

The Test for Jury Trial in Personal Injury Cases

**Chesley F. Crosbie, Q.C.
Ches Crosbie Barristers**

June, 2005

Two opposing ideals of excellence in binding civil dispute resolution vie for control in Canada today. One looks to the jury for excellence in fact finding, including assessment of damages. The other looks to professional judges. Both models view fact finding in civil cases as a social construct, influenced by community policies and values. Proponents of the civil jury praise the jury as a mode of access to a cross-section or consensus of community opinion, while proponents of the professional model claim that judges are better qualified not just to know the law, but to find the facts and assess the damages as well.

In this month's decision in *Brewer v. Hewitt*, 2005 NLCA 30, the Court of Appeal decided that although s. 32(3) of the *Jury Act*, SNL 1991, c. 16, confers a discretion ("may make an order for trial with a jury ... where a party makes a request") to order trial by jury, "assessment of non-pecuniary general damages ought not to be placed before a civil jury other than in exceptional circumstances." [para. 79]

The decision in *Brewer* asserts that although certain heads of damages may be properly regarded as factual, "non-pecuniary general damages are quite different in nature". This virtually rules out personal injury cases, as a category of cases, from access to civil jury as a mode of trial. The decision premises that assessment of non-pecuniary general damages is fundamentally a matter of law.

By judicial fiat the Court of Appeal has not just constrained the scope of the jury's fact-finding function in assessing damages, but virtually abolished the jury's very jurisdiction to do

so. The various Canadian Negligence Acts and high judicial authority (see *B.(M.) v. B.C.*, 2003 SCC 53, para. 54; *Dilello v. Montgomery*, 2005 BCCA 56, para. 39) would seem to recognize that damages are a question of fact, and that the jurisdiction of the jury to assess damages is entitled to appellate respect. One might have thought that the legislature in s. 4 of the *Contributory Negligence Act*, RSNL 1990, c. C-33, was clear in its intent:

“4. In any action the amount of damage or loss, the fault, and the degrees of fault shall be questions of fact.”

Indeed, the British Columbia Court of Appeal in *Dilello* has observed that the Supreme Court of Canada in the trilogy and other cases, failed to direct its mind to the provision of the Negligence Acts, and that these cases “may therefore be thought to have been decided *per incuriam*”: para. 38.

The real legal policy question is not whether juries are good finders of law, but whether juries are good finders of fact, perhaps even better finders of fact than judges. As stated extra-judicially by one jurist:

“Jurors are better fact finders than judges. Jurors have to convince one another of a witness’ credibility. Judges need only convince themselves.”¹

Statements by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1194, support the advantaged position of the civil jury:

¹ Hon. John C. Bouck, “Civil Jury Trials – The Nuts, the Bolts and the Problems”, paper delivered to conference of the Atlantic Provinces Trial Lawyers Association, June 2004. An excellent summary of the advantages of and negative attitudes toward civil juries is contained at pp. 5-11.

“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.”

The Supreme Court of Canada elaborated in *Whiten v. Pilot*, 2002 SCR 15, para. 136 that:

“One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.”

Judges live an isolated life, and the hazard of constant reference to conventional awards is that the process is circular and in danger of getting out of touch with social and financial reality. The value of assessment by a jury of one’s peers is that of access to a consensus or cross-section of community opinion (something which even Lord Denning esteemed in *Ward v. Janes*, [1965] 1 All E.R. 563, at least in theory). Without the jolt provided by lay opinion in *Whiten v. Pilot*, judges presiding in insurer bad faith cases would still be administering punitive damages in the \$15,000 range. Without the community dissatisfaction with judge-made arbitrary limits on non-pecuniary general damages, manifest in numerous jury verdicts in serious personal injury cases (some of which are reviewed in *Dilello* above), the trilogy limits doctrine would not be headed for review by the Supreme Court of Canada – something which is likely to occur within the next few years.

Judges state the law, but they do not have a monopoly on insight into justice. It is for this reason that the various Trial Lawyers Associations have pledged to defend and promote the civil jury, and for this reason every loss of the civil jury is a loss to justice.

A cover story in the June 2002 edition of Canadian Lawyer argued that the decline of the civil jury in Canada was due to the apathy of lawyers and the antipathy of judges. There have been only five Newfoundland civil jury trials in the 30 years preceding the *Brewer* decision. If trial lawyers fail to use the civil jury, judges will grow to distrust it. The lesson for those who prize the long and distinguished heritage of civil jury advocacy is “use it or lose it”. As the distinguished advocate Martin Wunder, Q.C. has stated: “If there is anything wrong with the average jury, it is the average judge and lawyer.”

The proponent ended her *leave factum* in *Brewer* with the request that “if an institution with so ancient a pedigree and so distinguished a contribution to legal history is to pass into oblivion, it deserves – nay, is entitled – to receive its epitaph from the highest judicial authority in this province.” For Newfoundland, at least for the personal injury case, that epitaph has now been read.

Chesley F. Crosbie, Q.C.
Ches Crosbie Barristers
St. John’s, NL

June, 2005