Burden of Truth – A Look at Juries

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THE IMPORTANCE OF PRESERVING THE RIGHT TO A CIVIL JURY TRIAL

The *Constitution Act, 1982* is the supreme law of Canada, encompassing the division of powers between the federal government on the one hand and the provincial and the territorial governments on the other. *The Constitution Act, 1982* also includes the *Charter of Rights and Freedoms*. The *Charter* proclaims the rights of Canadians. The democracy that is Canada is defined within this supreme law. But where is the power of the people?

One might argue that the power of citizens lies in each person's right to vote and elect members of their legislative assemblies and of Parliament. This may be true of legislative powers, representation and the implementation of policy. But what happens when the law and the person collide, or two parties have a dispute? In Canada, our judges are appointed for life by the federal government. The provincial governments administer the courts. But, where is the balance of power for society? One vital way for individuals, groups, and corporations to achieve justice in the court system is through the use of juries, both criminal and civil.

The jury system, or a form of it, was recorded as far back as biblical times, but really emerged in the 11th century in England, around the time of the Norman Conquest. When the *Magna Carta* was signed in 1215, it guaranteed every landowner the right to a trial by his peers before any punishment or prison sentence could be issued. Members of the nobility felt that a trial by a jury of one's peers would protect a person from oppression by a despotic ruler. In a sense the jury was a way of establishing a form of democracy in the days prior to constitutional monarchies like Canada is today.

The jury system as we know it today emerged in England around the 12th century through Henry II.[2] Juries at the time were composed of people who knew something about the dispute, in that sense they were more like witnesses, and could provide the king with information to decide the issue.[3] In the early days, judges who disagreed with a jury verdict would mistreat the jurors, withhold food and water and even imprison jurors. Of course, now, greater deference is given to jury verdicts. Juries were, at the time, primarily used to decide criminal trials, and it is on this foundation that most people today associate juries.

It is fairly obvious why a jury trial is appealing to society in a criminal situation. It is necessary to have twelve people come to a unanimous verdict beyond a reasonable doubt. This golden thread has been discussed throughout the western world and need not be addressed here.

This paper, however, aims to discuss the use of juries in a civil trial, particularly in tort cases. One might question the usefulness of a jury in a trial between two private entities. The jury is not there to protect one person from the state, nor to ensure that proof beyond a reasonable doubt is established. I suggest that in a working democracy, the right to civil trial by one's peers is an expression of the strength of that democracy. This is especially true in a world where a litigant must litigate against large corporate interests, including Crown corporations. The jury levels the playing field, mitigating against the views of any one voice, regardless of how powerful, wealthy or popular. It is not the contention of the author that a judge is incapable of adjudicating the conflicts between parties – it is rather that the jury system affords the legal system a clear avenue from where the community can have meaningful and immediate impact.

Juries today are composed of, ideally, a cross-section of society. One does not need a special education to be on a jury, nor have any legal experience, nor indeed have any experience with the courts at all. The fact that jury participation is mandatory rather than voluntary ensures that people from all corners of society are recruited to join the process. This is the heart of democracy. Democracy is often described as "one person, one vote" – but jury participation in the process of resolving conflicts between two private people or entities crystallizes the democratic system. Serving on a jury is one of the only ways a citizen can make contact with and impact on Canada's justice and legal system. Rather than having a judge appointed by the government decide the fate of two litigants, the jury is able to participate in the resolution of a dispute. A true government of the people should be based on a system where the citizens are able to join in the resolution of legal issues, in addition to electing government.

What is the importance of a jury in a trial? A jury functions to reduce the power of an appointed judge; to limit, in a sense, the power of the state upon the individual. The English *Bill of Rights* in 1689, after the Revolution in 1688, forbade the selection of partial and corrupt jurors; in *R.* v. *Bryant*, Blair JA of the Ontario Court of Appeal suggests that this was the time when juries became an essential protection against arbitrary rule.[4] In providing some history on juries in England and the United States, Blair JA indicates that in the USA, the framers of the *Constitution* felt that an independent judiciary is only the first step; juries are necessary for further protection from arbitrary power. The right to being tried by a jury gave an accused (and, we can extrapolate, a civil litigant) a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[5]

An article about pre- and post-Colonial periods in the United States suggests that in the early days, judges were not seen as neutral arbiters because they were appointed, and as such, had political ties.[6] Juries, therefore, were an important check on state power, and a demonstration that judges did not have absolute control over the law.[7] It might be an indicator of the Colonists' desire to separate from the monarchy of England that juries in the United States have achieved far more recognition and use in civil cases than in England. In England, the right to a trial by jury in civil cases has been limited to actions in slander, libel, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and fraud; in all other cases a litigant has to specially

request a jury from the court.[8] Especially after World War I, the popularity of a trial by jury has substantially declined, to the point where only a small percentage of civil cases is tried by jury.[9]

The Supreme Court of Canada has stated, "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons."[10] Judges, however, often seem ready and willing to declare that issues are too complex for a jury, and thus strike out juries in certain actions. The courts are also able to overturn or reject a jury verdict, although not all courts will do this. The Ontario Court of Appeal, for example, has said that in a jury award for damages, only if the award is a "wholly erroneous estimate of damages" will the appellate court intervene.[11] So it would seem, the state of civil juries in Canada, while not as limited as in England, is certainly not as popular as it is in the United States.

In an article examining civil juries in Canada, Professor Bogart uses a 1994 report by the Ontario Law Reform Commission to review why civil juries are not widely used.[12] He brings up the argument in favour of juries that this paper proposes: that a jury is fundamentally a protection against the abuse of power by the state. He suggests, however, that this argument is not well grounded, in that juries are prohibited in Ontario and BC, for example, in actions that directly involve the state (i.e., where the province or municipality is being sued.) This, however, seems to be a fallacious view of the argument being propounded. Those in favour of civil juries are suggesting that the way in which juries protect against the power of the state is by balancing the power of state-appointed judges. Perhaps the prohibition of trial by jury in cases against the state ought to be abandoned. Perhaps a future *Charter* challenge will discard the last remnants of Crown immunity. By having a group of ordinary citizens with no legal experience weigh out evidence and decide issues of credibility, the system is at least partially assured that potential problems such as political bias are eliminated. The power of the judiciary is constrained to focusing on the issues of law, a job for which requiring a legal education is easily justified.

Arguments in favour of trials by judge alone often center on efficiency and cost. Most data shows that a full jury trial takes longer than a full judge alone trial, yet the Ontario Law Reform Commission also found that once a jury trial commences, the rate of settlement is higher than when a judge alone trial begins.[13] Experience in this province demonstrates that many cases otherwise set to be tried by jury are settled. Trial by jury is by no means a certainty. But, I ask, why does a trial with similar issues take 5 days in the USA when the Canadian counterpart takes 4-6 weeks? Perhaps the Americans do have something to teach us. It does follow that a longer trial would increase the total cost. It is, however, a sad state of affairs where we would prefer to shorten trials and speed processes along rather than allow the people to participate in the application of appropriate community standards. Having people who are not legally educated join in the legal system is far more valuable to the community than the possible savings of a trial by judge alone.

During Christmas 2004, I was in Ukraine, participating as one of the team leaders for the Canadian Observers Mission. The Supreme Court of Ukraine had just declared the previous election a nullity, and ordered a re-election to be held on December 26, 2004. The fact that the judges who ordered the re-election were the same judges who had come to Canada after Ukraine's declaration of independence was no coincidence. After decades of Soviet rule and the regime's disregard for the rule of law, these judges broke with the usual rubber-stamping of the government's position. While they were in Canada, these judges saw firsthand a working democracy. They met with our judiciary, observed the workings of our court system, and most importantly, witnessed that no one, not even government, is above the law. These lessons were applied in their ruling that declared the fixed election a nullity.

I write of these events not for the overall implications of what I was witnessing, but rather to convey to the reader my experiences and how this relates to democracy as expressed by juries. As team leader it was my obligation to visit numerous polling stations and observe the voting. Most people I spoke to wanted to know about our system of politics in Canada. Many expressed a feeling of powerlessness; the system being so powerful that they felt individually, they had no impact. They were astounded to hear that in my riding, I had not voted for the winning candidate in the last several elections. They had grown up with the notion of voting for the strong man. They were very curious to hear why people in Canada might want to vote for anyone other than the perceived front runner. I tried to explain to them that in the democracy, at least notionally, it was the people who held power. The idea that the individual was capable of change was foreign to them.

In my attempt to demonstrate the concept, I explained our jury system. I tried to explain the notion that in a civil trial, an individual could sue another individual, a corporation, a policing agency, and even a crown corporation, without fear of reprisal. I explained that a jury comprised of eight of his or her fellow citizens would sit in judgment. I explained that the eight jurors, strangers to any of the parties, would hear evidence in open court, and then upon being instructed on the law by the presiding judge, would deliberate in secret, uninfluenced by any of the parties or by any government agency. Jurors use their good judgment and conscience to arrive at their verdict.

Since my trip to Ukraine, I have had the opportunity to reflect what it means to live in a democracy. I think we take for granted many of the privileges we are afforded. It is important to remember that it is not only in an election year when democratic rights are exercised, but that each day we are given the opportunity to experience democracy. Democracy is not just about voting every four or five years. As citizens, Canadians can participate in the forming of community values through sitting on a jury. The right to trial by jury as it applies to the rule of law in civil disputes is a fundamental right in a working democracy. Without the ability to be judged by your fellow citizens, independent of the judiciary, I fear that our democratic rights are eroded. In a working democracy, the individual must have the right to impact his or her society through more than just voting for the government.

Access to justice must include the right to trial by jury. If expense is an excuse for ridding the system of jury trials then perhaps we should look elsewhere to reduce the expense. As a first measure, eliminating daily court fees and jury fees would go a long way to lowering these costs.

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2 "History of Jury Duty", US Courts for the Western District of Missouri, http://www.mow.uscourts.gov/jury/history_jury_duty.htm.
3 Sir Patrick Devlin, *Trial by Jury,* 3d ed. (Toronto: Carswell, 1966).
4 *R.* v. *Bryant* (1984), 16 CCC (3d) 408, at 419.
5 *Ibid.*, at 421.
6 K. Jhaveri, "Judicial Gatekeeping in the United States: A Historical Perspective", http://cyber.law.harvard.edu/daubert/ch1.htm, 1999.
7 *Ibid.*
8 Sir Patrick Devlin, *Trial by Jury,* 3d ed. (Toronto: Carswell, 1966), at 181
9 *Ibid.*
10 *King* v. *Colonial Homes Ltd.* [1956] SCR 528, at 533.
11 *Koukounakis* v. *Stainrod,* [1995] 23 OR 3d 299 (Ont. CA), at 305.
12 W.A. Bogart, "Guardian of Legal Rights... Medieval Relic: The Civil Jury in Canada" 62 Law & Contemp. Probs. 305 (Spring 1999)
13 Ontario Law Reform Commission, "Consultation Paper on the Use of Jury Trials in Civil Cases" (1996).

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