Should the trilogy be revisited?

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"Do you swear that you shall well and truly try the matters in question between the parties and a true verdict give according to the evidence, so help you God?"

It is on this oath that a jury, acting in good conscience, renders its verdict. Many litigants expect that their peers will judge them according to this oath.

We, the judges and the lawyers in the judicial system, tell juries that they are the sole judges of facts. We tell them that this trial is the only time the plaintiff may come for assessment of her damages. Judges often tell juries that jury awards assist the court when making judge alone awards as they give guidance to the Bench on community standards. This article will show the many difficulties of the existence of the rough upper limit. This makes itself most apparent in high jury awards and the difficulty it imposes on reviewing appellant courts.

The trilogy, as it has come to be known, were decided in 1978, a time and circumstances much different than today. Without any evidence before it, the Supreme Court of Canada commented on an insurance 'crisis' in California, an incorrect apprehension since the crisis turned out to be an orchestrated fraud perpetuated by the insurance industry. Large corporate insurers claimed high payouts and raised premiums. Many lawsuits in the United States demonstrated unequivocally that the "high payouts" had never been paid. It was a fraud. The Supreme Court of Canada was just another victim – and through the Court, all subsequent injury victims. Based on its belief in the fraud, the SCC imposed the rough upper limit. No evidence was called. No intervention was permitted. In those decisions, the Supreme Court Justices failed to apply or consider the various statutes that have a similar provision to s. 6 of the *Negligence Act*, RSBC 1996, c.333,

> "In every action the amount of damages or loss, the fault, if any, and the degrees of fault are questions of fact."

This section finds its roots in the last century. It is unambiguous. It was not referred to in the trilogy and is not applied by our courts on its plain language. Likely, it was not referred to in the trilogy precisely because the court acted without notice and *ex mero motu*. It lacked the benefit of facts, of law, of argument.

Section 6 of the *Negligence Act* states that damages are a question of fact. The trilogy did not consider section 6. At all times, the Supreme Court of Canada , in the trilogy, referred to damages with reference to the common law. The statutory provisions of our *Act* and the *Acts* of six other provinces were not considered. Parliamentary supremacy (Parliament is above the court) was not applied. The courts have set legal policy imposing the upper limit as a matter of law. To borrow a phrase from a recent Court of Appeal decision, the trilogy and the decisions that flow from it are a form of "judicial activism" and needs to be revisited.

Increasingly, we find that the rough upper limit is out of step with community standards. The value we place upon our health and well-being is evident everywhere. We don't hesitate to pay six dollars for a cup of coffee with foam on it. Society has placed great value on the hedonic enjoyment of life in Canadian society. In contrast, the rough upper limit would not provide a catastrophically-injured 20 year old (and normal life expectancy) enough money to pay for a movie and box of popcorn each day, for the rest of her life.

The Court of Appeal currently finds itself reviewing jury decisions by applying two different and mutually exclusive means, the objective and the subjective tests. The differences in the two are well explained in Bouck J's article *"Civil Jury Trials – Assessing Non-Pecuniary Damages – Civil Jury Reform,"* published in the Nov. 2002 *Canadian Bar Review*, Volume 81, No. 3. In short, the subjective test is the jury's view of how the specific plaintiff was affected by her injuries. The objective test is the Court's review of similar judge-alone decisions without the benefit of having heard and seen the evidence, and through the interpretation of the trial judge.

This conflict arises because of the trilogy and its attempt to limit non-pecuniary damages. If the courts were to follow s. 6 of the *Negligence Act* and leave the fact finding on damages to the jury, then the community standard would apply. The Court of Appeal would be restricted to reviewing damage assessments in only the most extraordinary circumstances. Borrowing from Bouck J's presentation at TLABC's *Winning at Trial II* seminar on 29 October 2004, the Court of Appeal's substitution for the jury's findings would only apply to cases where the award is so "shockingly high or low as to amount to a palpable and overriding error". Otherwise, the jury decision would stand, the rough upper limit would be properly relegated to the annals of judicial history and, with real and mutual risk assessment, the result would be a greater number of fair settlements.

Unfortunately, the Court of Appeal applies different standards of appeal. Is it results-driven, rather than principled? Is it arbitrary? It

reduces certainty in the law. The Court of Appeal effectively makes it impossible for Plaintiff counsel to advise their clients.

Developments in Court of Appeal have demonstrated this atmosphere of uncertainty. An example of a case upholding a jury's subjective award is *Boyd* v. *Harris* [2004] BCJ No. 472. In *Boyd*, the jury awarded the plaintiff $225,000 for non-pecuniary loss, $85,000 for past loss of wage loss, $340,000 for loss of earning capacity, and $33,500 for cost future care. On appeal, the appellant alleged that the jury drew wrong inferences about the proper amount for non-pecuniary damages and damages for her loss of earning capacity.

After reviewing case law the court noted that:

> "jury verdicts are unpredictable or, at least, less predictable than those of trial judge's. This uncertainty of results inherent in jury trial and damages, coupled with the additional costs associated with the mode of trial, will surely spur the parties to reach an accommodation short of trial. Risk, an important factor in settlement negotiations, is amplified when the trial is to be by jury; the range of settlements acceptable to the parties is thereby broadened and settlement prospects are enhanced. Appellate interference with jury awards, unless circumscribed, will tend to remove from the system this incentive to settle cases."

The Court clearly recognizes and clearly endorses Risk Assessment as a valuable issue in considering settlement.

Furthermore the court commented:

> "juries bring to the assessment of the evidence common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and opinions of what would be fair, just, and reasonable in the circumstances"

and,

> "absent an objective basis for measurement of deviations from normative awards, we are left with a vague, adjectival standard that carries with it a risk of arbitrariness: what is the acceptable range and what is an excessive deviation from the range in a given case are questions on which there may be reasonable differences of judicial opinion".

After reviewing much of the evidence in the *Boyd* case the court stated:

> "a comparative approach based on the injuries of the plaintiffs in the 1978 trilogy does not accord with the fundamental principle that questions of law are for judges and questions of fact are for juries. The amount of damages is a question of fact in every case. The upper limit, on the other hand, is a matter of law and policy, of which a jury should not be told except in cases were the trial judge expects that they might assess damages in an unlawful amount."

The court, quoting *Brimacombe* v. *Matthews* (2001), 87 BCLR (3d) 75 adopted the position that the upper limit acts as the governor on an engine:

> "just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment may be granted for damages assessed under that head [non-pecuniary damages]."

Boyd deals with the notion of juries as triers of fact and judges as triers of law, within the confusing context of the trilogy's upper limit. The court does not consider the *Negligence Act* nor its impact upon the trilogy.

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To the extent that jury decisions fall under the rough upper limit, *Boyd* appears to endorse the subjective approach as required by the functional assessment of damages.

In contrast to *Boyd*, *White* v. *Gait* [2004] BCJ No. 2081, the Court of Appeal reviews a jury decision where the jury awarded the plaintiff $197,000 for non-pecuniary damages. In that case the majority of the Court lowered damages to $115,000 without reciting any facts, other than a somewhat oblique comment by the trial judge:

> "Whether there is any reasonable possibility of [loss of earning capacity], as there must be to justify an award, is a jury question. I consider there is some in this case, however weak it may be, to put to the jury".

It appears that the Court of Appeal in *White* accepted the appellant's contention that the plaintiff "overstated his injuries". No reference is made to the 'governor' in *White*. The Court of Appeal applied the comparative approach to damages review, substituting the jury's verdict with its own assessment. The dissenting opinion also referred to the comparative approach, but came to a different conclusion.

The dissenting judgement of Thackray JA outlines the law as it applies to proportionality, that is, reviewing jury awards by contrasting them to judge's awards. He reviews trial by jury in a civil case. He cites the British example of abandoning juries in favour of a 'scale' of damages to be relied on in judge alone trials. The "need" for juries would disappear. How this scale would track community values is unclear. Would the court find itself in a perpetual review of its own decisions, presuming itself in step with current community values? How would the court keep in step with these values? Little discussion is made of the right of a trial by your peers in civil trials.

Thackray JA references s. 6 dealing only with regard to jury charges, but does not consider the section in the context of the trilogy.

For many years there has been the perception amongst the plaintiff bar that the Court of Appeal comparatively finds more often for appellant/defendants than for appellant/plaintiffs. High awards are often reduced, whereas rarely are low awards increased. Bouck J's article *"Civil Jury Trials – Assessing Non-Pecuniary Damages – Civil Jury Reform"* (*Canadian Bar Review*, November 2002, Volume 81, No. 3) gave statistical support verifying this perception:

> "When plaintiffs asked the British Columbia Court of Appeal to increase non-pecuniary damage awards, they failed 81 percent of the time. When defendants appeal asking for a decrease in the jury award, they only failed 50%".

Yet these statistics do not completely reveal the true state of affairs. Having "lost" [i.e. nominal awards] before the jury the majority of plaintiff lawyers advise clients not to appeal. There are of course, additional costs in an appeal, and plaintiff lawyers advise clients that the chances of success are slim (1 in 5 as above or less). Individuals, unlike corporations, rarely can afford to continue with an appeal. Therefore, the 81 percent statistic does not take into account those cases that never get appealed for the reasons set out above.

Bouck J refers to the objective vs. subjective test. Many plaintiff counsel have heard these words from the Court of Appeal, "the jury did not believe your client". The court applies the subjective test and the appeal of a low award is dismissed. In those cases where the jury did "believe your client" and a substantial award is made there is a near 'probable' chance that, if appealed, the Court of Appeal will apply the comparative test. The judgment is either reduced or sent back for retrial.

Recently, a trial judge commented to this writer that the community standards reference was often used in judge alone trials in assessing damages when referring to low jury awards. Now that the pendulum swings back to plaintiff favourable jury verdicts, rarely if ever, the judge noted, do counsel hear judges referring to jury decisions for guidance on non-pecuniary damages.

The writer has not set down trial by jury for the last ten years. Some plaintiffs lawyers do, but these are rare indeed. The insurance companies and most notably the monopolistic insurance company in this province, ICBC, is well known to set jury trials as a matter of policy. To ignore this is to ignore reality. In those cases where a plaintiff succeeds in convincing the jury of the merits of the case and the jury, acting upon its oath and a good conscience, makes the award higher than what is "acceptable" to the insurer, the plaintiff is sure to face an appeal. From the insurer's perspective what is the downside? They have a 50 percent success rate. With these odds why not appeal? Gone is mutual "Risk Assessment". For the plaintiff even if she wins she may still lose. The incentive to settle on favourable terms is weighted against the plaintiff. It is no wonder that the vast majority of jury notices are taken out by the defence.

The court was asked to consider this in *White*. The majority of the court refused to consider argument regarding ICBC policy. The respondent/plaintiff argued that to reduce the award would encourage ICBC to seek jury trials for tactical reasons. This will result in an increase in the number of appeals. Where the Corporation is dissatisfied with the jury award it simply appeals in the hope that the Court of Appeal will reduce the award or send the case back for retrial. The respondents also referred to the Corporation's superior financial resources. The court rejected the submission on the basis that there was no evidence in the record. However, ICBC's financial resources are a matter of public record through its statutorily-required Annual Reports.

What if a retrial results in a similar finding by the next jury? Is it to be sent down again or will the Court of Appeal substitute its own findings as the "correct" assessment?

Bouck J put it rather eloquently: "we have embedded ourselves in a local legal culture". The upper limit is an artificial culture and in conflict with statutory law. As trial lawyers we must assist the courts in the evolution of the law. *Boyd* represented a step in that evolution while *White* appears to be a step back.

The Victoria Parliament Law Reform Committee; Victoria, Australia: Jury Service in Victoria; Final Report, in dealing with civil juries states:

> " 'rationale and the essential function' of trial by jury is to ensure 'the protection of the citizens against those who customarily exercise the authority of government: legislators...administrators...judges.' "

The right to trial by jury is intrinsic to our democracy. It acts as a check and balance and reminds our courts of societal norms. Our challenge is to ensure that the justice system preserves the right to civil jury and that the courts not interfere with this process except in the most exceptional circumstances. The trilogy imposes a rule prohibiting the court from considering evolving societal norms – in 1978 no one would have considered it a "norm" to have a computer in virtually every house, same sex marriage, the internet, cell phones which take and transmit pictures, surrogate mothers, satellite dishes the size of pizzas, or treating the Russians as allies and the Iraqis as enemies. Until such time as the courts reverse the trilogy by removing the artificial ceiling imposed by the SCC, we must expect to continue to advise our clients with greater uncertainty as to the outcome.