RESPECTING CIVIL JURIES

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The recent pronouncement of the British Columbia Court of Appeal in *Johnson v. Laing*[1] represents a remarkable and troubling episode in the historical tension between judges and juries in the adjudication of civil claims.[2] After setting aside a jury's verdict as "unreasonable" — something that it has repeatedly affirmed ought to occur on only the rarest of occasions — the court took the further and unprecedented step of remitting the question of damages *not* to a newly empanelled jury but rather to the original trial judge for assessment. While appellate courts have on many prior occasions substituted their own damages awards for those of juries, the complete exclusion of a jury from the fact-finding process (and the concomitant denial of a party's right to have a civil claim adjudicated by his or her peers) may herald a quickened pace towards the elimination of civil juries. Although such a conclusion might seem unduly pessimistic, when viewed in the context of the *de facto* judicially imposed ban in the United Kingdom on civil juries in cases of personal injury,[3] the elimination of the right of civil litigants to a jury trial is not inconceivable.

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1. (2004), 30 B.C.L.R. (4th) 103, 242 D.L.R. (4th) 48, [2004] 10 W.W.R. 51 (C.A.), supp. reasons 133 A.C.W.S. (3d) 586, further supp. reasons 248 D.L.R. (4th) 239. Although the form of the Court of Appeal order is still being settled, the defendant is seeking leave to appeal to the Supreme Court of Canada. As will become apparent in this article, we are of the view that the defendant's leave application should be granted and that the jury verdict should be restored.
2. See the Hon. John C. Bouck, "Civil Jury Trials — Assessing Non-Pecuniary Damages — Civil Jury Reform" (2002), 81 Can. Bar. Rev. 493.
3. In *Ward v. James*, [1965] 1 All E.R. 563 (C.A.), Lord Denning established a rule that juries could decide personal injury actions only under "exceptional

In examining this extraordinary and in our view unfortunate pronouncement, we will first canvass the facts described by Southin J.A. (who wrote for the court). We will then consider the jury's verdict from the perspective of the standard of appellate review that is applied in Canada to civil jury verdicts. In particular, we will suggest that this standard of review, while presupposing a measure of deference to the unique role of juries in civil cases, ought to be more concretely formulated so as to set out with greater precision the confined circumstances in which a jury's verdict can be overturned. In the course of this discussion, we will make a case for greater judicial deference to civil juries than is exhibited by appellate courts generally, and was exhibited in *Johnson v. Laing* specifically. Having addressed the standard of review, we will then turn to consider the remedy that was imposed in this case. Here we will argue that when an appellate court overturns a jury verdict and remands the matter to the trial court, the proper remedy should be, as it has always been, a new jury trial. In our view, the decision in *Johnson v. Laing* is symptomatic of an appellate judiciary that all too often disregards the distinct normative function of civil juries. At the very least, it is an aberration that ought to be overturned by the Supreme Court of Canada.

1. Johnson v. Laing

(1) The Trial

On April 1, 1997, while cycling in Abbotsford, British Columbia, the plaintiff was struck by a vehicle operated by the defendant. Liability was admitted, leaving damages at issue. The plaintiff alleged that he had suffered permanent spine damage, making him unemployable during the six years leading up to trial, and permanently impairing his post-trial earning capacity.[4] In accordance with British Columbia's Supreme Court Civil Rules (Rules of Court),[5] the defendant's counsel filed and delivered to the plaintiff a notice requiring trial by jury.

The court's reasons do not canvass in any detail the plaintiff's subjective complaints or the extent of treatments including surgeries. Instead the court described how the jury heard opinion evidence from three medical experts — two orthopedic surgeons (Drs. McKenzie and Sweeting) and a specialist in physical medicine and rehabilitation

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circumstances". Such circumstances were found to exist in *Hodges v. Harland & Wolff Ltd.*, [1965] 1 All E.R. 1086 (C.A.), but in no other case since.

4. *Johnson v. Laing*, *supra*, footnote 1, at p. 109.
5. Rule 39(26).

(Dr. Travlos). Their evidence was "consistent in identifying degeneration of the lower spine at the L4-5 and L5-S1 or sacrum level".[6] Immediately after the accident, the plaintiff complained to his general practitioner about back pain, but had exhibited no tenderness upon palpation of his back and was able to demonstrate a full range of motion.[7] An x-ray taken three months later revealed no degeneration,[8] although there appear to have been subsequent x-rays that revealed a degenerating spine.[9] Drs. McKenzie and Sweeting attributed the cause of such degeneration to the accident, while Dr. Travlos refrained from drawing that conclusion.[10] In addition, a vocational consultant offered evidence that the plaintiff, who was described by the trial judge as having "had difficulty establishing any substantial earnings for a number of years prior to the accident",[11] would likely succeed only as a manual labourer, but that his injuries restricted him from duties that required more than "light lifting".

Prior to charging the jury, the trial judge spoke on the record with defence counsel. After suggesting that the plaintiff was in fact disabled from working, the trial judge pressed her on the matter of causation, warning her that:[12]

> if I did leave [causation] in as something in the charge, I would have to express an opinion that the evidence appears to be very weak in support of [the defendant's position]. Sometimes that door is best avoided from the defence point of view, you know, and I'll hear you if you think that it should go. But I would be putting that comment to the issue [sic] in any event.

Defence counsel replied: "I'm content with it not to go, my Lord."[13]

The jury returned with an award of $2,250 in general damages and no award for past or future income loss or for cost of future care. In

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6. *Johnson v. Laing*, *supra*, footnote 1, at p. 110. Although it is unclear whether this was his own conclusion based on past cases or whether this was specifically deduced from the evidence, the trial judge added that the condition caused significant back discomfort aggravated by activity and a permanent partial disability restricting the plaintiff from heavier labouring-type employment and some of the plaintiff's previous recreational activities.
7. *Ibid.*, at pp. 110 and 152.
8. *Ibid.*, at p. 152.
9. *Ibid.*, at p. 153.
10. The quality of Dr. Travlos's evidence was arguably compromised, inasmuch as his report identified a delay in the plaintiff reporting a back sprain to his general practitioner as a "key factor" (*per* the trial judge, *ibid.*, at p. 110) in doubting attribution of causation. Before testifying, however, he recognized that there was, in fact, a record of the plaintiff reporting a back sprain a day after the collision.
11. *Ibid.*, at p. 111.
12. *Ibid.*, at p. 155.
13. *Ibid.*

answer to the defendant's motion for judgment, counsel for the plaintiff submitted that the verdict was perverse and that either a new trial should be ordered or that the trial judge should substitute an award based on his own assessment of the evidence. He declined to do so, and the plaintiff appealed.

(2) The Appeal

After a brief review of the facts and issues, Southin J.A. posed two questions:[14]

1. When a jury verdict is perverse or inordinately low, may a trial judge assess damages and substitute his or her own assessment for that of a jury?
2. On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court (a) remedy the apparent error by substitution of damages for the jury's verdict; (b) remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or (c) order a new trial on a limited issue (for example, assessment of damages).

The implication that the verdict was "perverse or inordinately low" and "contain[ed] an error of law" suggests that the verdict's illegitimacy was never in question. Indeed, Southin J.A. made only passing reference to the verdict itself. She did, however, cite the evidence of Dr. McKenzie regarding the plaintiff's degenerating spine as well as the conversation between the trial judge and defence counsel regarding causation. Referring to that exchange, she stated that both the judge and defence counsel had concluded that the jury was to eliminate from its consideration "any issue on the existence of degenerative changes and their being caused by the accident".[15] "That being so", she added, "for the jury to have concluded the contrary, if they did, was unreasonable."[16]

Having set out her questions, Southin J.A. then extensively reviewed British Columbia's legal history, canvassing the evolution of statutory powers conferred on the Court of Appeal and the judicial interpretation of those powers. This *opus* led her to two unsurprising conclusions. First, the appellate standard of review of a civil jury verdict based upon "reasonableness" is contained in, among other authorities, the

14. *Ibid.*, at p. 112.
15. *Ibid.*, at p. 155.
16. *Ibid.*

pronouncement of the Supreme Court of Canada in *McCannell v. McLean.*[17] Secondly, s. 9(1) of the *Court of Appeal Act*[18] confers a wider scope of remedial discretion upon the court when it is confronted with an "unreasonable" verdict than did the preceding Court of Appeal Rules.[19] Given the court's powers under s. 9(1)(c) to make any order that it considers "just", Southin J.A. concluded, in answer to her second question (regarding the range of potential remedies), that it could remit the case to the trial *judge* to assess damages, adding:[20]

> Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants.

Ultimately, on the authority of a 1981 decision of the Court of Appeal,[21] Southin J.A. was also able to conclude that the answer to her first question (whether a trial judge may substitute his or her own assessment of damages for that of the jury) was "no".[22]

Before proceeding to our analysis, we note that the court reserved some criticism for the trial judge as well as the jury. The questions put to the jury were as follows:[23]

> At what amount do you assess the damages sustained by the Plaintiff in the following categories?
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> 1. General Damages (pain and suffering and loss of activities and enjoyment of life; both past and future).
> 2. Past Wage Loss (from the date of the collision until today).
> 3. Future Loss of Income (from today forward).
> 4. Cost of Future Care (from today forward).

Observing that the jury ought to have been asked "more explicit questions, that is to say, asked not for a general verdict but a special verdict",[24]

17. [1937] S.C.R. 341, [1937] 2 D.L.R. 639. We discuss that test below, beginning at *infra*, footnote 38.
18. R.S.B.C. 1996, c. 77.
19. Section 9(1) of the *Court of Appeal Act* provides that the court may,
    (a) make or give any order that could have been made or given by the court or tribunal appealed from,
    (b) impose reasonable terms and conditions in an order, and
    (c) make or give any additional order that it considers just. (emphasis added).
    The Court of Appeal Rules governed appellate procedure in British Columbia from 1906 (when the Full Court Rules were adopted) until 1982 (when the *Court of Appeal Act* was enacted).
20. *Johnson v. Laing*, *supra*, footnote 1, at p. 156.
21. *LeBlanc v. Penticton (City)* (1981), 28 B.C.L.R. 179, [1981] 5 W.W.R. 289, 20 C.P.C. 226 (C.A.).
22. *Johnson v. Laing*, *supra*, footnote 1, at pp. 147-48.
23. *Ibid.*, at p. 110.
24. *Ibid.*, at p. 110-11.

Southin J.A. stated that these general questions enable jurors "to avoid facing whatever questions of fact arise on the evidence".[25] "Only questions framed to the live issues of the particular case", she explained, "can . . . prevent juries from deciding cases capriciously rather than judicially".[26] She suggested, for example, that the jury be asked "(1) whether the appellant had suffered a permanent back injury; and (2) whether that injury was going to impair his future earning capacity".[27]

2. Standard of Review

(1) Preliminary Observations

We should acknowledge at the outset that we share a deep commitment to the role of civil juries in Canada. In those jurisdictions that have retained them,[28] they are a democratizing influence, allowing laypersons to inject the broad range of legitimate societal values and attitudes into questions of civil obligation and damages and the contents of juridical private law rights generally.[29] Moreover, they force

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25. *Ibid.*, at p. 149.
26. *Ibid.*, at p. 150.
27. *Ibid.*
28. Juries may hear civil cases, with varying conditions, in all provinces except Quebec. See s. 17 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 (which we recite and discuss below under section 3, The Remedy); s. 17 of the *Jury Act*, R.S.A. 2000, c. J-3; s. 18 of the *Jury Act*, S.S. 1998, c. J-4.2; s. 64 of the *Court of Queen's Bench Act*, C.C.S.M. 1988, c. C280, s. 64(1) and (2); s. 108 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; Rule 46 of the New Brunswick Rules of Court; s. 3 of the *Jury Act*, S.P.E.I. 1992, c. 37, s. 3; s. 34 of the *Judicature Act*, R.S.N.S. 1989, c. 240 and s. 32 of the *Jury Act, 1991*, S.N.L. 1991, c. 16.
29. See Bouck, "Civil Jury Trials", *supra*, footnote 2. In *Bisson v. Corp. of the District of Powell River* (1967), 62 W.W.R. 707, 66 D.L.R. (2d) 226 (B.C.C.A.), affd 68 D.L.R. (2d) 765*n*, the court cited approvingly the statement by Morris L.J. in *Scott v. Musial*, [1959] 2 Q.B. 429, [1959] 3 W.L.R. 437, [1959] All E.R. 193 (C.A.): "If, however, an award of a jury does not conform to [judges' damage awards] that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges."

    Similarly, in *Way v. Frigon* (2001), 107 A.C.W.S. (3d) 420, 2001 BCSC 573 (S.C.), Smith J. stated (at paras. 32 and 33):

> It has often been said in our courts that juries are the conscience of the community and, in fact, trial judges often tell juries that they bring an educational value to trials in that they let the trial judges know what members of the community are thinking.
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> . . . . .
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> I think that juries have been telling trial judges for the past few years that trial judges have been awarding too much money in non-pecuniary damages for minor soft tissue injuries. The many recent reported cases in which juries have awarded damages for medical expenses and for loss of income, but

trial judges and lawyers to crystallize their own views on such questions so that they can convey them to others lacking legal training. Aside from actual participation as a litigant, participation in a civil jury is the principal institutional means of broadening popular appreciation for the often misunderstood work that civil litigators and judges do, and for the fundamental principles of civil justice. As a consequence, we share Justice John Bouck's recently expressed concern about the evident indifference (or, in some cases, outright

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> nothing for non-pecuniary loss, support that impression. It is not for me to say whether there is an injustice in this, but the discrepancy that has given rise to situation where the Insurance Corporation routinely takes jury trials in these types of cases anticipating, in my view, smaller verdicts, can be resolved by judges paying attention to what the community tells us through juries selected from the community. I intend to do that in this case.

There is fundamentally no distinction between the fact-finding function of a criminal and civil jury. (See Lysander Spooner, *An Essay on the Trial by Jury* (New York: Da Capo Press, 1971, originally printed 1852), p. 110. The civil jury's role, moreover, has an ancient pedigree. Spooner (at pp. 110-11) cites Glanville's statement, made 50 years before *Magna Carta*, that the ancient writs in civil suits would "summon twelve free and legal men . . . to be in court *prepared upon their oaths to declare whether A or B have the greater right to the land in question*". (emphasis in original).

The compatibility of function between the civil and criminal jury tends to affirm the significance of the civil jury, described (in the context of a criminal jury case) by L'Heureux-Dubé J. in *R. v. Sherratt*, [1991] 1 S.C.R. 509 at pp. 523-24, 63 C.C.C. (3d) 193, 3 W.A.C. 161:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

Arbour J. made a similar observation in *R. v. Pan*, [2001] 2 S.C.R. 344 at pp. 370-71, 200 D.L.R. (4th) 577, 155 C.C.C. (3d) 97:

> The jury is a judicial organ of the criminal process . . . In a jury trial, the jury is the "judge" of the facts, while the presiding judge is the "judge" of the law. They, judge and jury together, produce the judgment of the court. The jury hears all the evidence admitted at trial, receives instructions from the trial judge as to the relevant legal principles, and then retires to deliberate. It applies the law to the facts in order to arrive at a verdict. In acting as fact-finders in a criminal trial, jurors, like judges, bring into the jury room the totality of their knowledge and personal experiences and their deliberations benefit from the combined experiences and perspectives of all of the jurors. One juror may remember a detail of the evidence that another forgot, or may be able to answer a question that perplexes another juror. Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a unanimous verdict.

hostility)[30] among practicing and academic lawyers respecting the jury's future, its strengths and its weaknesses.[31]

Our own views aside, as a matter of positive law the right of Canadians to pursue or defend a civil claim before a jury remains an essential aspect of the civil justice system which judges and lawyers are obliged to preserve and enhance to achieve justice and serve the public interest. As criminal juries have checked unjust criminal prosecutions, civil juries have also vindicated the rights of persons in Canadian society, even where judges had failed to do so.[32] A litigant's right to a civil jury is not, therefore, an historical accident or anachronism lacking contemporary purpose. Rather, it is a fundamental component of the Anglo-American model of civil justice, finding positive expression in constitutions[33] and statutes.[34]

For these reasons, we applaud Southin J.A.'s remarks in *Johnson v. Laing* concerning special verdicts and how to improve fact-finding by juries. Absent the court's troubling application of the standard of appellate review and its chosen remedy in this case, this suggestion could be

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30. See, for a recent example, Rudy V. Buller, "*Whiten v. Pilot*: Controlling Jury Awards of Punitive Damages" (2003), 36 U.B.C. L. Rev. 357. At p. 362, Buller states that unless juries are supplied with "monetary guidelines" on damage awards, "it defies rationality to expect a jury to act rationally". While one can argue that guidelines would bring about more conformity to judicial awards, it seems trite to observe that such conformity would not necessarily lead to rationality.
31. Bouck, "Civil Jury Trials", *supra,* footnote 2, at p. 493.
32. The case of *Brownlee v. McMillan*, [1937] S.C.R. 318, affd [1940] A.C. 802 (P.C.), is one such example. There, the plaintiff was residing with the defendant, who was then the Premier of Alberta. Claiming that the defendant had seduced her, she sought compensation under the now-repealed *Alberta Seduction Act*. The jury rendered a verdict for the plaintiff that was set aside by the trial judge, a decision affirmed on appeal. Both the Supreme Court of Canada and the Privy Council reinstated the jury award. Reiterating the standard of review for civil jury verdicts (which will be discussed later in this article), Duff C.J. stated (at p. 328): "The settled rule is that the verdict of the jury must stand unless, examining the evidence as a whole, the court is clearly of opinion that it is one which no jury, acting judicially, could give."
33. The Seventh Amendment to the Constitution of the United States states: "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 reexamined in any court of the United States, than according to the rules of the common law." Many state constitutions have similar provisions: see, *e.g.* Ala. Const. Art. I, §11; Cal. Const. Art. 1, §16; Conn. Const. Art. 1, §19; Fla. Const. Art. 1 §22; N.Y. Const. Art. 1, §2; Va. Const. Art. 1, §11. Virginia's state constitution is particularly emphatic, stating that "in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred".
34. See *supra*, footnote 28.

taken as reflecting a desire to reform and preserve the role of civil juries. In fairness, however, to the trial judge and to counsel (who would have assisted in formulating the questions to the jury), the questions at issue reflected the governing practice in British Columbia as prescribed in a respected publication of the Continuing Legal Education Society of British Columbia.[35] That practice notwithstanding, the court's suggestions here are apposite. Directing jurors' minds more expressly to the evidence respecting liability and damages (for example, asking jurors to define particulars of damage instead of being confronted with the heads and asked for a quantum) might help confine their attention to the evidence. It may also give appellate courts some insight into the jury's assessment of that evidence. While at most a glimpse, it is better than nothing.

(2) The Current Standard of Review

In *Johnson v. Laing,* the court accurately cited and applied the prevailing standard of appellate review of civil jury verdicts in Canada. Civil jury verdicts on appeal, the court observed, may be overturned only when they are "perverse" or "unreasonable", the latter term often being used interchangeably with "inordinately" high or low. Both

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35. The Hon. Mr. Justice John C. Bouck, The Honourable Mr. Justice R. Dean Wilson, and James P. Taylor, *CIVJI – Civil Jury Instructions* (Vancouver: The Continuing Legal Education Society of British Columbia, 2003 update). At §11.02, the instruction states:

> All we need from you is your assessment of reasonable amounts that should be awarded (the plaintiff) under the heads of the damages I discussed with you.
>
> PAIN, INJURY, SUFFERING, AND LOSS OF ENJOYMENT OF LIFE
>
> If you determine that (the plaintiff) is entitled to an award for pain, injury, suffering and loss of enjoyment of life from the date of the accident until (his/her) estimated time of recovery, you should fill in the amount you choose to award under this head.
>
> SPECIAL DAMAGES
>
> You will notice in paragraph ___ a space for filling in this amount with respect to any special damages you should find, providing these were adequately proved. In that space you should put an appropriate dollar amount consistent with the evidence and instructions I gave you.
>
> PAST LOSS OF INCOME
>
> Next is the question relating to the alleged past loss of income suffered by (the plaintiff). Again, you should fill in any sum you choose to award under this head of damages consistent with the evidence and instructions I gave you.
>
> FUTURE LOSS OF INCOME
>
> Finally, there is a question for you to answer on the alleged future loss of income of (the plaintiff). Should you decide that (he/she) is entitled to compensation for this future loss, you should insert a figure that is reasonable in accordance with the evidence and my instructions in the space provided.

"perverse" and "unreasonable" are also frequently used interchangeably and, if there is in fact a distinction between them, it is a subtle one.[36] Since the court in *Johnson v. Laing* ruled that the verdict was unreasonable, however, in this article we shall focus on verdicts impugned as "unreasonable".

The Supreme Court of Canada in *McKinley v. BC Tel*[37] recently articulated two formulations of the test for setting aside a jury verdict. The first arises where the evidence does not permit "a jury acting judicially to reach the conclusion"[38] it did, a threshold that Duff C.J. first formulated in *McCannell v. McLean*:[39]

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
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> . . . . .
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> There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

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36. In its most distinct form, a perverse verdict is rendered by jurors who were intentionally unfaithful to the task they swore to undertake. It is a "dishonest verdict", where the jury "did not appreciate their duty or acted willfully in violation of it". See *Johnson v. Laing*, *supra*, footnote 1, at p. 109; *Olszynko v. Larocque* (1999), 127 O.A.C. 162 (C.A.), leave to appeal to S.C.C. refused 139 O.A.C. 400*n* (citing *Saint John Gas Light Co. v. Hatfield* (1894), 23 S.C.R. 164 at p. 169); *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697 (C.A.) at p. 700, leave to appeal to S.C.C. refused 51 N.R. 398*n*; and *Playford v. Freiberg*, 1995 CarswellOnt 3428, 55 A.C.W.S. (3d) 1146 (C.A.). Perverse jury verdicts must be set aside by the appellate court, which may also substitute its own judgment for the jury's: see the Honourable William A. Stevenson and the Honourable Jean E. Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003), pp. 75-102; *Ludolph and Ludolph v. Palmer and Phillips*, [1950] O.R. 821 (C.A.); *Gobo v. Rockingham Hardware Ltd.* (1971), 3 N.S.R. (2d) 100, 24 D.L.R. (3d) 355 (C.A.), affd 26 D.L.R. (3d) 768*n*, [1972] S.C.R. vi, 3 N.S.R. (2d) 761*n*.

37. [2001] 2 S.C.R. 161, 200 D.L.R. (4th) 385, [2001] 8 W.W.R. 199.

38. *Ibid.*, at p. 191, citing de Grandpré J. in *Vancouver-Fraser Park District v. Olmstead*, [1975] 2 S.C.R. 831 at p. 839, 51 D.L.R. (3d) 416, 3 N.R. 326.

39. *McCannell v. McLean*, *supra*, footnote 17, at pp. 343 and 345.

The second formulation of "unreasonableness" was said to apply where an appellate court found "no evidence supporting a particular verdict".[40]

The two formulations are closely linked in Duff C.J.'s statement. If, we are told, there is only *some* evidence on which a jury could possibly have relied in coming to a controversial verdict, in deciding whether this was "reasonable" when considering the *whole* of the evidence, an appellate court should not automatically exercise its discretion to strike the verdict as "unreasonable". While more recent pronouncements occasionally offer general statements of deference towards civil juries while citing *McCannell v. McLean's* "reasonableness" test, this precautionary note struck by Duff C.J. is rarely cited or applied.[41] Below, we will argue for a reformed standard of review that would revive and enhance this aspect of Duff C.J.'s reasons.

We noted earlier that the standard of "reasonableness" is often used interchangeably with one that considers whether a jury's verdict is "inordinately" high or low. Inasmuch as the "ordinate" quality of the verdict is in relation to the evidence, properly understood this is a restatement of (and not a distinction from) the "reasonableness" test. Indeed, it was in applying Duff C.J.'s "reasonableness" test that Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd.*[42] first introduced the concept (which he called "proportionality") between the jury's award and the circumstances of the case.[43] Similarly, Viscount Simon in *Nance v. British Columbia Electric Railway Co.*[44] held that an appellate court may not overturn damages awarded by a

40. *McKinley v. BC Tel*, *supra*, footnote 37, at p. 191.

41. So, for example, in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248, 38 W.A.C. 118 (C.A.), leave to appeal to S.C.C. refused 53 W.A.C. 238*n*, *where* McEachern C.J.B.C. cited only Duff C.J.'s test for overturning a verdict, but not the precaution. Thackray J.A., speaking for the court in *Vaillancourt v. Molnar Estate* (2002), 290 W.A.C. 109, 8 B.C.L.R. (4th) 260, 31 M.V.R. (4th) 161 (C.A.), leave to appeal to S.C.C. refused 321 N.R. 397*n*, similarly confined his application of *McCannell v. McLean*.

42. [1942] A.C. 601, [1942] 1 All E.R. 657 (H.L.).

43. *Ibid.*, at p. 616. Specifically, Lord Wright stated: "Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case." In *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 156 O.A.C. 201, the majority pronouncement of Binnie J., in considering a jury verdict awarding the plaintiff (*inter alia*) $1 million as punitive damages, enunciated a nuanced and multi-faceted proportionality analysis. The court (at pp. 650-59) distinguished among six forms of proportionality that related to (1) blameworthiness of the defendant's conduct; (2) the degree of vulnerability of the plaintiff; (3) the harm directed specifically at the plaintiff; (4) the need for deterrence; (5) other civil or criminal penalties that have been or are likely to be inflicted upon the defendant; and (6) the advantage wrongfully gained by a defendant.

44. [1951] A.C. 601, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705 (P.C.).

trial judge unless it is "satisfied either that the judge . . . applied a wrong prin-ciple of law . . . or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".[45]

Moreover, even where the reasonableness test is restated as one requiring courts to measure inordinate variation or proportionality, appellate judges are to restrain their intuitions regarding what ought or ought not to be awarded. Hence Lord Justice Morris's statement in *Scott v. Musial:* "If, however, an award does not conform to such pattern, that is not to prove that the jury is necessarily wrong. The view of juries may form a valuable corrective to the views of judges."[46]

(3) Application of the Standard in Johnson v. Laing

We therefore do not dispute that the court, albeit in the course of Southin J.A.'s lengthy historical review of appellate jurisdiction, cited the currently prevailing test governing the appellate review power. None of these authorities, however, were cited or applied when she turned to the evidence before the jury in *Johnson v. Laing*. Questions of remedy aside, this is a particularly disturbing aspect of the court's pronouncement.

At this point, the medical evidence on causation in this case deserves reiteration. First, while Drs. McKenzie and Sweeting attributed the cause of the plaintiff's degenerating spine to the accident, Dr. Travlos would not make that inferential leap, the plaintiff's own complaints to his general practitioner notwithstanding. The medical evidence also reflected objective indications that the plaintiff's back was upon initial examination "non-tender" and that he exhibited a full range of motion.

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45. *Ibid.*, at p. 613. Such careful statements of the standard of review are similar to those articulated in the United States, where civil juries are more common. In *Hall v. Hall*, 397 S.E.2d 829 (Va. Sup. Ct. 1990), where an estate administrator brought a wrongful death suit on behalf of the deceased child who had been struck by the defendant's vehicle, the jury returned a verdict in the amount of $3,000. The trial judge set aside the verdict and entered judgment in favor of the defendant. The Supreme Court of Virginia reversed, stating:

> Great respect is accorded a jury verdict, and it is not sufficient that a trial judge, had he been on the jury, would have rendered a different verdict. Indeed, every reasonable inference must be drawn in favor of a verdict that has been rendered fairly under proper jury instructions. The time-honored standard that a court must apply in deciding whether to approve a verdict [is that if] there is conflict of testimony on a material point, or if reasonably fairminded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court or by this court, or if improperly set aside by the trial court, it will be reinstated by this court.

46. *Scott v. Musial, supra,* footnote 29, at p. 438.

We do not know from the appellate pronouncement what issues of credibility arose at trial. Without examining the transcript, we cannot know whether, for example, the characteristics that might arise in cases that typically lead insured defendants to seek a trial by jury applied in this case. It is not unusual, for example, for juries to be shown videos of plaintiffs engaged in employment, recreational or domestic activities which they have testified on examination for discovery they cannot do. Employment records may be lacking or non-existent, thus negatively impacting a plaintiff's future income loss claim. Third party evidence may also call into doubt the plaintiff's claims of injury or disability.

We do know, however, that the jury in this case had heard evidence from Dr. Travlos that would have supported its verdict. While, as already noted, his conclusions were arguably weakened under cross-examination,[47] he nonetheless offered admissible expert testimony on which the jury was entitled to rely. Moreover, this was merely one piece of evidence in a larger pool of *viva voce* or documentary evidence whose contents might well have legitimately influenced jurors on questions of fact such as credibility and damages — questions that are exclusively within their purview.[48] Hence the deference shown by the English courts in *Davies v. Powell Duffryn* and in *Scott v. Musial* — deference that is all the more significant given the contemporary English antipathy towards civil juries.[49] In determining a jury's reasonableness, then, the mere fact that the jury appeared to rely upon one bit of evidence over a body of evidence that a judge might find far more persuasive is not, in and of itself, conclusive.

Given the potential range of evidence upon which juries might ground their verdicts and in view of the care and restraint appellate courts are

47. See *supra*, footnote 10.

48. Credibility was recognized as a question of fact by the Supreme Court of Canada in *R. v. White*, [1949] S.C.R. 268, 89 C.C.C. 148 where (at p. 272) Estey J. said that "The issue of credibility is one of fact and cannot be determined by following a set of rules." As to damages, McLachlin C.J.C., for the majority of the court in *B. (M.) v. British Columbia*, [2003] 2 S.C.R. 477, 230 D.L.R. (4th) 567, [2003] 11 W.W.R. 262 said (at p. 500) "[t]he trial judge's assessment of what proportion of the damage sustained by M.B. was caused by the foster father's assault is a judgment of fact". The British Columbia Court of Appeal has itself recently affirmed that "the amount of damages is a question of fact" in *Boyd v. Harris* (2004), 237 D.L.R. (4th) 193 at p. 196, [2004] 6 W.W.R. 436, 319 W.A.C. 217 which, unlike *B.(M.)*, involved an appeal from a jury verdict. Most of Canada's common law provinces also statutorily affirm that damages are questions of fact. *Boyd v. Harris*, for example, cited (but curiously, did not rely upon) the relevant British Columbia provision, which is contained in s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333.

49. Indeed, within six years of *Scott v. Musial*, as we have noted *supra*, footnote 3, trial by jury was effectively judicially banned in personal injury actions in England.

urged to employ in reviewing jury verdicts, we are struck by the absence in the court's application of the reasonableness test in *Johnson v. Laing* of any elaboration, cogent or otherwise, of precisely what led it to the conclusion that the award was in fact unreasonable. While the court referenced the governing test and reached a conclusion, it did so peremptorily, offering no analysis of the verdict or an explicit accounting for (or, conversely, recording the absence of) other issues such as evidence going to credibility that may have legitimately influenced the outcome. Instead, the court appears to have relied solely upon the pre-charge exchange between the trial judge and defence counsel regarding causation, and specifically upon the defence counsel's statement that she was content with the judge omitting reference to causation in the charge.[50] The court's conclusion, as we have already noted, was that defence counsel must have been of the view that a causal link existed between the accident and the plaintiff's degenerating spine and that, as a consequence, any jury concluding otherwise must be unreasonable.

With respect, and putting aside the irrelevance to the standard of review of the opinions of the trial judge and defence counsel, the court's conclusion ignores an obvious and, we suggest, more likely explanation of that exchange. Objectively viewed, the trial judge was advising defence counsel that because of the unfavourable impression he had formed of the quality of Dr. Travlos's evidence on causation, any charge touching upon causation would have to reflect that unfavourable opinion. We suggest that the defence counsel's response, agreeing that the charge could be silent as to causation, was a strategic concession, and cannot be taken as necessarily reflective of her opinion on causation. Far from expressing a view on causation, her response was likely motivated by a desire not to appear unreasonable in the eyes of the trial judge and, more importantly, by concern that the jury not hear the judge contradicting her on a material issue. We obviously cannot know for certain which hypothesis is correct. While we believe our interpretation represents the more tenable explanation, our point is that this exchange admitted of at least one meaning other than that which the court ascribed. It is consequently a weak foundation for overturning a jury's verdict as unreasonable.

Although it did not expressly say so, it seems reasonable to surmise that the court was troubled — as we are — by the low amount awarded for non-pecuniary damages and by the jury's failure to make any award whatsoever for future income loss. The injuries alleged are such that our intuitions, shaped in part by our familiarity with judge-made awards,

50. See text associated with footnotes 12 and 13.

indicate a higher award. Like the Court of Appeal, however, we did not have an opportunity to form judgments about the credibility of the plaintiff's *viva voce* evidence and therefore about the veracity of his complaints to his physicians. Nor did we hear evidence that jurors may have heard about other accidents that might have led to the plaintiff's degenerating spine or about the specific disabling effects of such degeneration. While the trial judge was evidently leaning towards a different conclusion than the jury reached, common sense and, as we have seen, case law dictates that the trial judge's inclinations cannot be a test for reasonableness. While in this case such judge-jury divergence may signal that the jury ignored certain evidence, it may also signal that the jury, having heard the plaintiff's evidence and reached conclusions about its reliability generally, felt that the opinion of Dr. Travlos on causation was more consistent with such evidence than that of Drs. McKenzie and Sweeting.

Furthermore, the evidence as it was recounted in the appellate judgment tends to support the low damages award. There was evidence that the plaintiff had never held a steady job. This would support a finding of no past wage loss. Furthermore, the plaintiff offered no evidence of any skills or vocation that he possessed that would, but for the accident, have someday enabled him to earn living. This would support a finding of no future wage loss. As to the cost of future care, the appellate judgment cites no evidence adduced under this head. It is unclear therefore how the jury could have arrived at a figure substantially higher than it did. Indeed, if the low verdict was a reflection of the plaintiff's failure to put forth evidence to substantiate his claim, the jury was not only entitled to return a verdict for a low award, it was bound to do so.

Admittedly, we do not know whether or not such evidence was adduced at trial. Our point here is not that the plaintiff must have failed to adduce such evidence at trial but, rather, to emphasize that, if such evidence was adduced, it was incumbent upon the Court of Appeal to refer to it in offering some explanation for its pronouncement. Low jury awards are not *per se* unreasonable. Canadian appellate courts have on many occasions upheld the reasonableness of jury awards that would strike legally trained observers as parsimonious.[51] Recently, for example, the Ontario Court of Appeal cited the jury's mandate to determine issues of credibility in upholding a verdict that had attributed 100% of the defendant's symptoms to pre-existing conditions and

51. Recent examples include *F. (T.) v. Lush*, [2003] B.C.J. No. 2507 (QL), 2003 BCCA 579 (C.A.); *Morriscey v. Zwicker*, [2001] N.S.J. No. 126 (QL), 192 N.S.R. (2d) 268 (C.A.); *Rogers v. Young*, [2000] N.S.J. No. 179 (QL), 185 N.S.R. (2d) 197 (C.A.); and *McElroy v. Embleton*, [1996] B.C.J. No. 819 (QL), 121 W.A.C. 304, 19 B.C.L.R. (3d) 1 (C.A.).

awarded the plaintiff no damages whatsoever.[52] Conversely, the British Columbia Court of Appeal recently dismissed an appeal from an unusually *high* jury award.[53] This deferential norm was also apparent in the Supreme Court of Canada's treatment of a high jury verdict for punitive damages awarded in *Whiten v. Pilot Insurance Co.*[54]

In short, neither the sole express reason (specifically, the exchange between the trial judge and defence counsel regarding causation) nor the probable but unspoken reason (the low award) offered by the court in *Johnson v. Laing* justifies its finding of unreasonableness. Nowhere in its pronouncement did the court offer a persuasive account of the reasoning that led it to impugn the jury's verdict and ultimately to order such an unorthodox remedy. Such reasoning would have been particularly helpful, given that there was in fact expert evidence supporting the jury's evident conclusions as to causation.

(4) Refining the Standard of Review

Our argument here is that judges (and, for that matter, practicing and academic lawyers) can demonstrate respect for civil juries by recognizing that juries are not judges. This is not a call for leniency, necessitated by jurors' lack of legal training. Rather, it represents a juridical principle — reflected in the very fact that our civil justice system retains jury trials — that the jury's role is distinct from the judicial role.

Consider for example our intuitions, honed as legally trained observers, which call for a higher award in *Johnson v. Laing*. Such intuitions are not necessarily shared by the wider community of fact-finders. This was, we think, Lord Wright's point where he said in *Davies v. Powell Duffryn* that "There is an obvious difference between cases tried with a jury and cases tried by a judge alone."[55] Lord Lowry amplified the point in *Simpson v. Harland & Wolff*[56] with the perhaps controversial opinion that judges tend to "become less adaptable and less receptive to changing values . . .".[57] As unkind or even unfair as such an expression may seem, the point remains that civil juries operate to inject community values into issues of liability and damage. For that reason alone, as a *sui generis* finder of fact, the jury in *Johnson v. Laing* was, as a matter of law, entitled to be taken more seriously and accorded more deference than was evident in the court's peremptory

52. *Olszynko v. Larocque*, *supra*, footnote 36.
53. *Boyd v. Harris*, *supra*, footnote 48.
54. *Whiten v. Pilot Insurance Co.*, *supra*, footnote 43.
55. *Supra*, footnote 42, at p. 616.
56. [1988] N.I. 432 (C.A.).
57. *Ibid.*, at p. 440.

and unexplained reproval. This is particularly so where the sole issue before that jury was quantum of damages. As Cory J. stated (on this issue) for the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*:[58]

> 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. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* . . . it 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.

Underlying the ongoing place of civil juries in our system of civil justice, then, is a normative assumption: so long as a jury operates within certain judicially and statutorily prescribed parameters, the law respects its status as a representative, non-expert fact-finder, free of unrepresentative, expert usurpation by appellate judges. The problem is that, while the jurisprudence on the standard of review suggests that judges recognize the jury's distinct, representative fact-finding function, the plethora of jury verdicts deemed unreasonable based on the amount of the award or the weight of the evidence suggests that the *result* of that function is nonetheless controversial. While little empirical data of jury verdicts in Canada has been collected, it verges on triteness to observe that juries often come to different conclusions on liability and damages than judges would on similar evidence. It is commonly (although not necessarily accurately) perceived, for example, that jurors return lower verdicts in minor motor vehicle accident cases than judges. Hence, beginning in the 1990s, British Columbia's public auto insurer began instructing counsel to try such cases in front of juries.[59] Conversely, however, the historical concern was that juries would run amok, making awards that were excessive relative to judicial awards. This remains a concern for appellate justices, particularly in cases involving catastrophic injury.[60] The issue here is not, however, whether juries (or, for that matter, judges) are unduly generous in some cases or unduly parsimonious in others. The point to be taken from divergence from judge-made awards is that it is

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58. [1995] 2 S.C.R. 1130 at p. 1194, 126 D.L.R. (4th) 129, 84 O.A.C. 1.
59. This phenomenon was described in more detail in Bouck, "Civil Jury Trials", *supra*, footnote 2, at p. 513 and note 90.
60. See, for example, *Hoskin v. Han* (2003), 298 W.A.C. 130, 12 B.C.L.R. (4th) 21, 2003 BCCA 220 (C.A.), and *Dilello v. Montgomery* (2005), 250 D.L.R. (4th) 83, 2005 BCCA 56, where the award for non-pecuniary damages exceeded the upper limit prescribed by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. 225, [1978] 1 W.W.R. 577.

a natural consequence of the jury's distinct function which, flowing from litigants' continuing ability to choose between two distinct types of fact-finders, is expressly contemplated by our civil justice system. The integrity and coherence of that system depends, therefore, on the respect we accord civil juries. If judges and lawyers are not prepared to allow juries to be juries and instead review them on the basis of judicial presuppositions regarding weighing evidence and calculating damages, the civil justice system risks incoherence and its current expression of appellate deference to jury verdicts risks being revealed as token or even disingenuous.

The meanings of "coherence" and "incoherence" in this context merits explanation. The right to a civil trial by jury must serve a function that is distinct from a right to a trial by judge alone. Were our civil justice system unable to account for two separate fact-finders by prescribing distinct functions for each, it would be incoherent because it would incorporate a functional redundancy: one type of fact-finder is expected to arrive at the same result as the other. If, then, our civil justice system is to retain two distinct fact-finding options, it can do so coherently only by acknowledging that one type of fact-finder does something different from the other. For its part, the judicial fact-finding function is restrained in its flexibility by the case law governing damages, which is the product of the system of reasoning judges serve and employ. They are qualified for this task not as representatives of the community but by "hard-won mastery of the specialized rationality".[61] Why did the Supreme Court of Canada say in *Hill v. Church of Scientology of Toronto* that 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"?[62] The answer lies in the implications of the simple fact that a jury is not a judge. In contrast to the judge's trained role, the civil jury derives its legitimacy from a democratic principle of popular representation that privileges the legitimate values that jurors collectively apply to questions of liability and damages. Their reasoning is necessarily grounded in intuition, experience and common sense, rather than the nuanced and conditioned reasoning that judges employ. But that does not mean that where a jury differs — even sharply — from a judge on a conclusion to be drawn from the evidence, the jury's verdict is unreasonable or, for that matter, even incorrect. It is simply different.

Respecting civil juries and their distinct function is also a matter of practical necessity. Gauging a jury's reasonableness is inherently

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61. Peter Birks, "Equity in Modern Law: An Exercise in Taxonomy" (1996), 26 W. Aust. L. Rev. 3 at p. 97.
62. *Hill v. Church of Scientology of Toronto*, *supra*, footnote 58, at p. 1194.

difficult since, unlike judges, juries do not give reasons explaining their verdicts.[63] We can never know whether a jury had regard to the evidence in coming to its decision, or the relative weight it assigned. Acquiring insight into a jury's reasoning is also made difficult by the dearth of empirical data on civil jury awards in Canadian courts. Furthermore, we are inhibited by the *Criminal Code* offence penalizing a juror for disclosing information relating to jury deliberations.[64] Thus Canadian trial judges and lawyers are unable to learn how jurors perceive different kinds of evidence and to discern the tools that might assist jurors in reaching a just verdict.[65] This carries implications, moreover, for the standard of review, as the majority at the British Columbia Court of Appeal observed (in *obiter*) in *Foreman v. Foster*:[66]

> Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases.

Pragmatic as well as normative imperatives, then, justify restricting the circumstances in which an appellate court can properly overturn a jury verdict. The history of appellate review suggests, however, that if we are to respect the distinct role of the jury and thereby preserve the coherence of our civil justice system, the "rare case" meriting appellate intervention needs to be more particularly and concretely elucidated. The alternative, if there is a lesson to be drawn from the history of appellate review of civil juries, would be continuing reformulation and refinement of the reasonable jury test. This would perpetuate the *ad hoc* and (as revealed by *Johnson v. Laing*) occasionally unreasoned and dismissive treatment of civil jury verdicts.

Past refinements of an already exhausted test suggest, however, that what is needed is not more refinements, but rather a fundamental shift in the appellate mindset. Even a more rigorously stated standard of review is inadequate if it leaves room for similar appellate intrusion into the fact-finder's realm. Reasonableness, howsoever stated, would in

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63. Indeed, they must not do so. See *R. v. Tuckey* (1985), 20 C.C.C. (3d) 502 at p. 513, 46 C.R. (3d) 97 (Ont. C.A.).
64. *Criminal Code*, R.S.C. 1985, c. C-46, s. 649.
65. This particular hurdle is, in our view, disgraceful, and we can do no better than to refer to Mr. Justice John Bouck's proposals for reform. See Bouck, "Civil Jury Trials", *supra*, footnote 2, at pp. 526-27.
66. (2001), 196 D.L.R. (4th) 11 at pp. 21-22, 84 B.C.L.R. (3d) 184, [2001] 3 W.W.R. 396 (C.A.).

such circumstances continue to be employed as a device that could be judicially geared to embrace or exclude jury verdicts, thereby disregarding the jury's representative function as a fact-finder and detracting from the coherence of our civil justice system. Because of our inability to parse a jury's reasoning, however, practicable objective standards of review are elusive. Given these limitations, in our view, the unavoidable solution is to eschew the reasonableness standard of review altogether. In its place, we propose an unambiguous and concrete parameter that respects the civil jury's distinct function and accounts for the inherently peremptory nature of the jury verdict. In our view, the sole possible objective standard of review restricts appellate judges to considering whether the jury's verdict is supportable by *any* evidence.

This reform might also be achieved by reference to the distinction that we have suggested might be discernible in the case law between the standard of review of a verdict said to be perverse and one that is said to be unreasonable. Specifically, our suggested standard of review might be viewed as a jettisoning of this distinction and the application of the standard of review for allegedly perverse verdicts to all impugned civil jury verdicts. This would require an appellate court to find that jurors were intentionally unfaithful to the task they swore to undertake and, as a consequence, rendered a "dishonest verdict".[67] More to the point, this threshold has been most recently and pragmatically explained in terms comparable to the standard of review we suggest. In the notorious case of *Grobbelaar v. News Group Newspapers Ltd.*[68] the House of Lords described such impugned civil jury verdicts as requiring the foundation of only *some* evidence. Specifically, Lord Bingham held that it was only where the jury's finding "could not be explained on *any* ground"[69] that an appellate court would be entitled to quash the verdict.

An alternative way of understanding the reform we propose is as a revival of the precautionary aspect of *McCannell v. McLean,* which we canvassed earlier.[70] That is, our suggested standard of review would

67. See footnote 36.
68. [2002] 1 W.L.R. 3024, [2002] UKHL 40. The plaintiff was a professional footballer who sued a newspaper that had claimed that he had accepted bribes to fix matches. The newspaper had obtained audio and video recordings of him accepting cash and responding positively to requests to fix matches. The plaintiff claimed that he had baited the person offering the bribe to gain his confidence so that he might discover the identity of those behind the bribery scheme and report them to the authorities. Believing his version of events, the jury returned a verdict for the plaintiff and awarded him £85,000. The Court of Appeal did not believe the plaintiff, however, and allowed the defendant's appeal on liability. The House of Lords reinstated the verdict, although it reduced the damages to the "derisory" measure of £1. In contrast to *Johnson v. Laing*, however, detailed reasons were offered for why it reduced the damages.
69. *Ibid.*, at p. 3037.
70. Beginning with the text associated with footnote 39.

restore and enhance Duff C.J.'s caveat that, where there is only some evidence on which a jury could possibly have relied, an appellate court must exercise restraint.

Regardless of how the standard of review we propose is to be conceptualized, we suggest that any standard of review that purports to refine or otherwise restate the "reasonableness" threshold carries two principal disadvantages. First, while arguably being phrased in objective terms, it would risk becoming as susceptible to *ad hoc* manipulation as other incarnations of the "reasonableness" standard have become. Inasmuch as it would rely on an ambiguous and malleable threshold, it risks allowing judicial predispositions and idiosyncrasies to trump jurors' intuitions on issues of liability and damages. This would, as we have explained, render the civil justice system incoherent as it fails to account for the distinct role of juries. Secondly, it would require appellate judges to gaze imperfectly into the jury mindset, forcing them to make inferences of questionable reliability about what a jury did or did not consider. In a nutshell, our proposed standard of review removes the guesswork while preserving the coherence of the civil justice system.

3. The Remedy

The court in *Johnson v. Laing* ordered a remand to the trial judge rather than to a newly empanelled jury. So far as we have been able to discern, and subject only to a single exception arising in Ontario in 1913,[71] such an order is unprecedented in Anglo-American legal history. All other cases that we have identified restrict the appellate court's options to substituting its own verdict for that of the jury and remanding the action for another jury trial. Moreover, Canadian appellate courts have substituted their own damages awards for those of juries only where there were undisputed facts on the record that allowed the court

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71. The sole exception appears to have been *Reiffenstein v. Dey*, [1913] O.J. No. 73 (QL), 28 O.L.R. 491 (C.A.), where the Court of Appeal of Ontario, having overturned a jury verdict, then ordered the case remanded to trial before a judge alone. That order, however, was overturned on appeal. At para. 35 of the appellate pronouncement, the court stated:

> I do not think that the direction that the new trial shall be had before a Judge without a jury ought to have been made. A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties . . .

More recently, Laskin J.A. of the Ontario Court of Appeal, in *Wrbaskic v. Ratkowski*, [2001] O.J. No. 4572 (QL), 151 O.A.C. 330 (C.A.), argued in dissent for a similar remedy. The majority (Catzman and Doherty JJ.A.), however, ordered a new trial, stating (at para. 5) that it must be "before a judge and jury, subject to any order to the contrary made in the trial court". See also *Nychka v. Huppe* (unreported, November 4, 1991, Alta. C.A., File No. 9003-0401-AC). In 1975, the Prince Edward Island Court of Appeal in *MacLeod v. Gallant* (1975), 7

to infer the correct measure of damages with substantial certainty.[72] As to remand, consistent with the English law going back nearly four centuries,[73] Canadian courts have maintained a practice of remanding to a newly empanelled jury, not to the trial judge.[74]

So viewed, the remedy imposed by the British Columbia Court of Appeal abandoned a longstanding and widely accepted appellate practice regarding a fundamental institution of civil justice. We would have

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Nfld. & P.E.I.R. 298 (P.E.I.S.C.) also seemed to open the door for retrial by judge only, although it confined the issue of judge-versus-jury to the directives of that province's *Judicature Act*. It held (at pp. 301-302) that:

> It is our opinion that a new trial should be ordered on the issue not only of the Appellant's general damages but also on the issue of the Appellant's special damages. The appeal is therefore allowed, the judgment of June 18th, 1974, is set aside and a new trial on the issue of the Appellant's damages is ordered. Such new trial may be by Judge and jury or by Judge without a jury, as may be directed in accordance with the Judicature Act and Rules of Court.

72. See *Astley v. Garnett*, [1914] B.C.J. No. 147 (QL), 20 D.L.R. 457, 7 W.W.R. 538 (C.A.); *Corby v. Foster*, [1913] O.J. No. 107 (QL), 13 D.L.R. 664, 29 O.L.R. 83 (C.A.).

73. As to remanding to a newly empanelled jury, the first such order we have been able to identify was issued in *Wood v. Gunston* (1655), 82 E.R. 864 (K.B.). Other early cases where new jury trials were ordered include *Anon.* (1661), 83 E.R. 775 (K.B.); *Anon.*(1665), 83 E.R. 1288 (K.B.); *Duke of Richmond v. Wise* (1671), 86 E.R. 86 (K.B.); *R. v. Bewdley* (1712), 24 E.R. 357 (K.B.); *Musgrave v. Nevinson* (1723), 93 E.R. 715 (K.B.); *Dormer v. Parkhurst* (1738), 95 E.R. 414 (K.B.); *Berks v. Mason* (1756), 96 E.R. 874 (K.B.); *Bright v. Eynon* (1757), 97 E.R. 365 (K.B.); and *Norris v. Freeman* (1769), 95 E.R. 921 (C.P.). See also John Marshall Mitnick, "From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror" (1988), 32 Am. J. Legal Hist. 201; T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956); Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (New York: Law Center of New York University, 1952), p. 335.

74. *de Araujo v. Read*, [2004] B.C.J. No. 963 (QL), [2004] 8 W.W.R. 473, 322 W.A.C. 271 (C.A.), leave to appeal to S.C.C. refused January 13, 2005; *Prentice v. Dharamshi* (2002), 6 B.C.L.R. (4th) 39, 295 W.A.C. 200 (C.A.) (Southin J.A.); *Binnie v. Marsollier*, [2001] B.C.J. No. 1930 (QL), 258 W.A.C. 201 (C.A.); *Wrbaskic v. Ratkowski*, *supra*, footnote 71; *Levesque v. Levesque*, [2001] O.J. No. 4416 (QL) (C.A.); *Laufer v. Bucklaschuk*, [1999] M.J. No. 553 (QL), 193 W.A.C. 253, 134 Man. R. (2d) 253 (C.A.); *Robinson (Litigation Guardian of) v. Caraway*, [1997] O.J. No. 500 (QL) (C.A.); *Smith v. Foussias*, [1996] O.J. No. 1426 (QL), 62 A.C.W.S. (3d) 686 (C.A.); *Gairns v. Trainor*, [1996] P.E.I.J. No. 38 (QL), 139 Nfld. & P.E.I.R. 311, 20 M.V.R. (3d) 69 (C.A.); *Angelopoulos v. Machen* (1992), 7 O.R. (3d) 45, 54 O.A.C. 153, 36 M.V.R. (2d) 198 (C.A.); *Lombardi (Litigation Guardian of) v. Grande*, [1992] O.J. No. 2143 (QL) (C.A.); *Schepp v. Ozirny*, [1991] 5 W.W.R. 66, 92 Sask. R. 314, 49 C.P.C. (2d) 223 (Q.B.), vard 93 D.L.R. (4th) 542, [1992] 5 W.W.R. 64, 18 W.A.C. 241 (C.A.), leave to appeal to S.C.C. refused 97 D.L.R. (4th) vii; *Gellie v. Naylor*, [1986] O.J. No. 372 (QL), 28 D.L.R. (4th) 762, 55 O.R. (2d) 400 (C.A.); *Katsiroumbas v. Dasilva*, [1982] O.J. No. 36 (QL), 132 D.L.R. (3d) 696 (C.A.); *Robson v. McDonnell*, [1980] O.J. No. 291 (QL), 19 C.P.C. 239 (C.A.); *Scott v. Moore*, [1988] N.S.J. No. 34 (QL) (C.A.);

expected such a step to entail at least some measure of explanation beyond reference to the broad powers conferred under s. 9(1)(c) of the *Court of Appeal Act* to make any order that it considers "just", and a single sentence citing cost and inconvenience (tempered, admittedly, by a fleeting reference to how important the right of civil trial by jury is "thought to be"). Such an explanation might, for example, have accounted for s. 27(1) of the *Court of Appeal Act*,[75] which already specifically addresses the court's remand power by authorizing it to set aside a trial verdict and order a new trial. Furthermore, the court's explanation ought to have anticipated and addressed the obvious concern that such a result is unjust insofar as it operates to strip a party of

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Harich v. Stamp (1979), 27 O.R. (2d) 395, 106 D.L.R. (3d) 340, 59 C.C.C. (2d) 87 (C.A.); *Krahn v. Rawlings* (1977), 16 O.R. (2d) 166, 77 D.L.R. (3d) 542, 2 C.C.L.T. 92 (C.A.); *Samac v. Vamplew* (1974), 2 O.R. (2d) 159, 42 D.L.R. (3d) 203 (C.A.); *Pye v. McDiarmid*, [1973] O.J. No. 361 (QL) (C.A.); *Feener v. McKenzie*, [1972] S.C.R. 525, 25 D.L.R. (3d) 283, 3 N.S.R. (2d) 829; *Hill v. Harvey*, [1969] O.J. No. 684 (QL) (C.A.); *Haist (Next friend of) v. Shack*, [1966] O.J. No. 534 (QL) (C.A.); *Mulligan v. MacLeod*, [1966] O.J. No. 96 (QL) (C.A.); *Clarke v. Forbes*, [1959] O.J. No. 458 (QL) (C.A.); *Pearce v. Worstencroft*, [1956] O.J. No. 444 (QL) (C.A.); *Ross v. Lamport*, [1956] S.C.R. 366; *Ludolph and Ludolph v. Palmer and Phillips*, [1950] O.R. 821 (C.A.); *Marks v. Hamilton Street Railway Company*, [1946] O.R. 236 (C.A.); *Mowder v. Roy*, [1946] O.R. 154 (C.A.); *L.V. Wolfe and Sons v. Giesbrecht*, [1945] S.C.R. 441; *Canadian Pacific Railway Co. v. Kizlyk Estate*, [1944] S.C.R. 98; *Field v. David Spencer Ltd.*, [1938] B.C.J. No. 71 (QL), [1938] 2 D.L.R. 245, [1938] 2 W.W.R. 385 (C.A.); *Grant v. British Columbia Electric Railway Co.*, [1937] B.C.J. No. 11 (QL), [1937] 4 D.L.R. 113, [1937] 3 W.W.R. 164 (C.A.); *Alexander v. Canadian National Railway Co.*, [1930] O.J. No. 89 (QL), 65 O.L.R. 162 (C.A.); *Hughes v. Hughes [Hughes v. Sun Publishing]*, [1925] B.C.J. No. 54 (QL) (C.A.); *Goudy v. Mercer*, [1924] B.C.J. No. 18 (QL) (C.A.); *Port Coquitlam (City) v. Wilson*, [1923] S.C.R. 235; *Wilson v. Port Coquitlam (City)*, [1922] B.C.J. No. 6 (QL), 67 D.L.R. 49, [1922] 1 W.W.R. 640 (C.A.); *Wallace v. Grand Trunk R.W. Co.*, [1921] O.J. No. 117 (QL), 49 O.L.R. 117 (C.A.); *Holmes v. Kirk & Co.*, [1920] B.C.J. No. 56 (QL), 53 D.L.R. 53 (C.A.); *Gage v. Reid*, [1917] O.J. No. 153 (QL), 38 O.L.R. 514 (C.A.); *Lumsden v. Spectator Printing Co.*, [1913] O.J. No. 129 (QL), 29 O.L.R. 293 (C.A.); *Dickinson v. Harvey*, [1913] B.C.J. No. 89 (QL), 12 D.L.R. 129 (C.A.); *White v. Victoria Lumber and Manufacturing Co.*, [1909] B.C.J. No. 55 (QL) (C.A.); *Woolsey v. Canadian Northern R.W. Co.*, [1908] O.J. No. 730 (QL), 11 O.W.R. 1030 (C.A.); *Douglas v. Stephenson*, [1898] O.J. No. 148 (QL), 29 O.R. 616 (H.C.); *Stewart v. Woolman*, [1895] O.J. No. 172 (QL), 26 O.R. 714 (H.C.); *Brown v. Moyer*, [1893] O.J. No. 129 (QL), 20 O.A.R. 509 (C.A.); *Oliver v. Newhouse*, [1883] O.J. No. 53 (QL), 8 O.A.R. 122 (C.A.); *Morse v. Thompson*, [1868] O.J. No. 99 (QL) (U.C.C.P.); *McIntyre v. Lockridge*, [1868] O.J. No. 6 (QL) (U.C.Q.B.); *Mitchell v. Barry*, [1867] O.J. No. 26 (QL) (U.C.Q.B.); *Hope v. White*, [1866] O.J. No. 189 (QL) (U.C.C.P.); *Young v. Fluke*, [1865] O.J. No. 177 (QL) (U.C.C.P.); *Cook v. Phillips*, [1863] O.J. No. 66 (QL) (U.C.Q.B.); and *Mittleberger v. By*, [1832] O.J. No. 18 (QL) (U.C.K.B.).

75. *Court of Appeal Act*, *supra*, footnote 18.

his or her entitlement to have a civil claim adjudicated by his or her peers. Just as a criminal defendant would have cause for complaint were a jury verdict of innocence overturned on appeal only to be remanded to a trial by judge alone,[76] so has the defendant in *Johnson v. Laing* been deprived of a fundamental civil right. Thus six years before *Johnson v. Laing,* Southin J.A. expressly stated in *Networth Industries Ltd. v. "Cape Flattery" (The)*[77] that, if "there have been errors in the charge, in the admission of evidence or the rejection of evidence which are of such significance as to justify interference with the jury's conclusions", the proper remedy is "to remit the whole case for a new trial".[78] Continuing, she explained: "When a litigant chooses to have his case tried by a jury, it is by a jury it must be tried."[79]

This concern applies *a fortiori* to a jurisdiction such as British Columbia, where, subject to the few enumerated restrictions in British Columbia's Rules of Court,[80] litigants are entitled by the terms of s. 17 of the *Supreme Court Act*[81] to require a trial by jury:

> Nothing in an Act or the rules takes away or prejudices the right of a party to an action to have the issues for trial by jury submitted and left by the judge to the jury before whom the party comes for trial, with a proper and

76. In *Segreti v. Toronto (City)* (1981), 20 C.P.C. 110 (Ont. H.C.) Haines J. refused to reassess a jury's assessment of damages, saying at p. 114: "This would be tantamount to substituting a non-jury trial upon the parties."
77. (1998), 61 B.C.L.R. (3d) 357 (C.A.).
78. *Ibid.,* at p. 360.
79. *Ibid.,* at p. 357.
80. As of September 1, 2005, a new Rule 68 will provide for judge-only trials where the amount claimed is $100,000 or less.

    More generally, Rule 39(25) provides that a trial shall be heard *without* a jury where it relates to:

    (a) the administration of the estate of a deceased person,
    (b) the dissolution of a partnership or the taking of partnership or other accounts,
    (c) the redemption or foreclosure of a mortgage,
    (d) the sale and distribution of the proceeds of property subject to any lien or charge,
    (e) the execution of trusts,
    (f) the rectification, setting aside or cancellation of a deed or other written instrument,
    (g) the specific performance of a contract,
    (h) the partition or sale of real estate,
    (i) the custody or guardianship of an infant or the care of an infant's estate,
    (j) any matter brought by originating application [governed by Rule 10(1) of the *Rules*], or
    (k) a family law proceeding.

    These exceptions are unremarkable. Similar exceptions are noted, for example, in s. 108 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43.
81. R.S.B.C. 1996, c. 443.

> complete direction to the jury on the law and the evidence applicable to the issues.

The rule in *Johnson v. Laing* eviscerates this statutory guarantee of a right to a jury trial. The court has, in the Act's language, "tak[en] away or prejudice[d] the right of a party to have the issues for trial by jury submitted and left . . . to the jury". This is not, with respect, within the judicial prerogative. As Hutcheon J. (as he then was) remarked in *Foster v. Prins,*[82]

> As to the right of a plaintiff to have a trial by jury, I am very much impressed with the undoubted fact that cases of this kind, and in this I include the question of whether the alleged condition of the plaintiff flows from the accident, have been decided by juries for many years. In my view, *if there is to be a change, it must be brought about either by a change in the rules or by some other legislative change,* or by the presentation of evidence that members of the jury are protesting about the complexity of the task.

Given this background, the suggestion that the Legislature intended, by enacting s. 9(1)(c) of the *Court of Appeal Act,* to confer authority upon the court to formulate such a rule is dubious.

This is not to say that cost and inconvenience are of no consequence, but rather that their consideration ought not to exclude an accounting for litigants' civil rights. The court's concern for economic imperatives in *Johnson v. Laing* is unsurprising, however, as it follows years of criticism from some members of the bar and bench in Canada of the expense associated with civil juries. In 1984, the British Columbia Law Reform Commission observed that, where "compelling reasons" exist for overturning a jury verdict, "having the matter retried before another jury is probably the most expensive and time-consuming method of arriving at a satisfactory verdict".[83] Trial judges who have purported to set aside jury verdicts and substitute their own assessment have adopted this sentiment (before being overruled at the Court of Appeal).[84]

All that having been said, economic imperatives have generally bowed to concerns for a litigant's civil rights.[85] Moreover, the stated

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82. (1979), 13 B.C.L.R. 238 at p. 241, 109 D.L.R. (3d) 643, [1979] 6 W.W.R. 90 (S.C.) (emphasis added).

83. Law Reform Commission of British Columbia, *Review of Civil Jury Awards* (Vancouver: Law Reform Commission of British Columbia, 1984) at p. 40.

84. Thus in *Prentice v. Dharamshi,* [2000] B.C.J. No. 2041 (QL) (S.C.), revd *supra,* footnote 74, the trial judge reassessed the non-pecuniary damages after ruling that the jury's assessment was perverse. The Court of Appeal overruled the trial judge on other grounds, but in *dicta* it indicated its unhappiness with such a remedy. Similarly in *LeBlanc v. Penticton (City),* (1979), 19 B.C.L.R. 121 (S.C.), revd 28 B.C.L.R. 179, [1981] 5 W.W.R. 289, 20 C.P.C. 226 (C.A.), the trial judge set aside the jury verdict and calculated the damages based on his understanding of the law and facts, only to be overruled at the Court of Appeal.

85. The priority of a litigant's rights can claim some pedigree, at least in Canada where, as early as 1844, concerns for judicial economy were being subordinated to the

rationale of avoiding cost and inconvenience does not explain a remand to the trial judge. Were this concern pressing, the logical remedy in the present case, given that liability was not at issue and that the Court of Appeal viewed the jury's damages award as "unreasonable", was for the court to substitute its own damages award, as it has done on many past occasions. As well, for future cases it might have prescribed the more cost-effective and convenient remedy of allowing trial judges to substitute their assessment for jury awards, thus leaving it open to the court on appeal to simply affirm the trial judge's substitution.[86]

A purely pragmatic concern that arose in *Johnson v. Laing* should also militate against overturning jury verdicts for remand to the trial judge. Shortly after the Court of Appeal's pronouncement, it heard an application by the defendant seeking leave to make further submissions. The court was advised that the trial judge, at the conclusion of trial, had been informed of the existence and terms of a formal offer to settle that had been delivered by the plaintiff to the defendant under British Columbia's Rules of Court, which provide: "No statement of the fact that an offer to settle has been made shall be disclosed to the court, or jury, or set forth in any document used in the proceeding, until all questions of liability, and of the relief to be granted, other than costs, have been determined."[87] The difficulty here is the same difficulty that will arise in future where an offer to settle is delivered in a jury case that is appealed from and then, following the rule in *Johnson v. Laing,* is remanded to the trial judge for determination. Specifically, after the jury returns with a verdict the trial judge will be advised of the offer to settle and will make an order reflecting the cost implications of the opposing party having failed to accept its terms. Months or years later, however, the trial judge will be called upon to determine liability and damages, *knowing of the offer to settle's existence and terms.* These concerns notwithstanding, Southin J.A. refused to grant leave.[88]

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right to a jury. See *Kerby v. Lewis*, [1844] O.J. No. 44 (QL) (Q.B.) where, after threesuccessive "perverse" verdicts returned by successive juries, the Upper Canada Court of Queen's Bench overturned a fourth jury verdict as perverse and ordered a fifth new jury trial. Similarly in *Alexander v. Canadian National Railway Co.*, [1930] O.J. No. 89 (QL), 65 O.L.R. 162 (C.A.), the appellate court ordered a new jury trial of a case that had already been tried three times before juries.

86. The court in *Johnson v. Laing* actually considered this possibility, although it demurred, noting that the legislature had not granted trial judges the power to impose their own assessments: *Johnson v. Laing*, *supra*, footnote 1, at p. 148.

87. Rule 37(11).

88. *Johnson v. Laing*, *supra,* footnote 1. It was held that this concern ought to have been raised in the original submissions.

4. Conclusion

On its first opportunity to apply the rule in *Johnson v. Laing,* the British Columbia Court of Appeal has refrained from doing so.[89] Without commenting on the option of remand to the original trial judge, the majority in *White v. Gait* substituted the court's own (lower) award for the jury's. Speaking in dissent, however, Thackray J.A. signaled a reluctance to order a remedy that deprives civil litigants of their right to trial by jury:[90]

> Speaking generally, I suggest that it is a better practice for this Court, where it determines that an award cannot be upheld, to return the case to the trial court for re-trial. This avoids changing the forum, that is, trial by jury, to trial by judges alone. This leaves it to the parties to again choose their forum. This also diminishes the concept that judge-made decisions have an elevated stature compared to diverse and not truly comparable cases decided by juries.

Such judicial discomfort is perhaps heartening — the stripping by an appellate court of the civil right of trial by jury should, to say the least, give pause. We would, however, carry Thackray J.A.'s point further. The normative significance of the fact that jury decisions are "not truly comparable" to judge-made decisions is that they are the product of a distinct component of civil justice, with a correspondingly distinct function. To require that jury fact-finding conform (or conform more closely) to judicial fact-finding would strip juries of that function. In such circumstances, the retention of civil juries would perpetuate an incoherent civil justice system, inasmuch as the jury's role would be superfluous and the appellate role would be reduced to measuring jury verdicts against judicial decisions of varying comparability.

We have referred to how juries are peculiarly limited by their inability to explain the reasoning that lead to verdicts that legally trained observers may find curious (or even "unreasonable"). Such limitations ought to be embodied in the standard of appellate review and, more to the point, reflected more consistently in its application. The elimination of judicial second-guessing of how juries weigh evidence and calculate damages, achieved by allowing jury verdicts to stand where any supporting evidence exists, regardless of its quality or quantity, would be a salutary reform that respects the civil jury's democratic function.

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89. *White v. Gait* (2004), 244 D.L.R. (4th) 347, 333 W.A.C. 234, 3 C.P.C. (6th) 147 (C.A.).
90. *Ibid.*, at p. 366.