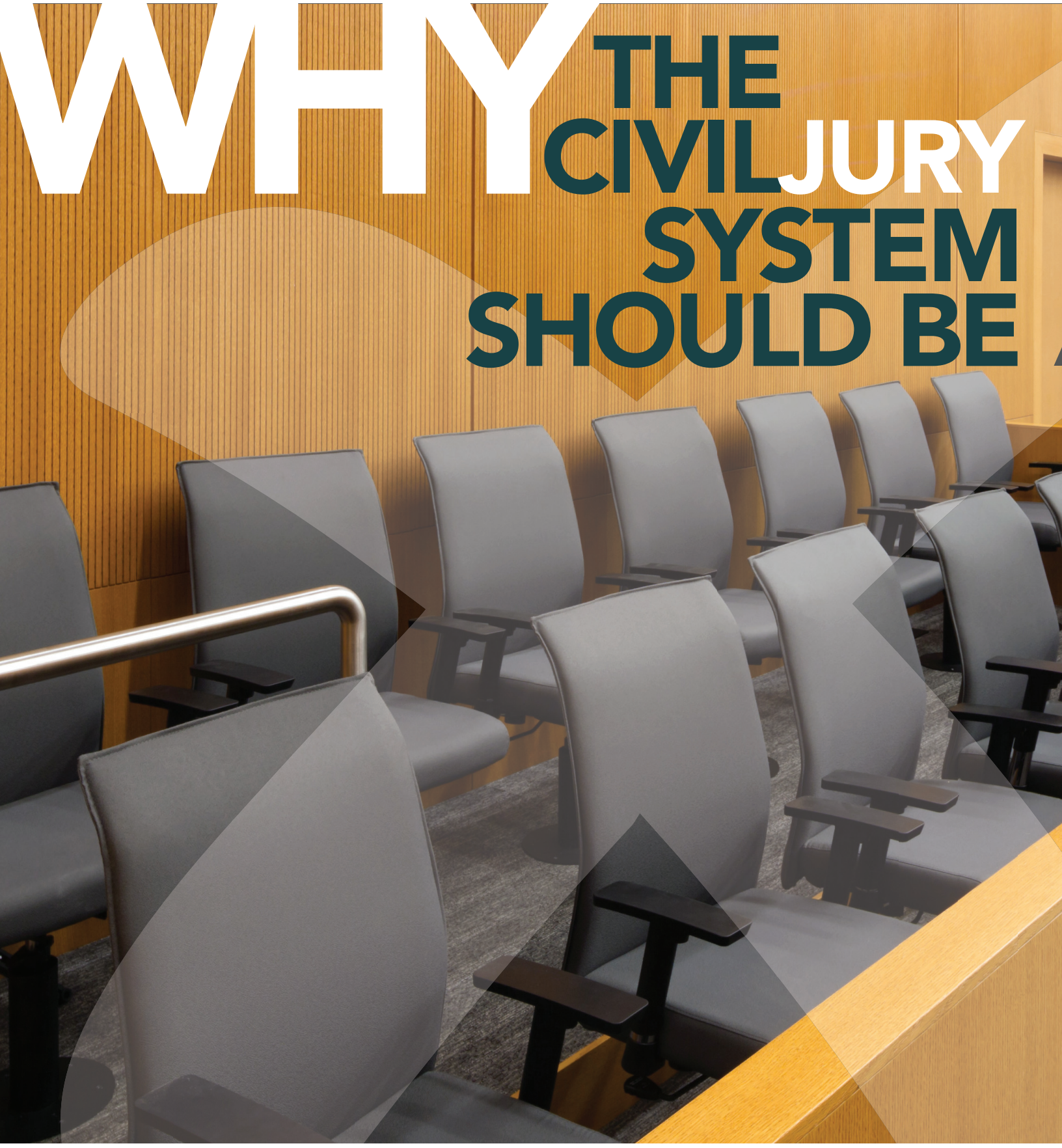
WHY THE CIVIL JURY SYSTEM SHOULD BE



Justice DELAYED is justice DENIED

ABOLISHED

BY PATRICK BROWN & RYAN MARINACCI

The Attorney General's call for submissions on whether to legislate away civil juries is overdue. Well before the pandemic, the years-long delay to obtain a jury trial had been frustrating access to justice.

In *R. v. Jordan*, the court took extraordinary steps to address the issue.[1] No such measures followed in the civil context and the delays for jury trials became even worse because criminal matters received priority.

When juries do resume, criminal trials will again take precedence and the already backlogged civil system will face insurmountable delays. Justice delayed is justice denied.

In addition to the public health emergency exacerbating this overwhelming access to justice issue, deficiencies inherent in the civil jury system have long justified eliminating juries.

Quebec abolished civil juries in 1976, and the United Kingdom narrowly restricts juries to certain actions.[2] Indeed, in 1966, Lord Denning wrote that jury trials accounted for only 2% of civil matters.[3]

Ontario stands in stark contrast, where jury trials were noted to account for 23% of civil trials.[4] Insurers drive up this exceptionally high rate and it comes at a heavy cost to plaintiffs. As noted by the Honourable Coulter A. Osborne in 2007,

> I recognize the unfortunate reality that insurers in most negligence actions require their counsel to deliver a jury notice. I refer to this as "unfortunate" because one clear aim of the strategy is to increase the risk to which the plaintiff is exposed, manifestly on the basis that the insurer can absorb the risk better than almost all plaintiffs.[5]

Almost a decade later, Justice Myers echoed the sentiment,

> While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land.[6]

This remarkable unfairness is built into civil juries in three ways.

First, there is much a jury is not told at trial. It is not informed of policy limits, nor told the defendant is insured and defended by the insurer. This can lead to smaller awards due to the faulty

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impression that defendants will be personally liable for judgments.

Juries are also not told about the statutory deductible, and can mistakenly believe a $50,000 award will be ruinous for defendants and adequately compensate plaintiffs. In reality, the defendant pays nothing, the award is close to $10,000 post-deductible and the insurer keeps the rest.

Second, appellate courts routinely revisit high jury awards yet defer to juries on low awards. In *Hamilton v. Canadian National Railway Co,* the court cut by half or more what the jury awarded to each family member in the death of a nine-year old.[7] Likewise, the court halved an eleven-year-old's jury award for the death of her brother in *To v. Toronto Board of Education*.[8]

The court in *Fiddler v. Chiavetti* similarly reduced from $200,000 to $125,000 a mother's jury award for the loss of her daughter.[9] In *Padfield v. Martin*, the court further reduced the judgment from $274,000 to $150,000 after the trial judge had already reduced the jury's award by nearly half from $500,000.[10]

By contrast, appellate intervention is practically nonexistent when jury awards are low. In *Lazare v. Harvey*, the court left undisturbed a jury's zero verdict and stated,

> …where there is some evidence to support the jury's verdict, high deference will be accorded and the verdict will not be set aside even if another conclusion is available on the evidence.[11]

The court similarly dismissed the plaintiff's appeal from a jury's zero verdict in *Jugmohan v. Royle* and stated, "decisions of this nature are afforded the highest degree of deference."[12]

Third, there is no real way to prevent jurors from using smartphones to access external information that would be inadmissible at trial. The only safeguard is the oath when trial starts. Unfortunately, it is too easily ignored.

Even when a jury openly flouts the instruction not to engage in independent research, still a mistrial is not automatic. In *Patterson v. Peladeau*, jurors clandestinely accessed and raised the *Fault Determination Rules* during deliberations.[13]

Incredibly, no mistrial was ordered. Instead, all the trial judge had to do was tell the jury that the *Rules* were irrelevant and repeat the earlier instructions that "it [was] completely improper to research or Google law" and that "there [was] to be no independent research conducted by any juror."[14]

There can be no meaningful review of jury verdicts for this issue if relief is not granted in the clearest of cases when a jury so plainly ignores the trial judge's instructions, especially when this behaviour will often go undetected.

Ontario must eliminate civil jury trials to remedy the systemic issues that disproportionately impact plaintiffs, particularly in light of the access to justice crisis in relation to the ongoing pandemic.

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NOTES

[1] 2016 SCC 27 (CanLII).

[2] *Jurors Act*, S.Q. 1976, c. 9, s. 56; *Supreme Court Act 1981*, s. 69, Sch.7.

[3] *Ward v. James* [1966] 1 QB 273, CA at 290.

[4] *Civil Justice Reform Project* – Findings and Recommendations (2007), *Civil Juries*.

[5] *Ibid*.

[6] *Mandel v. Fakhim*, 2016 ONSC 6538 (CanLII) at para 9.

[7] 1991 CanLII 8348 (ON CA).

[8] 2001 CanLII 11304 (ON CA).

[9] 2010 ONCA 210 (CanLII).

[10] 2003 CanLII 36239 (ON CA).

[11] 2008 ONCA 171 (CanLII) at para 29.

[12] 2016 ONCA 827 (CanLII) at para 12.

[13] 2020 ONCA 137 (CanLII).

[14] *Ibid* at para 22.