*Case Name:*

# Purba v. Ryan

**Between**
**Parmjit Singh Purba and Beant Kaur Purba, Appellants (Plaintiffs), and**
**Janie Louis Ryan and Clifford Ryan, Respondents (Defendants)**

[2006] A.J. No. 963

2006 ABCA 229

61 Alta. L.R. (4th) 112

397 A.R. 251

30 C.P.C. (6th) 35

153 A.C.W.S. (3d) 572

2006 CarswellAlta 1006

Docket: 0603-0074-AC

Alberta Court of Appeal
Edmonton, Alberta

**Fraser C.J.A and Côté and Martin JJ.A.**

Heard: June 5, 2006.
Judgment: August 2, 2006.

(64 paras.)

*Civil procedure -- Trials -- Judge's powers and duties -- Juries -- Appeal by the plaintiffs from a chambers judge's decision, ordering that the trial proceed as a jury trial, allowed and order set aside -- In their Amended Statements of Claim the plaintiffs sought individual amount below the statutory limit of $75,000 -- There was no basis on which the chambers judge could properly order*

*a civil jury trial -- Nothing in law prevented a plaintiff from reducing the amount claimed below the statutory floor to avoid a jury trial -- No general power on the part of a court to order a jury in a simple negligence suit for less than the statutory floor.*

Appeal by the plaintiffs from a chambers judge's decision ordering that the trial proceed as a jury trial. The chambers judge ordered a civil jury trial on the application of the defendants even though the amount claimed by each of the two plaintiffs was limited by pleadings and solicitors' undertakings to a sum less than the $75,000 statutory floor. Following a motor vehicle accident caused by the alleged negligence of the defendants, the plaintiffs filed Statements of Claim claiming damages for personal injury in the amount of $200,000 each. Four months after they filed their Statements of Claim and before Statements of Defence were filed, each of the plaintiffs filed an Amended Statement of Claim claiming $74,000 plus costs and disbursements. After filing a Statement of Defence to each claim, the defendants applied to consolidate the two actions and to have the consolidated action proceed before a jury. The plaintiffs agreed to the consolidation, but opposed a jury trial. At the hearing, the chambers judge suggested that the plaintiffs file a letter of undertaking limiting their individual damages to those pled in their Amended Statements of Claim. The plaintiffs did so. Even though the amount claimed in each action was under the statutory floor, the chambers judge nevertheless decided that a civil jury trial should be ordered.

HELD: Appeal allowed and the order for a jury trial set aside. Once the plaintiffs agreed to limit the damages claimed to an amount below the statutory floor there was no basis on which the chambers judge could properly order a civil jury trial. The chambers judge erred in three respects. First, the reasons for decision used the fact that the amount claimed was close to the statutory floor as a justification for ordering a jury trial. Second, the reasons also used against the plaintiffs the fact that they only later limited, and undertook to limit, their damages to $74,000 each. There was nothing in law preventing a plaintiff from reducing the amount claimed below the statutory floor to avoid a jury trial. Finally, there was no general power on the part of a court to order a jury trial in a simple negligence suit for less than the statutory floor.

**Statutes, Regulations and Rules Cited:**

Alberta Rules of Court, Rule 234

Jury Act, R.S.A. 2000, c. J-3, s. 17(1)(b)

Jury Act Regulation, Alta. Reg. 68/83, s. 4.1(b)

Rules of the Supreme Court (UK),

Appeal from the Order by The Honourable Chief Justice A.H.J. Wachowich. Dated the 18th day of January, 2006. Filed on the 1st day of March, 2006

**Counsel:**

B.D. Filips for the Appellants (Plaintiffs)

W.B. Hembroff for the Respondents (Defendants)

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Reasons for Judgment

Joint reasons for judgment were delivered by Fraser C.J.A. and Côté J.A.. Concurred in by Martin J.A.

FRASER C.J.A. and Côté, J.A.:--

## I. Introduction

**1** Under what circumstances, if any, may a jury trial be ordered in Alberta where the damages claimed in a tort action fall under the threshold amount? That is $75,000, specified by regulation (the "statutory floor") under s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3.

## II. Background

**2** In this case, the chambers judge ordered a civil jury trial on the application of the Ryans (the defendants), even though the amount claimed by each of the Purbas (the plaintiffs), was limited by pleadings and solicitor's undertakings, to a sum less than the $75,000 statutory floor.

**3** The facts briefly stated are these. Following a motor vehicle accident caused by the alleged negligence of the Ryans, the Purbas filed Statements of Claim claiming damages for personal injury in the sum of $200,000 each. Approximately four months after filing of the Statements of Claim and before Statements of Defence were filed, each of the Purbas filed an Amended Statement of Claim claiming $74,000 plus costs and disbursements.

**4** The Ryans then filed a Statement of Defence to each claim, and examinations for discovery were held. Thereafter, the Ryans applied to consolidate the two actions and to have the consolidated action proceed before a jury. The Purbas agreed to the consolidation, but opposed a jury trial. At the initial hearing before the chambers judge, the judge suggested that the Purbas file a letter of undertaking limiting their individual damages to those pled in their Amended Statements of Claim. The motion was adjourned to allow them to do so (and to permit counsel to submit relevant authorities on another issue raised by the Ryans). The Purbas did file the proper undertaking.

**5** The chambers judge then heard the adjourned motion. First, he correctly concluded that to compute whether the statutory floor is exceeded, one must consider the amount claimed in each cause of action separately, and not the cumulative total of consolidated actions. This Court had already settled that question in ***Rich v. Henson***, [1923] 2 D.L.R. 111, 19 Alta. L.R. 103 (C.A.) and ***Tree Island Steel Co. v. Treeter*** (1976), 2 A.R. 34, 72 D.L.R. (3d) 172 (C.A.). Indeed, the Ryans did not suggest otherwise on appeal.

**6** However, even though the claimed amount in each action was under the statutory floor, the chambers judge nevertheless decided that a civil jury trial should be ordered, relying on Rule 234 of the Rules of Court. He stated:

> The Amended Statements of Claim are a blatant attempt by the Plaintiffs to foreclose the Defendants' *prima facie* right to a civil jury. The Plaintiffs reduced their claims from $200,000 to $74,000. . . . It would appear that they vastly over-estimated their damages in the original pleadings and then recalculated their damages based on the statutory limit for civil juries rather than attempting to more accurately estimate their actual damages. This conduct ought to be discouraged. (***Purba v. Ryan***, [2006] A.J. No. 157, 2006 ABQB 127 at para. 20)

**7** From this order the plaintiff Purbas appeal.

## III. Issues and Standard of Review

**8** The central issue raised by this appeal is whether Alberta courts have a residual judicial discretion to order a civil jury trial even if the amount claimed in a tort action is below the statutory floor. This requires an assessment of the legislative intention underlying Rule 234 of the Rules of Court and s. 17(1) of the *Jury Act*. As a matter of statutory interpretation, it constitutes a question of law, subject to review on a standard of correctness: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 286 N.R. 1, 2002 SCC 33 (paras. 8-9); ***Pauli v. Ace Ina Ins. Co.*** (2004), 346 A.R. 263, 2004 ABCA 84 (para. 5).

**9** Subsumed in the central issue is another one. Even if there is no statutory basis for a residual judicial discretion, should the courts superimpose one on the legislative framework? For example, if a plaintiff reduces damages claimed below the statutory floor after issuing a statement of claim, does that entitle a defendant to seek a jury trial and a court to order one? Although the exercise of judicial discretion is typically reviewed on a standard of reasonableness, if the issue engages a question of law, the standard of review is correctness: ***Decock v. R.*** (2000), 255 A.R. 234, 2000 ABCA 122 (para. 13). Since the related issue here is whether a judicial discretion exists, this too is a question of law, attracting a correctness standard of review.

## IV. Relevant Statutory Provisions

**10** The Ryans contend that there are two separate legislative routes to a jury trial. One has been in place and remained substantially the same for over 85 years (as shown by Part V below). It is now the *Jury Act*, s. 17(1)(b), the relevant portion of which follows:

> 17(1) . . . on application by a party to the proceeding, the following shall be tried by a jury:
>
> . . .
>
> (b) an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation . . .
>
> (emphasis added.)

**11** Since the Purbas' actions were commenced after March 1, 2003, the statutory floor as prescribed by regulation is $75,000: *Jury Act Regulation*, Alta. Reg. 68/83, s. 4.1(b), as am. by Alta. Reg. 18/2003, s. 2.

**12** Even though the Purbas' claims are, by agreement, below the statutory floor, the Ryans contend that they have a second legislative route to a jury. They assert that second route is under Rule 234 of the *Rules of Court* (which have been validated by the *Judicature Act*, R.S.A. 2000, c. J-2, s. 63, as am. 2004, c. 11, s. 3(4)). Rule 234 provides that ". . . unless a trial is directed to be with a jury, the mode of trial shall be by a judge without a jury." (Emphasis added.) In the Ryans' view, the words "unless a trial is directed to be with a jury", confer on a court a residual judicial discretion to order a jury trial even where the amount claimed is less than the statutory floor. That, they argue, is precisely what the chambers judge did in this case when he ordered a civil jury. They assert that his decision reveals no reviewable error in the exercise of his residual discretion.

**13** In deciding whether such a residual judicial discretion exists, one cannot simply focus on Rule 234 in isolation. Instead, in assessing legislative intention, one must consider the combined effect of all relevant legislation as a whole and in its appropriate context.

## V. Legal History

**14** The starting point for interpreting this legislation must be the history of the legislation and case law on civil juries in Alberta. A review of that legislative history reveals a statutory intention

that all civil trials today be by judge alone unless a jury claimant falls within one of the categories for which the Legislature has provided an express right to a jury trial. And a review of the old case law reveals why the Alberta Legislature opted to define precisely those categories of cases in which a jury trial could be sought as of right, rather than leaving the subject to judicial discretion. In fact, to the extent that residual judicial discretion remains in Alberta, it is to deny a jury to a party who otherwise has a right to a jury, rather than to grant one where no right is prescribed.

**15** We turn now to that relevant history. Few jurisdictions have left the common law on mode of trial untouched. Legislation on the topic has been passed in various forms, and then frequently been amended. General statements of law applicable to all times and all provinces are therefore almost impossible. For example, for much of the 20th century, the Ontario *Judicature Act* and *Rules of Court* gave Ontario very different criteria for a jury than did Alberta's legislation. As a consequence, we confine ourselves to Alberta case law and legislation, and avoid cases which appear to be overruled by later legislation.

**16** The history of Alberta's legislation on mode of trial shows that it was enacted to eliminate any general power by a court to order a jury in civil cases where no right to a jury existed.

**17** This was not always so. Under England's *Rules of the Supreme Court* (adopted in 1883), trial in civil cases by judge alone was the default mode, but either party could file a notice and demand a jury in most situations. The Judicature Ordinance of the Northwest Territories contained Rules which said much the same, except that smaller cases should be tried by judge alone: See C.O. 1898 c. 21, Schedule, R. 170. England and the Northwest Territories also always had a list of about six narrow types of claim (including defamation and false imprisonment) which gave an absolute right to trial by jury.

**18** Northwest Territories law continued when Alberta was created, and some Northwest Territories Ordinances continued in force for many years.

**19** The first Alberta Rules of Court were passed by the Lieutenant Governor in Council, to take effect in 1914. At that time, there was no other legislation on mode of trial. The Juries Ordinance then in effect was confined to the mechanics of summoning jurors, and did not deal with when a trial would be with or without a jury. Under the new Rules, Rule 172 preserved the right to trial in the six narrow types of claim; so either party had the right to demand a jury if the suit fell into one of these categories. Rule 176 preserved trial by judge alone as the default mode in civil cases. The most important Rule, R. 173, provided as follows:

> In any other case, upon the application of either party, the Judge may in his discretion direct that the action or that any particular issue in the action be tried with a jury or that the amount of damages only be ascertained by a jury.

It is important to remember that that Rule was the basis for all the discussion of a "discretion". It was **not** any other Rule, such as 1914 R. 176. There has been no equivalent to 1914 R. 173 for

almost 90 years.

**20** It soon became apparent that there was substantial disagreement amongst Alberta judges as to how to interpret and apply 1914 R. 173 and its express discretion. Some thought that even if the case fell outside the prescribed six classes which gave a right to a jury, the court should consider the case on its merits and be influenced by the traditional practice. Those holding this view also concluded that since there was no presumption against civil juries, a jury should be allowed for larger contract or tort cases when requested. Others, including Harvey C.J., were of a different mind. He observed that he had drafted the jury parts of the 1914 Rules and there was no prima facie right to a jury except in the six narrow cases in R. 172: **Godfrey v. Marshall** [1917] 1 W.W.R. 1097. In his view, the Alberta practice represented a radical departure from the traditional English, Ontario and Northwest Territories practice. The critical question, as he saw it, was what would serve justice, not the desire of one party. This being so, he concluded that the old English practice should no longer govern how to exercise the new Alberta discretion under R. 173.

**21** Later that year, the Appellate Division held that the right to a jury is procedural, not substantive, for purposes of passing Rules of Court. Thus, the limitation on the former right to a jury was intra vires and the Rules were valid: **Hubbard v. Edmonton** [1917] 3 W.W.R. 732, 12 Alta. L.R. 115 (C.A.). The Appellate Division also concluded that if England had a common-law right to a civil jury, that right was not imported into the Northwest Territories or Alberta. From the outset, they governed the topic by statute: ***id.*** at 734-35 W.W.R..

**22** To clarify the law, the Alberta Legislature then intervened. It enacted 1918 c. 4 s. 54, adding a new s. 21 to the end of the Northwest Territories' Juries Ordinance, then still in force in Alberta. This new section dealt with right to trial. The Legislature expressly provided a list of cases where either party could get a civil jury as of right, by asking for it on the motion for directions. The first six cases were the familiar narrow English list, including defamation and false imprisonment. The Legislature also added three new categories of case which entitled a party to a jury trial:

1. tort wrong or grievance;
2. debt or contract over $1000; and
3. claims to recover land.

In all cases, however, a judge had power to direct a trial without a jury where prolonged examination of documents or any scientific or local investigation would be required and a jury would be inconvenient.

**23** Before this new s. 21 was proclaimed in force, the judges amended the 1914 *Rules of Court* to identical effect, probably on April 24, 1918. (Old amendments to the *Rules of Court* between published office consolidations are hard to trace today.) In any event, by September 1, 1923, the Rules were as follows:

1. 1914 R. 173 and its discretion had disappeared.

2. 1914 R. 176 still said that judge alone was the default mode of trial.
3. New R. 173 now incorporated the English exception for inconvenience because of prolonged examination of documents or accounts or a scientific or local investigation.
4. 1914 R. 172 was amended to add the three new categories (1 - 3) above from the new s. 21 of the Juries Ordinance (and the $1000 floor was applied to tort claims).

**24** Again, the Appellate Division concluded that these amendments to the Rules by the judges were valid; and in any event, the Legislature had validated them by 1918 c. 4 s. 5: **McIntyre v. Alta. Pac. Grain Co.** [1918] 3 W.W.R. 906, 14 Alta. L.R. 373 (C.A.).

**25** Then in 1921, the Alberta Legislature replaced the old *Juries Ordinance* with a new *Jury Act*, effective August 1, 1921: see 1921 c. 8. Section 32 gave the right to a jury in the same cases as had the 1918 legislation (and Rules) (except for "wrongs or grievances"). Section 33 allowed "supplementary" *Rules of Court* on topics of "machinery". That legislation was carried forward into the first revised statutes: R.S.A. 1922 c. 74 s. 32.

**26** The present Jury Act of Alberta is similar, except that inflation has necessitated an increase of the old $1000 floor to $10,000, and then $75,000, the present statutory floor.

**27** To sum up the legislative history, legislation occupied the field of civil juries from the earliest days of the Supreme Court of the Northwest Territories in 1887. That legislation gave a right to a jury (on demand) in a fixed list of types of suit. Legislation which also gave the court a general discretion to order a jury in other types of cases was only in effect from 1914 to 1918, and it proved to be a source of great difficulty during those 3 1/2 years. Since 1918, the right to a jury has been confined to what the Alberta Legislature has characterized as bigger cases. Only the narrow six English cases (including defamation and false imprisonment) have no floor amount. Tort and contract claims must be over a prescribed statutory floor (today $75,000).

**28** The most important point is that a discretionary power to order juries in other types of cases has never been in any enactment since 1918. Moreover, the 1944 and 1968 *Rules of Court* have said much less about the right to a jury, leaving that topic largely to the *Jury Act*. In addition, there never was a civil jury in District Court, where smaller cases were tried. The Alberta legislation on right to a jury was confined to the Supreme Court (and then the Court of Queen's Bench).

**29** Given this legislative history, it is understandable why this Court has held that the current legislation governs, and that pre-1918 court decisions have no bearing now, as the legislation was very different then. See ***Duxbury v. Calgary*** (#2) [1940] 1 W.W.R. 174 (Alta. C.A.). For the same reason, cases from other provinces with different legislation and different legislative history are inapplicable.

**30** Most Alberta decisions since 1918 have been about the exclusion of juries in complex cases,

not about causes of action omitted by the *Jury Act*, nor about tort or contract claims under the statutory floor. A few decisions have said that over the statutory floor, there is a right to a jury, not a mere discretion, providing that the case is not too complex.

**31** In recent years, a few Court of Queen's Bench decisions about large tort claims began to use the word "discretion" in reference to whether a civil jury should be ordered. Why this concept was introduced is not clear, and the judgments in question did not explain why.

**32** One must not lift out of context a few brief statements in ***Tree Is. Steel v. Treeter***, *supra*. That case was about juries for claims not begun by statement of claim, e.g. in counterclaims. It said nothing about cases under the statutory floor. Such problems did not and could not arise then. The floor was then only $1000, and a jury was obviously unthinkable in such a tiny suit.

**33** Only one Court of Appeal decision involved a case smaller than the existing statutory floor (and not defamation, false imprisonment, etc.): ***Quang Luong v. Mawson***(2000) 255 A.R. 299 (C.A.), affg. [1999] A.J. No. 512, 1999 ABQB 345, [1999] A.R. Uned. 284, [1999] AUD 2409. The chambers judge denied a jury and this Court affirmed that denial . The Court of Appeal's reasons are brief and oral. That appellant had argued that the chambers judge had erred in principle because he had wrongly thought that he had no choice but to deny a jury trial since the amount claimed was below the statutory floor. The Court of Appeal said that the chambers judge knew that he had a choice, and had looked at the facts, so his decision was correct. Later Court of Queen's Bench decisions have fastened on one phrase in the Court of Appeal decision saying that 1968 R. 234 gave a judge "a discretion . . . to order a jury trial even if the mandatory requirements of s. 16(1) are absent." However, the Court of Appeal cited no Court of Appeal authority for this proposition, and we cannot find any on point after the 1918 amendments.

**34** Perhaps not surprisingly, that one statement has also resulted in applications inviting chambers judges to exercise a "discretion" to order a civil jury even where the amount claimed is below the statutory floor. And in reliance on the phrase by the Court of Appeal in **Luong**, supra, a number of Court of Queen's Bench decisions have concluded that there is a discretion to order a jury in cases under the statutory floor. Most have been *dicta*, as the case was not suitable for a jury, or in any event was not clearly under the floor amount. A very few have ordered juries under the statutory floor on the grounds that the amount claimed was close to the floor amount (discussed in Part VI below).

**35** In our view, the brief statement quoted from ***Luong***is a *dictum* only, and did not specifically address the point at issue here. Nor did it have to, on the facts there. The essence of the Court of Appeal's ***Luong***decision was that the appellant's argument made no difference to the result in light of the facts.

**36** Where then does this legal history leave matters? It strongly suggests that there is no broad discretion to order a jury in other types of case which the Legislature does not list. And no Court of Appeal authority since the 1918 amendments orders (or upholds) a jury in such circumstances. The

Jury Act itself contains no provision for a residual judicial discretion to order a jury trial. Instead, the reverse is true. The judicial discretion that exists under the Jury Act is to deny a civil jury where a right would otherwise exist, in two different circumstances. First, a judge may decide that the proceedings should be tried pursuant to the summary trial procedure set out in the Rules of Court: s. 17(1.1) of the *Jury Act*. Second, if the trial might involve a prolonged examination of documents or accounts or a scientific or long investigation that cannot, in the judge's opinion, conveniently be made by a jury, then the judge may order that the matter be tried without a jury.

**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.

**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), 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.

## VI. Tort Claims below the Statutory Floor and the Judicial Discretion Theory

**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.

**40** We begin with the obvious. We cannot shut our ears to the voice of experience. Jury trials involve many extra steps and procedures, some complex and some ordinary. And jury trials take longer and cost more than would the same trials by judge alone: ***Lukic v. Rogers***, *supra* at para. 11; ***Ali v. Malik*** (2004), 366 A.R. 173, 2004 ABQB 427 (paras. 11, 18). The Ryans admit this was the view of the legislators here (factum para. 19), but contend that it is a "fallacy" that jury trials are more lengthy or expensive. On the expense issue, they submit that the party applying for the jury trial is required to pay the jury deposit, the implication being that costs should not therefore be a concern. Regarding delay, they contend that jury deliberations often take less time than would a judge in preparing his or her reasons for judgment.

**41** There are several problems with these arguments. Even though one party in a civil case may be required to pay certain "costs," those are not intended to, nor do they cover the full expense to the winning litigant, as party-party costs rarely do: ***Fahie v. Rubin***[2006] A.J. No. 121, [2006] A.R. TBEd.FE.060, 2006 ABQB 81 (para. 38.) (Jan. 27 J.D.C. 0401-10529). Still less do any fees charged to the parties reimburse fully the real expense to the public or the courts flowing from civil

jury trials. For example, there is no fee charged for the incremental court costs (whether in terms of staff time, clerk time, judge time and facilities usage) arising from the longer length of time that jury trials typically take.

**42** Nor should we overlook the biggest public subsidy of all. Members of the jury are very modestly indemnified for all their expenses and losses (including all their wages and business losses) caused by the public service which a jury order compels them to render. At present, a member of a jury receives $50 per day for his or her services; that amount speaks for itself in terms of the cost to the public of serving as a juror in a civil trial. (See Alta. Reg. 150/06.)

**43** With respect to giving reasons for decision after trial, the Ryans' argument ignores the very real additional time that must be spent by judges in preparing charges to civil juries. And though juries may well come to a quick decision on both liability and quantum, so too may a judge. Reserved reasons are not required in all personal injury cases. Further, where reasons are provided by a court, these serve as the basis for appellate review when required. Because juries do not give reasons for their decisions, the losing party in a civil case is largely deprived of the ability to challenge the decision, short of asserting an error in the jury charge. While there are many advantages to the jury system, this is not one of them.

**44** Therefore, legitimate concerns about costs and delay weigh heavily in favour of not allowing the courts to order jury trials under R. 234 where the amount claimed is below the statutory floor.

**45** We must also face squarely the Ryans' repeated argument that there is something improper about a plaintiff's limiting his or her claim to a sum less than $75,000 in order to avoid a jury trial. The defence argument appears to be that if and when this happens, it deprives the defendant of his or her "right" to a jury trial. This argument cannot be sustained. The underlying assumption, that there is an entitlement to a jury trial, is incorrect. As noted, for sound policy reasons, there is no "right" to a jury trial for actions where the amount claimed is equal to or less than the statutory floor. So the defence argues in circles.

**46** The Ryans also contend that allowing a plaintiff to reduce his or her claim below the statutory floor is unfair to defendants, because this means that plaintiffs alone control the mode of trial. But the same legal situation would prevail if a plaintiff never claimed an amount in excess of the statutory floor. Accordingly, this argument too is misconceived. A plaintiff does not give himself or herself a jury. The decision to limit access to civil jury trials is a decision of government and not of individual plaintiffs. By raising the amount of the statutory floor, the Alberta government has made a policy decision. Claims in tort or contract under $75,000 should not be borne to their destination at public expense in a Rolls Royce - a civil trial involving 6 jurors and all the time and expense that necessarily entails. There being no constitutional issue at stake here, our task is not to substitute the court's views on when a civil jury trial should be held, for the Legislature's or the Lieutenant Governor's. The government's choice should be respected by the courts, and not undermined.

**47** The Legislature's decision is not capricious. Where the damages claimed are under the

statutory floor, the defendant's liability is limited. A defendant is then not exposed to damages in excess of the statutory floor. Whether a plaintiff's claim was formerly worth more than $75,000, now it is worth less. If a plaintiff has suffered damages in excess of $75,000, that person's genuine willingness to limit his or her damages to a sum less than the amount of damages actually incurred should be applauded, and not condemned, by a defendant. Put simply, where there is no jeopardy in excess of the statutory floor, the Legislature has determined that there is no right to a jury trial - nor any right to demand one.

**48** An analogy exists in the criminal law. The accused in a criminal case, unlike a defendant in a civil suit, has a *Charter*-protected guarantee of a right to a jury trial where the maximum penalty for the offence is five years or more. See *Canadian Charter of Rights and Freedoms*, s. 11(f), (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11). In recent years, Parliament has amended the Criminal Code R.S.C. 1985, c. C-46 to create more hybrid offences. Those allow the Crown to proceed summarily, and so avoid jury trial. That flows from the *Charter* and the *Criminal Code*, because the maximum sentence that can be imposed for summary conviction offences is a lesser jeopardy, namely a maximum of two years' imprisonment. Therefore, if Parliament can limit jury trials where an accused faces a term of imprisonment, the Legislature can certainly restrict the ability of a civil defendant to a civil jury trial where the only risk the defendant faces is a monetary one, and a relatively modest one at that.

**49** The decision of the Alberta government to set the statutory floor at $75,000 is rooted in legitimate concerns about preserving access to justice for Albertans. Since neither winner nor loser is fully indemnified for litigation expense, increasing that expense deters any careful prudent litigant, especially one of modest means. The Courts should be wary of imposing additional financial burdens on people in this category.

**50** The real complaint seems to be that the Purbas first claimed larger amounts, and then reduced their claims to avoid a jury trial. But a plaintiff's reduction of the amount which he or she claims is no sham, no tricky device, no nominal gesture. The Purbas cannot recover a penny over $74,000 (plus costs). They have bound themselves to the mast of that small craft with a solemn undertaking to the court. No one suggests that suing under the small claims ceiling to get into Provincial Court is improper. We even let plaintiffs abandon part of a debt to do that. There is no jury there. Indeed, if one were to carry the Ryans' argument through to its logical conclusion, courts would be faced with the prospect of defendants asserting that plaintiffs' injuries were actually far more serious than claimed and the amount sought far too low. The illogic inherent in arguments to this effect - and where they would necessarily lead - is self-evident.

**51** Further, courts must be careful before criticizing plaintiffs' counsel in a personal injury case who pleads a certain amount in damages and then amends that prayer for relief as and when the extent of the injuries is learned. This is to be expected. Legal counsel are not evaluators of the future prognosis of an injured party. Courts sometimes criticize counsel who move suits slowly and take no step before the last possible day. But counsel who sues promptly, once a serious

disagreement as to liability or damages emerges, will rarely yet have full medical reports. Indeed, injuries and expenses will still be revealing themselves. See ***Fahie v. Rubin***, *supra* (para. 47).

**52** Moreover, if a plaintiff claims too much, or for that matter, a defendant offers too little to settle an action, there is another way to deal with this matter once a case has come to an end: costs. This is one of the reasons for the costs regime and detailed Rules relating thereto presently in effect. Thus, the prospect of either of these events occurring does not justify attributing to the courts a judicial discretion not provided for by statute.

**53** It is also suggested that there ought to be a residual judicial discretion on the part of the courts to order a civil jury where the damages claimed are close to the statutory floor. But does this justify a judge's ordering such a jury trial? Does that flow either directly, or because the amount claimed is not "relatively modest"? Again, in our view, the answers must be no.

**54** There does not appear to be much quarrel with the general outlines of the legislative scheme, that larger cases should have a right (with some exceptions) to a jury, and smaller cases should not. This dispute is over where to draw the line. The Ryans suggest that $74,000 is too close to $75,000 to make a difference and deny them a civil jury. But if $74,000 is not enough, then would $73,750 not be close to that and so too high to avoid a civil jury? Or $73,500, or $73,250, or $73,000? As a matter of policy, such a Dutch auction does not appeal to us. The advantage of a statutory floor (the regulated threshold) is certainty, and it should not be frittered away: see ***Luong v. Mawson***, *supra* (para. 4) (C.A.).

**55** The Legislature has set a threshold for a right to a jury trial: $75,000. So it matters not whether the damages claimed are $74,999 or $1; the principle is the same. Most laws involve line-drawing, especially those which set number limits. For example, everyone is either a minor (infant) or an adult. One cannot avoid a contract made a few days after one's 18th birthday. There is no reason to deviate from the legislative intention simply because in one case, the claimed amount is close to the dividing line. After all, the very purpose of a dividing line is to demarcate what falls within a right and what does not. So the bare fact that the amount claimed is close in dollar amount to the statutory floor is not a justification for concluding that there should be a residual discretion in a court to order a civil jury in these circumstances.

**56** Apart from policy, there is a question of jurisdiction. The legislation fixes the boundary between large cases (with a right to a civil jury) and small cases (with no right) at $75,000. How can a court say that the legislators were wrong, and the boundary should be lower? This sounds like the old doctrine of "equitable" treatment of a statute, which became discredited before 1800. See F.A.R. Bennion, *Statutory Interpretation: A Code*, at 400-401 (4th ed. London: Butterworths, 2002). It is improper, because it is amendment, not interpretation: see P. St. J. Langan, *Maxwell on The Interpretation of Statutes*, at 236-38 (12th ed. London: Sweet & Maxwell, 1969); cf. ***R. v. R.F.G.*** (1992), 131 A.R. 389 (C.A.). Where to draw precise lines is usually for the Legislature, not the courts, even where there is a *Charter* issue: ***Edwards Books & Art v. R.***, [1986] 2 S.C.R. 713, 35

D.L.R. (4th) 1 at 51. This reasoning applies all the more where there is no *Charter* issue.

**57** So judges cannot replace the $75,000 dividing line with a different one, such as "a modest amount".

**58** Counsel for the Ryans also questions the motives of plaintiffs' counsel. But counsel's motives, unless improper in some way, are irrelevant. If courts were to begin questioning the motives and strategies of plaintiffs' counsel in opposing a jury trial, fairness would invite the same kind of scrutiny of the benevolence and disinterestedness of the motives of defendant's counsel in requesting a jury trial. This is ground on which the courts should be reluctant to tread. The adversarial system is based on the principle that litigation strategy is for each party's counsel; neither one is obliged to take into account the interests of his or her opponents in picking that strategy. For this reason, motives in such matters ordinarily do not interest the court. In other words, whether it is prudent on a cost-benefit analysis to reduce claimed damages below $75,000 to avoid a jury trial is for a plaintiff to decide, not for the defendant allegedly responsible for those damages. To characterize a decision so made as bad motive lacks merit.

**59** In any event, if the damages incurred are less than $75,000, there is no rational reason why a plaintiff is not entitled to claim the lesser amount and step past the additional costs and time associated with a jury trial. As noted before, even a winning plaintiff at best gets party and party costs which are far less than the full amount of the plaintiff's solicitor's real bill.

**60** In summary, these various policy reasons strongly weigh against any residual discretion to order a civil jury trial where legislation has not provided one. So the history of civil juries in Alberta, the changes in relevant legislation through the years, and increasing understanding of the significant impediment to access to justice posed by increased costs and delays, all lead us to one conclusion. There is no residual judicial discretion in ordinary torts or contracts cases, including motor vehicle negligence suits, to order a civil jury where the amount claimed is under the statutory floor. Such a general discretion would contradict the legislation, ignore the legislative history, and undermine the compelling policy considerations pointing away from any such discretion. Put simply, the flip side of a statutory right to a jury trial is the absence of any such right unless a claimant falls within one of the prescribed categories determined by the Legislature. And while the courts do retain a residual discretion under the Jury Act, it is to deny a civil jury trial, not order one.

**61** Could there be any exceptions? Are there special circumstances where a court might order a civil jury? Courts in England were more willing to order a civil jury trial where a person's reputation was at stake. It may be that there could be a case outside the enumerated classes of defamation and wrongful imprisonment etc. where that was so. But here, what is at stake is money and money alone. No one is accused of malicious or disgraceful conduct. Not even an injunction is threatened, still less criminal penalties. So we would not finally decide whether a residual judicial power exists to give a jury in suits under $75,000 in certain special cases. We would leave that issue of an exception open for future consideration.

**62** If there exists a systemic problem that is now influencing choice of mode of trial in favour of plaintiffs or defendants, the courts may have to address that issue to ensure that the integrity and fairness of the civil jury is preserved. In this context, the Ryans' factum lauds civil juries at paragraph 13, saying they

> provide a check' to Justices who may otherwise find themselves in an isolated professional environment, in this limited context, having to rely exclusively upon other Judge made law' to assess general damages, and other types of subjective damages.

However, this overlooks the fact that appellate courts give guidance on proper floors and ceilings for damages. And that makes relevant for Alberta the debate in some other provinces about whether trial judges should tell juries about those floors and ceilings, and not be constrained to leave matters to be upset on appeal. That is an issue that is linked to the subject of civil juries, but it too must await another day for resolution.

## VII. Application of Law

**63** The decision here appealed flowed from three views of law or principle which we do not accept. The reasons for decision used the fact that the amount claimed was close to the statutory floor as a justification for ordering a jury trial. The reasons also used against the plaintiff Purbas the fact that they only later limited, and undertook to limit, their damages to $74,000 each. There is nothing in law preventing a plaintiff from reducing the amount claimed below the statutory floor to avoid a jury trial. Finally, in any event, there is no general power on the part of a court to order a jury in a simple negligence suit for less than the statutory floor. All this being so, once the Purbas agreed to limit the damages claimed to an amount below the statutory floor, there was no basis on which the chambers judge could properly order a civil jury trial in the circumstances of this case

## VIII. Conclusion

**64** Therefore, we would allow the appeal and set aside the order for a jury trial.

FRASER C.J.A.
CÔTÉ J.A.
MARTIN J.A.:-- I concur.