

# Civil Justice Reform : What do we Know?

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Reform of the administration of civil justice has a lengthy and honourable history in the common law world. Generation after generation, leading members of the bench and bar, though more typically the former, have struggled to formulate proposals for improving the operation of the civil justice system in the public interest.<sup>1</sup> The Woolf Report<sup>2</sup> and the First Report of the Ontario Civil Justice Review<sup>3</sup> are recent and distinguished additions to the lengthy list of previous reports on the reform of civil procedure. There are many interesting parallels between these two reports. Like the Woolf Report, the First Report of the Civil Justice Review characterizes the administration of civil justice as being in a state of crisis. Both identify as the principal culprit, the twin problems of cost and delay and then attack them with a rather similar list of remedies. Both evince enthusiasm for case management and Alternate Dispute Resolution (ADR), for simplified procedures in some types of cases, for increased reliance on computer technology, and for a more managerial role for judges — though perhaps the Woolf Report adopts a more aggressive stance on this point. Both inquiries also mounted substantial research programs. It is to the research enterprise associated with reform work of this kind that I have been invited to give some attention.

The Ontario Review was established in April of 1994 as a joint project of the Ontario Court (General Division), the Superior trial Court for the province, and the Ministry of the Attorney General. The Review, co-chaired by a trial judge, Mr. Justice Robert Blair, and the Assistant Deputy Attorney General — Courts Administration,<sup>4</sup> included representation from the bar and the laity. The task force was invited to coordinate and integrate existing experiments in progress, including case management pilot projects, a court-annexed ADR Centre established in Toronto and a simplified rules study undertaken by the Rules Committee. More generally, however, it was directed to examine a number of topics relating to the administration of civil justice with a view to developing proposals for a "speedier, more streamlined and more efficient structure".

The Review's terms of reference also established a sub-committee or a sub-group of the Review, styled the Fundamental Issues Group, which was established for the purpose of dealing with questions having longer range implications for the civil justice system. The Group was asked to consider such issues as the types of disputes that ought, in principle, to be allocated to publicly funded or to privately funded dispute resolution mechanisms. Within the publicly funded domain, the Group was asked to consider which disputes ought to be assigned to the courts as opposed to other adjudicative mechanisms. As well, the Group was asked to consider the proper role of privately and publicly funded ADR in dispute resolution, the role of small claims courts, and the use of juries in civil cases. I was asked, in my capacity as Chair of the

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1. Lord Wolf *Access to Justice : Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at 4, notes that there have been 60 reports on aspects of civil justice reform since 1851.
  2. *Ibid.*, an account of which is provided elsewhere in this volume by Mr. Justice Latham. For another view, see G. D. Watson "From an Adversarial to a Managed System of Litigation — A Comparative Critique of the Lord Woolf's Interim Report" in R. Smith, ed., *Achieving Civil Justice : Appropriate Dispute Resolution for the 1990's* (London : Legal Action Group, 1996).
  3. Ontario Civil Justice Review, *First Report* (Government of Ontario : March 1995).
  4. Initially Sandra Lang, succeeded by Heather Cooper.

Ontario Law Reform Commission, to serve as a co-Chair of the Group.<sup>5</sup> The purpose of the present brief paper, then, is to attempt to draw from my experiences as a member of the Group some lessons for research and reform in the field of civil justice.

The Group tackled its rather ambitious mandate with three initiatives. First, it commissioned Professor Rod Macdonald of McGill University to prepare a paper that would identify and provide a theoretical analysis of the central issues involved in a fundamental reconsideration of civil disputing.<sup>6</sup> The ambition was to stimulate the production of a paper that could inform consideration of various adjustments that might be made to the administration of civil justice in the near foreseeable future and, at the same time, bring to a wider audience the insights that can be drawn from the extensive international literature that has developed in recent decades on the subject of civil justice. Professor Macdonald's paper, subsequently published by the Commission, richly fulfilled this ambition and was in turn made the subject of a one day symposium at which leading Canadian, American and English scholars of civil justice commented on various aspects of the paper. The written presentations prepared by this panel of experts were published together with the Macdonald paper.<sup>7</sup> Secondly, the Group undertook a round of consultations with a variety of interested groups including those representing racial minorities, the disabled, women, francophones, aboriginal people, the ADR community and business and commercial groups.<sup>8</sup>

With the benefit of the insights obtained from these first initiatives, the Group then commissioned a series of background papers to develop more precise proposals relating to various aspects of the Group's mandate.<sup>9</sup> Publication of those papers is anticipated in the fall of 1996. Finally, I should note that the Ontario Law Reform

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5. The other co-chair was the Director of the Policy Branch of the Ministry, initially J. Douglas Ewart who was succeeded by Sandra Wain.
  6. Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice*, (1995). A Study Paper by Roderick A. Macdonald with commentaries by H.W. Arthurs, W.A. Bogart, O. Fiss, M. Galanter, B. Garth, C. Glasser, D.R. Hensler, G.L. Priest, P.H. Russell, S.S. Silbey, L. Smith, M.J. Trebilcock and G.D. Watson.
  7. *Ibid.*
  8. A summary of the results of these consultations is set forth in S. Wain "Public Perceptions of the Civil Justice System" (forthcoming). See note 9, *infra*.
  9. This aspect of the Group's work was orchestrated by Professor M. Trebilcock, Faculty of Law, University of Toronto. Papers were commissioned on the following topics : Public Perceptions of the Civil Justice System (Sandra Wain); Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994 (John Twohig et al); Administrative Agencies Empirical Study (Larry Fox); The Role of the Civil Justice and the Choice of Governing Instrument (Robert Howse and Michael Trebilcock); The Role of the Courts in the Resolution of Civil Disputes (Lorraine Weinrib); The Reallocation of Disputes from Courts to Administrative Agencies (Martha Jackman); Fundamental Reforms to Civil Litigation (Kent Roach); Alternative Dispute Resolution and the Ontario Civil Justice System (Allan Stitt et al); Small Claims Courts : A Review (Iain Ramsay); Fundamental Reforms to the Ontario Administrative Justice System (Margot Priest); Barriers to Access to Civil Justice for Disadvantaged Groups (Iain Morrison and Janet Mosher).

Commission, which had been previously invited by the Ontario Courts Management Advisory Committee<sup>10</sup> to conduct a study of the appropriateness of employing juries in civil cases, was further invited by the Review to continue this work as an aspect of the Group's work on civil juries. It is, indeed, this jury study to which I first turn for it offers, in my view, a useful parable of law reform in the civil justice field.

## I. THE USE OF JURIES IN CIVIL CASES

The invitation to the Commission to undertake the study of the use of juries in civil cases was inspired, in no small measure, by the tentative view that substantial savings to the public purse could be achieved by the abolition or restriction of the use of juries in civil cases. Accordingly, it was felt appropriate to consider, once again,<sup>11</sup> whether the benefits flowing from the use of juries in civil cases outweigh the costs. The Commission was invited to study the subject rather quickly in the hope that a legislative window, if needed, would not be lost through the passage of time. With a view to stimulating public discussion of this subject, the Commission produced, a few months later, a Consultation Paper<sup>12</sup> examining the history of the use of civil jury trials in Ontario, experience in other jurisdictions and an assessment of the arguments for and against the continued use of juries in civil cases. It is not unfair, in my view, to suggest that a good deal of unconvincing rhetoric is spoken on this subject. Thus, for example, it is often argued that the civil jury should be retained because "people ought to be allowed to have juries if they want them", a view which conveniently ignores the fact that in many cases one party (on the advice of counsel) wishes to have a jury and the other does not. The Consultation Paper attempted to evaluate the traditional justifications and critiques of the civil jury and in the course of doing so, attempted to weigh the costs and benefits of civil jury trials.

The matter of costs proved elusive. We were confident that jury trials take longer than non-jury trials and that, for this and other reasons, surely some additional expense was involved in providing civil juries. We were assured by Ministry officials that something in the order of 19 percent of civil trials in the province are conducted

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10. An advisory committee consisting of the senior judges of the courts and representatives of the Ministry, the bar and the laity. See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 73.
  11. The matter had been considered previously in Ontario. In 1968, the Royal Commission Inquiry into Civil Rights recommended the abolition of the right to a civil jury trial except in a small class of cases including defamation, malicious prosecution and false arrest. In 1973, the Ontario Law Reform Commission made a similar recommendation. See, Ontario, *Royal Commission Inquiry into Civil Rights* (1968), Rep. No. 1, Vol. 2 at 850-860; Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973), Part I at 329-350.
  12. Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).

with a jury.<sup>13</sup> It was thus apparent that the expense involved was non-trivial. We received very sceptically, however, the advice that as best could be determined from Ministry statistics, jury trials, in fact, take no longer than non-jury trials. Indeed, we preferred to place reliance on the advice we received from experienced court administrators, and counsel who assured us that jury trials require something in the order of an additional day to conduct.<sup>14</sup> This advice was consistent with an American report which had reached a similar conclusion on the basis of a careful empirical study.<sup>15</sup> On this basis and on the basis of other evidence relating to the costing of courtroom officials and juror fees, we felt able to conclude that the provision of civil juries does indeed constitute a substantial expense. Further, the Consultation Paper tentatively concluded that the costs of civil juries, on balance, outweighed their benefits in many cases and the Paper's tentative conclusion, therefore, was that further restrictions on the availability of the civil jury ought to be introduced. The Paper then invited written submissions to assist the Commission in fashioning its final recommendations concerning the civil jury issue.

Although the responses to the Consultation Paper we received reflected a range of opinions, the overwhelming weight of the reaction was critical of the Paper's tentative recommendation.<sup>16</sup> We were criticized moreover, by some correspondents for our reliance on American data with respect to the relative length of jury trials. Membership surveys were undertaken by the Advocates Society and by the Canadian Bar Association — Ontario. In each case, the responses indicated substantial professional support for the jury. Conversations with counsel from outside the major metropolitan areas indicated that we had failed to fully appreciate the importance of access to a jury in smaller communities, and so on. Thus chastened, we resolved to devote more time and resources to a study of this subject than we had initially planned and we undertook, within the constraints of a modest budget, some further additional empirical work.

We remained perplexed about our inability to get to the bottom of the costs issue and initiated a small-scale project to examine actual court files with a view to getting accurate information on the relative length of jury and non-jury trials. Our study was quite revealing. In the first place, it became apparent that the concept of a "trial" is somewhat ambiguous for statistical purposes. Discussions with trial coordinators at various sites indicated that some of them were in the practice of recording as trials every matter that had been listed for trial whether or not an actual trial, in the sense of a hearing, had occurred. Indeed, as best we could determine, actual trials appeared to occur in only 43 percent of the matters which had been

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13. *Ibid.* at 7 and 8.

14. *Ibid.* at 25-29.

15. National Center for State Courts, *On Trial : The Length of Civil and Criminal Trials* (1988).

16. A full account of the Commission's consultation process is set out in the Commission's final report. See Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (1996), chap. 5.

recorded as "trials" in Ministry statistics.<sup>17</sup> At the time of preparing our Consultation Paper, then, we had overestimated the number of civil jury trials occurring within the province by a factor of more than 100 percent.

Most interestingly, perhaps, our study revealed that indeed the median and average length of a civil jury trial is not significantly different from the median and average lengths of a non-jury trial. When the actual trial files were examined, however, the explanation for this counter-intuitive fact became apparent. Civil jury trials settle more frequently and more quickly than non-jury trials. When comparing the length of trials for costing purposes, of course, one includes both cases which go through a full trial and those which settle during the trial. Thus, although it is no doubt true — as we suspected — that an average jury trial, if it goes through to completion, will take longer than an average non-jury trial, the effect of the settlement rate is that, on average, civil jury trials take no longer than non-jury trials. Thus confronted with the phenomenon of the settlement effect of juries and, presumably, jury notices, the possibility of determining the true cost of jury trials became even more elusive. Although we were able to estimate that the actual out-of-pocket public expenses peculiar to the use of the jury amounted to approximately \$1,600 per trial on average,<sup>18</sup> we were unable to conclude that abolition of jury trials would effect a substantial reduction of public expenditures on civil justice.

With the apparent collapse of the cost-benefit argument for restricting the use of civil juries, we focused greater attention on what we characterized as the "conscription problem". Jury service is one of the few occasions on which citizens are conscripted to perform a public duty. For many, perhaps most, one might assume, jury service would be an unwelcome intrusion into busy lives, especially in the context of civil cases where the subject matter in dispute would very commonly be personal injuries arising out of motor vehicle accidents. With our renewed faith in the need to check the facts, however, we decided to undertake a survey of individuals who had served as jurors in civil cases. Again, the results were not as anticipated.<sup>19</sup> The questionnaire sent out to former jurors enjoyed a very high response rate. Many of the respondents indicated that they were very pleased to be invited to comment on their experience. In general, former jurors reported very high levels of satisfaction with their jury service. Moreover, the results indicated that service on a jury enhanced their approval of the jury as an institution. Indeed, a substantial majority indicated that if they were involved in a civil matter going to trial they would prefer to have the matter tried by a jury. Although the results of the juror survey offer a more complicated picture than I have portrayed here, it was certainly our view that it would be difficult to justify abolition or substantial restriction of the use of civil juries on the basis that compulsory service on civil juries was a largely negative experience for an oppressed citizenry.

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17. *Ibid.* chap. 6.

18. *Ibid.* chap. 6, section 2. Interestingly, this amount corresponds closely to the jury notice fees charged in some provinces. See *ibid.* chap. 7, section 2.

19. *Ibid.* chap. 7, section 3.

I will not elaborate further on the Commission's findings nor, indeed, on the recommendations ultimately made in the Commission's final Report on this subject,<sup>20</sup> except to indicate that our proposed reform of the civil jury system was much more modest than that tentatively proposed in the initial Consultation Paper and that these modifications to our recommendations were very much informed by our empirical work and our consultation process. For present purposes, rather, my concern relates to the lessons that can be drawn from a research and reform exercise of this kind. I wish to emphasize three points.

First, and this is essentially the theme of this paper, I was quite surprised to discover how very little we know in any systematic way about various aspects of the administration of civil justice. Our modest efforts in the jury study to uncover some basic information concerning the use of civil juries enjoyed some success. But they left me quite impressed with our lack of systematic knowledge and understanding of the functioning of the civil jury process. As I shall suggest here, this is, I believe, a pervasive problem in the context of civil justice reform efforts.

Second, and I believe this is also a pervasive phenomenon in research in this area, I was struck by the counter-intuitive nature of the results generated by empirical research. Inescapably, one engaged in this sort of work makes assumptions about the existing system and how it functions or about how it may be affected by reform measures. It is perilous, in my view, to proceed on the basis of such assumptions without testing them empirically.

Third, and this is merely an application of the second point to the general theme of this conference, I have been impressed by the ease with which we make assumptions about public perceptions of various aspects of the administration of justice which are also largely untested. I suspect that I am not alone in being mildly surprised that people by and large appear to enjoy and profit from the experience of sitting on juries in motor vehicle cases. More generally, however, our civil justice system has been designed, in part at least, on the basis of certain assumptions with respect to public perceptions of fairness and justice. We have constructed an elaborate due process model of civil justice on the theory (pretty much untested) that fair procedures would increase public satisfaction with the system. Such studies as have been undertaken with respect to public perceptions of the civil justice system confirm that the system is generally considered to be too expensive and unwieldy.<sup>21</sup> On the other hand, an Ontario study of public perceptions discloses, perhaps surprisingly, that motor vehicle accident victims report high satisfaction with the system, with the outcome in their particular cases, with their lawyers and, indeed, their lawyer's fees.<sup>22</sup> Do we really know whether the attention paid in the system to due process assists in

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20. Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (1996), *supra* note 16.

21. See, generally, S. Wain, *supra* note 8.

22. W. Bogart and N. Vidmar, "Problems and Experience with the Ontario Civil Justice System : An Empirical Assessment" in A.C. Hutchinson, ed., *Access to Civil Justice* (Toronto : Carswell, 1990) at 19, 34 and 40.

generating this positive response? Can we predict with accuracy whether dismantling the due process model to some extent will reduce public satisfaction with the system? Interestingly, an American study of tort litigants found greater correlation between satisfaction with the system and due process than with the impact of cost and delay, leading the authors to suggest that "[i]f more rapid or less expensive procedures accomplish cost and time savings at the expense of apparent dignity, carefulness or lack of bias, they may constitute a poor bargain in the eyes of litigants".<sup>23</sup> This is not to suggest, of course, that problems of unacceptable cost and delay need not to be addressed. My point is the more modest one that it would be unwise to base substantial reform proposals on untested assumptions about public perceptions, needs and wants.

## II. THE CURRENT INVENTORY OF CIVIL CASES AND TRENDS

Given the nature of the issues assigned to the Fundamental Issues Group, an obvious starting point for analysis was to ask questions about the existing inventory of the civil caseload and any trends that might be observable within the last few decades. Those who have done research work in the civil justice field will not be surprised to learn that we found that it was very difficult to obtain accurate and precise information on what might appear to the uninitiated to be very basic questions of this kind. Although heroic efforts are made by Ministry statisticians to produce annual statistics which are as revealing as possible under the circumstances, we as a society have simply not invested very significantly in the creation of effective statistical or management information systems in the civil courts. Thus, fine-grained data about the types of cases in the court system are simply not available. Data that does exist with respect to case types is sufficiently broad or crude in its categories that it offers little assistance to one contemplating reform measures at the operational level. The difficulties we experienced in the jury study were thus replicated when we looked at the broader picture. Although it is possible in Ontario to get some sense of litigation trends by examining data concerning court filings, it is much more difficult to gain information concerning the nature of cases actually tried. Accordingly, as with the jury study, we resolved to attempt a modest study which would include examination of actual court files.<sup>24</sup>

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23. A.E. Lind et al, *The Perception of Justice* (Rand : 1989) at 78, referred to in Swain, *supra* note 9, sec. 2(d)(ii) c.

24. See J. Twohig et al, *supra* note 9.

Again, the results of the study are not entirely in accord with what might have been one's initial assumptions. For example, if one labours under the assumption that Ontario, perhaps under American influences of one sort or another, has become an increasingly litigious society, it may be of interest to note that civil filings reached a twenty year low in Ontario in 1994, albeit, after reaching a twenty year high in 1992.<sup>25</sup> Though the picture is rather more complicated than I am here portraying, our study suggests, albeit tentatively, that litigiousness may be more related to the economic cycle than to a cultural shift in the Canadian identity. Similarly, if one assumes that the litigation boom is related to the increasing productivity of our legislators, our study offers little evidence in support of this thesis.<sup>26</sup> The dominant component of the annual filings consists of collections and other contracts cases.<sup>27</sup> If one examines the nature of the cases coming to trial, however, motor vehicle and other negligence claims constitute a close second. When one examines claims resting on a statutory basis, however, it is difficult to find significant evidence of claims being made upon the foundation of recently enacted statutes. The overwhelming majority of the claims studied rested on a common law basis.

The authors of this pioneering effort are to be congratulated for accomplishing much within limited resources. Nonetheless, one comes away from the exercise with an increased appreciation of the very limited extent of the data base we have concerning the existing court system and its case inventory. The absence of a satisfactory statistical or management information system within the administration of civil justice stands as a virtually insurmountable hurdle to rational analysis and reform.

### III. SETTLEMENT

Our study of the use of the jury in civil cases served to highlight an area of inquiry with respect to which we have very little Canadian information or analysis — the settlement of disputes. Our initial work on the use of the jury in civil cases unwisely ignored the apparent settlement effect of the filing of jury notices. More generally, of course, we know that settlement rates are both very high and very important to the operation of the civil justice system. Estimates of settlement rates<sup>28</sup> typically run in the 95 to 97 percentage range. That is to say, something in the order of 3 to 5 percent of all cases filed ultimately go to trial.<sup>29</sup> It is no exaggeration, therefore, to suggest that the current size and architecture of the system for administering civil justice is quite dependant upon the existence of an extremely high settlement rate.

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25. *Ibid.* section 3.

26. *Ibid.* section 5.3.

27. *Ibid.* section 5.2.

28. I use the term "settlement rate" rate loosely here to include all non-trial dispositions including abandonments and default judgments. We do not know what percentage of this total is actually constituted by settlements in the strict sense.

29. See, e.g. Watson, *supra* note 6, at 298.

Similarly, the impact of any adjustment in that settlement rate could have a profound impact on the functioning of the system. Thus, if procedural reforms were introduced which had the effect of decreasing settlement rates by only one or two percent, the impact on the number of trials occurring could represent an increase of one-third to two-thirds if the settlement rate is 97 percent or one-fifth to two-fifths at the 95 percent end of the range. And yet, we really have very little information, systematic or otherwise, about the settlement process and very little basis for predicting the impact of various types of reform on settlement rates. Indeed, in Ontario at least, we have no certain information about the most basic of facts — which cases have in fact settled? Our lack of precise information of this kind makes our assessment of the nature of trial backlogs highly problematic indeed.

It may be useful to identify some of the implications of our lack of understanding of the settlement process. First, we should note that these very high settlement rates are recorded in systems in which there is no third party intervention in the settlement process required by the governing rules of process and procedure. Against this background, the increasing use, in many jurisdictions, of third party and in particular judicial intervention in the settlement process raises a number of interesting questions. If we assume that settlement is typically in the interest of the parties and of society more generally, we may ask whether judicial or third party intervention increases settlement rates. Such studies as have been undertaken on this subject offer mixed results. The general thrust of American research, however, suggests that the investment of judicial resources in settling cases neither increases the settlement rate nor increases the productivity of those resources.<sup>30</sup> On the other hand, an Ontario study of approximately 160 cases, half of which were randomly assigned to settlement — oriented pretrial conferences, suggests that higher settlement rates were achieved.<sup>31</sup> What does seem clear, however, is that the application of these resources to the settlement of the approximately 95 percent of cases that would have settled in any event is difficult to justify on the basis that this conduces to a maximization of the efficient use of judicial resources. Indeed, American studies suggest that any savings that might be produced by increased settlement rates are probably off set by the opportunity cost of utilizing judicial time in this way.<sup>32</sup> There may be, of course, other justifications for the deployment of judicial resources in this fashion. It may well be that cases in which such interventions occur settle more quickly with resulting benefit to the parties. Further, judicial intervention may conduce to a better quality of settlement in terms of process values and, perhaps, ameliorate to some extent situations in which there is an inequality of bargaining power between the parties. Again,

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30. M. Galanter and M. Cahill, "Most Cases Settle : Judicial Promotion and Regulation of Settlements" (1994) 46 *Stan. L. Rev.* 1339 at 1366.

31. M. Stevenson, G.D. Watson and E. Weissman, "The Impact of Pretrial Conferences : An Interim Report on the Ontario Pretrial Conference Experiment" (1977) 15 *O.H.L.J.* 591. See, however, G.D. Watson, *Judicial Mediation : The Results of a Controlled Experiment in the Use of Settlement-Oriented Pretrial Conferences* (June 1984, unpublished), noting some falling off in the success rate over time.

32. Galanter and Cahill, *supra* note 30, at 1364-1371, 1388.

however, these are questions on which we have little, if any, hard information or analysis.

Further, it is increasingly likely to be the case that reform of civil justice is to be premised on an understanding that the devotion of public resources to the system must be constrained or reduced. It is not obvious how to reconcile this objective with concomitant demands for greater access to justice, if access to justice is defined as access to a speedy and relatively inexpensive trial. We may ask, then, whether settlements are, in fact, encouraged by a prolix and expensive process. It seems rather likely that they are. On the other hand, it may well be that access to a speedy trial might, in some contexts at least, encourage earlier settlement and, perhaps, a higher settlement rate. Perhaps it is even more likely that, again in particular contexts, access to a speedy trial would ameliorate imbalances in bargaining power. In short, without an adequate understanding of the impact of these kinds of reforms on the settlement process and on settlement rates, we are not well positioned to engage in a cost-benefit analysis of any particular proposed reform.

Thirdly, we have very little analysis of the potential impact of procedural reforms on the cost and quality of settlements. It appears that in Ontario, at least, the filing of a jury notice increases the likelihood of settlement of a claim. We do not know, however, whether the higher settlement rate is to be explained by attractive or unattractive reasons. Does the filing of a jury notice intimidate some types of litigants, thus facilitating the extraction of "unfair" settlements? In the personal injury field, for example, different views on this point were communicated to the Commission by members of the plaintiff and defence bars. On the other hand, does selection of a decision-maker whose predisposition cannot be known in advance level the playing field for the parties in some contexts and thus facilitate "fairer" settlements? Will third party intervention in settlement increase its cost to the parties? Will mandatory judicial intervention with a view to settlement provide counsel with an excuse or reason not to pursue settlement discussions independently? Will the front-end loading of some kinds of costs that might be associated with judicial intervention — such as case management witness statements — increase or decrease the cost of settlement to the parties on average? Again, we have very little basis for predicting these kinds of impacts.

Perhaps it is not too much to suggest, then, that an increased understanding of the nature of settlement processes could very much enhance our understanding of our current system and our ability to engage in thoughtful reform. I am unaware, however, of any current research being done in Canada on this topic.

#### **IV. COSTS**

A familiar theme in much contemporary discussion of reform of administration of civil justice relates to the question of the costs of litigation, both public and private. The cost of an average law suit is presumed to be beyond the reach of many ordinary potential litigants. Governments concerned with fiscal constraint are increasingly concerned to reduce the level of public sector resources devoted to the

administration of civil justice. Again, however, it appears that little is known about the quantum of these private and public costs and, in turn, about the most effective means for reducing them, without, at the same time, unacceptably or unattractively reducing the quality of justice administered by the system. Further, it appears that little is known about the interrelationship between public and private costs. Do particular measures designed to reduce public expenditures simply off load these costs or, indeed, impose greater costs upon private parties? Such questions seem to be rarely asked or, more importantly, answered.

The Ontario Civil Justice Review, in its First Report, lamented the absence of hard data with respect to public and private costs of the administration of justice. As well, however, the Report attempts to assemble some information of this kind with a view, it appears, to whetting the reader's appetite for better information.<sup>33</sup> The Review examined gross data concerning provincial public resources devoted to courts administration within the province, only to concede, in due course, that it is virtually impossible to estimate the public resources absorbed by a typical three day trial, a figure suggested very tentatively to be "perhaps as high as \$20,000."<sup>34</sup> A more confident estimate of the private costs of a three day trial was offered by the Review on the basis of a survey of lawyers across the province and on the basis of an hypothesized model of the steps required to be taken prior to and in the course of a trial of this length. The latter exercise offered an estimate of \$38,200 for one party's lawyer's fees (191 hours at \$200 per hour).<sup>35</sup> The survey indicated that the average hourly rate being currently charged by the respondents across the province was \$195 and the survey responses indicated that the median of the largest bill charged by respondents in the past two years was \$38,500.<sup>36</sup> The Review's findings strongly suggest that the not uncommon phenomenon of a three day trial would be beyond the means of most Ontarians. The Review did not, however, purport to identify the average bill rendered by lawyers with respect to particular types of matters, and with respect to particular types of procedures, including trials. Indeed, the Review called for the creation of a working group to address questions relating to legal fees.<sup>37</sup>

If little is known about the private costs of civil justice, it is nonetheless widely believed that it is far too expensive. As the Review notes, it is also widely believed that the practice of billing clients at an hourly rate has created an upward pressure on professional fees. Indeed, there is some evidence of a public perception that the phenomenon of "billable hours" creates an incentive for members of the

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33. *Supra* note 3, at 125-154.

34. *Ibid.* at 142. The Fundamental Issues Group discovered that it was unable, on existing data, to make meaningful comparisons of the costs of processing disputes within the courts to the cost of processing similar disputes within the administrative tribunals.

35. *Ibid.* at 143 and 144.

36. *Ibid.* at 145.

37. *Ibid.* at 149. For an illustration of the type of study that such a group could undertake, see P.L. WILLIAMS et al, *The Cost of Civil Litigation before Intermediate Courts in Australia* (Australia Institute of Judicial Administration Inc. : 1992).

profession to engage in the provision of services which are not truly necessary with a view to maximizing their return.<sup>38</sup> Although, again, the full dimensions of this problem have not been examined, if we assume this to be a problem which requires correction, there are a variety of techniques that might be explored. A number of solutions were canvassed in a background paper for the Fundamental Issues Group prepared by Professor Kent Roach.<sup>39</sup> Professor Roach considered a possibility of increased regulation of lawyer-client bills with a view to ensuring that time expended by a lawyer will not be the critical factor in assessing such bills. Another possibility would be to deregulate fees through the introduction of contingency fees. A third alternative would be to encourage or require the parties to negotiate enforceable limits or budgets for litigation. In the absence of agreement, the budget could be set by an officer of the court. A further strategy would be to better inform clients about average or suggested fees and so on. As Roach concedes, however, our current state of knowledge in this area renders it very difficult to predict which of these or other strategies that might be adopted would likely enjoy success in effectively reducing the cost of legal services to the client.

## V. EVALUATION OF IMPLEMENTED REFORMS

Understandably, reform oriented research in the civil justice field often looks to innovative changes implemented in other jurisdictions as a source of inspiration. Almost invariably, however, such reforms are implemented without an adequate attempt being made to evaluate whether such reforms have accomplished the objectives set out for them. In his background paper for the Fundamental Issues Group, for example, Professor Roach recommended that Ontario consider the adoption of a summary trial rule of the kind adopted in British Columbia in 1983.<sup>40</sup> The summary trial rule<sup>41</sup> permits a party to apply for judgment on the basis of a summary trial in which the evidence will be adduced by affidavit, responses to interrogatories or evidence taken upon an examination for discovery. Patently, the objective of the procedure is to provide a speedier and more cost effective dispute- resolution mechanism with resulting savings to the parties and to the public purse. What is not clear, however, is whether this reform has accomplished these objectives.

Such data as is available concerning the British Columbia experience offers some encouragement for the view that the new scheme is enjoying some success. Thus, it appears that the rule is being used quite extensively. The data gathered by the British Columbia Supreme Court in Vancouver indicates that for 1991 approximately the same number of matters were disposed of by summary trial applications as by traditional trials. Many other summary trial motions resulted in something other than a complete disposition and only 9 percent appeared to result in dismissal of the application in

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38. *Ibid.* at 147.

39. *Supra* note 9, section 3.

40. *Ibid.* section 5(d).

41. Rule 18A. See B.C. Reg. 178/83. Manitoba has adopted a similar rule, Rule 20.03(4). See Man. Reg. 553/88.

favour of a traditional trial. To get a full sense of the costs and benefits of the new scheme, however, one would like to know a good deal more about its operation. It would be useful to know, for example, what it is that the summary trial has replaced. Has it truly replaced traditional trials or has it replaced other types of disposition such as settlements that might have occurred without a trial in any event? One might like to know more about the 2/3 of the motions that did not enjoy a complete disposition and their costs and benefits to the parties and to the justice system. One might like to examine the true private cost of the summary trial and determine whether it is typically more or less than the traditional trial. One might also like to know more about the cost associated with the cases in which unsuccessful summary trial motions are brought and then followed by a traditional trial. In short, a thoroughgoing evaluation of the British Columbia experience would be very revealing to others who might wish to pattern their reforms on the British Columbia model.

Evaluations of this kind, however, are very rare. There may be a number of factors contributing to this phenomenon. In order to conduct such evaluations in an effective manner, it would be essential to have a baseline of pre-reform statistical data. As has been suggested above, such data would be difficult to marshal in Ontario and I suspect that this is true in other Canadian jurisdictions as well. Further, such research is considered to be expensive. I would argue, however, that it is probably a false economy in most instances to avoid undertaking evaluation of this kind, given the scale of both public and private resources being absorbed in the civil justice field. As well, such evaluation requires a clear articulation of the proposed objectives of the reform and precise identification of the problem it is designed to solve. The politics of consensus building and moving such reforms through the decision-making process may weigh against clear agreement on such matters. Finally, it is of critical importance that such evaluation be planned and undertaken prior to implementation in order to establish base lines and proper controls for the study. The proponents of reform may have more enthusiasm for implementation than evaluation at that early stage in the reform process. However it is to be explained, the dearth of such work creates problems not only for the comparativists but for those within the jurisdiction in question who wish to gain a clear sense of the progress achieved by a particular reform of civil process.

## CONCLUSION

I have attempted to persuade you that our lack of knowledge of quite basic information about the administration of civil justice makes law reform research activity in the civil justice field a rather perilous exercise. It is not my view, however, that the information context is so dismal that it renders all attempts at reform futile. Surely, the challenge for law reform in this and in other fields is to make as much progress as we can within available resources and on the basis of our imperfect knowledge of the world around us. On the other hand, there can be no doubt that our lack of knowledge and our traditional reluctance to engage in appropriate kinds of empirical research does bedevil research and reform work in this field. Indeed one highly respected American scholar in the civil justice field has observed as follows :

*[C]ivil justice reform efforts frequently proceed prior to problem definition; rarely confront difference in values and perspectives of the participants in the policy process and the court system; find little or no empirical basis to support either assertions as to what the problems are or recommendations for solutions, and often pursue policy "fixes" that are poorly understood and not well thought through.*<sup>42</sup>

This is a damning indictment from a very informed source. I suspect that we could all identify examples of reform efforts in our own jurisdictions with respect to which this line of criticism comes painfully close to the mark. What, then, is to be done? I claim no originality in offering the following three suggestions.

First, an increasing awareness of the obstacles to effective law reform in the civil justice field created by our lack of knowledge about the system itself should encourage us to make better efforts to invest the necessary resources in improving our data collection practices and statistical analysis in this field. If the current round of civil justice reform were to accomplish no more than this, the movement forward would be of unprecedented importance.

Second, I would suggest that our work in this field must become more experimental, empirical and evaluative. We simply should not make dramatic reforms to our procedural system without adequate evaluation of pilot projects and empirical testing of the assumptions on which the reforms are designed. On this point, the picture is not entirely bleak. Indeed, in Ontario in recent years there have been a number of attempts to design and implement reforms in an experimental mode of this kind.<sup>43</sup>

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42. Deborah R. Hensler in *Study Paper on Prospects for Civil Justice*, *supra* note 6, at 235.

43. Pilot projects coupled with evaluation have taken place in the contexts of court — annexed ADR, case management and mediation in the family law context.

Finally, it seems unlikely that we will continue to make steady progress in our research and reform efforts in the civil justice field if we do not find an institutional home for providing support to such activities. Our existing institutional arrangements appear to be incapable of producing the desired result. I suspect that only a truly collaborative effort involving all three branches of the legal profession and other relevant stakeholders could gather together the necessary resources and develop an appropriate national strategy. May I conclude by wondering aloud whether this is an area in which the Canadian Institute for the Administration of Justice could play a constructive role?

