THE USEFULNESS OF JURIES IN ONTARIO'S CIVIL COURTS:

CONSIDERATIONS FOR SERVING A JURY NOTICE IN PERSONAL INJURY LITIGATION

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Introduction

In the 1835 Monograph Democracy in America, French political observer Alexis de Tocqueville wrote, "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation…"[1] Tocqueville was referring to the importance of participation in democratic society. Nevertheless, this quote raises a question that arises even in today's litigation – what is the usefulness of civil juries to the litigants?

Individual lawyers often develop a regular practice on whether or not to serve a jury notice. Many lawyers automatically serve a jury notice or decline to do so in particular cases. While jury trials are more common in personal injury cases than in other civil and commercial litigation matters, they are not necessarily the norm. Many plaintiff and defence counsel have their reasons for choosing a jury trial or one tried by judge alone. Although both modes offer perceived advantages, the jury trial continues to offer a reasonable level of predictability, an opportunity for strategic advocacy, as well as other not-readily-evident advantages.

I. Are Juries Unpredictable?

The perceived unpredictability of jury trials presents difficulty for counsel on both the plaintiff and the defence side. Unpredictability is somewhat inherent in this mode of trial since, in the Canadian legal system, lawyers have little or no control over the composition of a jury. During jury selection in Ontario, lawyers on either side are given four peremptory challenges, objections which are primarily based on three pieces of information including the name of the juror, their address and their occupation. The only other information is what can be gleaned from a potential juror's appearance or

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[1] Alexis de Tocqueville, 1835/202 *Democracy in America*, Washington, DC: Gateway Editions (Trans. by Henry Reeve, 1899) in John Gastilri *et al.*, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*, (New York: Oxford University Press, Inc., 2010) at 5.

demeanour, and therefore decisions in this regard are often based on stereotypes.[2] Even after the trial commences and the jury is empanelled, the thoughts and opinions of the jury remain a mystery.

For some, the absence of information about the members of their jury allows for the possibility of a bad or unexpected verdict. There is a perception that jurors base their decisions on emotion rather than reason.[3] Likewise, some proponents of the abolishment of juries argue that jurors' lack of legal training leads to unsound results.[4] Meanwhile, others argue that the quality of jury verdicts is inferior or less reliable than the judgments of judges sitting alone.[5]

Although there is generally no control over choice of the specific judge in a judge-alone trial, generally-speaking he or she will be highly educated and well-trained, usually with a great level of experience on the judiciary and previously as counsel. The consistently high level of competence of Canadian judges would seem to provide a greater level of predictability than a six-person panel of which counsel knows very little.

Another aspect which would appear to render judge-alone trials more predictable is that judges are bound by legal precedent, while juries are not given case law or precedent to follow when making their decision. A judge may be an attractive option because counsel may consult binding precedents and refer to past decisions of the specific trial judge in an attempt to glean how the trial judge thinks

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[2] Ian Kirby, "Civil Jury Trials: A Practical Guide" in The Honourable Mr. Justice Todd L. Archibald & Randall Scott Echlin, *Annual Review of Civil Litigation*, 2007 edition, (Toronto: Thomson Canada Limited, 2007) 199 at 204-205.
[3] L. Timothy Perrin *et al.*, *The Art & Science of Trial Advocacy* (Cincinnati: Anderson Publishing Co., 2003) at 3.
[4] The Honourable Mr. Justice Todd L. Archibald & Robert L. Gain, "The Breadth of Civil Jury Trials in Canada: Their History and Availability" in The Honourable Mr. Justice Todd L. Archibald & The Honourable Mr. Justice Randall Scott Echlin, *Annual Review of Civil Litigation*, 2007 edition, (Toronto: Thomson Canada Limited, 2007) 139 [*Archibald*] at 152.
[5] Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Actions*, (Toronto, Ontario Law Reform Commission, 1996)

or is persuaded,[6] whereas no such opportunity is available to determine how a jury is likely to decide a case.

Resigning the task of quantifying damages to a jury, largely unaided by the guidance of the court or past precedent, may seem to akin to an immense gamble, which, for some, simply cannot be afforded. Research based out of the United States has found that although compensatory damages tend to correlate positively with the severity of the plaintiff's injuries, a number of studies demonstrate variability in these damage awards, even while controlling for important case characteristics.[7]

Unpredictability surrounding juries extends into the cost of trials as well, representing a further reason given to decline the option of a jury trial. Jury trials are typically regarded as more expensive than those presided over by a judge alone. At the outset, a jury trial will require time for jury selection, address and charge, voir dires and other occasions where the jurors will have to be excused from the courtroom. These requirements will prolong the trial of an action, translating into increased costs which a party must risk in selecting a jury.[8]

For all of these reasons, juries have been viewed by some counsel and clients as wild cards to be avoided. Yet, juries continue to be popular in civil litigation cases and more particularly in personal injury matters.

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[6] *Supra* note 2 at 201.
[7] Edith Green, "Psychological Issues in Civil Trials" in Joel D. Lieberman and Daniel A. Krauss, ed., *Jury Psychology: Social Aspects of Trial Processes* (Burlington: Ashgate Publishing Limited, 2009) 183 at 190.
[8] Norman B. Lieff, "Practical Considerations and Whether or Not to Serve a Jury Notice in Commercial Disputes" in *Civil Jury Trials in Commercial Disputes: Practice, Tactics and Advocacy* (Paper presented to the 1991 Institution of Continuing Legal Education Held January 17-19, 1991) (Toronto: Canadian Bar Association, 1991) at 2.

II. The Usefulness of Civil Juries

a. Juries are Predictable Enough

Juries are able to effectively and efficiently process evidence and come to reasonable decisions in civil cases. While there is undeniably a measure of unpredictability in civil juries, in reality, there is unpredictability in any case that reaches trial given that any case that is truly predictable will typically settle before ever reaching the trial stage.[9]

Some plaintiff and defence counsel will serve and fight to maintain a jury notice in any case. Plaintiffs' counsel may believe that juries tend to favour higher damage awards, while defence counsel may see the jury as predisposed to a lower damage award than what might be awarded by a judge. Interestingly, oftentimes both the plaintiff and defendant perceive the jury as advantageous to their side.

Defence counsel in personal injury cases often serve jury notices for the frequently cited position that juries generally award lower damages than judges. The Ontario Law Reform Commission comments on juries' tendency towards lower damage awards: "Anecdotal evidence suggests that this trend is a consequence of the greater use of the jury by defendants, whose defences are usually conducted by the insurance companies that insure them. Anecdotal evidence further suggests that the appeal of the jury for insurance companies stems from the tendency of juries in Ontario, to make smaller awards of damages than judges."[10] In contrast, the University of Chicago Jury Project, a Chicago-based study by Kalven and Zeisel, found that jury awards tended to be higher than judge awards.[11] This discrepancy may suggest that the trend towards low jury awards is an Ontario (and possibly Canadian)

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[9] *Supra* note 5 at 29.
[10] *Supra* note 5 at 10.
[11] *Supra* note 5 at 24.

phenomenon and does not necessarily apply in other parts of the world. Regardless, many defence lawyers in Ontario serve jury notices in an effort to take advantage of this perceived tendency.

There is some suggestion that Ontario juries tend to award low damages due to their inability to fully appreciate the expert evidence and complicated calculations associated with claims for future loss.[12] However, as the Ontario Law Reform Commission comments, there is no data to show that juries are making awards outside the range proposed by the experts at trial and it is therefore difficult to conclude that juries are assessing damages improperly.[13] "Even if a jury makes a damage award smaller than an award made by a judge, it does not mean that the decision of the jury is less correct than that of a judge."[14]

Juries' tendency to favour lower damage awards may also come from jurors' greater willingness to take an appropriately sceptical view of the testimony of plaintiffs.[15] According to Edith Green, empirical data makes it clear that laypeople tend to be rather suspicious of plaintiffs and their motives for suing. As part of a series of studies that examined lay perceptions of business and corporations, Hans and Lofquist (1994) interviewed jurors who had served in civil cases. Most jurors agreed that there are far too many frivolous lawsuits and that people are quick to sue. These jurors indicated that during deliberations they carefully scrutinized the plaintiffs' motives and questioned the legitimacy of their complaints. They were especially hostile toward plaintiffs who did not seem to be as injured as they claimed, had pre-existing medical conditions, and might have contributed to, or did little to mitigate

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[12] *Supra* note 5 at 28.
[13] *Supra* note 5 at 28.
[14] *Supra* note 5 at 28.
[15] *Supra* note 5 at 28.

their own injuries.[16] The presumption that jurors are sceptical dramatically favours the defence position before defence counsel has even started to argue his or her case.

By closely adhering to legal precedent, judges will tend to arrive at higher damage awards. For instance, author Ian Kirby states that in personal injury cases where the plaintiff suffers from some pre-existing condition, the trial judge is obliged to explain to the jury the principles enumerated by the Supreme Court in *Athey v. Leonati*[17] in that if a defendant's negligence has materially contributed to the plaintiff's damages, even where that negligence is not the sole cause of the plaintiff's damages, a defendant may nonetheless be responsible for all of the plaintiff's damages. Kirby discusses this scenario further from the defence perspective: "While it is unknown exactly how an individual juror will accept this proposition, many defence counsel believe that a jury which has listened to days if not weeks of evidence about pre-existing problems that the plaintiff had will have difficulty awarding the same level of damages as a judge would sitting alone, applying the principles enumerated by the Supreme Court of Canada."[18] Even when provided with such guidance by the trial judge, jurors may decline to apply certain principles if they do not believe it brings about a fair result, again tending to lower the damage awards rendered by juries.

On the other hand, plaintiffs' counsel are often seeking jury trials because they are relying on the emotional appeal of the case at hand to motivate jurors to award substantial damages.[19] It is thought that a jury is more likely to find liability and award substantial damages, while a judge who has heard it all before will have a more detached view of the evidence and take a harder look at the issues of

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[16] *Supra* note 7 at 188.
[17] [1996] 3 S.C.R. 458.
[18] *Supra* note 2 at 200.
[19] *Supra* note 8 at 3.

liability and general damages.[20] Plaintiff's counsel will be particularly favourable toward a jury trial if they are blessed with a plaintiff who is likeable and with whom jurors will easily identify. A well-liked plaintiff is a definite boon for that side, which will be difficult for the defence to undermine. On the other hand, if the plaintiff lacks this appeal, appears litigious or lacks credibility, the defence will surely emphasize such points.

Generally, the principle of emotional appeal operates to the advantage of either side, depending on who has the likeable characters. "The best chance of success comes from the sympathetic case with the imminently likeable witness and an excellent set of facts…"[21] The principle works from the defence side as well, with the defendant(s) also having an opportunity to be well-received by the jury. However, in personal injury cases, the plaintiff is the party on whom there is generally a greater level of focus and visibility. Therefore, while the element of emotional appeal may benefit either side, it is often of greater benefit to plaintiffs.

On the issue of cost of civil juries, the Ontario Law Reform Commission's cost study found that jury trials do not take as long and are not as costly as is often suggested.[22] The average response to the Commission's survey to a number of senior judges on this issue found that civil jury trials take between one-half of a day and one full day longer.[23] The consulted judges, however, acknowledged that jury trials generally provide the decisions to the parties more promptly than a judge alone, especially due to the fact that judges often reserve their judgments.[24]

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[20] *Supra* note 8 at 3.
[21] Geoffrey D.E. Adair, "Success before a Jury" in *Civil Jury Trials in Commercial Disputes: Practice, Tactics and Advocacy, 1991 Institution of Continuing Legal Education Held January 17 – 19, 1991* (Toronto: Canadian Bar Association, 1991) at 1.
[22] *Supra* note 5 at 26.
[23] *Supra* note 5 at 36.
[24] *Supra* note 5 at 37.

In the case of motor vehicle trials, the Commission found that those heard by a judge alone took an average of approximately one hour longer than those which were heard before a jury.[25] The Commission concluded that the fact that motor vehicle cases of equivalent complexity took approximately the same amount of time for a judge or a jury to adjudicate suggests that there is no significant difference in the amount of court time required to dispose of a matter by a judge alone or a jury. Finally, the Commission suggested that while trying a matter before a judge alone might result in a shorter trial than if a matter were tried before a jury, such an analysis fails to account for the fact that, had a jury been scheduled, the case may not have reached trial as a result of prior settlement.[26]

b. Juries are Competent

The appeal of a jury from a theoretical perspective is that they represent the perspectives of a community, providing the court with a cross-section of societal views.[27] In practical terms, the modern Canadian jury is also able to process and weigh complex information and competently carry out the role of adjudicator. Justice Todd Archibald states, "Jurors today are sophisticated, able to understand the issues before them, as well as the vagaries of the law."[28] As well as being capable, juries generally take their role seriously and endeavour to perform their function to the best of their ability. According to Perrin, Caldwell and Chase, "Most judges fairly and impartially preside over trials. Most jurors admirably perform their fact finding function."[29] Whether one opts for a judge-alone or a jury trial, it is almost certain that the adjudicator will appreciate the importance and seriousness of that responsibility. Some supporters of civil jury trials argue that many citizens have greater confidence in

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[25] *Supra* note 5 at 49.
[26] *Supra* note 5 at 55.
[27] *Supra* note 5 at 21.
[28] *Archibald*, *supra* note 4 at 139.
[29] *Supra* note 3 at 4.

the fairness of their peers than they do in the fairness of judges.[30] A survey conducted by the Ontario Law Reform Commission suggested that, after serving as jurors, many citizens would prefer trial by a jury of their peers to judge alone. The Commission's consultations with counsel revealed that some counsel request juries out of a concern for fair treatment.[31]

To be sure, jurors must undertake daunting tasks in civil actions. For instance, they must consider and weigh the evidence of highly technical expert evidence, which some judges have identified as a significant source of difficulty for jurors, particularly in complex trials.[32] Jurors' task of applying the facts it finds to the law it receives in the form of judicial instruction is another serious difficulty.[33]

Given jurors' lack of legal training and experience relative to judges, it would not be surprising if jury verdicts lacked foundation. However, various studies demonstrate that juries often reach the same ultimate decisions as judges. According to one study cited by Green, judges tend to agree with the jury's verdict in the vast majority of cases. Likewise, the University of Chicago Jury Project, a seminal study by Kalven and Zeisel, found that judges agreed with jury verdicts approximately 80% of the time.[34] As Green says, "judges' awards are similar in magnitude and variability to those of jurors […], and they tend to rely on the same evidence to inform their decisions…."[35] Green concludes, "According to these findings, we have little reason to believe that jurors' reasoning processes or verdict preferences are inherently different from those of judges. In fact, judges have been shown to

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[30] *Supra* note 5 at 24.
[31] *Supra* note 5 at 24.
[32] *Supra* note 7 at 191.
[33] *Supra* note 7 at 191.
[34] *Supra* note 5 at 24.
[35] *Supra* note 7 at 190.

employ the same cognitive illusions as lay people".[36] Juries' ability to reason and reach a just decision are apparently not as far removed from those of judges as is commonly believed.

Jurors use common sense, real-world knowledge and principles of fairness to weigh the evidence and arrive at a just decision. Judges, on the other hand, are learned in the law and are bound to follow precedent in our common law system. Judges have a deep understanding of legal principles and significant experience on which to rely. Finkel describes the dichotomy that is created:

> There are two types of "law." There is the type we are most familiar with, namely "black letter law," the "law on the books." This is the law that legislators enact, the law that was set down by the Fore Fathers in the Constitution, the law that evolves through common-law cases and appeals decisions. It is the law that law school students study, judges interpret, and jurisprudes analyze. But there is another "law" – although law may be too lofty or lowly a term to describe it: I call it common sense justice, and it reflects what ordinary people think is just and fair. It is embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be.[37]

Groscup and Tallon suggest that the difference between common sense justice and "black letter" law can be the driving force behind what appears to be nonsensical jury decision-making but what is actually quite reasoned.[38]

The court has taken steps to assist juries in order to address their apparent shortcomings. For instance, in Ontario, as of 1989, two additions were made to the *Courts of Justice Act*[39] relevant to the

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[36] *Supra* note 7 at 190.
[37] Jennifer Groscup and Jennifer Tallon, "Theoretical Models of Jury Decision-Making" in Joel D. Lieberman and Daniel A. Krauss, ed., *Jury Psychology: Social Aspects of Trial Processes* (Burlington: Ashgate Publishing Limited, 2009) 41 at 48.
[38] *Ibid.* at 49.
[39] *Courts of Justice Act*, R.S.O. 1990, c. C.43 [*CJA*].

consideration of juries making damage awards.[40] Section 118 of the *CJA* provides that, "in an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages".[41] Section 119 of the *CJA* provides that, "on an appeal from an award for damages on personal injury, the court may, if it considers just, substitute its own assessment of the damages".[42]

Furthermore, the judge's discretion in regard to the use of a jury in any particular case means that cases which are too complex or are not appropriate for a jury will be tried by a judge alone, so long as a motion to strike the jury is before the said judge.[43] In regard to the question of which cases are best heard by judge alone, most responses suggested that complex cases, such as commercial matters and malpractice cases, or any case involving considerable technical evidence are appropriate for a judge alone.[44] Judges are generally in agreement that complex cases are not appropriate for juries.[45]

However, an Ontario Court of Appeal case has held that the existence of a difficult or unsettled question of law is not in itself a ground for discharging the jury.[46] In *Murray v. Collegiate Sports Ltd.*[47] the court stated:

> We are of the opinion…that the trial judge erred in discharging the jury. In his reasons, he stated that he was motivated by the fact that there were 'serious, difficult and unsettled questions of law as to who should bear the onus in this case.' It was his obligation to resolve the question of onus and put the appropriate question to the jury. If other questions necessarily followed he could put those further questions and if

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[40] *Supra* note 5 at 8.
[41] *CJA*, *supra* note 39.
[42] *CJA*, *supra* note 39.
[43] See *supra* note 4.
[44] *Supra* note 5 at 38.
[45] *Supra* note 5 at 39.
[46] *Supra* note 5 at 85.
[47] (1989), 40 C.PC. (2d) 1 (C.A.) [*Murray*].

> that brought about difficulties, the question of discharging the jury could be considered.[48]

Likewise, in *Cosford v. Cornwall*,[49] the Ontario Court of Appeal held that the issues to which the trial judge referred were issues of law which it was his duty to decide and the difficulty in deciding such issues did not form a basis for dispensing with the jury. The judge stated that questions of law are never matters for the jury to decide. As a result of *Murray* and *Cosford*, there would appear to be little justification now for striking out a jury notice on the ground of the complexity of legal issues involved.[50]

Adding to this dialogue in regard to the issue of scientific evidence, Justice Archibald states, "the test is whether the jury can comprehend, recall and analyze the nature of the scientific evidence. Even when there are conflicting expert reports, a jury trial will still be the appropriate venue if a jury can resolve the conflicts between experts through the assessment of credibility and the application of common sense."[51] Thus, a very high threshold is required in order to discharge the jury on the basis of complexity.

The judicial system has a high level of confidence in the verdicts of juries. Normally, the decision of a jury will not be overruled by an appeal court.[52] The Supreme Court of Canada has held that a jury verdict will not be set aside unless it is so plainly unreasonable and unjust as to satisfy the appeal court that no jury reviewing the evidence as a whole and acting judicially could have reached the verdict.[53]

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[48] *Ibid.* at 5.
[49] *Cosford v. Cornwall* (1992) 9 O.R. (3d) 37 (C.A.) [Cosford].
[50] *Supra* note 5 at 86.
[51] *Archibald, supra* note 4 at 152.
[52] *Supra* note 5 at 21.
[53] *Supra* note 5 at 21, *McCannell v. McLean*, [1937] S.C.R. 341, and *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697 (C.A.).

c. Juries Promote Settlement

An advantage of serving a jury notice is that it has the inadvertent consequence of promoting settlement. A jury notice will tend to promote settlement because of the perceived element of unpredictability described above. Counsel may become so conscious of the risk that he or she faces with a jury, that counsel or his or her client may choose to avoid the risk altogether by simply choosing to settle. Kirby suggests,

> …there are competing arguments on whether the introduction of a jury in a civil case increases or decreases the likelihood that a matter will settle. On the one hand, some will argue that increasing the uncertainty of the result will increase the chance that the litigants will be unable to resolve their differences and proceed to trial, each with the expectation that they will do better than others have done in cases of a similar type. The contrary view that increasing the risk to each side (not only in terms of a jury verdict but also corresponding legal costs) creates added uncertainty for all sides in a civil dispute which is going to be resolved by a jury and correspondingly, applies added pressure on each side to settle. While I profess to be no statistical wizard, my informal survey tells me that there is a higher rate of settlement of civil jury cases than those to be heard by a judge alone.[54]

Although a tendency towards settlement is often a side-effect of the service of a jury notice, in some circumstances, counsel may wish to serve a jury notice primarily as a tactic to place pressure on the other side.

The Ontario Law Reform Commission undertook a detailed comparative study of jury and non-jury trials, which found that jury trials are more likely to settle and are more likely to settle quickly. The Commission noted that a number of lawyers and judges expressed the view that the effect of the jury

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[54] *Supra* note 2 at 201.

on settlement rates is likely a function of the jury's perceived unpredictability.[55] According to data provided for one Ontario region, 15-18% of matters scheduled to be heard before a judge alone actually proceed to trial, whereas only 3% of cases scheduled to be heard before a jury actually proceed to trial, demonstrating that the jury has a real effect on settlements.[56]

d. Good advocacy can make all the difference

The general principles of advocacy are substantially the same in both modes of trial. As Perrin, Caldwell and Chase argue, "…principles of good advocacy are the same whether the trier of fact is a judge or a jury."[57] Certainly, whether a case goes before a judge or a jury, the general principle of advocacy remains constant; it is the style of advocacy that counsel must adapt to suit the mode of trial.

While judges may have heard it all before, for each individual juror, the experience of entering a courtroom and listening to evidence will likely be completely new. The facts of the case that they are about to hear will also be untrammelled territory to them. The newness of being a juror brings with it significant opportunity for persuasive counsel to identify with each jury member and persuade him or her of the merits of their case. While the facts of each individual case will be unique, a judge hearing the case may have already decided cases of similar facts many times.

Arguably because of the inexperience of jurors, advocacy itself will become more important. As Perrin, Caldwell and Chase explain:

> Most cases tried before juries are closely contested, involving at least two quite different views of what happened. It is in those cases that trial advocacy

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[55] *Supra* note 5 at 23.
[56] *Supra* note 5 at 37.
[57] *Supra* note 3 at 9.

> matters most. In cases with one-sided facts, jurors will likely reach the obvious verdict regardless of the advocacy skill of the lawyers. In cases with closely divided facts, the outcome will turn on which witnesses the jury believes and on which advocate the jury trusts.[58]

Where a case could easily be decided either way, all of the other elements of advocacy take on a new importance, even seemingly basic or insignificant elements. According to Perrin, Caldwell and Chase, the first impressions of the trial and its participants are monumentally significant factors in the decision process and many jurors will arrive at tentative verdicts in a case as early as by the conclusion of jury selection.[59]

A theme which is consistently woven into counsel's case will have more of an impact on jurors who are new to the entire experience, as opposed to a judge who will be likely to see where counsel is going with his or her theme and narrative. A judge is inherently and appropriately more closely confined to legal precedent and specific guidelines. Although the same principles of advocacy may be employed, the use of storytelling and themes may not impress upon the judge in the same way as the jury. The judge has the experience and training to move quickly beyond this type of advocacy and to focus more closely on what courts before him or her have decided.

Having a strong and recurring theme is crucial to success before a jury, and has been seen to have practical success. In a study involving a mock trial, participants rated the evidence as stronger when presented in story format.

> The ease with which stories could be constructed affected verdict decisions, such that participants were more likely to favour the side of the case presented in story format. Evidence was also found supporting the principle of coherence as a determinant of ultimate

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[58] *Supra* note 3 at 6.
[59] *Supra* note 3 at 73-74.

> decision-making. Although the strength of the evidence was an important factor, the findings suggest that it is rather the strength of one story compared to another which has a greater influence on the final decision. This endorses the notion of coherence cause the more coherent story is the more likely it will be accepted with confidence by the juror.[60]

The type of advocacy that is most appropriate for juries arises from cases that have the factual nuances that will no doubt be striking for jury members. One of the primary reasons that counsel give for serving jury notices is that "There is a perception that the party has a "righteous cause" whether or not that righteousness strictly accords with black letter law."[61] A righteous cause will appeal to a jury. Jurors are interested in rendering a verdict in favour of the party who is deserving of it. "Jurors want to know who to silently root for, who wears the white hat. Jurors want to feel good about their decisions, and they can't unless they learn enough about the key people to get a feel for them and reach a verdict that is consistent with their feelings about those people."[62] Counsel must make a case that leads the jurors to the inevitable realization that a finding in favour of his or her client is the verdict that accords with truth and fairness.

Deciding Whether to Serve a Jury Notice

As the Ontario Law Reform Commission states, the issue – whether there are particular types of cases that are appropriate for civil juries – is one on which opinion is divided. Moreover, among those who take the view that a decision can be made between cases that are appropriate for a jury and cases that are not, there appears to be little consensus as to where the division occurs."[63]

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[60] *Supra* note 37 at 45.
[61] *Supra* note 2 at 199.
[62] Thomas A. Mauet, *Trial Techniques*, 8th Ed. (New York: Aspen Publishers, 2010).
[63] *Supra* note 5 at 23.

Certain types of cases are simply not suitable for a jury. For instance, in commercial litigation cases -- frequently involving complex issues of law and fact revolving around substantial quantities of documentary proof and multiple parties including corporations and other artificial entities --- a bench trial may provide a better option since the facts can be both confusing and boring to a jury.[64]

There is no general rule that can be applied across the board for service of a jury notice. While generalizations are useful guides, they should not override the evaluation of each individual case.[65] The final decision on the method of trial must be one that is made between counsel and client, having regard to the competing considerations existing in the particular circumstances.[66] Personal injury cases which are not precluded from being tried by a jury and which have emotional appeal warrant particular consideration of a jury for the reasons outlined above.

III. Conclusion

Although there are no hard and fast rules on cases that are appropriate for juries, it remains the case that juries are indeed useful; juries render decisions that accord with common sense and fairness, and frequently coincide with what judges would have decided in the same cases. Juries take their role seriously and have proven to be competent adjudicators. The use of the jury has the beneficial effect, whether intentional or not, of making settlement more likely. Perhaps most significantly, the use of the jury provides counsel on both sides with a special opportunity to employ creative and colourful advocacy skills that will resonate more deeply with jurors who are unversed in the law. For all of these reasons and more, counsel on both sides of the bar will continue to opt for jury trials in many cases, and juries will continue to be a central component of Ontario's system of adjudication.

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[64] *Supra* note 62 at 32.
[65] *Supra* note 8 at 4.
[66] *Supra* note 8 at 4.