

Juries: A Canadian Historical Perspective

Introduction

There are many diverging views put forward by historians and academics about how and where our modern system of trial by jury originated. Many academics believe it came from the Anglo-Saxon or Norman period of conquest in English history.¹ However, similarities from systems dating even further back than England can be found.² While similar, these ancient methods of trial would be inadequate for modern society's complex legal system.³

Ancient Jury Systems

Traces of juries can be found in many historical records. For instance, the Greek tribunal contained members that can be considered, in parts, similar to today's modern jurors.⁴ These tribunals consisted of 10 panels of 500 Athenians from 6,000 citizens to be selected to hear a cause that must be tried and ultimately act as judges of both law and fact.⁵ This method of selection poses a similarity to the method of selection used in today's society, gathering groups of twelve jurors in as many groups as is needed for trials to be run from a broad selection of citizens. Another similar aspect to the Canadian legal system is the trials of the Greek tribunals were also presided over by a magistrate who would state to the panel the questions that were at issue and the results

¹ Robert Von Moschzisker, 1870-1939., *Trial by Jury: A Brief Review of Its Origin, Development and Merits and Practical Discussions on Actual Conduct of Jury Trials* (Philadelphia: Geo. T. Bisel., 1922) at 6-11 [*Moschzisker 1922*].

² *Ibid* at 11-12.

³ Robert Von Moschzisker, "The Historic Origin of Trial by Jury", *University of Pennsylvania Law Review and American Law Register*, 1 November 1921, Vol.70(1) at 1 [*Moschzisker 1921*].

⁴ *Moschzisker 1922*, *supra* note 1 at 11.

⁵ *Ibid* at 11-12; *Moschzisker 1921*, *supra* note 3 at 6.

of that magistrate's preliminary examination of these issues.⁶ The statement of the issues and preliminary examination would be followed by statements from the parties and witnesses.⁷

The main distinguishing feature of the Greek system was that the members of the tribunal, Dikasts, were judges of both law and fact unlike the modern Jury system in Canada.⁸ Although there is significant similarity to our modern system to be found in the Greek tribunal, no direct connection has been made between these Greek Dikasteries and the modern Canadian Jury.⁹

Turning to the Roman tribunal system, similarities can be seen between Roman Comita, their judicial council, and the modern-day jury.¹⁰ However, historians distinguish the Roman legal system from modern systems based on the fact that:

The principal and characteristic circumstances in which the trial by a Roman differed from that of a modern jury, consisted in that in the former case neither the praetor [magistrate] nor any other officer distinct from the jury presided over the trial, to determine as to the competency of witnesses, the admissibility of evidence, or to expound the law as connecting to the facts with the allegations to be proved on the record.¹¹

In order to make up for this lack of presiding authority on the law, the Roman jury system generally included one or more men who possessed proper legal knowledge (not lawyers in the modern sense of the word), in such a way the members could gain such knowledge of the law as was necessary from their own members to make a proper determination of both law and fact.¹² The Roman tribunal selected its members from the community in a similar fashion to that of ancient Athens,

⁶ *Ibid* at 11.

⁷ *Ibid* at 11-12.

⁸ *Ibid* at 12.

⁹ *Ibid*.

¹⁰ Moschzisker 1921, *supra* note 3 at 6.

¹¹ Moschzisker 1922, *supra* note 1 at 12.

¹² *Ibid* at 13.

however it also had a method of objecting to specific members chosen to try a particular case, reminiscent of our modern day jury challenge.¹³

Additionally, evidence of ancient juries can be found in northern Europe. For example, in Scandinavia Historians studying the trial by jury are unclear on how far back the ancient jury system may stretch, suggesting that “their origin lies beyond the age of clear history.”¹⁴ Definitely, they can “trace the undoubted existence of juries as far back as one thousand years; before that period, ... we must not expect to find authentic records respecting juries where all other records fail.”¹⁵

Sweden had an ancient tribunal consisting of twelve men quite similar to the modern jury.¹⁶ This tribunal of men were “sworn to investigate and ascertain the truth in any case, before whom witnesses appeared”.¹⁷ Much like other ancient systems mentioned, this tribunal judged both fact and law.¹⁸ Only seven of the twelve men were required to return on a verdict.¹⁹ Furthermore, similarities to the modern jury system can also be found in historical accounts recounting legal systems of Norway, Denmark, Iceland, Jutland, Normandy, and Germany.²⁰ Denmark also extensively used a system known as the wager of law in which “the defendant denied, on oath, the act of which he was accused, and this oath was confirmed by his conjurators, usually twelve... who declared themselves satisfied that the defendant told the truth.”²¹ Unlike the ancient trial by

¹³ *Ibid.*

¹⁴ *Ibid* at 13-14.

¹⁵ *Ibid* at 14.

¹⁶ *Ibid* at 15.

¹⁷ Moschzisker 1922, *supra* note 1 at 15.; Moschzisker 1921, *supra* note 3 at 8.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Moschzisker 1922, *supra* note 1 at 1-27.

²¹ Moschzisker 1921, *supra* note 3 at 9.

jury, where the majority determined the case, this wager of law required unanimity much like the modern jury trials of law in Canada.²²

The Development of the Jury System in England

These early systems of jury trials used by other civilizations most likely played a role in influencing the jury system as it developed over a period of centuries in England, from ancient systems to the way we understand it in modern day life.

After the Norman conquest of England in the 11th century, the accused in criminal cases were subjected to a trial by ordeal, compurgation, and combat.²³ The accuser was required to support their charge by personal combat, leading to few accusations of wrongdoing.²⁴ This method of law was replaced by the Constitutions of Clarendon in 1164, a set of legislative procedures passed by Henry II of England.²⁵ These Constitutions declared:

[W]here a party was suspected whom no one dared openly to accuse, the sheriff on the requisition of the bishop should swear twelve lawful men of the neighborhood or the vill in the presence of the bishop, and these were "to declare the truth thereof according to their conscience."²⁶

This appears to be the beginning of a body of jurors present in a criminal case after the Norman conquest of England. In these cases, the jurors were also considered the witnesses, their verdict given based on their own knowledge of the issue.²⁷ The jury was not permitted to “weigh circumstantial evidence under legal rules to investigate the fact, or the charge against the

²² Moschzisker 1921, *supra* note 3 at 10.

²³ John Proffatt, *Treatise on Trial by Jury, including Questions of Law and Fact. With an Introductory Chapter on the Origin and History of Jury Trial* (San Francisco: S. Whitney., 1877) at 41 [Proffatt].

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid* at 43.

accused.”²⁸ Therefore, if there were no witnesses to the crime, there would be no trial by jury prior to the rule of King Edward I in 1272.²⁹ In such circumstances, the accused and the accuser would be required to determine the case with a trial by combat.³⁰

The Magna Carta, dated 1215, “established the belief of a right to a trial by one’s peers”.³¹ However, although this was written in the Magna Carta, the jury did not evolve into a recognizable form of trial by jury until more than a century after it was created.³² The only jury system that existed contemporaneously with the Magna Carta was a “jury of presentment that did not determine guilt or innocence.”³³ At the beginning of the development of the jury system under English law, the accused was required to consent to be tried by a jury.³⁴ If the accused refused to consent to the trial by jury coercive methods could be implemented, including,

[T]he loading of heavy stones onto the accused’s chest. Many chose to die by this method rather than be tried by jury since one consequence of a guilty verdict was confiscation of the entire estate. If there was no trial there would be no forfeiture.³⁵

Over time, the jury system moved from one where the jurymen were witnesses, and therefore had a working knowledge of the facts themselves, to one where they relied only on the evidence and statements provided to them.³⁶ The jury system in its present form became fully established by the beginning of the Tudor period, which occurred between 1485 and 1603.³⁷

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Thornton M. Hinkle, “Magna Carta” (1899) Yale LJ at 262, 265.

³² Allen Shoenberger, “Magna Carta, the Charter of the Forest, and the Origin of the Jury System” (2015) 24 Nottingham LJ 156 at pp 159.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Proffatt, *supra* note 23 at 51.

³⁷ *Ibid* at 52.

From England to Canada

Canada received British law in the 17th and 18th centuries when it was established as a colony of Britain. In 1792 the Parliament of Upper Canada met and passed eight bills, of which included the ruling that the British trial by jury would be established and the British rules of evidence would be observed.³⁸ The effect of this Constitutional Act was “to make Upper Canada a British Province, with English laws, English institutions, and with all lands held on freehold tenure.”³⁹ This lasted for less than half a century.⁴⁰

In 1867 the British Parliament passed the *British North American Act*, which was later renamed the *Constitution Act of 1867*.⁴¹ At this time Canada was still a colony under British law and as such there was no rule for amending legislation, no Parliamentary privileges, and no Supreme Court. In 1982, British Parliament created another Constitutional Act⁴² in order to terminate the UK Parliament’s authority over Canadian law, leaving Canada to amend legislations by its own authority.

Canadian jury selection in criminal proceedings is governed by both federal and provincial legislation. Subsection 91(27) of the *Constitution Act, 1867* confers upon the Canadian Parliament jurisdiction over “[t]he Criminal Law ... including the Procedure in Criminal Matters.”⁴³ Subsection 92(14) of the same Act grants jurisdiction over “[t]he Administration of Justice” to the provincial legislatures.⁴⁴ Consequently, the in-court process for selecting jurors for criminal trials

³⁸ Albert Richard Hassard, *Canadian Constitutional History and Law* (Toronto: Carswell, 1900) at 43.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 68.

⁴² *Constitution Act*, 1982, s 35, being schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁴³ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

⁴⁴ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91(14), reprinted in RSC 1985, Appendix II, No 5.

is established by the provisions of the *Criminal Code*, but the eligibility criteria for potential jurors are established by provincial and territorial statutes. Jurisdictional conflict is avoided by subsection 626(1) of the *Criminal Code*, which recognizes that persons are qualified to serve as jurors in a criminal proceeding if they meet the requirements established by the law of the province where the trial is to be conducted.⁴⁵

In addition to establishing eligibility criteria, provincial and territorial laws govern the initial stages of the jury selection process. These statutes authorize the annual preparation of a jury roll by an official (usually the sheriff) in each judicial district. The roll is a list of potential jurors for all the trials to be held during the ensuing year. The names which appear on the roll are generated in a random fashion from other pre-existing lists.⁴⁶

Conclusion

While there is evidence of the use of juries in various forms found in countries throughout the world, modern Canadian juries are truly unique. Canadian juries may reflect many aspects of these ancient juries as well as the jury systems of modern nations such as England. However, Canada's unique laws and the division of powers found in the Canadian Constitution reflect the jury systems of the past but establish a jury system capable of operating in modern society's complex legal system.

⁴⁵ Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147 at 150. See also, *Criminal Code*, RSC 1985, c C-46, s 626(1).

⁴⁶ *Ibid* at 151.