**Application for a Jury Trial in Personal Injury Claims**

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## General Principles

The right to a jury trial in a civil matter is governed by section 17 of the *Jury Act*, R.S.A. 2000, c. J-3 (the "*Act*"). That provision prescribes, among other things, that a tort action in which the amount claimed exceeds the threshold set by regulation may be tried by jury. Section 17 states:

> 17(1) Subject to subsections (1.1) and (2), on application by a party to the proceeding, the following shall be tried by a jury:
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> (a) an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
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> (b) **an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation**, or
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> (c) an action for the recovery of property the value of which exceeds an amount prescribed by regulation.
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> **(1.1)** If, on an application made under subsection (1) or on a subsequent application, a judge considers it appropriate, the judge may direct that the proceeding be tried by judge alone pursuant to the summary trial procedure set out in the *Alberta Rules of Court*.
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> **(2)** If, on a motion for directions or on a subsequent application, it appears that the trial might involve
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> (a) a prolonged examination of documents or accounts, or
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> (b) a scientific or long investigation,
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> that in the opinion of a judge cannot conveniently be made by a jury, the judge may, notwithstanding that the proceeding has been directed to be tried by a jury, direct that the proceeding be tried without a jury.
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> **(3)** In this section, "proceeding" includes a counterclaim. (emphasis added)

The *Jury Act Regulation*, Alta Reg 68/1983, section 4.1, (the "*Regulation*") sets the monetary limits referred to in section 17(1)(b) of the *Act*. Pursuant to the *Regulation*, actions commenced before March 31, 2003 will qualify for jury trial if the amount at claimed is greater than $10,000. For actions commenced after March 31, 2003, the amount claimed must be greater than $75,000.

In *Purba* v. *Ryan* (2006), 397 A.R. 251 [leave to appeal refused, 2007 CanLII 2775 (SCC)], the Alberta Court of Appeal overruled earlier case law which suggested the existence of a judicial discretion to allow a jury trial in cases where claims fell below the monetary limits set out in the *Regulation*. Consequently, these monetary limits are now considered to be strict requirements. In *Purba*, Fraser, C.J.A. and Côté, J.A, for the Court, stated:

> [37] Further, the Alberta government recently increased the statutory floor from $10,000 to $75,000 (for actions begun on or after March 1, 2003). Why? It is apparent that the purpose was to restrict civil jury trials in claims over the previous statutory floor but below the new floor. It was not to leave everything up to individual judges.
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> [38] To put this in a rights lexicon, **there is no right to a civil jury trial in Alberta where the amount claimed falls below the statutory floor**: ***Lukic v. Rogers*** 2001 ABQB 508 (CanLII), (2001), 11 C.P.C. (5th) 184, 2001 ABQB 508. **Any right in Alberta is purely statutory**: see Harvey C.J.A., in ***Hubbard v. Edmonton (City)***, *supra* at 734-35 (W.W.R.), and our Court in ***Duxbury v. Calgary (City),*** (#2), [1940] 1 W.W.R. 174 (C.A.). Now actions falling under the statutory floor can attain a jury trial (if at all) only through a postulated residual discretion under R. 234.
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> [39] That takes us to the next issue. **Is there a residual "power" or "discretion" under R. 234 to order a jury trial in cases where the Legislature does not give a right to one? We conclude that for ordinary tort actions, including personal injury claims arising out of motor vehicle actions, there is not.** Sound policy reasons militate against interpreting R. 234 as conferring a residual discretion on courts to order jury trials where the Legislature has not seen fit to grant a right to the same. (emphasis added)

Once a claim is shown to meet the criteria set out in section 17 of the *Act*, the applicant has a *prima facie* right to a trial by jury. The burden then shifts to the party opposing the application to demonstrate, based on factors identified in section 17(2), why the matter should not be tried by a jury, as stated by Wachowich J. in *Govias* v. *Tempo School*, 1999 ABQB 571, 248 A.R. 189:

> [3] The right to a civil jury trial is a *prima facie* right where the case satisfies the criteria outlined in s. 16(1): *Knight et. al.* v. *Goodfellow*, (1979), 11 Alta. L.R. (2d) 191 (C.A). The court must not interfere lightly with this right: *Couillard* v. *The Municipal District of Smokey River #30*, (30 May 1980), Edmonton No. 13431. (C.A.). However, ss.16(2) gives the judge wide discretion to decide whether the case is one that can conveniently be heard by a jury: *Sayers* v. *Shell Canada Resources Ltd.*, (1981), 16 Alta. L.R. (2d) 388 (Q.B.). The term 'conveniently' relates to the issues in the matter and not to the convenience of individual jurors: *McVey* v. *Petruk et al.* (1990), 77 Alta. L.R. (2d) at 88 (Q.B.). **The onus falls on the party which opposes a jury trial to prove, on the preponderance of the evidence, that these facts fall within ss. 16(2) such that the jury will be inconvenienced in the execution of its task.** (emphasis added)

In *Shaw* v. *Standard Life Assurance Co*. 2006 ABQB 156 (CanLII), (2006), 56 Alta. L.R. (4th) 275, the analysis of factors under section 17(2) was stated by Rooke J. to involve a two-part analysis:

> [7] Once the applicant for a civil jury trial establishes the requisite type of action, and, as necessary, the threshold limit pursuant to s. 17(1) of the *Act* and s. 4.1 of the *Regulation* respectively, **then the applicant has a *prima facie* right to a jury**: *Ralph v. Robertson* (1995), 173 A.R. 146 (Q.B.- Moore C.J.); *Greenwood v. Syncrude Canada* (1998), 240 A.R. 130 (Q.B. - Wachowich A.C.J.). […]
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> [8] Even where the applicant has a *prima facie* right to a jury, s. 17(2) of the Act provides the court with discretion to deny the application. **The party opposing the application for a jury bears the burden of demonstrating that the matter cannot be conveniently tried by a jury**: *Govias v. Tempo Schools* 1999 ABQB 571 (CanLII), (1999), 248 A.R. 189, 1999 ABQB 571 (Q.B. - Wachowich A.C.J.). In exercising its discretion, the court must consider the factors outlined in s. 17(2) of the *Act*. **This determination involves the application of a two-part test**: *Nichiporuk v. McVean*, 2005 ABQB 647 (CanLII), 2005 ABQB 647 (Lee J.) at para. 16. **First, the court must determine whether there "might" be a prolonged examination of documents or accounts, or a scientific or long investigation. Second, the court must determine whether such an examination or investigation "cannot be conveniently be made by a jury"**. (emphasis added)

Consequently, pursuant to section 17(2) of the *Act*, a court hearing an application for trial by jury retains the discretion to refuse the application, even where section 17(1) criteria are met, if of the opinion that the matter cannot be conveniently tried by a jury. The court must consider, first, whether the case is likely to involve prolonged examination of document or accounts or a scientific or long investigation, and second, whether such an investigation, if present, would be inconvenient to conduct by jury.

A frequently cited case discussing this *prima facie* right and the exercise of the Court's discretion under section 17(2) is *Ralph* v. *Robertson* (1995), 173 A.R. 146. In that decision, Moore C.J. emphasized that the discretion, though broad, should be exercised only where it is clear that trial by jury would be inappropriate. He stated:

> [2] **This section makes it clear that if an applicant's case falls within one of the enumerated categories, application for a jury trial is to be granted without reservation.** In *Knight v. Goodfellow*, (1979), 11 Alta. L.R. (2d) 191 (C.A.), Lieberman J.A. articulates this principle at p. 192:
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> > The whole weight of authority in this province in construing s. 32 [the then equivalent of s. 16] of the Jury Act **is to give effect to the prima facie right of the litigant, whose claim falls within that section, to have his case tried by a jury**.
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> [3] In s. 16(2), the Legislature has limited the scope of subs. (1) in these terms:

> (2) If on a motion for directions or on a subsequent application it appears that the trial might involve
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> *(a)* a prolonged examination of documents or accounts, or
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> *(b)* a scientific or long investigation,
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> that in the opinion of a judge cannot conveniently be made by a jury, the judge may, notwithstanding that the proceeding has been directed to be tried by a jury, direct that the proceeding be tried without a jury.

[4] Consequently, where permitted, an applicant's right to a jury trial in a civil suit is not without limitations. If either of the two conditions in s. 16(2) are satisfied, and a judge is of the opinion that a jury cannot thereby effectively perform its function, then judicial discretion is granted to direct that the trial proceed without a jury.

[5] In the case of *Wenger v. Marien*, (1977), 3 Alta. L.R. (2d) 378 (T.D.), Chief Justice Milvain drew a series of conclusions with respect to s. 32(2) of the *Jury Act*, R.S.A. 1970, c. 194, which is identical to the current s. 16(2) in all but form, three of which are relevant here. At p. 383 he states:

> (1) Section 32(2) confers a discretionary power that must be exercised judicially and which should not be cabined and confined within rigid rules.
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> (2) **The situations envisaged in the subsection require a wide rather than restricted interpretation**.
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> (3) A jury is a suitable tool for determining common-sense matters but not those of a more complex nature.

[6] **In light of these observations, it can be said that the discretion contemplated by s. 16(2) is broad in breadth, but nevertheless not arbitrary. Before a judge removes a case from a jury, it must be clear, in light of the evidence likely to be adduced at trial, that a jury will be inconvenienced in the execution of its task.** In *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449, the Ontario Divisional Court cogently enunciated what inconvenience to the jury would entail. At p. 454 the Court set forth the following test:

> … will justice to the litigants in this case be better served by retention or discharge of the jury? We think that an important element in any answer to that question is which forum is more likely going to be able to comprehend, recollect, analyze and eventually weigh expert testimony on complex and highly technical scientific matters. It is essential to just determination of issues that the tribunal of fact be able to understand the case that the litigants are putting forward.

[7] It is this kind of inconvenience which s. 16(2) of the *Jury Act* envisages, one which, as Boyd McBride J. points out in *MacDonald v. Leduc Utilities Ltd.* (1952), 7

> W.W.R. (N.S.) 603 (Alta. T.D.), at p. 608, "relates to the nature of the issues raised, technical or otherwise, and not to the personal convenience of the individual jurymen."" (emphasis added)

Similarly, in *McVey* v. *Petruk* (1990), 111 A.R. 36, Picard J. emphasized that the applicant's *prima facie* right to a jury trial should not be overturned lightly. She stated:

> [12] [...]
>
> (a) **The right to a jury trial is an important, substantive right that may not be lightly taken away and only for a cogent reason**: [...] In *Couillard v. Smoky River (Mun. Dist. 30)*, Alta. C.A., Edmonton No. 1343, 13th May 1980 (unreported), McGillivray C.J.A. stated at p. 2:
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> > We are all of the view that it must first be said that **the right of trial by jury is not lightly to be taken away**. In this case the areas of expert evidence or scientific investigation are departmentalized. The issues are not complicated. The scientific evidence in relation to each issue should not be lengthy and we do not think that they can be treated cumulatively so that it can be said that the trial cannot be conveniently tried by a jury. The medical evidence is a further issue. Again, a jury is perfectly capable of appreciating this. The actuarial evidence, involving discount rates, is a matter that a judge himself would have some problem with. The subject is a complicated one. But we think on this area that a judge is in a position to instruct a jury and we cannot think that because damages may be substantial that this is a ground for refusing a trial by jury. (emphasis added)

In *Martin* v. *Hwang*, 2006 ABQB 871 (CanLII), 153 A.C.W.S. (3d) 1089, Wachowich C.J. summarized the factors to be weighed under section 17(2), emphasizing that in most cases, the party opposing trial by jury will need to demonstrate a combination of factors suggesting inconvenience, rather than just a single one :

> [7] The Defendant has a *prima facie* right to a civil jury trial if the action meets the requirements set out in s. 17 of the *Jury Act*: ***Ralph* v. *Robertson*** (1995), 173 A.R. 146 (Q.B.). This claim meets the requirements of s. 17(1)(b). The action is founded on a tort, it was commenced after March 2003 and a claim is advanced for damages of more than $75,000.
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> [8] Section 17(2) of the *Jury Act* provides that a judge may direct that a matter be tried without a jury if the trial may involve a prolonged examination of documents or

> accounts, or a scientific or long investigation, that in the opinion of a judge, could not be conveniently made by a jury. **The test is one of convenience.**
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> […]
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> [12] Section 17(2) of the *Jury Act* provides that inconvenient cases for juries to hear involve prolonged examination of documents and/or accounts, or scientific or technical investigations. As well, case law has established that complexity of a case is also relevant for a court to consider when determining whether a case is inconvenient for a jury to hear. **In determining complexity a court will consider the number of experts and issues, the legal issues involved, conflicts in expert reports, causation, and other factors**: *Shaw* v. *Standard Life Assurance Co*. 2006 ABQB 156 (CanLII), (2006), 56 Alta. L.R. (4th) 275, 2006 ABQB 156, at para. 11. **Generally, a combination of these statutory and common law factors must be present in a matter before a jury will be denied to a defendant**: *Shaw*, at para. 12.

**The *Shaw* Decision and "Inconvenience" under Section 17(2)**

The decision in *Shaw* v. *Standard Life Assurance Co*. (2006), 56 Alta. L.R. (4th) 275 provides extensive discussion and synthesis of case law related to the determination of "convenience" on an application for jury trial. Rooke J. in *Shaw* set out the criteria relevant to the exercise of judicial discretion under section 17(2):

> [10] In this context, "inconvenience" (or the absence of convenience) is defined not as personal inconvenience to an individual juror, **but the ability of jurors to record, comprehend and collate evidence, and to recall/recollect, assess and analyse the information**: […].
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> [11] There are a number of criteria for determining "inconvenience" that have developed through case law over the last 10 years and before. In particular, the criteria relevant to any s. 17(2) analysis include the following:
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> 1. prolonged examination of documents (s. 17(2)(a));
> 2. prolonged examination of accounts (s. 17(2)(a));
> 3. scientific or technical investigation (s. 17(2)(b));
> 4. long investigation (s. 17(2)(b)); and
> 5. complexity, which requires consideration of the following:
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>  i. the number of issues;
>  ii. the number of experts;
>  iii. the need for an interpreter;
>  iv. the legal issues to be put to the jury;
>  v. conflicts of expert opinions;

vi. causation; and
vii. other factors.

While, on occasion, meeting one of these criteria is sufficient to result in the dismissal of a jury application, **the cases tend to show that generally a combination of these factors must be present before the court will deny an application for a jury trial.**

[…]

[13] **It should be noted, however, that while principles abound, each case must be decided on its particular facts**; it is problematic to simply refer to general conclusions without reference to the specific facts of the cases cited:

[…]. (emphasis added)

As concerns the criteria of "prolonged examination of documents", Rooke J. stated simply:

[14] It is not the number of documents that is important, but whether the jury will need to spend an undue amount of time studying them: […]

In general, the focus under this criterion tends to be on the complexity and intelligibility of documents for the jury, rather than on their length per se.

With respect to "scientific or technical investigations", particularly as related to personal injury claims, Rooke J. concluded that such matters could in many cases be amenable to jury trials. He stated:

"[19] A personal injury action and medical records relevant thereto, by definition, will involve a scientific investigation or examination, but that alone does not necessarily preclude a jury. For example, **a medical procedure that is not unusual to the public will not be considered too scientific and complex, without more, to disentitle an applicant to a jury:** *Lee; Johnman*. It is important to note that "science" can include any science, including social sciences such as political science: *Goddard v. Day* 2000 ABQB 735 (CanLII), (2000), 200 D.L.R. (4th) 752, 2000 ABQB 735 (Q.B. - Ritter J.)

[20] As Picard J. (as she then was) stated in *McVey v. Petruk* (1990), 111 A.R. 36 (Q.B.), "doctors are capable of explaining medical procedures and information to lay persons". Therefore, **although some medical reports use specialized terminology and discuss concepts which may be foreign to a jury, if these reports are properly explained by counsel and by the live evidence of their authors, a jury will be able to understand and assess them:** *Hamblin v. Markowski*, 2004 ABQB 846 (CanLII), 2004 ABQB 846 (Wachowich C.J.)." (emphasis added)

Concerning the "complexity" factor, Rooke J. identified seven sub-factors (listed above) that should be taken into consideration. Among these, the most relevant for the personal injury lawyer are likely the

number of experts, the potential for conflicts of expert opinion, and causation. On these points, Rooke J.'s conclusions again suggest that there is considerable scope for allowing a jury trial, even where expert evidence of some degree of complexity is present. He states as follows:

> **2. Number of Experts**
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> [34] **The number of experts to be called is not necessarily, in and of itself, a significant factor in assessing the convenience of a jury trial. Instead, it is the complexity of the expected evidence that should be the focus of the inquiry:** *Sharma*; *Hanak*; *Johnman*; and *Cheema*.
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> [35] Illustrating that numbers alone may not determine an application, in *Murdoch v. Balfour*, a jury was granted despite the need for up to 26 experts to testify at trial because the case was not complex. In particular, there were no pre-existing injuries or conditions, and no conflicting expert evidence, no reconstruction, no complex loss of income claim. Instead, the real issue was merely the credibility of the plaintiff's injuries.
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> [36] However, in *Teichgraber v. Gallant* 2001 ABQB 265 (CanLII), (2001), 290 A.R. 338 (Q.B. - Wachowich C.J.), 2001 ABQB 265 (CanLII), 2001 ABQB 265, a jury application was denied with only 12 experts because of the complexity of expert evidence, which resulted from issues of causation when some of the evidence was conflicting. This demonstrates that issues of causation and conflicting expert evidence, discussed below in their own right, may also impact a decision due to the complexity they create, notwithstanding that there is not an undue number of witnesses.
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> […]
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> **6. Conflicts of Expert Opinions**
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> [45] Conflict among experts' opinions, or a "battle of the experts", may be a ground (in severe cases, sometimes sufficient in itself) for dismissing a jury application: […]. **However, it is expected that expert opinions will conflict somewhat in litigation and that at least some complications arising from conflicting opinions may be resolved by the jury in the usual manner by the assessment of credibility and the application of common sense:** *Hanak*; *Teichgraber*, and *Hennawi v. Zinger*, [2005] A.J. No.1653 (Q.B. - Wachowich C.J.). **Whether real conflicts between experts will sink a jury application ultimately depends on the jury's ability to understand the nature of the issues and discern the conflicting expert evidence:** *Green*. Applications are more likely to be denied where the conflicts are exacerbated by the number of experts to be called: *Babyn*; *Favel*; and *Smith*.
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> [46] In conducting an analysis under s. 17(2), the court must clearly distinguish between real conflicts of expert opinions on the one hand and the credibility of a plaintiff in subjective self-reporting on the other: *Sinclair v. Stehr*, 2002 ABQB 374 (CanLII), 2002 ABQB 374 (McMahon J.). In *Sinclair*, the Court granted the application for a jury trial on the basis that the conflict in medical opinion did not arise from differing medical views but instead from the credibility of the patient's subjective complaints.

> […]
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> **7. Causation**
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> [47] Where the analysis of causation involves complex factual and legal issues with respect to pre-existing conditions and subsequent injuries, these are typically considered inconvenient for a jury trial: […]. **However, that is not always the case, especially if other criteria negative to a jury are not present in abundance:** […].
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> [48] **Cases in which civil jury applications have been granted tend to not have conflicting expert opinions as to causation: *Lentz*. However, properly instructed juries may be able to sort through the causation issues associated with simple low-impact and rear-end collisions:** *Danser*; *Hamblin*; and *Sandhawalia*.
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> [49] Pre-existing health conditions, multiple collisions and subsequent injuries may complicate the issue of legal causation, but the fact that the plaintiff has suffered injuries in a subsequent accident does not, in itself, prohibit the matter from being decided by a jury: *Ali v. Murdoch*, 2004 ABQB 720 (CanLII), 2004 ABQB 720 (Wachowich C.J.); *Johnman*; *Cheema*; and *Chan*. (emphasis added)

Rooke J. concluded his analysis as follows, asserting that in his view, juries can be trusted to handle reasonably complex matters:

> [57] It should be apparent from the foregoing that the factors at play in determining whether a jury is appropriate (that is, "convenient") are linked and, to a degree, overlapping. However, the principles are not complex or difficult to apply. In every case, the issue is one of convenience, as defined above, and the issue of convenience is inextricably linked to the issue of complexity. **Civil juries can be trusted to competently assess a certain degree of scientific information, and can be expected to fairly weigh issues of credibility. They will, in many cases, be able to assess the evidence of disagreeing experts and come to conclusions with respect to causation, where it is in issue.** However, as the number of factors indicating that a searching analysis of complex information will be required increase, the less convenient an action will be for trial by a civil jury. (emphasis added)

**Case Law Specific to Personal Injury Claims**

The case law provides many examples of cases in which applications for a jury trial have been granted in personal injury matters. In general, these decisions correspond to the approach set out in *Shaw*; that is, the court typically makes a specific finding that the injuries, legal issues and/or expert evidence involved, while scientific or technical in nature, are not so complex as to be beyond the jury's understanding.

These cases also frequently reiterate the view espoused in *McVey* v. *Petruk*, cited earlier, concerning the ability of experts to reduce technical or scientific information to language that can be understood by jurors. In that case, dealing with injuries resulting from a motor vehicle accident, Picard J. granted the plaintiff's application for jury trial, concluding that the matters at issue, including the expert evidence, were not more complex than could be handled by a jury:

> [17] On the material before me, I am not persuaded that this case will involve such a prolonged examination of documents or matters of such complexity that it could not conveniently be tried by a jury. It does not appear that conflicting medical evidence will be tendered. The medical evidence that counsel for the doctors and for the hospital anticipate putting in at trial is not so difficult that it cannot be reduced to plain and understandable language. I believe that doctors are capable of explaining medical procedures and information to lay persons.

Similarly, in *Esmail* v. *Hanna*, 1999 ABQB 485 (CanLII), [1999] A.J. No. 745, it was anticipated that the parties would call expert witnesses from at least four medical disciplines, as well as an economist. Both causation and quantum of damages were at issue, although the defendant had admitted liability. Wachowich C.J. allowed the defendant's application for jury trial, holding as follows:

> [8] In determining "convenience", the focus is on the complexity of the issues involved which effect the juries ability to "follow, comprehend, analyze and weigh the conflicting and often confusing testimony of experts in a highly scientific area of activity": ***Soldwisch* v *Toronto Western Hospital*** (1983), 43 O.R. (2d) 449 at 452 (Div. Ct.). The number of issues or the volume of evidence are not determinative: ***Przybylsk*i v *Morcos***, *supra*.
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> [9] I find that the Plaintiff in this case has failed to discharge its onus. After a careful analysis of the reports filed by both the Plaintiffs and the Defendants it appears that this case involves no issues more complex than those in ***Peterson* v *Bischoff***, [1998] A.J. No. 93, where I granted the defendant's application for a civil jury trial. In fact, the issues of the case at bar are simpler than in ***Peterson* v *Bischoff***, *supra*, as the Plaintiffs here are not suffering from pre-existing injuries which complicated the issue of apportionment of liability in that case. Also, the medical reports on file are not highly conflicting as to the extent of the injuries. **I share the confidence of Justice Picard in *McVey* v *Petruk* (1990), 44 Alta L.R. (2d) 88 at 95 (Q.B.) where she stated, the "medical evidence ... is not so difficult that it cannot be reduced to plain and understandable language. I believe that doctors are capable of explaining medical procedures and information to lay persons".**
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> [10] It is also clear that the fact the collision was low impact does not, in itself, make it an inappropriate case for a jury: ***Peterson* v *Bischoff***, *supra* and ***Sandhawalia* v *McGurk***, [1997] A.J. No. 1180 (Q.B.). This is especially the case as in their application, the Defendants have submitted that they would not call accident reconstruction experts. It is the evidence of these experts which frequently makes such

> proceedings too complex and scientific for a jury: ***Dietz* v *Ramsey***, [1999] A.J. No. 448 (Q.B.), also citing ***Favel* v *Shepard*** (1997), 202 A.R. 220 (Q.B.).
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> [11] **A final factor to consider is the extent to which the Defendants plan to challenge the expert evidence adduced by the Plaintiffs: *Babyn* v *Patel*, [1997] A.J. No. 261 (Q.B.). The material filed for the defence makes this difficult to determine, nevertheless, I do not see this as sufficient reason to refuse this application for a jury trial.** I find support for this reasoning in previous decisions where I dealt with similar difficulties. In both ***Peterson* v *Bischoff***, *supra* and ***Singh* v *Malhi***, [1999] A.J. 119 (Q.B.), I granted the applications for a civil jury trial though it was not clear to what extent the defendants would challenge the experts called by the plaintiffs. It is of note that in these cases the application for the jury trial was successful even though additional potentially complex issues existed. In ***Peterson* v *Bischoff***, *supra*, the plaintiff had suffered pre-existing injuries and in ***Singh* v *Malhi***, *supra*, interpreters would be used for parts of the trial, though not for the expert witnesses. (emphasis added)

In *Ali* v. *Murdoch*, 2004 ABQB 720 (CanLII), 134 A.C.W.S. (3d) 798, liability, causation and damages were all live issues. The medical evidence, while not lengthy, emanated from specialists in several different disciplines and was considered likely to be challenging for a layperson. In addition, the issue of causation was alleged to be complicated by both a prior and a subsequent car accident. Wachowich C.J. nonetheless allowed the application for jury trial, holding that, on the facts of that case, none of the factors cited by the plaintiff were sufficient to preclude the jury trial sought by the defendant:

> [11] In this matter, the Plaintiff's argument focuses on the length and complexity of the scientific evidence to be lead by the medical experts, and the potentially complex determinations that will be required in relation to the issues of causation and apportionment of damages.
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> [12] **The number of expert witnesses to be called is not significant in assessing whether a jury trial would be inconvenient: *Sharma v. Smook*** (1996), 177 A.R. 353. **Instead, the inquiry centres on whether a jury could conveniently understand, recollect and process the scientific information, and whether a layperson would likely be able to comprehend and evaluate potentially perplexing or conflicting medical evidence and analysis: *Hanak v. Kirkpatrick***, 2000 ABQB 445 (CanLII), 2000 ABQB 445.
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> [13] The medical reports submitted in this application are not overly complex or lengthy. **The scientific processes and medical terminology contained in the reports may be challenging for a layperson. However, the stated medical conclusions are clear and concise, and would not be beyond a jury's understanding. I am satisfied that the experts' conclusions could be explained in layperson's vernacular such that they could be understood and analysed.** The Plaintiff speculates that later medical reports may be more complex, and that the Defendants are likely to enter conflicting medical evidence at trial. That is a possibility. **However, this application cannot be decided on the basis of speculation.** (emphasis added)

In *Dhaliwal* v. *Edmonton Public School Board*, 2008 ABQB 429 (CanLII), 169 A.C.W.S. (3d) 755, the application for jury trial was considerably aided by the fact that liability was admitted and the defendant did not contest the extent of the plaintiff's physical injuries. Dispute in that case centred around the quantum of damages, particularly as to the plaintiff's claim for loss of future earning capacity. Although the plaintiff anticipated calling as many as 18 witnesses, and medical and other reports to be examined were alleged to be lengthy, Wachowich J. found that the limited scope of issues to be decided made these elements manageable for a jury. In addition, while the jury would likely be presented with hundreds of pages of medical charts, expert reports and other documents, the content of these materials was not considered overly difficult for a jury to understand. Wachowich J. stated:

> [11] As noted by the Court in ***Shaw,*** the query the Court is concerned with is not the number of documents, but whether the jury will be forced to spend an undue amount of time studying those documents: para.14.
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> [12] Dhaliwal indicates that if this action is tried by a jury, **he intends to call all of his treating physicians and present their medical charts and reports to the jury.** The Court was not provided with an estimate as to number of pages contained in these medical charts. He further contends that his school file, containing approximately 500 pages to 2006, will be a crucial element given his loss of future income claim. Leaving aside for the moment the issue of the necessity of calling each of the treating physicians, **one would not expect that a review of a school file and medical charts would be overly labourious for the jury. This is especially so given the Defendants acknowledgment in their brief that they do not dispute the extent of Dhaliwal's objective physical injuries. Accordingly, the review of the medical charts and reports by the treating physicians will likely not warrant an undue amount of attention.**
>
> [13] The expert witnesses Dhaliwal intends on calling are an orthopaedic specialist, a vocational assessor, occupational therapist and a labour economist. These reports combined consist of just over 100 pages. The Defendants only intend on calling two expert witnesses in the area of occupation therapy and vocational assessment. Together these expert reports total approximately 57 pages. **A review of all these expert reports reveals that the bulk of each consist of summaries of Dhaliwal's medical history, straightforward observation, test results and photographs, none of which will require the jury to spend an undue amount of time studying.**
>
> [...]
>
> [22] **There will likely be 6 expert witnesses called in this action; 4 by Dhaliwal and 2 by the Defendants. These experts only come from four different fields of expertise which is not diverse enough to add to the complexity of case.** While the evidence provided by these experts will have to be carefully examined, the complexity of the trial will not render it inappropriate for a jury.
>
> [...]

> [25] **It is expected that expert opinions will conflict in litigation but it must be remembered that such conflict will not always equate to complication.**
>
> [26] There will be no conflicting medical evidence given the Defendants' concession that they do not dispute Dhaliwal's objective injuries. There is conflict between the reports of the occupational therapists and the vocational assessors as to what Dhaliwal's level of employment will be in the future based on his objective injuries. **While these experts may disagree, their competing conclusions are not beyond the scope of the conflict that is routinely expected. Each of the reports standing alone are clear and understandable and there are not so many that the jury will not be able to keep track of them all. The jury in this case would be able to rely on its collective common sense to assist it in resolving the experts' inconsistent conclusions.** Further, the fields of expertise between which the conflicts occur are closely related allowing the jury to engage in a meaningful assessment of reliability and credibility. I do not find that the conflict between the expert opinions in this case would render it too complicated for a jury to hear. (emphasis added)

In *Murdoch* v. *Balfour*, 2002 ABQB 494, [2002] A.J. No. 777, the plaintiff's claim that she intended to call 24 expert witnesses did not persuade the Court that the matter was in fact as complex as the plaintiff wished to portray. McMahon J. found that the case dealt with a low impact collision from which the plaintiff appeared to have fully recovered and involved no expertise on potentially complicated issues such as pre-existing conditions or loss of future earnings. A key issue would be credibility, which was well within the ability of a jury to handle:

> [4] Counsel advise that there is no allegation of pre-existing injuries or conditions. This was a very low impact collision and the primary issue is whether the injuries complained of are as severe as alleged and whether all can be related to the accident. Indeed, a number of the plaintiff's medical reports produced suggest that she has already fully recovered.
>
> [5] The plaintiff alleges that she underwent a number of relatively novel treatments in order to seek pain relief but those issues alone do not take the matter beyond the reach of a jury.
>
> [6] There is a suggestion of an exaggerated description of the injury **which will raise a credibility issue which a jury is well able to deal with.**
>
> [7] **I am not to be unduly influenced by the number of expert witnesses since it is the complexity of the expected evidence and issues that must be considered.** See ***Shilmover*** v. ***Schubert*** [2000] A.J. No. 1299. I note that there will be no complex loss of income calculation nor cost of future care calculation. The absence of complex accident reconstruction reports and conflicting evidence in that regard is also a positive factor in relation to this application.
>
> [8] The plaintiff bears a burden of showing the matter to be beyond the reach of a jury. I conclude that the plaintiff has not discharged her burden and, accordingly, the

> application for a trial by jury is granted on the usual terms as to the posting of costs. (emphasis added)

In *Hanak* v. *Kirkpatrick*, 2000 ABQB 445, [2000] A.J. No. 757, the presence of complicated expert reports was found not to prevent a jury trial, since the conclusions of the reports were clear, as were the explanations provided by the experts concerning the complex elements of the expertise. This was the case despite conflicts in the expert opinions which would have to be resolved by the jury:

> [7] **There are two reports that contain more complexity than the others.** They are the psychological assessment of Dr. Berendt and the economist's report of Dr. Jenkins. In her Affidavit, the Plaintiff notes that **Dr. Berendt's opinion is based on nine different standard tests and states that she believes the psychological evidence is complex.** According to the Defendants' Affidavit, this report will not be relied on at trial. Yet, even if it were, **I find that the report explains the function and application of each of the nine tests clearly and concisely. The conclusions reached by Dr. Berendt from the results of each of the tests are similarly clear and concise. Thus I find that a jury would have no trouble in understanding and utilizing this report.**
>
> [8] The economist's report of Dr. Jenkins is more technical in nature. It sets out the details of the Plaintiff's damages claims, such as past and future loss of earning capacity, past and future loss of household services capacity, and future care outlays. **The report contains complicated calculations and some potentially complicated economist concepts such as discount rates and tax gross-ups. Yet again, I find the conclusions drawn from the calculations to be clear and concise, and the sources of information relied on are clearly set out. As well, I have little doubt that the concepts underlying the various calculations can be easily expressed in layman's terms, though the report itself contains little effort to do so. A jury will be able to understand and utilize this report.**
>
> [9] The Plaintiff points out that the various experts' reports conflict in their conclusions. She posits that this adds to the overall complexity of the matter and will be problematic for a jury. **It is expected that expert opinions will conflict in litigation. This fact of itself is not a reason for denying a civil jury application. As I have stated, each report standing alone is clear and understandable and their number is not so great that a jury couldn't keep track of them all. The complication arising from conflicting opinions will be resolved by the jury in the usual manner by the assessment of credibility and the application of common sense.**

In *Gagliardi* v. *Flash Electric Ltd.*, 2008 ABQB 281, [2008] A.J. No. 520, it was expressly held that the presence of a claim for loss of earning capacity, while potentially involving complicated expert evidence, does not necessarily preclude a jury trial (at paras. 9-11). Similarly, the presence of conflicting expert evidence concerning the severity of the motor vehicle accident, while very technical, was sufficiently well explained to be understandable by the jury (at paras. 12-17).

And it is to be noted that civil juries have been ordered even in the event of long trials in other jurisdictions, such as in *Makowski* v. *John Doe* 2007 BCSC 1231(a 25 day civil trial) and *Quoc Luong Toe* v. *The Toronto Board of Education* 2001 CanLII 11304 (O.C.A.) (28 days).

**Conclusion**

As Jean-Jacque Rousseau wrote in "On the Social Contract", the rights and privileges we enjoy as citizens exist contemporaneously with duties to enforce the rights and privileges of citizenship-the rights and duties are inseparable and indivisible. Thus jurors must be expected to take their responsibilities seriously and acquit their civic duties, even if the jury trial should be of long duration. Whereas once we were primarily an agrarian nation and agricultural life imposed obligations that would mitigate from long jury service, now we are primarily an urban nation and more able to shoulder the burden of a long jury trial. Moreover, the *Criminal Code* enshrines the right to a jury, without limit as to the amount of time the jury is expected to serve. Surely the right to a jury even in cases of a long civil trial should also be enshrined, as there are equally serious consequences at play, such as damages for a catastrophic injury or compensation for the loss of a career.

END