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The Civil Jury in the Courts of Ontario: A Postscript to the Osgoode Hall Study

Notes

THE CIVIL JURY IN THE COURTS OF ONTARIO: A POSTSCRIPT TO THE OSGOODE HALL STUDY

ALLEN M. LINDEN and RICHARD J. SOMMERS*

I. *Introduction*

The civil jury is under attack in Ontario.¹ Bruised and battered by repeated onslaughts upon its integrity, the jury system is gradually falling into disrepute. The charges levelled against juries are varied: because they are easily influenced by emotional appeals, they tend to find for the plaintiff; because they are plaintiff-minded they tend to award damages that are too high; because they are laymen, inexperienced in the law, the pace of litigation is slowed down. There are other criticisms as well, in the realm of values, upon which men may understandably differ, but the main thrust of the attacks have been factual in nature. In spite of this, these accusations have not been supported by any empirical data. Nor, surprisingly, have the defenders of the jury system utilized statistical analysis to refute the charges.² To be sure, the destiny of the civil jury will be determined ultimately as a value choice; we must, nevertheless, ensure that we are not diverted from the main issues by collateral statistical assertions, especially when they are not buttressed by empirical data.

The reason why the protagonists have not used statistical data is because none are available in this country. The authors decided to fill this statistical vacuum in order to illuminate with facts the growing debate over the future of the jury. If the charges made are borne out by the facts, the jury would be dealt a severe blow; if, however, they are demolished by the data, the jury system would receive a transfusion.

The *Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents*,³ a broad analysis of the economic effect of motor vehicle crashes upon individuals, did not cast much light on the litigation process itself, because so few of the cases

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¹ See McRuer, *The Motor Car and the Law* (1966), 4 O.H.L.J. 54; for a defence see Haines, *The Future of the Civil Jury* to be printed in *STUDIES IN CANADIAN TORT LAW* (1968).

² See, for example, the excellent empirical studies of H. Zeisel, H. Kalven and B. Buchholz, *DELAY IN COURT* Boston: (1959); and see C. W. Joiner, *CIVIL JUSTICE AND THE JURY* (Englewood Cliffs N.J.): (1962).

³ A. M. Linden, *The Report of the Osgoode Hall study on COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS*, Toronto: 1965.

studied reached a trial on the merits.⁴ Consequently, it was decided to do a postscript to the *Osgoode Hall Study* that would focus its attention on cases that needed trials for resolution. From the files of the central office of the Supreme Court of Ontario that were made available to us, we examined all the automobile cases there commenced in the year 1961 that eventually went to trial. Automobile cases were chosen for several reasons: the jury is frequently used in this type of litigation, they are relatively homogeneous cases, there were a fair number of them, and the results could be compared with the findings of the *Osgoode Hall Study*. The year 1961 was selected because most of the actions would have been completed at the time the fact-gathering began and because the findings would harmonize with the *Osgoode Hall Study*.⁵ As the total number of cases was of manageable proportions, sampling techniques were not necessary. Collecting the required data was a laborious process that involved a preliminary examination of the files of about 10,000 actions begun in the year. With the aid of a simple questionnaire, full information was extracted from the files of the 121 cases that reached trial. The information collected consisted of the type of trial, the result, the length of time taken to reach trial and to complete the trial, the assessment of damages and other matters. All of this data was coded, key-punched onto I.B.M. cards and processed on the I.B.M. computers at the Ontario Department of Transport.⁶ This article is the product of the study.

Before plunging into the data, a brief outline of the jury system in Ontario may be helpful.⁷ Jury trial in Ontario, unlike in the United Kingdom, is still flourishing, although the size of the jury has shrunk to six members.⁸ There are some types of cases, like libel and slander, that are automatically placed on the jury list unless the parties waive their right to jury trial⁹ and others where trial by jury is prohibited altogether.¹⁰ In most cases, however, either party has the right to request a trial by jury, which is done by filing a jury notice within four days after the close of the pleadings.¹¹ The other party is entitled to apply to a judge in chambers to strike out the jury notice,¹² which will be done if he feels the case is too complicated for a jury (as in a malpractice case) or if the jury is likely to have difficulty remaining objective (as in a suit against a municipality). The trial judge may, in any event, strike out the jury prior to beginning the trial or at any

⁴ Only 8 of the 560 cases studied had a completed trial, Chapter V.

⁵ Actually not all of the actions commenced in 1961 arose out of accidents that occurred in 1961, but this was as close as we could come.

⁶ The assistance of the Department and Mr. Frank Brence, in particular, is gratefully acknowledged.

⁷ See generally, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA, JURY TRIALS (1959).

⁸ The agreement of five is necessary for a decision, see the Judicature Act, R.S.O., 1960, c. 197, s. 61(1).

⁹ *Id.*, s. 55.

¹⁰ *Id.*, s. 56.

¹¹ Judicature Act, R.S.O. 1960, c. 197, s. 58.

¹² See Grossberg, *Striking out the Jury*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA (1959) at 261.

time during the trial, for example, if insurance is mentioned.¹³ Under these general principles, juries decide around one-half of all the automobile cases tried in the County of York.¹⁴ Let us now look at the results of the trials to see whether juries evince any bias. Next we shall examine the assessments of damages by juries as compared with those done by judges. After this, a study of the problem of delay will be undertaken and, lastly, some conclusions will be offered.

II. *The Result of Trials*

Critics of the civil jury charge that it is biased in favour of the plaintiff and, consequently, the defendants do not get a fair hearing. This allegation is not borne out by the facts. Table I shows that, although the jury decided wholly in favour of the plaintiff in 48.6 per cent of the cases studied, the trial judges alone found completely in the plaintiffs favour 71.7 per cent of the time, indicating a more marked inclination on the part of judges to favour the plaintiff, contrary to what has been charged. When one studies the dismissals, however, this trend is modified, for judges alone tended to dismiss law suits more readily than juries did; judges exonerated the defendant in 18.8 per cent of the cases, while juries did so only in 2.7 per cent of the cases they decided.

TABLE I

THE RESULT OF JURY TRIALS COMPARED WITH NON-JURY TRIALS

| Type of Case | For Plaintiff Wholly | | Apportionment Plaintiff 1-50% At Fault | | Apportionment Plaintiff 51-99% At Fault | | Case Dismissed | | Total | |
|--------------|----------------------|------|--|------|---|------|----------------|------|-------|------|
| | No. | % | No. | % | No. | % | No. | % | No. | % |
| Jury | 18 | 48.6 | 11 | 29.7 | 7 | 18.9 | 1 | 2.7 | 37 | 99.9 |
| Non-Jury | 38 | 71.7 | 3 | 5.6 | 2 | 3.7 | 10 | 18.8 | 53 | 99.8 |

It is in the treatment of contributory negligence that one of the main distinctions between judge and jury trial is demonstrated; judges rarely apportion negligence, whereas juries do so frequently. Liability was split in 48.6 per cent of the jury trials, but only in 9.3 per cent of the judge trials. This indicates that judges have hardly taken notice of the comparative negligence legislation which permits liability to be divided, feeling themselves able to decide completely one way or the

¹³ *Id.*

¹⁴ 61 jury cases and 60 non-jury cases were completed out of the actions commenced in 1961.

other on the facts. The jury is less confident of its own powers and chooses rather to divide responsibility between the two parties, a practice that may well accord better with the true position with regard to blameworthiness. This willingness on the part of juries to reduce the awards of plaintiffs shows a lack of bias on their part. As another consequence, however, plaintiffs before juries receive some reparation in 97.2 per cent of the decisions, while those before judges do in 81 per cent of the cases. This indicates that the jury system does in fact assist to broaden the incidence of tort recovery, but these payments are often reduced in amount because of comparative negligence. Indeed, if the jury trial were jettisoned, the laudable objective of the Negligence Act would be severely undermined, since judges seem so reluctant to avail themselves of it.

III. *The Assessment of Damages*

Opponents of the jury system contend that juries are too generous in the amount of damages they award, but seldom do they consider that newspapers print these stories about large awards only because they are so rare. In fact juries tended to assess damages at very small figures more often than judges. Table II demonstrates that in 31.7 per cent of their cases juries calculated damages at under \$3,000 while judges alone went this low in only 26.1 per cent of their cases. At the other end of the scale, both juries and judges appeared to agree; assessments over \$25,000 occurred in 11.4 per cent of all jury cases studied and in 11.6 per cent of non-jury cases, an almost identical pattern. In the middle ranges, however, juries seem more generous than judges; 38.2 per cent of the jury assessments fell between \$7,000-\$25,000, while only 24.5 per cent of the judge assessments were within this range; 18.5 per cent of all the jury assessments were between \$3,000-\$7,000. Whereas 37.6 per cent of the non-jury ones were in this category. In other words, juries appear to be assessing damages more liberally in the middle ranges, but less generously in the lower ranges, because the largest group of jury assessments was between \$7,000-\$25,000, while the biggest group of non-jury assessments were between \$3,000-\$7,000. However, one must not lose sight of the fact that these are only *assessments* of damages, not *awards*. It will be recalled that juries are more prone to dividing responsibility than judges, so that many of their higher damage *assessments* may emerge ultimately as lower damage *awards*. These figures should, therefore, lay to rest the unfounded accusation that juries are always too generous. Counsel for defendants must be aware of this, because it was they who served 53 per cent of the jury notices in the Supreme Court cases awaiting trial in Toronto where the notice was filed in 1966.

TABLE II

ASSESSMENT OF DAMAGES
(JURY CASES COMPARED WITH NON-JURY CASES)

| Assessment | Under \$3,000 | \$3,000-\$7,000 | \$7,000-\$25,000 | Over \$25,000 | Total |
|----------------|---------------|-----------------|------------------|---------------|-------|
| Jury Cases | 31.7% | 18.5% | 38.2% | 11.4% | 99.8% |
| Non-Jury Cases | 26.1% | 37.6% | 24.5% | 11.6% | 99.8% |

IV. *Delay*

Another recurring complaint about jury trials is that they take too long to get to trial and that these trials last longer than non-jury trials. This study sought to obtain data to verify or disprove these charges of delay in court.

(a) *The Waiting Period*

The length of time between the issuance of the Writ of Summons and the commencement of the trial is actually shorter in jury than in non-jury cases. Table III discloses that 19.6 per cent of the jury trials were heard in less than a year, but only 15 per cent of non-jury cases were heard in this short period. In all the other longer categories the jury trial percentage was smaller than the non-jury percentage: 52.4 per cent of jury trials compared with 53.3 per cent of non-jury trials were reached in the period 1-2 years; 22.9 per cent of jury cases compared with 25 per cent of the non-jury trials were heard in the period 2-3 years; 4.9 per cent of the jury trials compared with

TABLE III

THE WAITING PERIOD
(TIME TAKEN FROM ISSUANCE OF WRIT TO
START OF JURY TRIALS COMPARED WITH NON-JURY TRIALS)

| Time Required To Start Trial | Less than 1 year | | 1-2 years | | 2-3 years | | 3-4 years | | Total | |
|---------------------------------|---------------------|------|-----------|------|-----------|------|-----------|-----|-------|------|
| | No. | % | No. | % | No. | % | No. | % | No. | % |
| Jury Cases | 12 | 19.6 | 32 | 52.4 | 14 | 22.9 | 3 | 4.9 | 61 | 99.8 |
| Non-Jury Cases | 9 | 15 | 32 | 53.3 | 15 | 25 | 4 | 6.6 | 60 | 99.9 |

6.6 per cent of the non-jury trials were begun in the period 3-4 years. Thus, rather than taking longer to be heard, jury trials in Ontario are reached a little sooner than non-jury cases. Although this may explode the criticism made about delay in jury cases, it does not go much further; the time taken to reach the court-room door is a function, *inter alia*, of the number of judges available, rather than the type of tribunal that hears the dispute. Consequently, if jury trials were reached more slowly an increase in the number of jury courts would remedy the delay problem and *vice versa*. After examining these figures, one cannot escape the conclusion that an infusion of additional judicial resources to *both* jury and non-jury trials in Ontario is indicated.

(b) *Duration of Trial*

Once the trial gets under way, a jury trial does tend to take longer to dispose of than does a trial by judge alone. Table IV demonstrates that, while only 5.5 per cent of the jury cases are disposed of in one day or less, 35.5 per cent of non-jury cases are completed in

TABLE IV
DURATION OF TRIAL
(TIME TAKEN TO COMPLETE JURY TRIALS
COMPARED WITH NON-JURY TRIALS)

| Length of Trial | 1 Day or Less | | 2 Days | | 3 Days | | 4 Days | | 5 Days | | Total | |
|-----------------|---------------|------|--------|------|--------|------|--------|-----|--------|-----|-------|------|
| | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| Jury Cases | 2 | 5.5 | 21 | 58.3 | 9 | 25 | 3 | 8.3 | 1 | 2.7 | 36 | 99.8 |
| Non-Jury Cases | 16 | 35.5 | 17 | 37.7 | 10 | 22.2 | 2 | 4.4 | 0 | 0 | 45 | 99.8 |

this time period.¹⁵ The chance of a non-jury trial being over in one day, therefore, is about six and one-half times as good as in a jury case. A similar pattern emerges in the other time classifications: 58.3 per cent of the jury cases took 2 days but only 37.7 per cent of the judge trials took this long; 25 per cent of jury trials required 3 days to be disposed of but only 22.2 per cent of judge trials took this long; 8.3 per cent of jury cases took 4 days, but only 4.4 per cent of non-jury trials lasted this long; 2.7 per cent of jury trials went 5 days, but no non-jury case lasted that long.

A more meaningful comparison, however, may be made by examining the average length of time taken by a jury trial and a

¹⁵ Because of the state of the records any *part* of a day was counted as one day.

non-jury trial. The average time needed to conclude a jury trial was 2.4 days, whereas the average length of time needed to finish a non-jury case was only 1.9 days, a difference of .5 days. Consequently, jury trials definitely do take longer to be tried, but, when one looks at the total judicial resources involved, this extra time becomes insignificant. To illustrate this, if the 61 cases arising out of all the 1961 claims in the Supreme Court in Toronto were tried by a judge alone instead of with a jury, 30.5 judge days would have been saved. There are, of course, other expenses as well, but future attacks on the jury can hardly rest on this data.

V. *Conclusion*

After an examination of the factual data, the inescapable conclusion to be drawn is that they do not support most of the criticisms of the jury system. Rather than finding in favour of the plaintiff all of the time, the jury holds completely in his favour less often than does the judge alone. It is true, however, that the jury is less likely than a judge to dismiss an action altogether, tending instead to apportion liability more frequently than judges. Nor does the jury consistently assess higher damages than judges; indeed, juries bring in more small assessments and the same number of large ones. In the intermediate ranges juries do seem to be more generous, but this tendency must be viewed in the light of the increased use of apportionment in jury trials. On the question of delay in getting to trial, jury trials are no slower than non-jury trials in this respect; actually trials by jury are reached slightly more rapidly than those without a jury. One complaint was proved correct; a longer time period is necessary to try a jury case, an average of one-half of a day. However, if all jury trials were abolished the total saving to the County of York would be thirty and one-half Supreme Court judge days. In other words, the cost of jury trial in judge days is so insignificant that one need hardly consider it. There are, of course, other costs in jury trials and value choices to be assessed as well, but these are not so easily measured. In the future, however, those who wish to jettison the civil jury trial will have to search elsewhere for ammunition, for the factual data here assembled will afford them only slight comfort.