

**CIVIL JURY TRIALS — ASSESSING NON-
PECUNIARY DAMAGES — CIVIL JURY REFORM**

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The allocation of decision making between the judge and the jury injects 'community values' into the judicial process while shielding the judge from criticism for unpopular decisions and insulating the whole justice system from allegations of elitism, judicial bias and political influence.¹

Foreman v. Foster presents an opportunity to examine the modern history of civil juries and their awards for non-pecuniary damages in the courts of England, the United States of America, British Columbia, Ontario and the Supreme Court of Canada. Trial by a civil jury is not just a right possessed by all litigants in a common law action. Like the right to vote, it is also a democratic privilege giving eligible citizens the right to insist on participating as jurors from time to time. No political voice champions the cause of trial by a civil jury. Few Canadian academics write about its strengths and its weaknesses. Because of procedural antiquity, it is used less frequently. Unless judges and lawyers join together and update its operation, soon it will disappear from the legal landscape. Judges and lawyers carry the duty to preserve and modernize the civil justice system for the public's benefit.

La décision dans Foreman c. Foster offre l'occasion d'examiner l'histoire moderne des jurys civils, et de l'attribution par eux de dommages-intérêts pour des pertes non pécuniaires, dans les tribunaux d'Angleterre, des États-Unis d'Amérique, de la Colombie-Britannique, l'Ontario et la Cour suprême du Canada. Le procès civil devant jury n'est pas qu'un droit de tous les justiciables, dans une action de common law. Comme le droit de vote, c'est aussi un

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¹ P.L. Hannaford, B.M. Dann & G.T. Munsterman, "How Judges View Civil Juries" (1998) 48 DePaul L. Rev. 247 at 251.

privilège démocratique conférant aux citoyens éligibles le droit d'insister pour agir comme jurés de temps à autre. On n'entend pas d'acteur politique se faire le champion de la cause des procès civils devant jury. Peu d'universitaires canadiens écrivent sur leurs forces et leurs faiblesses. En raison d'une procédure antique, ils sont utilisés moins fréquemment. À moins que juges et avocats ne joignent leurs forces pour le moderniser, le procès civil devant jury disparaîtra bientôt du paysage juridique. Dans l'intérêt du public, les juges et les avocats ont le devoir de préserver et moderniser le système de justice civile.

I.	<i>Introduction</i>	495
II.	<i>Foreman v. Foster</i>	495
III.	<i>Assessing Non-pecuniary Damages – The Subjective and Objective Approach</i>	496
	A. <i>Introduction</i>	496
	B. <i>The Subjective Approach – Measuring Non-pecuniary Damages at the Trial Level – Judge Alone and Judge and Jury Trial Assessments</i>	498
	C. <i>The Objective Approach – Measuring Non-pecuniary Damages – English and Canadian Appellate Court Assessments</i>	499
IV.	<i>History of Personal Injury Damage Awards in England, the United States and British Columbia</i>	500
	A. <i>Introduction</i>	500
	B. <i>English Civil Juries and Judge Alone Non-Pecuniary Damage Awards</i>	500
	C. <i>United States of America</i>	505
	D. <i>The Canadian Situation</i>	511
	E. <i>Ontario</i>	514
	F. <i>The Rough Upper Limit of Non-pecuniary Damages</i>	515
V.	<i>Summary of Higher Courts Attempts to Control Civil Jury Damage Awards and Conclusions</i>	517
	A. <i>England</i>	517
	B. <i>The United States</i>	517
	C. <i>British Columbia, Ontario and Canada</i>	517
VI.	<i>Reform of the Civil Jury Process</i>	520
	A. <i>Introduction – Case Management</i>	520
	B. <i>Jury Empanelling Fees</i>	521
	C. <i>Challenging Civil Jurors For Cause</i>	522
	D. <i>Counsel Addressing the Jury on the Range of Damages</i>	524
	E. <i>Pattern Jury Instructions</i>	524
	F. <i>Motion For a New Trial</i>	525
	G. <i>Post-Trial Juror Interviews</i>	526
	H. <i>Court of Appeal – Amendments to Rules and Statute</i>	527
	I. <i>Publishing Details of Jury Verdicts</i>	527
VII.	<i>Conclusion</i>	528

I. Introduction

As a trial judge for almost three decades, I remain an enthusiastic advocate for the democratic institution of the citizen's right to a civil trial with a jury. Other judges may not agree with some or all of the views that follow.²

The question this paper tries to answer in part is whether trial judges should instruct juries on a range of non-pecuniary damages they might award a plaintiff in personal injury actions? In *Foreman v. Foster*,³ Lambert J.A. and Braidwood J.A. of the British Columbia Court of Appeal answered in the affirmative.

That case presents an opportunity to examine the modern history of civil juries and their awards for non-pecuniary damages in the courts of England, the United States of America, British Columbia, Ontario and the Supreme Court of Canada. This essay will illustrate how the higher courts in England strayed from principle when reviewing jury assessments of non-pecuniary damages. Unfortunately, higher courts in Canada followed the English precedent. American higher courts did not. Finally, the paper will recommend several reforms to modernize the civil jury system in those provinces retaining the jury.

II. *Foreman v. Foster*

Foremen v. Foster was a personal injury case set for trial with a jury. The defendant admitted liability. Under Rule 18A of the British Columbia Rules of Court, the plaintiff applied before Mr. Justice Vickers to assess his damages by way of affidavit evidence. He declined, on the grounds it would be unjust to do so. He held the defendant was entitled to a trial by way of *viva voce* evidence in the usual way.

Madam Justice Saunders dismissed the plaintiff's appeal. She found that the trial judge had committed "no reversible error."⁴ The court then sent the case back to the Supreme Court for trial in the ordinary way.

Mr. Justice Lambert in support wrote a helpful review of Canadian and English law as to whether a trial judge may give guidance to a jury in personal injury cases on the appropriate range of "non-pecuniary and other damages," even when the plaintiff's injuries are not catastrophic. He argued that the present practice of judges not giving guidance could lead to injustice.

² It is unusual for a sitting Canadian trial judge to suggest that higher court practices need reform. However, few Canadian legal academics seem interested in civil jury issues. In part this may be due to the fact that not many Canadian courts keep relevant statistics allowing researchers to conduct empirical studies on the subject. Unlike the United States and Australia, Canada has no periodical literature devoted to the administration of justice, including civil jury practice. Therefore, a Canadian researcher must depend upon somewhat unreliable anecdotal evidence, personal experience and United States data.

³ (2002), 84 B.C.L.R. (3d) 184 (C.A.).

⁴ *Ibid.* at para. 27.

In the end, he agreed with courts in a few other jurisdictions that seem to favour giving such a range, in order to achieve “fairness, consistency, and rationality in damage awards.”⁵ He left it to the trial judge to decide whether or not to tell the jury the range. He argued that “a greater measure of consistency in damage awards is an important goal in the administration of justice.”⁶

His comments being *obiter dicta*, hence, are not binding on trial judges. Accordingly, Mr. Justice E.R.A. Edwards later declined to follow Mr. Justice Lambert’s suggestions.⁷ Nonetheless, they deserve respectful consideration. But, the question remains, is this an appropriate reform?

III. Assessing Non-pecuniary Damages – The Subjective and Objective Approach

A. Introduction

Both common⁸ and statute law⁹ declare that the amount of damages is a question of fact and not a question of law. At common law, the measure of any damage head was always a question of fact. What amount a defendant should pay a plaintiff for breaching a contract depended upon the evidence at trial and

⁵ *Ibid.* at para. 73. See also *Rieger v. Burgess*, [1988] 4 W.W.R. 577 at 634-5 (Sask. C.A.) speaking in favour of judicial guidance to juries on ranges of damages. See also the dicta of Laskin C.J.C. in *Crosby v. O’Reilly* (1970), 51 D.L.R. (3d) 555 at 559 (S.C.C.).

⁶ Lambert J.A., at paras. 42-46, relied on the Saskatchewan Court of Appeal comments in *Junek v. Ede*, [1991] 1 W.W.R. 60. A summary of the procedure he recommended is as follows:

- a) Prior to or at trial, counsel would submit written briefs setting out their respective views on the appropriate range of damages.
- b) Counsel would not be able to argue before the jury any range the judge might select.
- c) When reciting the range to the jury, the trial judge would mention that it is for the jury’s guidance and assistance, it is not a hard and fast upper and lower limit and the jury alone must determine the appropriate amount.

⁷ *Estphanous v. McLeod* (2001), 88 B.C.L.R. (3d) 192, at para. 11: “In my view, this practice involves the judge usurping at least in part the jury’s fact finding role, since in a typical case there may be conflicting evidence on the severity of an injury or the likely duration of the injury. No range could be set without considering what the jury would or should find as facts in regard to such questions.”

⁸ At common law the amount of damages is a question of fact for a jury: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1194: “Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community... [i]t is often said that the assessment of damages is ‘peculiarly the province of the jury’. Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.” And see: H. McGregor & J.D. Mayne, *McGregor on Damages*, 13th ed. (London: Sweet & Maxwell, 1972) at para. 1413.

⁹ That principle is now enshrined in most provincial statutes such as in s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333: “In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.”

not on damage awards given in other cases. Similarly, what amount a defendant should pay a plaintiff for damages arising out of such torts as nuisance, negligent misrepresentation or defamation¹⁰ had to be proved through evidence and not through reliance on a range extrapolated from other cases. Apart from wrongful dismissal cases, no court seems to suggest that a “range” be imposed on these kinds of damages for “fairness, consistency and rationality.”

Before 1974, British Columbia judges and juries, for example, could assess personal injury damages in one all inclusive award, known as a “general” verdict.¹¹ Usually, it included amounts covering non-pecuniary damages for pain, injury, suffering and loss of enjoyment of life plus the four other pecuniary heads of damages.¹² Together, those five heads are:

- (i) pain, injury, suffering and loss of enjoyment of life – measured from the accident date to the pre-trial recovery date or to the anticipated post-trial recovery date;
- (ii) past loss of income – measured from the accident date to the trial date;
- (iii) future loss of income – measured from the trial date to the plaintiff’s anticipated post-trial recovery date;
- (iv) cost of future care – measured from the trial date to the plaintiff’s anticipated post-trial recovery date; and
- (v) special damages – plaintiff’s pre-trial out of pocket expenses.

Pre-1974 awards did not require that judges or juries articulate the exact amount they awarded for each independent head of damages. One lump sum included all heads of damages. For example, counsel could not tell how much the trier of fact awarded for non-pecuniary damages and how much for past loss of income.

Two events changed this practice. First, *Prejudgment Interest Act* (1974);¹³ and *Andrews v. Grand and Toy Alberta Ltd.*¹⁴ in 1978.

The *Prejudgment Interest Act* of 1974 provided for an award of interest on non-pecuniary damages and past loss of income from the time the cause of action arose until the date of the judgment. The calculation of interest on past

¹⁰ *Hill, supra* note 8 at 1194-1195: “When the jury had retired to consider their verdict, they returned after four hours with a sagacious question: ‘what if any are realistic maximums that have been assessed by society in recent history?’ The trial judge prudently sought the advice of counsel on the question. Counsel for the appellants agreed with the trial judge that no guidance could be given to the jury as to the quantum of damages. The jury was so advised.” However, in *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 at para. 97, the Supreme Court approved the notion of giving the jury ranges of awards in the field of punitive damages.

¹¹ K.D. Cooper-Stephenson & I.B. Saunders, *Personal Injury Damages in Canada*, 2nd ed. Scarborough: Carswell, 1996) at 106.

¹² Sometimes the evidence raises other heads of damages such as future management fees payable to the plaintiff’s financial advisors for managing actuarial funds invested to pay post trial anticipated expenses or losses: Cooper-Stephenson & Saunders, *ibid.* at 119.

¹³ S.B.C. 1974, c. 65.

¹⁴ [1978] 2 S.C.R. 229.

special damages was different from the other heads of damages. The statute did not allow judges or juries to add interest onto damage awards for future loss of income or for cost of future care. Hence, it became necessary for judges and juries to return a “special” verdict by specifying the amount they awarded under each head of damages. That practice continues today.¹⁵

The second event occurred in 1978, when *Andrews* limited the amount of non-pecuniary damage awards, by setting a rough “upper limit” of \$100,000.00 where a plaintiff suffered catastrophic personal injuries. *Andrews* was an appeal from a trial judge’s decision sitting without a jury. The Supreme Court of Canada did not specify how a jury should be directed with respect to this upper limit. Subsequent case law tried to work that out with varying degrees of success.¹⁶ *Andrews* had the side effect of confirming the then existing British Columbia practice whereby judges and juries already gave “special verdicts” by specifying the amount they awarded for each head of damages.

B. *The Subjective Approach – Measuring Non-pecuniary Damages at the Trial Level – Judge Alone and Judge and Jury Trial Assessments*

Following the early common and statute law, British Columbia trial judges and juries assessed non-pecuniary damages subjectively. In other words, each award was custom-made for the particular plaintiff because every plaintiff suffers the effects of an injury differently. In law, defendants take their victims as they find them.¹⁷ One plaintiff may be sensitive to a particular kind of pain. Another may be stoic and able to endure pain. One plaintiff may have slow powers of recovery. Another may be just the opposite. One plaintiff may have no hobbies or outside activities. Injuries incurred by another plaintiff may affect his or her ability to continue playing a musical instrument or participating in a favourite athletic sport. One plaintiff may exaggerate the effect of his or her injuries. Another may understate them.

As for all heads of damages, judges tell juries to give *fair and reasonable* compensation for non-pecuniary damages.¹⁸ Judges do not tell juries to give *full* compensation for an injury because, for example, there is no monetary limit that is equivalent to the loss of an eye. Common law requires a jury to give an appropriate award even though the amount is difficult to estimate.¹⁹

¹⁵ See: L. Smith & J.C. Bouck J., *Civil Jury Instructions*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2001), Appendix C.

¹⁶ *Ibid.* at para. 9.18.

¹⁷ *Bourhill v. Young*, [1943] A.C. 92 (H.L.) at 109-110: “... if the wrong is established the wrongdoer must take the victim as he finds him.”

¹⁸ Smith & Bouck, *supra* note 15 at para. 9.12(5).

¹⁹ S.M. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book, 1991) at 13.30: “If the amount is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.”

C. *The Objective Approach – Measuring Non-pecuniary Damages – English and Canadian Appellate Court Assessments*

When appeal courts were created it was recognized that they could not interfere with findings of fact made by a jury.²⁰ Usually an appeal court could not intervene with a jury's personal injury damage award unless it found the award was "so inordinately high, it must be a wholly erroneous estimate of the damage".²¹ If it did make such a finding, most often the case had to be sent back for a new trial since appellate courts were not fact finders. Alternatively, if the parties agreed, the appellate court could substitute its award for that of the jury.²²

The British Columbia Full Court and Court of Appeal Rules were unique: beginning with the Full Court Rules of 1906 and ending with the 1982 Court of Appeal Rules. If the appellate court found the damage award excessive, even without the consent of the parties, the rule allowed the Court of Appeal to reduce the jury's award rather than ordering a new trial.²³ If it found a jury damage award inordinately low, presumably, it could only order a new trial. Today, the Court of Appeal may re-assess allegedly high or low jury damage awards or order a new trial.

When the Court of Appeal does re-assess jury damage awards, mostly this exercise involves just non-pecuniary damages. The test it applies is whether the jury, "properly instructed has awarded an amount wholly out of proportion to what ought to have been awarded".²⁴ In practice, this means comparing the non-pecuniary damage award given by a jury to other plaintiff's awards involving similar injuries that were given by judges sitting without a jury.²⁵

So, at the trial level, civil juries correctly award a plaintiff non-pecuniary damages based upon the facts they find from the evidence – the subjective test. But, at the higher court level, these courts primarily concern themselves with assessing a plaintiff's non-pecuniary damages based upon a comparison with awards given by trial judges in other similar causes of action – the objective test.

²⁰ *Mechanical and General Inventions Company, Ltd. v. Austin and the Austin Motor Co. Ltd.*, [1935] A.C. 346 at 369 (H.L.): "... once it has been decided that a civil case has to be tried by a jury, that tribunal and that tribunal alone is the judge of fact; and no appellate Court can substitute its own findings for those of the lawful tribunal."

²¹ *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 at 613-14 (P.C.).

²² *Ibid.* at 617.

²³ *The "Supreme Court Rules, 1906"*, R. 869a: "Where excessive damages have been awarded by a jury, if the court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party."

²⁴ *Y. (S.) v. C. (F.G.)* (1996), 26 B.C.L.R. (3d) 155 at 171 (B.C.C.A.).

²⁵ *Ibid.* at 169-171. In that case, the Court of Appeal reduced civil jury awards for non-pecuniary and punitive damages arising out of repeated sexual assaults by a father on his daughter from her age of 7 to 14 years by comparing the jury award with 13 other judge alone awards involving sexual assaults. At trial, the jury awarded her \$350,000.00 for non-pecuniary damages. Reduced on appeal to \$250,000.00. For punitive damages the jury awarded her \$250,000.00. Reduced on appeal to \$50,000.00.

When plaintiffs ask the British Columbia Court of Appeal to increase a non-pecuniary damage award, they fail 81% of the time. When defendants appeal asking for a decrease in a jury award, they only fail 50% of the time.²⁶ There were 4 cases where the defendant appealed alleging the jury damage award was too high. The defendant failed in 2 instances and succeeded in whole or in part in 2 others. A 50% success rate for plaintiffs. In very few cases does the court ever apply the objective “disproportionate”, or *Nance* test to allegedly low awards. Predominately, it applies the question of fact or subjective test in refusing to raise awards by using words such as; “it was open to the jury to reject the plaintiff’s evidence;” “the jury did not believe the plaintiff;” “not all injuries of this type are the same”, and so on.²⁷ *Bajwa v. Ellingson* [1999] B.C.J. No. 1002; which support the author’s position.

Higher courts in England and Canada contend the objective test is necessary in order to ensure consistency and uniformity in non-pecuniary damage awards. To test this theory, it is useful to examine the history of civil jury awards for non-pecuniary damages in England, the United States and Canada.

IV. *History of Personal Injury Damage Awards in England, the United States and British Columbia*

A. *Introduction*

First, I will review the English cases that brought an end to civil jury trials in personal injury actions. Then, I will examine how the courts developed a system of guidelines for non-pecuniary damages in personal injury actions tried by a judge alone. Thereafter, I will discuss the United States practice relating to civil jury damage awards, and lastly, I will comment upon Canadian appellate case law concerning awards for non-pecuniary damages.

B. *English Civil Juries and Judge Alone Non-Pecuniary Damage Awards*

In *Sims v. William Howard and Son Ltd.* the English Court of Appeal began the judicial process of ending personal injury jury trials.²⁸ There, Lord Denning M.R. argued for a degree of uniformity in personal injury awards for non-pecuniary damages. He said, over the years judges evolved a scale that was well known and applied daily. He urged trial judges to apply the scale, but the scale

²⁶ An empirical analysis using a QuickLaw search for the period 31 December 1996 to 8 March 2001 revealed 26 appeals by plaintiffs seeking increases in civil jury damage awards. Of these, 5 were successful in whole or in part. Twenty-one were unsuccessful. An 81% success rate for defendants and a 19% success rate for plaintiffs.

²⁷ For example, see the following three cases: *Dajani v. Khanna* (1999), 132 B.C.A.C. 157; *Bartucci v. Jormanainen* [2001] B.C.J. No. 261; and *Bajwa v. Ellingson* [1999], B.C.J. No. 1002.

²⁸ [1964] 2 Q.B. (C.A.) 409 at 415-16 (C.A.).

should never be mentioned to a jury. He argued that should a judge alone depart from the scale, the Court of Appeal could set the judge right. But that could not be done with a jury.

Without mentioning the common law principle about damages being a question of fact, the Court of Appeal held that the “principle” of uniformity of awards was so important it overrode the right of an injured plaintiff to be tried by a judge and jury.

Soon after, the English Court of Appeal decided *Ward v. James*.²⁹ Lord Denning M.R. also wrote this decision. He commented that until 1854, a judge and a jury tried all common law civil cases. Gradually, the number decreased. By 1965, it had fallen to about 2% of the total cases tried.³⁰ At that time, the Court of Appeal could not set aside a jury award and substitute its own views. If it disagreed with the jury’s verdict all it could do was order a new trial.³¹

Lord Denning M.R. candidly admitted the Court of Appeal’s frustration when dealing with a civil jury verdict. He said, the court could not interfere as readily with a jury verdict as it could with a trial judge’s decision because the jury did not give reasons. Its verdict was “as inscrutable as the sphinx.” Consequently, the court could not “pick holes in it” (as it could with a trial judge’s reasons?).³²

Before 1970, it appears that English law allowed judges and civil juries to return general verdicts in personal injury actions.³³ Juries did not have to specify what amount they gave for each separate head of damages. Where juries returned a general verdict the higher courts thought too generous, it seems the courts criticized the award by assuming it included too high an amount for the unexpressed non-pecuniary damages. But on a judge alone trial, appeal courts knew what the usual scale was for non-pecuniary damages with respect to a particular injury. Apparently appeal courts seemed able to extrapolate from any judge’s general verdict, the approximate amount awarded for non-pecuniary damages. Even though the amount of damages was a question of fact, appeal courts seemed to interfere with the amount of judge alone awards.³⁴

²⁹ [1966] 1 Q.B. 273 (C.A.).

³⁰ *Ibid.* at 290.

³¹ *Ibid.* at 282.

³² *Ibid.* at 301.

³³ Before 1970, McGregor & Mayne, *supra* note 8, said the following about lump sum awards (general verdicts) at para. 1094: “The courts have for long resisted demands that they should itemise their awards of damages for personal injury; a breakdown of the total award, allocating a particular amount to each separate head of damage, has been regarded not as a judge’s duty but as a matter for his discretion.” After 1970, the English equivalent of the British Columbia *Pre-Judgment Interest Act*, *supra* note 13, required judges to articulate the amount of damages separately under each head: see *Jefford v. Gee*, [1970] 2 Q.B. 130 (C.A.).

³⁴ *Supra* note 29 at 300: “One remedy that has been suggested is that the Court of Appeal should be more ready to correct the verdict of a jury. This court should correct it in much the same way it corrects the decision of a judge.”

Lord Denning M.R. went on to say that it would be improper for counsel or the judge to review the case law with a jury so it might arrive at a conventional figure. He discussed the idea of a judge suggesting a range of damages to the jury in line within the conventional figures set by judges. He said it was objectionable because if the judge can mention figures to a jury, then counsel must be able to do the same thing.³⁵

In the end, Lord Denning M.R. decided that if a judge was to tell a jury a range of non-pecuniary damages in a personal injury case, the range would need to be narrow, such as £4,000 to £6,000 for the loss of a leg. He felt there would be little use in telling a jury that the range is somewhere between £100,000 and £100. He went on to say that if a judge gave the jury a narrow range there would be no use in having a jury. Judges might as well be left to assess the figures themselves without a jury.³⁶ The court declined to change the law by having judges recommend a range of non-pecuniary damages to the jury. Ultimately, the court allowed the trial to proceed with a jury but said in the future it would not hesitate in upsetting orders made by chambers' judges allowing trial by a jury in personal injury accidents.³⁷ *Ward v. James* effectively ended English trials by jury in personal injury actions.

Like most higher court decisions concerning jury damages awards, the English courts seemed overly concerned with awards they perceived as being too high, even though they did not see the witnesses. The English Court of Appeal applied two tests for reducing a jury damage award. On an appeal from a jury verdict, the test was whether the jury award was "out of all proportion to the circumstances of the case." On appeal from a judge alone award the test was whether the award amounted to "a wholly erroneous estimate of the damage suffered."³⁸

Where the court found a jury award too low it could find "the damages were so grossly inadequate as to shew conclusively that the jury must have omitted to take into consideration some of the elements of damage."³⁹ Or, it could find it was unable "to interfere" with the verdict.⁴⁰ Strangely, there does not seem to be any case where the English higher courts raised the amount of a low award by applying the objective test that the award was "out of all proportion", or was "wholly erroneous." However, in *Ward v. James* the Court of Appeal did suggest on future reviews of jury damage awards it would use the "out of all proportion" test with respect to both high and low awards.⁴¹ It went on to say

³⁵ *Ibid.* at 302.

³⁶ *Ibid.* at 303.

³⁷ *Ibid.* at 303-304.

³⁸ *Ibid.* at 300: "This court can interfere with the figure awarded by a *jury* if it is 'out of all proportion to the circumstances of the case.' It can interfere with the figure awarded by a *judge* if it is 'a wholly erroneous estimate of the damages suffered.' In each case 'excess implies some standard which has been exceeded'."

³⁹ *Phillips v. The London and South Western Railway Co.* (1879), 5 Q.B.D. 78 at 83 (C.A.).

⁴⁰ *Supra* note 29 at 297.

⁴¹ *Ibid.* at 301.

that if it found awards unsuitable with respect to this test, it would order a new trial by a judge without a jury.⁴² Alternatively, if the parties consented it would fix the amount of the award itself.⁴³

When English courts now try personal injury actions without a jury, they receive guidance from guideline ranges for damages published by an institution called the Judicial Studies Board. It published these ranges in 1992, 1994, 1996, 1998 and 2000. On 15 December 1998, the English Law Commission recommended that the level of damages for non-pecuniary loss suffered by plaintiffs in serious personal injuries cases should be increased by 50% to 100% from what the Judicial Studies Board recommended in its 1998 edition.⁴⁴ The Commission defined a serious personal injury as one where non-pecuniary damages would exceed £2,000.

The Commission said the Court of Appeal or the House of Lords was in the best position to make the increases, using their existing powers to lay down guidelines as to the quantum of non-pecuniary damages in personal injury litigation.⁴⁵ It did not recommend the re-instatement of jury trials in personal injury cases.⁴⁶ It reached this conclusion mainly because 87% of persons whom it asked, felt that the assessment of damages by juries made settlement more difficult and increased the likelihood of an appeal.⁴⁷ However, it noted the argument that a jury's assessment of non-pecuniary damages is beneficial because it properly reflects public opinion, and is less subject to erosion over time. It cited the Scottish experience where civil juries are considered reliable and consistent.⁴⁸ Neither in the Judicial Studies Board, in its published personal injury damages guidelines for 2000,⁴⁹ nor the Commission's report, is it discussed that the amount of damages awarded is a question of fact.

In March 2000, the Commission's report became the main topic for discussion in *Heil v. Rankin*.⁵⁰ There, the English Court of Appeal reviewed the process of adjusting non-pecuniary damage ranges as recommended by the Commission. At the same time, it reviewed the adequacy of seven judge alone non-pecuniary damage awards.

In *Heil v. Rankin* the court formed a preliminary view that it should consider the Commission's report and increase the ranges established by the Judicial

⁴² *Ibid.* This seems to be a strange idea. Its purpose is not clear. Why not order a new trial with a jury? In that way, the appeal court could see whether its view on the size of awards corresponds with that of the community at large.

⁴³ *Ibid.*

⁴⁴ England, The Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss*, LAW COM No. 257 (15 December 1998) at 2, para. 1.6 and note 3.

⁴⁵ *Ibid.* at 2, para 1.7.

⁴⁶ *Ibid.* at 3, para. 1.8.

⁴⁷ *Ibid.* at 6, para. 4.2.

⁴⁸ *Ibid.* at 97, para. 4.3.

⁴⁹ The Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 5th ed. (London: Blackstone Press Ltd., 2000).

⁵⁰ [2000] E.W.J. No. 1495.

Studies Board. It invited interested parties to apply as intervenors. These included members from the insurance industry, legal organizations, the National Health Service, etc. They presented written and oral submissions to the court. Some opposed the court changing the levels, arguing that Parliament should make any such changes. Interestingly, the Court of Appeal relied heavily on the Supreme Court of Canada's example in *Andrews* as support for the proposition that it, rather than Parliament, should set the ranges.

However, the Court of Appeal criticized the Commission's research methods and its findings.⁵¹ While the Commission attached minimum significance to the impact on insurance premiums that might occur by raising the ranges, the Court felt that issue should not be ignored.⁵²

In the end, the court declined to increase the level of awards for injuries falling within the low range of damages – below £10,000.00.⁵³ It did not vary the middle range of damages, but increased the high range to start at £150,000.00 and end at £200,000.00.⁵⁴ In other words, the English equivalent of the *Andrews* “rough upper limit”, is £200,000.00 or approximately \$450,000.00 Canadian.⁵⁵ Today the *Andrews* limit in Canadian dollars is around \$280,000.00 to \$300,000.00. That is much less generous to Canadian plaintiffs who suffer a catastrophic loss as compared to their English counterparts.

A close reading of the judgment reveals a complex series of mathematical calculations and rough deductions or additions that counsel and judges apply when assessing non-pecuniary damages. The final scale may or may not result in a reasonable award for non-pecuniary damages to each injured plaintiff. It may or may not achieve a level of obvious mathematical consistency in awards between similarly injured plaintiffs – if there ever could be such a thing. As with the publications of the Judicial Studies Board and the Law Commission, the decision does not mention that damages are a question of fact and not law.

⁵¹ *Ibid.* at para. 87: “It is our view that the Commission attached too much importance to the survey which they commissioned.”

⁵² *Ibid.* at para. 95: “The position of the public as a whole has to be considered.”

⁵³ *Ibid.* at para. 98.

⁵⁴ *Ibid.* at para. 118. For two brain damaged plaintiffs, the court increased the trial awards of £135,000 non-pecuniary damages to £175,000. For the third plaintiff, who had multiple fractures and internal injuries requiring constant care, it increased the trial award from £110,000 to £138,000. For the fourth plaintiff, who had moderately severe brain damage, it increased the trial award from £80,000 to £95,000. For the fifth plaintiff, who suffered from asbestos induced illness, the court increased the trial award from £45,000 to £50,000. For the sixth plaintiff, who also suffered from an asbestos induced disease, the court increased the trial award from £40,000 to £44,000. For the seventh plaintiff, who incurred post traumatic stress disorder and related symptoms, the court declined to change an award of £6,000. For the eighth plaintiff, who suffered from a minor whiplash and two fractured ribs, the court declined to change the trial award of £3,000 on the grounds that an award in respect to minor injuries of less than £10,000 did not justify an increase.

⁵⁵ However, the Judicial Studies Board in its *Guidelines for the Assessment of General Damages in Personal Injury Cases*, *supra* note 49, says the following at 1: “It appears that the Court of Appeal intended the increases to rise in a more or less straight line from 0% at £10,000 to 33.3% at £150,000.”

Heil v. Rankin implicitly recognized potential higher court bias favouring lower non-pecuniary damage awards for plaintiffs, when it referred to remarks made by Lord J. Lowry of the Northern Ireland Court of Appeal in *Simpson v. Harland & Wolff*.⁵⁶ Lord Lowry dared to mention thoughts spoken privately by many British Columbia lawyers and some judges: essentially, that judges tend to get out of touch with the life experience of the average citizen and changing values. Male judges in particular tend to resist change while juries experience the need for change more directly.⁵⁷

C. *United States of America*

Given that England abolished personal injury jury trials some 37 years ago, for comparative purposes one must look at the experience in the United States where civil jury trials still flourish. By the 7th amendment to the *United States Constitution*, any party in a federal court has the right to a civil jury trial where the amount claimed exceeds \$20.00.⁵⁸ Most U.S. State constitutions or legislation give litigants the same right to a civil jury trial. Parties may agree to waive the right if they so wish.

Contrary to popular belief, juries try only about 2% of all United States federal and state civil trials. Judges sitting without a jury try the remaining 98%.⁵⁹

One cannot be overly precise on United States law, since the 50 individual states and the federal system have their own laws and rules. Generally, they seem to accept the fundamental principle that the amount of damages, in a personal injury action, as in all other damage actions, is a question of fact for the jury to determine – the subjective test. An appropriate amount should not be suggested by the judge because that would interfere with the jury's right to find the facts. However, counsel may suggest figures to the jury in their

⁵⁶ [1988] N.I. 432.

⁵⁷ *Ibid.* at 440: "This tendency is inevitable, since the age of judges ranges from middle-aged to elderly and, as objective people (including, I believe, most High Court judges) will readily concede, elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing values, even though at the same time, they may remain intellectually able and alert."

⁵⁸ In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

⁵⁹ N. Vidmar, "The Performance of the American Civil Jury: An Empirical Perspective" (1998) 40 *Arizona L. Rev.* 849 at 852: "In 1993, a total of 245,687 civil cases were terminated in United States District Courts. Only 1.8% or 4456 involved jury trials." At 851 Vidmar refers to the findings of B.J. Ostrom, D.B. Rottman & J.A. Goerdt, "A Step Above Anecdote: A Profile of the Civil Jury in the 1990s" (1996) 79 *Judicature* 233, a study of the nation's largest counties in 1992, revealing that of the 762,000 tort, contract and real property cases only 2% were decided by juries.

summations.⁶⁰ Separate and distinct from the function of summation, the closing argument serves the essential function of providing the jury with both incentive and guidance for computing damages. These are perhaps its most important aspects. [...] After discussing liability, the attorney must guide the jury in computing the damage award. [...] The attorney must provide a range of figures and a method of turning the range into one final figure that adequately compensates the plaintiff. [...] Where allowed, the attorney should present and explain each category of damages separately, assign each a value that reflects the plaintiff's loss, and arrive at a sum for compensation [...]. Judges tell juries they are not bound to award the figures mentioned by counsel if they find counsels' suggestions unreasonable.⁶¹ Instructions emphasizing the fact that counsel's statements are not evidence and that it is the jury's duty to decide the issues solely upon the evidence are generally curative of any prejudicial effect caused by a reference to the damages sought. [...] It has been noted that the trial court should caution the jury that dollar figures mentioned by counsel do not constitute evidence, but merely represent argument which [the] jury may disregard in its deliberations.

Unlike British Columbia trial judges, in state court judge alone trials the judges do not usually write lengthy personal injury judgments similar to many written by British Columbia trial judges. After a United States judge alone trial, the judge usually gives a short oral or written opinion as to the appropriate amount of damages. Prevailing counsel often prepare a document called "Findings of Fact and Conclusions of Law" for the judge's approval.⁶² Generally, neither it, nor the trial judge's "opinion" are available through commercial publications, as are many Canadian trial judge's decisions.

On the other hand, United States commercial organizations called "jury verdict reporters" prepare up-to-date jury award summaries for most state courts.⁶³

⁶⁰ 75A Am. Jur. 2d, "Trial":

§ 560 Reference to amount of damages claimed or expected

[...] Thus, counsel in his argument may suggest a lump-sum amount for total general damages and also may suggest the fragmented segments of the lump sum amount where such segments bear some real relation to the differences shown in the evidence, since to forbid counsel to relate such differences in amount would effectively bar him from the right to argue the amount of money to be awarded...

§ 561 Practice guide: arguing damages

⁶¹ C.A. Loring, ed., *California Jury Instructions*, 7th ed., Vol. II (St. Paul: West Publishing Co., 1986) at para. 14.13: "... the argument of counsel as to the amount of damages is not evidence of reasonable compensation."

Also see 75A Am. Jur. 2d, "Trial":

§ 562 Practice guide: Corrective action during trial

⁶² 75B Am. Jur. 2d, "Trial", § 1967 - § 1990.

⁶³ These are one to two page summaries that usually include the following items in personal injury actions. Here is a digest of one taken from the case of *Hemphill v. P&M Transport Inc. d.b.a. Service Tank Lines & Rockwell International Corporation*, a decision dated December 28, 1987 following a 5 day jury trial: 1. The names of the attorneys. 2. The names of the expert witnesses. 3. The name of the trial judge. 4. The nature of the action. 5. The nature of the plaintiff's injuries. 6. The amounts claimed for the various heads of

After a jury returns a verdict, both counsel may apply for a new trial order. The authority for this application comes from the common law and by Rules of Court.⁶⁴ A new trial may be granted where the jury makes an erroneous assessment of damages...unless verdict amounts are such as to shock the conscience of the court, they will be allowed to stand, because the trial judge is not warranted in pitting his or her judgment against that of the jury. In order to shock the sense of justice of the judicial mind, the verdict ordinarily must be so excessive or so inadequate so as to at least imply that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like. Upon hearing such a motion, the judge may, in certain circumstances, increase the amount of the award; (*additur*),⁶⁵ Also see: R.R.

damages. 7. The amount of the plaintiff's settlement demand; e.g. \$130,000. 8. The amount of the defendant's offer; e.g. \$85,000. 9. The total amount the plaintiff's attorney asked the jury to award; e.g. \$553,000. 10. The total amount the defendant's attorney asked the jury to award; e.g. \$20,500.00. 11. The amount of the verdict; e.g. \$68,000.00. (Settlement Conference Judge's estimate; \$75,000.00 to \$80,000.00.

⁶⁴ 58 Am. Jur. 2d, "New Trial":

§ 11. Generally

The power or authority to order a new trial was recognized early in the common law, and is inherent in all courts of general common-law jurisdiction. [...] The power of the trial judge to order a new trial derives from the equitable concept that neither a wronged litigant nor society itself can afford to be without some means to remedy a palpable miscarriage of justice.

Also see 58 Am Jur (2d), "New Trial", § 393-412:

§ 393. Generally

⁶⁵ 58 Am Jur 2d, "New Trial":

C. Additur or Increase of Amount of Verdict

[...]

§ 584. Generally

Whether the trial court has the power in a particular case to increase an inadequate award over either party's refusal or failure to consent to an additur depends to a great extent on the circumstances, some courts finding such a power to exist under the circumstances, while others have not. In some jurisdictions, the trial court may be authorized or even mandated by statute to suggest an additur where the verdict is inadequate.

Observation:

The practice of using additur is said to be in the interest of sound administration of justice, since it avoids the necessity of a new trial with its accompanying expense and delay.

§ 585. Situations where additur is appropriate or inappropriate

Additur may be found to be appropriate where the amount of damages is undisputed or liquidated or is reasonably susceptible to precise calculation, whereas additur is inappropriate where the amount was disputed, or involves consideration of complex and voluminous evidence. [...] A court may not increase an inadequate award in a case involving contested and unliquidated damages without defendant's consent...

[...]

§ 586

Recommendation: Instead of going through the formality of ordering a new trial conditioned on the lack of consent to additur, which is not allowed, the judge may announce to the parties an intention to order a new trial on damages unless the parties can work something out on their own, in which instance the judge avoids specifying the desired verdict.

Koenders, "Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages – Modern Cases" 5 A.L.R. (5th) 875. decrease the award (*remittitur*),⁶⁶ If the trial court determines that the jury's verdict is excessive, it can order a new trial in toto or on the issue of damages alone, or it may issue an order denying a motion for a new trial upon the condition that the successful party remit a certain sum from the verdict, giving that party the option of either submitting to a new trial or accepting the amount of damages that the court considers justified. The function of a remittitur is to correct an improper verdict as to damages, and where the error is only that the damages awarded are excessive it is not proper to retry the issue of liability: remittitur or new trial on damages is the remedy. or order a new trial.

As in Canada and England, some United States critics want to control or dispense with civil juries in personal injury actions because they perceive that civil juries have run amok. The vast majority of these complaints arise from jury verdicts they consider too high. An empirical analysis by at least two American researchers does not support that allegation.⁶⁷ Few jury critics complain about allegedly low jury awards.

Using data collected from jury awards in 44 counties and 10 states across America covering the period 1981 to 1985, United States researchers commented that, "claims about jury behavior that are typically used to illustrate a malfunctioning civil justice system as a justification for reform have little basis in fact."⁶⁸ These researchers conclude their study stating that "[t]he data gathered in the study show that plaintiff success rates tend to fall within a well-defined range and awards are generally modest."⁶⁹

For example, in King County, Washington State Superior Court (Seattle), the researchers looked at 416 verdicts. Of these, the plaintiff won 61.1% of the time. The median range for all damages in the lower one-third of the awards, not just non-pecuniary damages, was \$7,770.00. For the middle one-third it was \$23,289.00. For the top one-third, it was \$95,000.00. Comparable figures for San Diego County, California Superior Court, revealed a 48.5% plaintiff's success rate and median range figures from low to high of \$16,710.00, \$65,040.00 and \$169,774.00 respectively.⁷⁰

For 138 jury verdicts involving vehicular accidents in King County (1983–1985), the median jury award was \$14,599.00 in 138 verdicts. For 79 similar verdicts San Diego County (1981–1984), the median figure was \$40,370.00.⁷¹

⁶⁶ Am. Jur. 2d, "New Trial":

B. Remittitur or Reduction of Excessive Award

§ 575. Generally

⁶⁷ S. Daniels & J. Martin "Civil Jury Awards Are Not Out of Control" (1987) 26:1 Judge's J. 10.

⁶⁸ *Ibid.* at 10.

⁶⁹ *Ibid.* at 46.

⁷⁰ *Ibid.* at 13 (Table 1).

⁷¹ *Ibid.* at 15 (Table 2).

Other American researchers found similar results in their studies.⁷²

It seems that most United States jurisdictions allow civil juries to return a “general” verdict without specifying the amount given for the various heads of damages.⁷³ One researcher estimates that non-pecuniary damages make up around 26% to 70% of a United States jury’s general verdict amount in personal injury actions.⁷⁴ American jury general verdicts often include amounts for medical and hospital expenses incurred by the plaintiff. These figures are not part of civil jury or judge alone awards in Canada because of our national health care system. That tends to make United States awards appear all the more reasonable compared to awards given by judges or juries in British Columbia at around the same time.

A United States appellate court may increase or decrease an award of damages made by a trial judge. Before it will do so, it must find the judge’s award was “manifestly unjust”, or that the judge abused his or her discretion in making the award.⁷⁵ An appellate court has the power to increase or decrease an award of damages made by a trial judge. In deciding whether to modify a damages award, an appellate court applies the same test as for any factual insufficiency question – the court examines all the evidence in the record to see if sufficient evidence supports the damages awards, and remits only the portion that is so factually insufficient or so against the great weight of evidence as to be manifestly unjust. Or, as sometimes stated, before an appellate court will disturb a damages award made by the trial court, the record must clearly reflect that the trier of fact abused its discretion in making the award... On appeal from a jury verdict, a United States appellate court cannot substitute its judgment for that of the trial court in determining whether a jury damage award is excessive or inadequate. Rather, it can only find that the verdict was clearly erroneous. If so, it must order a new trial. Instead of reversing and ordering a new trial on the issue of damages, an appellate court may be able to affirm the judgment below on the condition the plaintiff remit part of the award to the defendant, but only if the award is “shockingly high.”⁷⁶ Instead of reversing and ordering a new trial on the issue of damages, an appellate court may be able to affirm the judgment below on the condition that the appellee remit a portion of the award. [...] A remittitur is proper only to reduce the amount of a verdict considered excessive

⁷² Ostrom, Rottman & Goerd, *supra* note 59. Also see Vidmar, *supra* note 59 at 852.

⁷³ Daniels & Martin, *supra* note 67 at 46.

⁷⁴ Vidmar, *supra* note 59 at 882.

⁷⁵ 5 Am. Jur. 2d, “Appellate Review”:

§ 841. Damage Awards

⁷⁶ 5 Am. Jur. 2d, “Appellate Review”:

§ 842. Limitations on modification

An appellate court generally cannot substitute its judgment for that of the trial court in determining whether an award of damages is excessive or inadequate. Rather, it can only find that the award of damages made by the trial court is clearly erroneous.

§ 843. Remittitur

by the court, and only upon a finding that taking into account the reaction of the trial court, which has seen the evidence firsthand, the award is shockingly high...

In effect, United States law rejects the English and Canadian objective test exemplified in *Ward v. James*, *Nance v. British Columbia Electric Railway*, and *Foreman v. Foster*, discussed earlier. For the most part, United States law holds true to the common law principle that the amount of damages is a question of fact for a judge or jury to decide. It is not a question of law for appellate courts to determine by comparing one case with another. United States law looks upon comparable cases as only an imperfect analogy and not a controlling criterion. American cases comment that the practice of referring to verdicts in other cases to determine whether a verdict is reasonable in a personal injury suit is a "dangerous game." They say that awards for pain and suffering should not be based upon pre-determined schedules.⁷⁷ (In B.C. judge alone trials, counsel will often hand up to the trial judge a number of cases where other trial judges made awards in "similar" instances. A brief review of these cases, almost invariably reveals how completely dissimilar they are from the case at bar, thus serving no particular useful purpose. It is best to ask counsel for their estimate of the range of non-pecuniary and other damages. My practice is to do this at the start of every personal injury judge alone trial.)

Other empirical research suggests that United States Federal appeal courts (Circuit Courts) tend to favour defendants more than they do plaintiffs. Professors of Law at Cornell University, Kevin M. Clermont and Theodore Eisenberg recently discussed this phenomenon in a valuable article.⁷⁸

They examined data gathered by the Administrative Office of the United States Courts assembled by the Federal Judicial Center. When any civil case terminates in a federal district court (trial court) or Court of Appeal (circuit court), the court clerk transmits a form to the Administrative Office containing

⁷⁷ 22 Am. Jur. 2d, "Damages":

E. Challenging the Verdict on Ground of Excessiveness or Inadequacy of Damages § 1018. Factors considered in determining whether verdict excessive or inadequate

... As a general rule, however, the verdict of a jury, unless they can be said to have been influenced by some error of law committed in the trial of the case, will not be disturbed upon the grounds of excessiveness or inadequacy, merely because of the size of the verdict. ...

§ 1024. Comparison with other verdicts

The courts [...] will accordingly consider the amount awarded in other similar cases in determining whether a particular verdict is excessive. [...] No case of personal injuries [...] is an exact and binding precedent for another upon the question of the excessiveness of a verdict. The amount of damages that may properly be awarded in any particular case depends upon the facts and circumstances of that case; hence, the verdict and judgment in another case of similar character is not a controlling criterion, but is at best an imperfect analogy. [...] It has been said that the facts of cases differ so much that no criterion can be established. [...] In fact, it had been said that referring to verdicts in other cases to determine whether a verdict in a personal injury suit is excessive is a "dangerous game," and that awards for pain and suffering should not be based upon pre-determined schedules.

⁷⁸ K.M. Clermont & T. Eisenberg, "Anti-Plaintiff Bias in the Federal Appellate Courts" (2000) 84 *Judicature* 128.

data regarding the case. That includes a number of things, such as the names of the parties, the subject category, the amount demanded, and other relevant data. The authors examined these returns for the period from 1988 to 1997. They looked at the results of 15,157 jury trials and 6,258 judge alone trials.

They found that upon losing a completed trial, defendants appealed slightly less often (20%) than plaintiffs (22%). Upon appealing a loss after a completed trial, defendants succeeded much more often (28%) than did plaintiffs on their appeals (15%). From this, and other data, they surmised that appellate courts exhibited concerns that trial courts favoured plaintiffs more than they did defendants. They surmised that this opinion likely resulted from appellate court judges' misperceptions of the trial process. They articulated that misperception in these words:

The appellate judges tend to act on their perceptions of a pro-plaintiff trial court. That tendency would be appropriate if the trial courts were in fact biased in favor of the plaintiff. But as empirical evidence accumulates in refutation of trial court bias, the appellate judges' perceptions appear increasingly to be misperceptions.⁷⁹

When it came to jury verdicts the authors discovered that plaintiff's jury wins at trial met with much more suspicion in the appellate courts than did defendant's jury wins. The authors' review of the legal literature on the subject of jury verdicts satisfied them that juries are not substantially different from judges. They agreed with other writers who examined the work of juries that "virtually no evidence exists to support the prevailing ingrained intuitions about juries"; instead, "the evidence, such as it is, consistently supports a view of the jury as generally unbiased and competent."⁸⁰

D. *The Canadian Situation*

Unfortunately, Canadian trial courts collect little data on the number of civil jury trials and the damages they award, making empirical analysis difficult. Neither commercial legal publishers, nor court statistical data track jury verdict damage awards as they do in the United States, where Federal and state commercial organizations and institutions assemble and analyze justice system data. These organizations include the United States Bureau of Justice Statistics, the Federal Administrative Office of the United States Courts, the National Center of State Courts, jury reporting services, the Brookings Institute and the Rand Corporation. Canada does not have provincial or national periodicals devoted to judicial administration as they do in the United States and Australia. With limited academic research or court collected data, it is difficult to report with any certainty, what the results are with civil juries, and how often they are used.

⁷⁹ *Ibid.* at 134.

⁸⁰ *Ibid.*, quoting Clermont & Eisenberg "Trial by Jury or Judge: Transcending Empiricism" 77 *Cornell L. Rev.* 1124 at 1151-52.

Before World War II, it appears that British Columbia judges tried many civil cases with a jury. A rough guess is around 10% -15% of the total common law civil trials. During World War II, it seems the court discouraged the use of civil juries since the country required potential jurors to maintain the war effort. In the late 1950's, civil jury trials made a comeback. For the most part, they involved just personal injury trials. Up to 1970, British Columbia statute law protected a litigant's right to obtain a civil jury trial by providing that no statute or rule of court could take away or prejudice the right of any party to a trial with a civil jury.⁸¹

At that time, rules of court required a party wanting a jury to apply for an order within 4 days after receiving a notice of trial.⁸² Those orders were sometimes hard to obtain. The burden was on the party requesting a jury, usually the plaintiff. Some judges felt that jury trials took up too much court time as compared to judge alone trials. Because there were no books on jury instructions, judges were concerned about drafting a suitable jury charge within the very short time available following counsels' addresses.

In the early 1960's, judges of the Supreme Court of British Columbia seemed to have a rough unpublished scale for non-pecuniary damage awards involving whiplash type injuries. It was something like \$250.00 for a minor injury, where there was quick recovery, \$500.00 for a moderately severe injury and \$750.00 for one that was quite severe and prolonged.

When British Columbia juries began hearing these types of cases, they awarded substantially higher amounts than most trial judges had been giving. Generally, a minor whiplash resulted in a jury verdict of \$750.00 to \$1,100.00. A moderately severe whiplash injury fell in the \$1,200.00 to \$1,500.00 range and a severe injury was in the range of \$1,600.00 to \$2,500.00. With this experience, judges trying similar cases without a jury tended to increase their awards to almost match the amounts given by juries.

Those results imbedded themselves into the local legal culture. Both plaintiff's and defendant's lawyers came to believe that juries would probably return a damage verdict greater than the amount given by any trial judge. Besides, on appeal, the Court of Appeal often gave more deference to jury awards than they did to trial judges' awards. For the Court of Appeal to interfere with a jury award, the difference between the award the Court of Appeal considered reasonable had to be much wider than the figure assessed by a judge sitting alone.⁸³

With a change in the British Columbia Supreme Court Rules in 1976/1977, a party could get a jury trial by serving a notice on the opponent within 21 days of delivery of the Notice of Trial.⁸⁴ The burden was then on the party objecting to a jury trial to satisfy a chambers judge that a trial with a jury was not

⁸¹ *Jury Act*, R.S.B.C. 1960, c. 202, s. 47.

⁸² *Supreme Court Rules*, 1961, Order 36, R. 6.

⁸³ *Nance*, *supra* note 21 at 614.

⁸⁴ *Supreme Court Rules 1990*, R. 39(26).

suitable.⁸⁵ Nonetheless, today the *Jury Act*⁸⁶ does not protect a party's right to a civil jury trial in the same way it did in the 1948 statute. It only gives a party the right to a jury trial providing the jury fees are paid.⁸⁷

Currently, those fees are a \$1,500.00 deposit to include the cost of summoning about 16 persons for an 8 person jury, and for the first day of trial, plus \$650.00 per trial day thereafter. Ontario does not charge these empanelling and hearing fees and in 1996, the Ontario Law Reform Commission rejected a proposal to implement those fees.⁸⁸ In 1998, Mr. Justice MacAdam of the Nova Scotia Supreme Court struck down similar jury fees imposed by that province because they denied litigants access to justice.⁸⁹

In the early 1990's some British Columbia defendants' motor vehicle insurers began setting down personal injury actions for trial with a jury. Most of these involved minor motor vehicle accidents. Colloquially they are called "no crash, no cash" actions. By and large, juries returned verdicts for non-pecuniary and other damages at amounts significantly lower than those a judge might have awarded.⁹⁰ So, the equation changed. Personal injury jury trials soon became the trial of choice for defendants while they had previously been the plaintiffs' trial of choice.

In British Columbia, as elsewhere, around 95% of civil cases settle before trial. That still leaves a large number of disputes competing for court time. Of the total number of civil cases that do go to trial, only about 1% — 2% are heard by a jury. Recent history indicates that a British Columbia Supreme Court judge probably tries around 1 to 2 civil jury trials per year. Around 90% of these are personal injury motor vehicle actions. The rest are a mix of tort claims, including actions brought for damages under the *Occupiers Liability Act*,⁹¹ assault and battery and medical negligence claims. Few parties seek a jury trial involving contract disputes, apart from wrongful dismissal actions. Even those are quite rare.

⁸⁵ *Ibid.* at R. 39(27).

⁸⁶ R.S.B.C. 1996, c. 242.

⁸⁷ *Ibid.* at s. 15.

⁸⁸ Ontario Law Reform Commission, *Report on the Use of Civil Jury Trials in Civil Cases* (1996) at 80: "The most significant problem with implementing a user-pay scheme for a civil jury is that, in some instances, it might act as a financial deterrent that would prevent individuals from having access to the mode of trial of their choice. When added to the high cost of a trial, the introduction of a jury user fee might make the jury too expensive for some litigants."

⁸⁹ *Pleau v. Nova Scotia (Supreme Court, Prothonotary)* (1998), 43 C.P.C. (4th) 201 at 227-242.

⁹⁰ A rough estimate of judge alone non-pecuniary damage awards involving whiplash type injuries for the period 1990 - 2000 is: minor; \$6,000 to \$12,000; moderately severe; \$13,000 - \$25,000; severe; \$26,000 - \$45,000.00. These amounts depended on the facts of each case and particularly the elapsed time from injury to substantial recovery. Jury trials involving these kinds of injuries occur most frequently. They lend themselves to a comparative assessment since the effect of the trauma often follows a predictable recovery path. However, claims involving multiple fractures and internal injuries tend to defy comparative analysis because their recovery path varies widely from plaintiff to plaintiff.

⁹¹ R.S.B.C. 1996, c. 337.

There is no Canadian database one can examine to determine whether jury awards are consistently high or low. Today, most judges like to try civil jury cases. The jury relieves the judge of making the hard decisions on liability and the amount of damages. We now have a collection of jury instructions that assist trial judges and the legal profession.⁹² They help remove the burden of drafting each jury charge from scratch, a burden that judges bore before 1989. United States empirical evidence suggests that trial judges agree with jury verdicts about 80% of the time.⁹³ Where there is a disagreement between the judge and the jury, often this can be accounted for by acknowledging that the jury found different facts from the evidence than did the judge.

Today, the *Court of Appeal Act* gives the court the power of increasing or decreasing any jury verdict damage award to an amount that could have been given by the judge or the jury.⁹⁴ In other words, the statute may elevate appeal court judges to that of fact finders just from reading the trial transcript. That seems an unlikely interpretation, since appeal courts deny they have this status when dismissing plaintiffs' appeals alleging a low jury award. Alternatively, the court can order a new trial.⁹⁵

E. Ontario

Not too long ago, Professor W.A. Bogart published a paper where he reviewed the history of civil jury trials in Canada.⁹⁶ He also commented on the 1996 Ontario Law Commission's *Consultation Paper on the Use of Jury Trials in Civil Cases* (the "OLRC Report"). Here is a summary of his observations on that report:

1. The number of civil jury trials in Ontario has generally increased from 15% (1988-1989) to 22% (1994-1995).
2. The median length of civil jury trials is three-quarters of a day longer than judge alone trials. However, when civil jury cases go to trial they settle mid-

⁹² *Supra* note 15, first published in 1989 and revised annually since then.

⁹³ Vidmar, *supra* note 59 at 853. The author states that United States judges agreed with juries on the issue of liability about 78% of the time. When plaintiffs prevailed, the jury damage award was on average about 20% higher than the trial judge would have awarded. Much more often than not, the judge and the jury saw the case the same way. In most instances of disagreement, the judges indicated that even though they would have decided the case differently, the jury's alternative verdict was reasonable.

⁹⁴ R.S.B.C. 1996, c. 77, s. 9(1)(a): "(1) On appeal, the court may (a) make or give any order that could have been made or given by the court or tribunal appealed from... [and] (3)...may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of the appeal...and (8) For all purposes of and incidental to the hearing and determination of any matter...and for the purpose of every other authority expressly or impliedly given to the Court of Appeal, (a) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court..."

⁹⁵ *Ibid.* at s. 27.

⁹⁶ W.A. Bogart, "Guardian of Civil Rights...Medieval Relic": The Civil Jury in Canada" in N. Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000) 405.

trial more frequently than judge alone trials so their average length is less than judge alone trials.

3. Civil jury trials take less courtroom time overall because of the higher rate of settlement and apparently lower appeal rates.
4. The citizens of Ontario generally approve the use of civil juries. About 64.5% favoured the continuing availability of the jury for most civil actions.
5. The statutory restrictions against the use of civil juries when governments are defendants should be removed.
6. Lay-decision makers are a strong protection against assembly-line justice.
7. Psychological studies support the contention that juries are as good as, or superior to, judges when deciding issues of credibility and the amount of damages.
8. Institutional defendants, particularly insurance companies, select jury trials because Canadian juries award lower damages than do judges.
9. Civil juries are not widely used in Canada. However, there is no clear evidence that they impose any burden on the justice system or that their verdicts are aberrant.
10. Before the 1996 OLCRC Report, the Commission consistently opposed the use of civil jury trials. After completing its empirical study for the report, it changed its position and recommended the continued use of the civil jury.
11. Ontario should not impose civil jury empanelling fees or daily hearing fees.

F. *The Rough Upper Limit of Non-pecuniary Damages*

In 1978, the Supreme Court of Canada decided *Andrews*. At trial, Kirby J. had awarded the plaintiff \$150,000.00 for non-pecuniary damages arising out of his quadriplegic injuries. The Alberta Court of Appeal reduced it to \$100,000.00. The Supreme Court of Canada confirmed the Appeal Court's assessment. In doing so, it decided there was "a great need for accessibility, uniformity and predictability" in the area of assessing personal injury damages.⁹⁷ What evidence there was of that "need" the court did not say. Like *Ward v. James*, the court seemed to rely on anecdotal as opposed to empirical evidence.

The court went on to decide that, as a matter of law, there should be a "rough upper" limit for damages arising out of catastrophic injuries.⁹⁸ Apparently, counsel did not argue this concept on the appeal. If counsel had done so, there is little doubt that the court would have declined to set such a limit since provincial common and statutory law declared that the amount of any damages is a question of fact. In the United States, a few states have set upper limits. But, this was done by state legislation and not by the courts.

⁹⁷ *Andrews*, *supra* note 14 at 477.

⁹⁸ *Ibid.*

When imposing an upper limit, the Supreme Court felt that non-pecuniary damages was an “area open to wildly extravagant claims”.⁹⁹ The court said that “in this area...awards in the United States have soared to dramatically high levels in recent years”.¹⁰⁰ Regrettably, the judgment does not cite any statistical support for that statement. Empirical research in the United State suggests exactly the opposite.¹⁰¹ Indeed, the 1987 article mentioned earlier, entitled “Civil Jury Awards Are Not Out of Control”, illustrates that United States civil jury awards are “generally modest”.¹⁰² Other researchers came to the same conclusion in the 1990s.

To make the upper limit approach work in practice, the court suggested a “functional” approach to awarding non-pecuniary damages.¹⁰³ Supposedly, counsel would lead evidence showing how injured plaintiffs could obtain other means of satisfaction to make up for the distress caused by the loss. Few judges and lawyers understood how that might work, and few, if any counsel have tried to lead such evidence.

Most Canadian trial judges were at a loss to understand how they could assess the plaintiff’s non-pecuniary damages using the “functional” approach. For example, would the cost of a cruise around the world make up for the plaintiff’s distress? The English Law Commission, in its report titled “Damages For Personal Injury: Non-pecuniary Loss”, declined to recommend that England adopt the “functional loss” theory. It said in part, that; “Canadian experience with the ‘functional’ approach has not been an entirely happy one”.¹⁰⁴

The idea of an “upper limit” went hand in hand with the recommended new method of assessing catastrophic personal injury damages by using the “functional’ approach. The “functional” method of assessing damages collapsed due to its impracticality. Around 1978, it seems that United States civil jury awards had not “soared dramatically.” The court depended on these two features as a reason for fixing a “rough upper limit.” It inferentially concluded that the amount of damages was a matter of law or policy that an appellate court could set instead of one of fact that only a trial judge or jury could set. With respect, it seems that *Andrews* should be revisited.

⁹⁹ *Ibid.* at 476.

¹⁰⁰ *Ibid.*

¹⁰¹ *Vidmar*, *supra* note 59, states the following at 850-75: “Starting from the middle of the 1970’s when contemporary criticism of the civil jury system began, a body of empirical research has increased to the point that we are able to obtain a better, though still incomplete, picture of the system. And the research often contradicts many of the commonly held beliefs about jury performance... Damages are the issues that engage the media and fuel the public and legislative debate about the need for tort reform. Studies clearly show that media reports are selective in the reporting of trial outcomes. Media coverage is heavily skewed toward reporting plaintiff’s wins and large damage awards.”

¹⁰² Daniels and Martin, *supra* note 67 at 46.

¹⁰³ *Andrews*, *supra* note 14 at 476-77.

¹⁰⁴ *Supra* note 44 at 6, para. 2.5.

V. Summary of Higher Courts Attempts to Control Civil Jury Damage Awards and Conclusions

A. England

As mentioned earlier, the English Court of Appeal in 1965 effectively abolished trial by civil jury in personal injury actions. Apparently it relied only on anecdotal evidence that civil jury non-pecuniary damage awards were too extravagant. The court felt that judge-made conventional ranges provided better justice because they were more uniform – the objective test. The court did not mention that the amount of damages is a question of fact for the trial court and not a question of proportionality for the appeal court.

English judge-made ranges did not withstand the test of time. Eventually, the Judicial Studies Board began publishing ranges for the guidance of the judges in 1992. These too came under attack by the English Law Commission in 1998. However, the English Court of Appeal did not agree with the Commission's recommendation that the ranges should be increased by 50% to 100%.

Looking at the cost of these studies and the results they achieved, one wonders whether England would not be better off if it had allowed civil juries to continue assessing personal injury damages in the 2% of the caseload where that issue arose. Perhaps it indicates that when courts abandon basic common law principles, they enter a legal “no man’s land” where justice takes a back seat to incompatible mechanical theories.

B. The United States

American law follows the common law principle that the amount of damages is a question of fact for a jury to decide – the subjective test. It looks upon comparable cases as only an imperfect analogy and not a controlling criterion. Therefore, it does not place much importance on the perceived necessity that civil jury non-pecuniary damage awards be consistent and uniform. At the trial level, it allows the trial judge to correct the amount of a jury award where there is an unmistakable indication the award must have been the result of passion or prejudice. If the trial judge so finds, he or she may add or subtract amounts from the jury award in lieu of a new trial order.¹⁰⁵

C. British Columbia, Ontario and Canada

English law does not support the proposal in *Foreman v. Foster* that juries be instructed on a range of non-pecuniary damages in personal injury cases.

¹⁰⁵ *West's Revised Code of Washington Annotated: Title 4 Civil Procedure* (St. Paul: West Publishing Co.) at para. 4.76.030.

American jurisprudence is similarly opposed. There is no empirical evidence proving it is necessary or that it will produce a more just result. Juries will easily become confused, since the trial judge will have to direct them on both the subjective and objective tests.¹⁰⁶ Such an approach will likely also result in more appeals on the grounds that the trial judge picked too wide or too narrow a range or the wrong range altogether.¹⁰⁷ If judges must set ranges for the jury to consider, will trial judges settle the range on a case by case basis? If they do, there is a good chance that counsel in two similar cases may present the judges with authorities suggesting two different ranges. How will that fit into the concept of consistency and uniformity?

If a higher court uses the subjective test on allegedly low awards, should it not be consistent and use the subjective test on allegedly high awards? For example, when a defendant alleges the jury award was too high, should it not say; “that it was open for the jury to accept the plaintiff’s evidence,” or, “that the jury must have believed the plaintiff,” etc? This may be the only area of the law where trial courts apply one legal principle to any given set of facts while appeal courts apply another principle – the objective test – inconsistently. Should not both trial and appeal courts apply the same principle: the subjective test?

Jurors are just as good fact finders and perhaps even better than judges. A judge need only convince himself or herself as to the credibility of a witness. Jurors must convince one another through debate and persuasion. Assessing the credibility of other human beings is not teachable. No law school or judicial training centre gives a course on fact finding.

Maintaining the amount of non-pecuniary damage awards at an artificial level under the *Foreman v. Foster* proposal would soon require us to establish our own costly administrative versions of the English Judicial Studies Board and the English Law Commission. Otherwise the ranges would remain fixed in time despite changing economic conditions.

¹⁰⁶For example, the trial judge must tell the jury that the amount of damages is a question of fact for them to decide. Under *Foreman v. Foster*, *supra* note 3, the trial judge will also have to tell the jury that the award for non-pecuniary damages should fall within certain ranges arising from previous cases. Juries may naturally ask, “Can we examine those cases to see what the facts were so that we can make a reasonable comparison?” Judges will have to tell them no.

¹⁰⁷Each counsel probably will present around 6 to 10 damage award decisions from other judges. Some decisions may be 5 pages long, others 50 pages. Some may be one year old, others may be 10 years old. Some may contain a complete description of the injuries and their consequences. Others may not. Ranges could vary widely, e.g., \$5,000.00 to \$75,000.00. Counsel may or may not present briefs that summarize the cases for ease of comparison. Counsel may or may not include all the relevant cases. Trial judges may have to do their own research. Will there be sufficient time to do that if counsel waits to submit the cases until after their addresses?

After judges instruct juries, they usually ask counsel if they have anything to say about the charge. At that point, there will likely be an argument as to whether the judge selected the appropriate range. In the meantime the jury must wait before it can begin its deliberations. Another delay is added to the trial process.

British Columbia judges now instruct juries to return damage awards that give a plaintiff reasonable compensation. With respect, it is a mistake to place such a high value on damage awards based on uniformity and consistency over awards based on reasonable compensation. Uniformity and consistency imply rigidity. Reasonable implies flexibility. Justice does not demand consistency in the amount of non-pecuniary damage awards any more than it demands consistency in the amount of special damages or damages for past loss of income. Justice demands that the amount of non-pecuniary damages for individual plaintiffs should reasonably reflect the nature of the plaintiff's pain, injury, suffering and loss of enjoyment of life.

When determining whether a particular award is disproportionate to other awards of a similar nature, higher courts often examine trial court decisions to help find an answer. Not many judge-alone awards refer to other trial judge's awards to justify the amount awarded for non-pecuniary damages. This is because the other awards are easily distinguishable on the facts and therefore not a reliable resource. Few trial judges would ever suggest that their personal injury decisions articulate in detail the precise nature of a plaintiff's injuries. Most trial judges write for the parties and not for some judicial data bank. A good deal is often omitted for economy of words. Therefore, the foundation the higher courts use for arriving at whether a particular award is proportionate to other awards is shaky at best.

American research suggests that United States federal appeal courts have a misperception about jury damage awards. They tend to think that trial courts are pro-plaintiff. That misperception may also be reflected in Canadian higher court decisions. When higher courts apply the proportionate or objective test for allegedly high awards, and impose a "cap" on non-pecuniary damages, those practices favour defendants more than they do plaintiffs. When higher courts frequently apply the subjective test for allegedly low awards, that too favours defendants over plaintiffs.

There is no empirical evidence suggesting that Canadian juries are more pro-plaintiff than they are pro-defendant. Since 31 December 1996, litigants appealed 31 civil jury non-pecuniary damage awards. Of these, 88% involved appeals from allegedly low jury awards and 12% appeals from allegedly high jury awards. If anything, these figures suggest that B.C. civil juries are more pro-defendant than they are pro-plaintiff.

Civil jury trials only occupy 1% to 2% of British Columbia Supreme Court trials. By and large they work reasonably well. Where they don't, it may be the fault of counsel failing to exercise their right to challenge jurors for cause, counsels' presentations to the jury or juror's misunderstanding of the judge's instructions.

With respect, the time now has come to drop the objective test and return to common law and statute law principles. The amount of non-pecuniary damages is a question of fact, not a question of proportionality. A jury damage award for non-pecuniary damages should be upheld on appeal unless the record shows it was the result of passion or prejudice over reason.

VI. Reform of the Civil Jury Process

A. Introduction – Case Management

Most lawyers and judges know that the British Columbia civil justice system is starved for resources. For this and other reasons, our court cannot provide litigants with a trial date in a timely fashion. We do not track the time gap from the writ's filing to the trial date, and that interval is important to most litigants. Anecdotally, judges talk of about two to five years to dispose of a civil action from filing to judgment.

The main reason for our inefficiency in British Columbia, is the Master Calendar System of Case Management ("MCS"), in which each judge's calendar is determined by a master administrator. The MCS is based on the English court rules of 1883, which even the British abandoned several years ago. Progressive United States state courts do track the time interval from filing to trial verdict, and strive to meet nationally recognized case-processing time standards set by the American Bar Association. It recommends that trial courts should dispose of 90% of all civil cases within twelve months after filing the complaint (writ), and 100% within two years.¹⁰⁸ Also see Ostrom, Rottman & Goerd, *supra* note 59 at 240-41: The median time from filing a complaint (writ) to verdict in jury trial automobile accident cases in all U.S. state trial courts is 660 days. To meet this goal many United States state courts abandoned the MCS and now use the Individual Calendar System of Case Management ("ICS").¹⁰⁹ Under the ICS each judge has control over his or her calendar of cases.

¹⁰⁸C.V. Johnson, "What Can You do With a 70,000 Case Backlog?" (1991) Judge's J. 16 at 18: "The Committee recommended timely disposition standards for the court. Basically the ABA standards (with a change in domestic case standards) were recommended. These included:

1. That courts should supervise and control the movement of all cases from filing to disposition.
2. That 90% of all civil cases should be settled, tried, or otherwise disposed of within 12 months and 100% within 24 months.
3. That domestic cases have time lines of 90% within 9 months, 98% within 12 months and 100% within 18 months."

¹⁰⁹For example, see: D.K. Somerlot, M. Solomon & B. Mahoney, "Straightening Out Delay in Civil Litigation" (1999) Judge's J. 10, an article about how Wayne County, Detroit, Michigan, dramatically reduced delay by switching from the MCS to the ICS; Johnson, *ibid.*, an article about how King County Superior Court, Seattle, Washington, reduced delay by switching from the MCS to the ICS; And see: J.C. Bouck J., "Switching From a Master Calendar System to an Individual Calendar System of Case Management in the Supreme Court of B.C. - A Pilot Project" (Paper presented to the judges of the British Columbia Supreme Court, 18 February 1993) [unpublished], in which this author recommended a pilot project to test the suitability of switching case management from the MCS to the ICS. Also see: J.C. Bouck J., "The Individual Calendar System of Case Management" (Paper presented to the Council of the Canadian Bar Association, British Columbia Branch, 18 April 1995) [unpublished].

The goal is to provide litigants with a new trial in a reasonable time following an order for a new trial. New trial orders given by a court or a Court of Appeal are a hollow remedy if an action remains in the system from writ to appeal court order for five to seven years and then waits another one to two years for a new trial. If we in Canada followed the Seattle, King County example, we could probably provide litigants with a new jury trial within a few months from the time a new trial order is made by the trial judge. This feature is quite important. Acceptance of a suggested reform that trial judges be allowed to order a new trial in certain circumstances may depend upon how soon a new trial will actually occur.

B. *Jury Empanelling Fees*

These fees need repealing because they restrict a citizen's right to access justice. Today in British Columbia it costs a litigant who applies for a civil jury trial \$1,500.00 for summoning and empanelling a jury and \$650.00 for each trial day thereafter. On top of that is a daily trial fee of \$312.00.¹¹⁰

Ontario litigants do not pay civil jury summoning fees or daily jury fees. In 1996, the Ontario Law Reform Commission considered whether such fees should be imposed and recommended against the idea.¹¹¹ Like Ontario, United States Federal courts do not charge any similar jury fees. Other Canadian superior courts charge jury fees less than British Columbia. On average, the United States filing, jury and hearing fees seem much lower than those in British Columbia.¹¹²

In 1998, Mr. Justice MacAdam of the Nova Scotia Supreme Court addressed the issue as to whether a jury empanelling fee and daily hearing unlawfully restricted access to the courts and were therefore unconstitutional.¹¹³ He found

¹¹⁰ Rules of Court, British Columbia Reg. 221/90, Appendix C; see C.J. Bouck J., J.R. Dillon & G. Turriff, *British Columbia Annual Practice 2001* (Aurora: Western Legal Publications (1982) Limited, 2000) at SC-535 – SC-539. For a 5 day civil jury trial, a litigant must now pay, approximately, \$2,162.00 in court filing fees, plus \$4,750.00 for jury summoning and daily sitting fees, totalling \$6,912.00. For a 10 day civil jury trial the litigant will have to pay about \$10,242.00. For a 15 day civil jury trial, the amount is about \$18,532.00.

¹¹¹ *Supra* note 88 at 79-80.

¹¹² An Internet inquiry directed to a few United States and Canadian judges revealed these figures: United States Federal Court: no fees for a jury trial; Illinois: "several" hundred dollars initially, nothing thereafter; Washington State: \$110.00 to commence an action, no other fees except a \$125.00 jury empanelling fee; Minnesota: \$129.00 to commence an action, nothing thereafter except for a \$75.00 jury summoning fee; Florida: \$200.00 to commence an action, no other fees thereafter except a 6 person jury fee of about \$90.00-\$180.00 per day; Saskatchewan: \$75.00 to commence an action; \$75.00 to set down for a pre-trial conference; \$75.00 to set down for trial; \$15.00 per hour after first 5 hours of trial; \$250.00 for summoning a jury plus a \$1600.00 deposit to cover the jury fees and expenses for the estimated length of the trial; Nova Scotia: \$178.75 to commence an action; \$200.00 for setting a case down for trial without a jury; \$300.00 with a jury; no daily hearing fee for a judge alone or jury trial after 5 days; etc.

¹¹³ *Pleau, supra* note 89 at 227-42.

the fees to be unconstitutional because they “put a ‘price on accessing the courts,’ a price on justice”.¹¹⁴ In one American state, 99% of all personal injury plaintiffs apply to have court fees waived because they are “*in forma pauperis*.” Judges usually approve 99% of these applications.

In many British Columbia personal injury trials, an “indigent” plaintiff or defendant may be able to get relief from paying any projected filing and hearing fees upon applying to the court and providing evidence that he or she does not have the financial ability to pay.¹¹⁵

C. Challenging Civil Jurors For Cause

Section 20(2) of the *Jury Act* enshrines in statutory form the common law right of parties to challenge jurors for cause. It reads: “Each party is entitled to challenge any of the jurors for cause.”¹¹⁶ The wording of this section is different from that of similar sections in the *Criminal Code*. In a criminal trial, the right to challenge potential jurors is subject to the discretion of the trial judge.¹¹⁷ Arguably, a judge cannot deny a litigant that right in a civil case.¹¹⁸

The problem is that no one seems to know exactly what procedure should be followed. Should it be the ancient common law process, now partially adopted for criminal juries, where the court selects alternate triers to determine a juror’s potential impartiality? Or, should we have new rules of court laying down a modern, more efficient process for challenging civil jurors?¹¹⁹ Such a

¹¹⁴*Ibid.* at 236.

¹¹⁵Rules of Court, *supra* note 110, and *Munro v. Stewart* (1988), 31 B.C.L.R. (2d) 164 at 165–67 (B.C.S.C.) at 166: “A pauper has no means and is altogether dependent upon charity; an “indigent” person may possess some means.””

¹¹⁶*Supra* note 86 at s. 20(2). Similarly, United States common law argues: “Because challenges for cause serve such important functions, it has been said that the right to challenge for cause is inherent in the right of trial by an impartial jury”: see 47 Am. Jur. 2d, “Jury”, § 228. Generally.

¹¹⁷*Criminal Code*, R.S.C. 1985 c. C-46, s. 638–640. Also see G. Ferguson and J.C. Bouck J., *Canadian Criminal Jury Instructions*, 3rd ed., Vol. 1 at para. 1.00, note 5; J.C. Bouck J., W.F. Ehrcke, R. Hira and D. Stone, *British Columbia Annual Criminal Practice 2001* (Aurora: Canada Law Book Inc., 2001), Rule 22 at 159 – 165.

¹¹⁸47 Am. Jur. 2d, “Jury”, § 228. Generally: [...] A statute which authorizes the setting aside of jurors for cause implicitly recognizes the right of the parties to challenge a member of the proposed jury for cause, even though the statute contains no specific procedures for striking jurors.

In *Anderson v. Busch* (1995), 22 B.C.L.R. (3d) 90 (B.C.S.C.), an oral decision, Vickers J. entertained the possibility of preventing the civil plaintiff from challenging jurors for cause. It does not appear that the right of a civil litigant to challenge jurors for cause was argued before Vickers J. He took into account criminal jurisprudence in making his ruling to allow the challenge.

¹¹⁹See J.C. Bouck J., “Civil Jury Trials: Challenging Civil Jurors for Cause” (1996) 72 *The Verdict* 30.

scheme might also include a process where potential jurors would fill out a form of questionnaire before jury selection.¹²⁰ When completed, those questionnaires would be made available to counsel and the judge prior to the empanelling process.

While awaiting the necessary law change, I would offer a procedure that judges and counsel may wish to consider:

1. Ten days, before the trial date, each party would send to the court a list of suggested questions to be asked every potential juror and a list of their potential witnesses.
2. The questions lists should be no more than 1 page in length, containing no more than 10-15 questions. The judge should settle the forms of questions if there is any dispute.
3. The judge should take an oath from the whole panel assembled in the courtroom to tell the truth on the *voir dire*.
4. Before summoning individual jurors, the judge should ask the potential jurors a number of preliminary questions, such as: Do any of you know the parties to this action or their counsel? Do any of you know the witnesses who will be called by each of the parties? (Counsel will read the names of their witnesses). The judge would give the jurors a brief overview of the case, and ask if there is any reason why any potential juror cannot try the case fairly and return a reasonable verdict based on the evidence and the law.
5. The judge should then ask the questions of each juror as they are selected by lot and take the witness stand.
6. The judge may allow counsel to ask the juror additional questions.
7. At the conclusion of the questioning, the judge should ask counsel if they are “content” with the juror or if they “challenge” the juror for cause.
8. The judge should then rule on whether a challenge should succeed based on potential bias.¹²¹ A principal challenge may arise when the connection between the prospective juror and either party is of so close a nature that, when the facts concerning the relationship or interest are proven or when the prospective juror has formed or expressed an opinion on the question at issue, the disqualification is conclusively presumed. A challenge to the favor is for bias in favor of one of the parties, the existence of which is to be determined by the trial court or triors, acting with sound discretion from the facts and circumstances.

¹²⁰47 Am. Jur. 2d, “Jury”, § 203: “The use by the trial court of a questionnaire in conducting voir dire is appropriate under certain circumstances. Such a questionnaire will reveal a great deal of relevant information from a large panel of prospective jurors...”

¹²¹*Ibid.* § 226: ... A challenge for cause to an individual juror for bias or prejudice can be either a principal challenge or a challenge to the favor.

9. If the challenge succeeds, the potential juror should be dismissed. If the challenge fails, the party objecting to the juror may challenge the potential juror peremptorily.
10. There should be no limit to the number of challenges for cause.

Counsel and the court should try to complete the empanelling process within 30 to 45 minutes.

D. *Counsel Addressing the Jury on the Range of Damages*

Today, the law may allow counsel to address a jury on the range of non-pecuniary damages. At one time, case law did not give counsel this right,¹²² but that restriction may no longer apply.¹²³ Since counsel have the absolute right to argue facts before the jury, it seems they are entitled to suggest a range of non-pecuniary damages to the jury, just as they can with any other personal injury damage head.¹²⁴

E. *Pattern Jury Instructions*

One demanding feature of civil jury work, from the trial judge's perspective, is putting together an intelligible and correct set of instructions within the limited time available. A system of Pattern Jury Instructions with its associated rules would rectify that difficulty. The Continuing Legal Education Society of British Columbia's *Civil Jury Instructions* (CIVJI) comes close, but is not as extensive, and it only has tentative approval from the Court of Appeal and only covers a few common law actions.

Pattern jury instruction rules usually provide that counsel must prepare suggested forms of instructions and submit them to the trial judge before the trial begins. Counsel use forms taken from published pattern form instruction books. After all the evidence is heard, and counsel make their submissions, the judge

¹²²*Force v. Gibbons* (1978), 93 D.L.R. (3d) 626 at 631; (1978), 9 B.C.L.R. 144 (B.C.S.C.); "In this province a civil jury is given no particular guidance as to what dollar value of general damages it ought to award an injured plaintiff. The matter is at large. Neither the judge nor counsel are permitted to suggest a figure."

¹²³In *Foreman v. Foster*, *supra* note 3, at para. 37, Mr. Justice Lambert stated that *Force v. Gibbons*, *ibid.*, has, in effect, been overruled by the Supreme Court of Canada in *Crosby Estate v. O'Reilly*, [1975] 2 S.C.R. 381; (1974), 51 D.L.R. (3d) 555.

¹²⁴Vidmar, *supra* note 59, at 885-86: "Judicial instructions regarding general damages are, in reality, quite vague and frustrating to jurors. Typical instructions suggest only 'fair compensation' or 'a reasonable amount'. In my interview with jurors who decided malpractice cases, this was one of their most frequent complaints. Hans' interviews with jurors indicated that a common concern was that plaintiffs should not get more than they deserved... The *ad damnum*s (top award) suggested by the plaintiff's lawyer (and perhaps the amount proposed by the defendant's lawyer) serve as the anchoring points around which deliberations take place... extreme requests produce a 'boomerang effect'."

settles the final instructions. The judge then reads the instructions to the jury. Jury members receive a written copy.

On appeal, counsel cannot argue instructional error unless they objected in writing at the time of the trial. Most United States federal and state trial courts have pattern form instructions for civil and criminal trials. A 1991 attempt to get the idea adopted in Canada for criminal jury trials, remains a long term priority for the Department of Justice, Ottawa.¹²⁵

F. *Motion For a New Trial*

Today, a British Columbia trial judge cannot change a jury's damage award. That can only be done by an appellate court.¹²⁶ The issue deserves revisiting.

American rules of procedure usually give trial judges the right to cure any errors at the trial level rather than putting the parties to the expense of an appeal. It is an idea first proposed in 1984 by the Law Reform Commission of British Columbia.¹²⁷ Following the Commission's suggestion, counsel should be able to bring a motion after a jury verdict requesting a new trial on the grounds the award was too low or too high. If the trial judge finds that the amount unmistakably indicated the verdict was a result of passion or prejudice he or she may order a new trial. But if the party affected consents to the increase or reduction a judgment will be entered for the amount found by the trial judge. Here is a summary of the Washington State Code of Civil Procedure dealing with such a motion:

- a) Where the trial judge finds the damages awarded by the jury to be excessive or inadequate because,
- b) The verdict unmistakably indicates the amount must have been the result of passion or prejudice;
- c) The judge may then order a new trial or;
- d) The judge may enter an order providing for a new trial unless the party adversely affected consents to a reduction or increase of the verdict;

¹²⁵ See: J.C. Bouck, "Criminal Jury Trials: Pattern Instructions and Rules of Procedure" (1993) 72 Can. Bar Rev. 129.

¹²⁶ *Collins v. British Columbia Motor Transportation Limited*, [1952], 5 W.W.R. (N.S.) 508 at 514 (B.C.C.A.). See *Force v. Gibbons*, *supra* note 122 at para. 36: "If there is some evidence to support a jury's verdict and it is not ambiguous or otherwise wrong in law then judgment must follow in accordance with the terms of the verdict. This is so even though any assessment of damages contained in the verdict may be more or less than what a judge might have otherwise awarded." *Force v. Gibbons*, *supra* note 120 at para. 36.

¹²⁷ Law Reform Commission of British Columbia, "Report on Review of Civil Jury Awards" (Victoria: Queen's Printer, 1984) at 47, the Commission recommended that: "The trial judge be given a jurisdiction, corresponding to that exercised by the Court of Appeal (as provided by Recommendation 1), upon the application of a party, to review a jury's verdict on quantum and to give judgment for an amount that is reasonable on the evidence."

- e) If the party affected consents to a reduction or increase and the opposite party appeals, the party who filed the consent is not bound by it; but
- f) Upon the appeal, the appeal court reviews the actions of the trial court *de novo* and, there is a presumption that the amount awarded by the jury was correct; and
- g) The amount awarded by the jury will prevail unless the appeal court finds from the record that the damages awarded were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.¹²⁸

This procedure and those tests would help cut down expense and delays caused by appeals. It would allow the trial judge, who observed the witnesses, to express an alternative independent judgment as to what amount of damages would be fair and reasonable in the circumstances. The party affected could then accept the judge's figure or proceed to a new trial.

G. *Post-Trial Juror Interviews*

After a criminal trial, it is an offence for a juror to disclose any information relating to the proceedings of the jury when it was absent from the courtroom.¹²⁹ Judicial interpretation of the section means that juries cannot disclose what took place during their deliberations.¹³⁰ Where a trial judge does not direct a jury that it need not discuss its findings with counsel after the trial, but it may do so if it wishes, and does not give counsel permission to speak to the jury, counsel commits contempt of court.¹³¹

Both these laws prevent Canadian trial judges and lawyers from discovering what additional help Canadian juries need to reach a just and fair verdict in criminal and civil cases. Lawyers cannot find out what evidence or tactic assisted the jury and what did not. Therefore, we are left to investigate these matters based on interviews conducted with American jurors by American counsel and researchers. We must then interpolate them to Canadian circumstances as best we can.

With respect, this state of the law is an embarrassment to Canada. It is more or less commonplace for American lawyers to gain information of this nature in most U.S. States and Federal courts, where there are no such restrictions. United States law presumes that the internal operation of a jury panel is fair. Impeachment of a jury verdict is a step taken only in the most extreme circumstances.¹³² The rule also applies when a party seeks to impeach a verdict

¹²⁸ *Supra* note 103.

¹²⁹ *Criminal Code*, *supra* note 117 at s.649.

¹³⁰ *R. v. Pan* (1999), 134 C.C.C. (3d) 1 (Ont. C.A.).

¹³¹ See *McCready v. Scott* (1967), 62 W.W.R. 563 (B.C.S.C.); also see *supra* note 15, at para. 12.04.

¹³² 75B Am. Jur. 2d, "Trial", § 1899. Generally.

on the grounds of misconduct on the part of a juror.¹³³ Similarly, a verdict cannot be impeached through the testimony of a juror on the grounds that another juror forced him or her into agreeing with the verdict.¹³⁴ Affidavits filed by third persons generally are not competent to impeach a jury verdict.¹³⁵ With rare exceptions United States jury verdicts cannot be overturned as a result of comments made by a juror concerning events that occurred while the juror was in or out of the courtroom.

For Canada to have a model civil jury system we should allow judges, counsel and Canadian researchers to discuss with civil jurors after the trial what helped them arrive at a fair verdict and what didn't. One way of doing this is to hold a post-verdict discussion in the courtroom with counsel and the jury present. The judge could tell the jury that counsel may wish to ask them some questions about the conduct of the trial, what helped them and what didn't, and how counsel could improve upon their presentations. The trial judge might also want to ask the jurors whether the instructions were helpful, what suggestions they might have to improve upon the process, etc. Jurors could be told they do not have to answer any questions or participate in the discussion if they choose not to do so. A process conducted in that manner will occur with the judge's permission and therefore, will not be in contempt of court.

These types of out of court discussions, between the jury and counsel or researchers, in the absence of the judge, presents a more awkward situation. Nonetheless, it is difficult to see how there could be a contempt of court if, upon application, the judge permits such discussions and warns the jury they do not have to answer any questions but they may do so if they wish.

H. *Court of Appeal – Amendments to Rules and Statute*

Should the suggested rules relating to new trial orders be adopted, it is likely that fewer cases will go to appeal. New rules could also provide that if the Court of Appeal finds a civil jury award unmistakably too high or too low, so as to indicate the amount must have been the result of jury prejudice or passion, it could order a new trial. Alternatively, where both parties agree, the court could fix the amount of damages in lieu of ordering a new trial.

I. *Publishing Details of Jury Verdicts*

To make informed future decisions on civil jury awards, we should begin collecting empirical data. Because of the relatively few civil jury trials in Canadian Courts, and because they occur all over the provinces, it is doubtful

¹³³ *Ibid.* at § 1901. Applicability of rule where juror misconduct alleged.

¹³⁴ *Ibid.* at § 1906. Coercion of juror.

¹³⁵ *Ibid.* at § 1921. Generally.

any commercial publisher would publish detailed results of a jury verdict as they do in the United States.

Canadian judges and lawyers could devise a form that counsel would complete before each civil jury trial. The form might contain all the details set out in the United States jury report form, minus the figures. When the jury returns its verdict, the Court Clerk would insert the figures. Then, the form would be posted on the court's Website under a special title for ease of research.

VII. *Conclusion*

Trial by a civil jury is not just a right possessed by all litigants in a common law action. Like the right to vote, it is also a democratic privilege giving eligible citizens the right to insist on participating as jurors from time to time.¹³⁶

No political voice champions the cause of trial by a civil jury. Few Canadian academics write about its strengths and its weaknesses. Because of procedural antiquity, it is used less frequently. Unless judges and lawyers join together and update its operation, soon it will disappear from the legal landscape.

Judges and lawyers carry the duty to preserve and modernize the civil justice system for the public's benefit. Talking about it is not enough. Action is necessary. As Associate Chief Judges E. Dennis Schmidt and Hugh G. Stansfield of the Provincial Court of British Columbia recently observed, "commitment to effective administration of justice must be greater than resistance to change".¹³⁷

In a prescribed time-frame we should aim to complete the many badly needed reforms mentioned above so that trial by civil jury will be as common then as trial by judge alone is today.

¹³⁶"Developments – The Civil Jury" Note (1997) 110 Harv. L. Rev. 1408 at 1437: "Considered in terms of its democratic function, the jury trial is a right of political participation possessed by the citizenry and not a right of litigants to have their disputes adjudicated in a certain forum... Anti-Federalists explicitly viewed the jury in this way and recognized the connections and parallels between jury service and the right to vote... [The] functions of the civil jury are based on the desirable consequences that jury deliberations produce, the democratic function assigns intrinsic value to the deliberations themselves – to the very fact that they occur, irrespective of their results."

¹³⁷E.D. Schmidt & H.G. Stansfield, "The Provincial Court: Will We Learn From the Past?" (2001) 59:2 The Advocate 247 at 252.