

Disappearing Trials? A Comparative Perspective

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Is the declining incidence of trials a uniquely American phenomenon or does it reflect a broader trend in the common-law world? To explore this question, this article examines trial patterns in England and Wales (both civil and criminal) and in the Canadian province of Ontario (civil only). There is a reasonably clear pattern of declining numbers (and rates) of civil trials in both jurisdictions examined, although in England and Wales much of the change reflects changes in jurisdiction and procedure. Some of the common patterns across the three countries may reflect the international focus of alternative dispute resolution, and some of the pattern may reflect ongoing changes in civil procedure. In England and Wales, the incidence of criminal trials in the Crown Court shows a remarkable pattern of stability, even as the number of cases rises and falls during the period examined; the reason for this pattern of stability is unclear.

I. INTRODUCTION

Resolution during or by means of trial has been the disposition mode of a minority of cases filed in American civil and criminal courts for a century or more;¹ however, Marc Galanter has documented a recent significant decline in the incidence of trials in the federal trial courts. The decrease described by Galanter can be seen in both relative and absolute terms; that is, not only has the proportion of cases resolved by trial gone down (as the overall caseload has gone up), but the absolute number of cases resolved by or during trial has also decreased. Moreover, this pattern holds up over a variety of types of cases, which eliminates the obvious explanation that it

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¹See, e.g., Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97 (1928).

reflects the changing subject matter of cases being handled by the federal courts.² There is some indication of a similar pattern in state trial courts, although the data are not extensive or as robust as those for the federal courts,³ and the pattern of decline may not be universal across all states or state courts.⁴

Trials are important because they establish normative expectations about behavior that may reduce the number of cases or disputes that arise.⁵ In addition, trials provide a framework that allows disputants to negotiate settlements in anticipation of what might happen at trial.⁶ On the other hand, the thrust of much of the debate over litigation in recent years has been the need to decrease the number of trials through judicial intervention into the settlement process,⁷ the adoption of

²Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. Empirical Legal Stud.* 459 (2004).

³*Id.*; see also Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 *J. Empirical Legal Stud.* 755 (2004). Three studies of civil cases in 45 large counties by the Bureau of Justice Statistics show that in the jurisdictions studied the number of trials declined 47 percent from 22,452 in 1992 to 11,908 in 2001; see Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, 8 (Washington, DC: Bureau of Justice Statistics 2004), available at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>>. In 1996, the number of trials in the jurisdictions studied was 15,638; see Carol J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996*, 1 (Washington: Bureau of Justice Statistics, U.S. Department of Justice 1999), available at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf>>.

⁴RAND Corporation researchers recently reported on trends of jury verdicts in two jurisdictions, San Francisco County and Cook County (Chicago and environs), Illinois; they found that over the 40 years for which they had data, there had been a 70 percent decline in the number of jury verdicts (and by my inference, jury trials) in tort cases in San Francisco comparing the 1960s to the 1990s; in Cook County, however, the number of jury verdicts had remained relatively stable. As the authors note, some of the change in California reflects changes in jurisdictional minimums; however, of more interest is the apparent stability in Cook County; see Seth Seabury, Nicholas M. Pace & Robert T. Reville, *Forty Years of Civil Jury Verdicts*, 1 *J. Empirical Legal Stud.* 1, 9–10 (2004).

⁵See Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); David M. Engel & Eric H. Steele, *Civil Cases in Society: Legal Process, Social Order, and the Civil Justice System*, 2 *Am. Bar Found. Res. J.* 295 (1979).

⁶See Stephen Daniels, *Tracing the Shadow of the Law: Jury Verdicts in Medical Malpractice Cases*, 14 *Just. Sys. J.* 4 (1990); Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 *Wis. L. Rev.* 169 (1998); Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 *Law & Contem. Probs.* 43 (1991); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 *Cal. L. Rev.* 1471 (1993).

⁷Ruggero J. Aldisert, *A Metropolitan Court Conquers Its Backlog—Part II, From Pure Pretrial to Compulsory Settlement Conferences*, 51 *Judicature* 247 (1968); William W. Schwarzer, *Managing Civil Litigation: The Trial Judges Role*, 61 *Judicature* 401 (1978); Herbert M. Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 68 *Judicature* 28 (1982); James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log*, 6 *Am. J. Trial Advoc.* 27 (1982); Marc Galanter, "... a Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States", 12 *J. L. & Soc'y* 1 (1985); Doris Marie Provine, *Settlement Strategies for Federal District Judges* (1986); Dale E. Rude & James A. Wall, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 *Judicature* 175 (1988); Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 *Stanford L. Rev.* 1339 (1994).

methods of alternative dispute resolution,⁸ and changing or applying procedural rules in ways that reduce the need to go to trial.⁹ Is the decrease in trials an indication of the failure of the justice system to provide the signals needed to prevent and resolve disputes, or is it a signal that the accumulation of reform of rules, procedures (i.e., ADR), and the judicial role has finally begun to pay off? An alternative explanation might be that litigants have become leery of trials, and avoid them for reasons of cost, uncertainty, or time.

One way to begin to sort out what might account for the changes in the number and proportion of cases going to trial would be to ask whether the pattern is unique to the United States or whether it can be found in other common-law countries?¹⁰ In this brief article, I look at civil and criminal trial trends in England,¹¹ and civil trial rates in Ontario, Canada.¹²

⁸A. Leo Levin, *Court-Annexed Arbitration*, 16 *U. Mich. J. L. Reform* 537 (1983); James Alfini (ed.), *Special Issue: Alternative Dispute Resolution and the Courts*, 69 *Judicature* (1986); John P. McIver & Susan Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 *Just. Sys. J.* 123 (1991); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations about Alternative Dispute Resolution in an Adversary Culture*, 19 *Fla. St. U. L. Rev.* 89 (1991); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 *U. Pa. L. Rev.* 2169 (1993); Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 *Judicature* 6 (1993).

⁹See Joe S. Cecil & C.R. Douglas, *Summary Judgment Practice in Three District Courts* (1987); Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 *Am. U. L. Rev.* 1465 (1993); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 *Boston Coll. L. Rev.* 785 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 *Boston Coll. L. Rev.* 525 (1998); Elizabeth C. Wiggins et al., *The Federal Judicial Center's Study of Rule 11, #2 FJC Directions* 3 (1991); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative View*, 75 *Marquette L. Rev.* 313 (1992); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 *Nw. L. Rev.* 943 (1992); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 *Ind. L.J.* 171 (1994). In fact, as I have shown, a significant minority of civil cases is resolved directly or indirectly through adjudication short of trial; see Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161 (1986).

¹⁰Procedural reform has been a topic in many developed countries around the world; see Adrian A.S. Zuckerman (ed.), *Civil Justice in Crisis: Comparative Dimensions of Civil Procedure* (1999); David E. Bernstein, *Procedural Tort Reform: Lessons from Other Nations, Regulation 71* (1996); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 *Am. J. Comp. L.* 277 (2002). The question of whether one broad procedural system (e.g., the common-law adversarial system or the civil-law investigatory/inquisitorial system) is "better" than another has been the subject of debate and research; see, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823 (1985); Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 *Nw. U. L. Rev.* 705 (1988); Simeon Djankov et al., *Courts: The Lex Mundi Project*, 118 *Q. J. Econ.* (2003).

¹¹I use "England" to refer to both England and Wales; my analysis does not include the other part of Great Britain (Scotland) or of the United Kingdom (Northern Ireland), each of which maintains a separate court system except at the highest appellate level.

¹²In Canada, trial is almost exclusively a provincial function. Although there is a federal trial court, the Federal Court of Canada (created in 1971), it has such a limited jurisdiction that it is not significant for a study of the incidence of trial; see <http://www.fctfc.gc.ca/about/history_e.shtml>.

II. CIVIL TRIALS IN ENGLAND

Civil trials in England, virtually none of which involve juries,¹³ occur in two courts, the High Court and the County Court. Under the current structure, these two courts function as something of a unit, with larger cases going to the High Court and smaller cases (currently £15,000 or less) going to the County Courts. As I will discuss below, the relationship between the High Court and the County Court has varied over the period I will examine. For the High Court, I will focus primarily on the Queen's Bench Division, which hears cases dealing with torts, contracts, property, and the like. I also present some data for the Chancery Division, which deals with "corporate and personal insolvency disputes, business, trade and industry disputes, the enforcement of mortgages, intellectual property matters, copyright and patents, disputes relating to trust property and contentious probate actions."¹⁴ I do not consider the Family Division.

My data source is the annual statistical reports compiled by the Lord Chancellor's Department (LCD) and published by Her Majesty's Stationery Office (HMSO).¹⁵ For the Queen's Bench Division of the High Court, I compiled data on civil trials between 1958 and 2002, although because of a change in how cases were aggregated and reported, I was not able to include data for 1999–2002 in the analysis discussed below.¹⁶ I specifically counted all cases disposed of during or after trial.¹⁷ For the Chancery Division, I counted all cases disposed of "after trial or hearing" in London from 1977 through 2002.¹⁸ The period covered for the County Courts is 1958

¹³Civil jury trials had largely disappeared from England by the 1930s; see R.M. Jackson, *The Incidence of Jury Trial During the Past Century*, 1 *Mod. L. Rev.* 132 (1937). Those few jury trials that do occur are in cases such as libel and slander, or damage claims related to alleged police misconduct.

¹⁴Lord Chancellor's Department, *Judicial Statistics 2002*, 23, available at <http://www.dca.gov.uk/judicial/jsar02/judicial_stats2.pdf>.

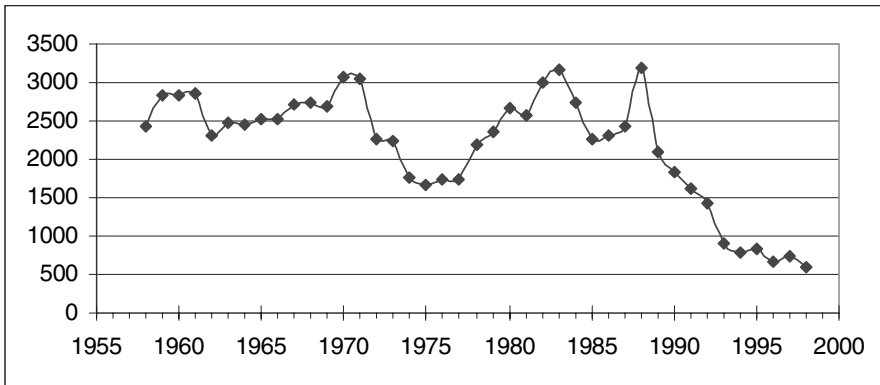
¹⁵In their most recent incarnation, these reports are entitled, *Judicial Statistics, England and Wales for the Year ___*; at an earlier time, the title was *Civil Judicial Statistics for the Year ___*. For many of the years, the figures provided in the reports are based on a sample of two months rather than actual counts.

¹⁶Specifically, three categories, "settled during course of trial or hearing," "settled at door of court," and "approval of prior settlement given" were collapsed into a single category labeled "settled during course of trial or hearing," with a footnote explaining that this was a combination of prior separate categories. Efforts to obtain unaggregated figures from the Lord Chancellor's Department (renamed the Department for Constitutional Affairs in 2003) were unsuccessful.

¹⁷Between 1974 and 1998, this is the sum of two categories, cases disposed during trial and cases disposed after trial; prior to 1974, this is the figure reported as "Actions Tried."

¹⁸Some cases are disposed of by the Chancery Division in proceedings outside London; however, the statistical reports do not consistently report those figures.

Figure 1: Number of trials in the High Court, Queen's Bench Division, 1958–1998.



SOURCE: Lord Chancellor's Department, *Judicial Statistics, England and Wales*, various years.

through 2001, omitting 1965 and 1966 when noncomparable data were reported. Starting in 1974, the County Court adopted a small-claims procedure, and from that date forward, I show multiple trends to try to take that procedure into account.¹⁹

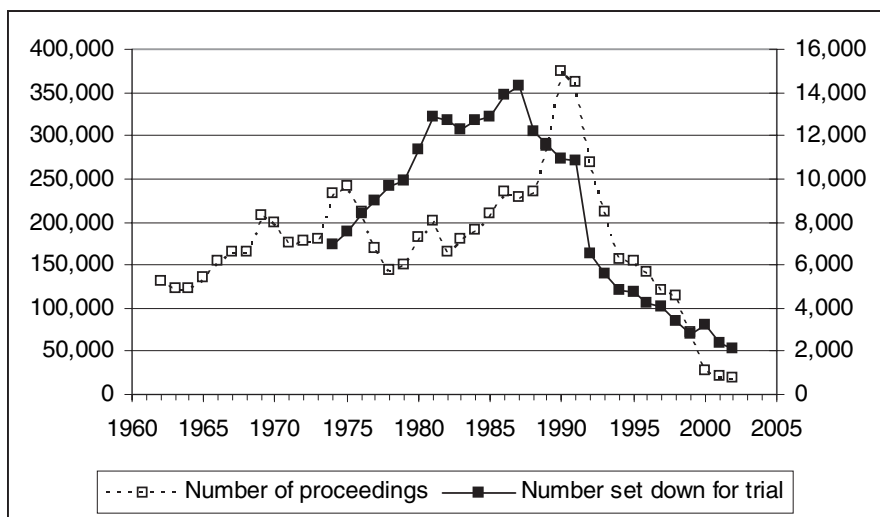
A. Trials in the Queen's Bench Division of the High Court

Figure 1 shows the pattern of trial frequency for the Queen's Bench Division of the High Court. Clearly, there have been some ups and downs. Between 1958 and 1971, the number of trials was generally in the range 2,500 to 3,000. A sharp drop occurs after 1971, with an increase beginning in 1978. There is another drop starting in 1983, interrupted by a spike in 1988, after which there is a precipitous drop from the 1988 peak of 3,189 to a mere 600 in 1998. The swings we see here dwarf the variations reported by Galanter for the United States; however, at least some of the change is readily explainable by court and civil justice reform.

Figure 2 shows the pattern for two other relevant variables: number of proceedings initiated in the Queen's Bench Division of the High Court (broken line

¹⁹Starting with the 1978 annual statistics report, the small-claims trials were reported separately, labeled in the tables as "arbitrations"; in the 1977 report, arbitrations were counted in with trials. I count arbitrations as trials throughout the period covered by the data I assembled. The label "arbitrations" does not denote the use of a nonjudicial arbitrator, but rather simply that, as in other small-claims courts, the procedure lacks the formality of the traditional trial, and that the decisionmaker takes on a more interventionist role somewhat like the role played by judges in the "inquisitorial" process used in civil-law systems. One relatively unique part of the small-claims procedure in England is that the hearing is done in private rather than in open court; for more detail on the procedure, see John Baldwin, *Small Claims in the County Courts in England and Wales* 7–11 (1997).

Figure 2: Number of proceedings initiated and number of cases set down for trial in the High Court, Queen’s Bench Division, 1961–2003.



NOTE: “Set down for trial” refers to cases being ready for trial.

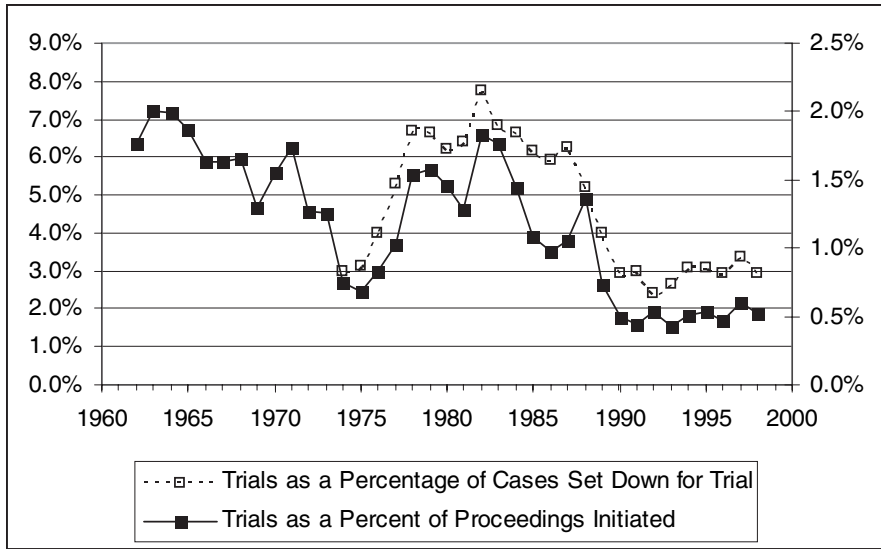
SOURCE: Lord Chancellor’s Department, *Judicial Statistics, England and Wales*, various years.

using the left axis of Figure 2), and the number of cases that reach the stage of being ready to be scheduled for trial, that is, “set down for trial” (solid line using the right axis of Figure 2). There was a spike in the number of proceedings initiated in 1990–1991, *after the spike in trials*. There was an increase in the number of cases set down for trials up until 1987. For both proceedings initiated and number of cases set down for trial, there has been a steady and precipitous decline through the 1990s.

Figure 3 shows the number of trials as a percentage of the number of proceedings initiated (solid line, left axis) and as the percentage of cases set down for trial (broken line, right axis). Although one could argue that there should probably be some lag incorporated into the computation of the percentages, I have not done that in Figure 3. Figure 3 shows a sharp drop in both percentages starting in the early to mid 1980s. This is well before the drop in cases shown in Figure 2. Interestingly, the trial *rate* as measured by these percentages has remained steady during the 1990s.

What might account for the patterns described above? Since 1960, there have been at least three significant rounds of reform affecting the civil justice system in England. The first came in the Courts Act 1971 in the wake of the Beeching Com-

Figure 3: Trials as percentages of proceedings initiated and cases set down for trial, Queen's Bench Division of the High Court.



NOTE: "Set down for trial" refers to cases being ready for trial.

SOURCE: Lord Chancellor's Department, *Judicial Statistics, England and Wales*, various years.

mission Report.²⁰ The reforms, which modified a system that had largely been in place since the Judicature Acts 1873–1875,²¹ consolidated several courts that had civil jurisdiction into the High Court.²² One of the effects of the change was to reduce the number of locations where there could be civil trials in the upper courts. The initial decline starting around 1970, and then the rise back to the original level pre-1970, may have reflected the time it took for solicitors and barristers to adjust to the new system, although there is no good evidence to account for the specifics of the changes during this period.

²⁰Report of the Royal Commission on Assizes and Quarter Sessions (1969).

²¹For a discussion of these changes, see Jackson, *The Machinery of Justice in England* 71–80 (7th ed.). For a history of the development of the High Court structure prior to these changes, see Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750–1965*, 29–52, 79–110, 247–84 (1967).

²²At about the same time, the Administration of Justice Act 1973 established the small-claims procedure (referred to as "arbitration") in the County Courts; see *id.* at 537–38.

Around this time, there were also changes in the jurisdiction of the County Court,²³ which would have shifted cases out of the High Court. The Administration of Justice Act 1969 raised the County Court limit to £750,²⁴ and authorized the Lord Chancellor to increase limits by Order in Council; he exercised this power in 1974, 1977, and 1981, raising the limit to £1,000, £2,000, and £5,000, respectively.²⁵ Thus, it is possible that some of the decline in the early 1970s reflected changes in allocation of cases between the County Court and the High Court, although the more than doubling of the County Court limit in 1981 did not lead to a decrease in trials in the High Court.

In 1985, the then Lord Chancellor, Lord Hailsham, commissioned a Civil Justice Review involving empirical investigation, research reports, and a report with extensive recommendations for change. Many of the suggested changes were adopted in the Courts and Legal Services Act 1990. Perhaps most important was the closer integration of the County Courts and the High Court, with many more cases disposable at the County Court level. Undoubtedly, the changes brought by the Civil Justice Review account for a significant portion of the drop in the number of proceedings initiated and the number of cases set down for trial in the High Court. *However*, even before these changes were adopted, a decline in the number of trials had begun, and well before the changes, the drop in the percentage of cases going to trial had started.

In 1989, the number of trials in the Queen's Bench Division of the High Court was at its lowest level since 1977 (i.e., ignoring the 1988 spike, 1989 still constituted the beginning of a decline). Between 1989 and 1998, the number of trials went down almost every year (there were slight upward bounces in 1995 and 1997). Thus, while some of the decline in the number of trials might be explained by changes brought by the 1990 act, the decline had already begun. In fact, the drop between 1989 and 1991,²⁶ the two years before the new law effectively came into force (major provisions

²³For a history of the County Court up until 1981, see Patrick Polden, *A History of the County Court, 1846–1971* (1999).

²⁴In 1938, the County Court limit had been set at £200, although defendants had the right to transfer actions involving more than £100 to the High Court; see Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750–1965*, 249–50 (1967). The County Courts Act 1955 fixed the limit at £400, which was raised to £500 in 1966; see Jackson, *supra* note 21, at 29.

²⁵J.R. Spencer, *Jackson's Machinery of Justice* 33 (1989).

²⁶The drop in trials may have reflected some anticipatory behavior reflecting uncertainty over exactly what changes would be implemented under the Courts and Legal Services Act (which delegated broad authority to the Lord Chancellor to structure the jurisdiction of the High Court and County Court, and to make a variety of procedural changes). It is also possible that the sudden spike in number of trials in 1988, which came just as the Civil Justice Review was ending, also was anticipatory, reflecting a concern that access to trials might be severely limited by future changes.

became effective during 1991), was as large as it was between 1992 and 1993, the two years after the act came into force. Moreover, the decline continued even after the changes were well established.

Even before the changes brought by the Courts and Legal Services Act 1990 could be thoroughly absorbed, yet another round of reform was on the horizon. In March 1994, the Lord Chancellor appointed Lord Woolf to investigate possible procedural changes that would speed cases and reduce costs.²⁷ Lord Woolf proposed extensive procedural changes, with relatively little structural change. The implementation of his proposals was in the Civil Procedure Rules 1998. Among other things, these new rules created a greater role for judges in case management, established a “fast track” for cases with a value of £15,000 or less, and moved yet more cases (including those on the “fast track”) into the County Courts.²⁸ However, given that the data in Figure 1 stop with 1998, none of these changes can explain the decline from 1989 through 1998.

There is one other change in the system of litigation worth noting that occurred during the 1990s. In 1995, a form of contingency fee, the “conditional fee,” became available for the first time for tort cases (which constitute the largest segment of cases going to trial). The conditional fee allows solicitors to take cases on a no-win, no-pay basis, with the solicitor receiving an “uplift” to the normal fee if recovery is obtained for the client. At the same time, a system of “after the event” insurance became available to protect clients from the risk of having to pay the opposing side’s cost should a case be unsuccessful. The conditional fee essentially replaced legal aid in cases for which it was available.²⁹ It is possible that the availability of this fee arrangement changed the calculation solicitors considered when deciding whether to take injury cases to trial, but there is no specific evidence available that speaks to that question.³⁰

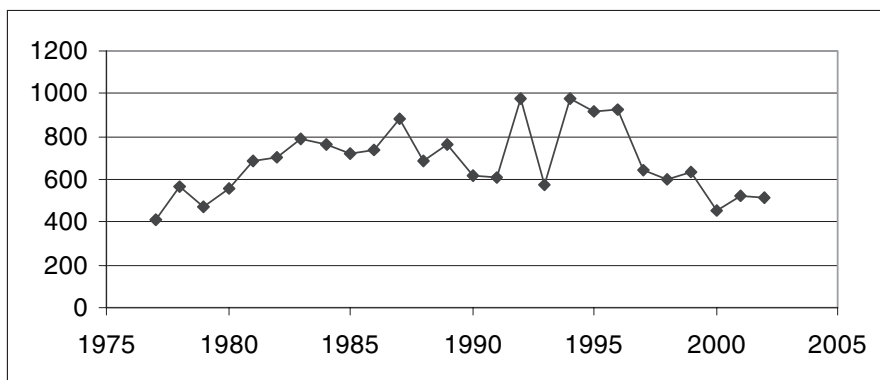
²⁷Lord Woolf, *Access to Justice: Final Report* (1996); see also A.A.S. Zuckerman & Ross Cranston (eds.), *Reform of Civil Procedure: Essays on “Access to Justice”* (1995).

²⁸Fiona Cownie & Anthony Bradney, *English Legal System in Context* 60–61 (2d ed. 2000). Although the Civil Procedure Rules were promulgated in 1998, they were authorized by the Civil Procedure Act 1997; *id.* at 188.

²⁹The Access to Justice Act 1999 added provisions that allowed both the “uplift” and the premium for after-the-event insurance to be recoverable. This led to extensive litigation over what amounts could be recovered for the uplift and the insurance.

³⁰Relatively little empirical work has been done on conditional fees; see Stella Yarrow, *The Price of Success: Lawyers, Clients and Conditional Fees* (1998); Stella Yarrow & Pamela Abrams, *Nothing to Lose? Clients’ Experiences of Using Conditional Fees* (1999); Stella Yarrow, *Just Rewards? The Outcome of Conditional Fee Cases* (Summary) (2000).

Figure 4: Number of cases disposed after trial or hearing in the Chancery Division of the High Court, 1977–2003.



SOURCE: Lord Chancellor's Department, *Judicial Statistics, England and Wales*, various years.

B. Adjudication in the Chancery Division of the High Court

The Queen's Bench Division has a high volume of cases but few trials and relatively little contested adjudication. The Chancery Division of the High Court has a much lower volume of cases (other than what in the United States would be called bankruptcy), but adjudication plays a more important role.

Figure 4 shows the trend for disposition after trial or hearing in London for the Chancery Division starting in 1977.³¹ Although somewhat erratic from year to year, the pattern does show first an increase for about 10 years, then a period that can best be described as erratic, and finally a period of decline starting in about 1995, and then a fairly steady decline over the last eight years. Because the data reported are very sketchy, it is difficult to suggest explanations for the patterns, although the decline in recent years is noteworthy because, while starting later, it does parallel in some ways the declines in the Queen's Bench Division.

C. Trials in the County Courts

As suggested by the discussion, one element of change throughout the period has been changes in the jurisdictional division between the High Court and the County Courts. One obvious reason that trials in the High Court might have declined would

³¹I limit the discussion here to cases handled by the Chancery Division in London because the statistical reports do not consistently report the nature of the disposition of cases handled at court centers outside London. The figures reported for the Queen's Bench Division include cases handled throughout England and Wales.

be that they moved to the County Courts. There are two kinds of “trials” in County Courts, one involving small claims and one involving claims other than small claims. As the system now operates, small claims are money claims involving £5,000 or less in nonpersonal injury cases; in personal injury cases, the limit is £1,000.³² Cases involving amounts between these limits and £15,000 are generally dealt with in the County Courts on what is now referred to as the “fast track.”³³ If in fact the impact of recent changes was simply to move cases from the High Court to the County Court, one would expect to see an increase in the number of cases going to trial in the County Court.

Figure 5a shows the number of trials, small claims and nonsmall claims combined, in the County Courts,³⁴ Figure 5b shows separate trends for small claims (broken line, right hand axis) and nonsmall claims (solid line, left hand axis).³⁵ The overall pattern is complex, showing significant growth in the wake of the creation of the small-claims procedure, a period of stability in the latter half of the 1980s, a spike in the early 1990s, a return to a plateau for several years in the middle of the decade, and then a further return to the level of the late 1980s by the end of the 1990s. Figure 5b shows that the spike in the early 1990s was attributable to small-claims cases, although there was some modest growth in the number of nonsmall-claims trials in the late 1980s. Nonsmall-claims cases, the ones most likely displaced from the High Court, began dropping in the early 1990s, and then dropped by about 45 percent between 1995 and 1999. This drop is significant because it took place *before* the changes in the Civil Procedure Rules proposed by Lord Woolf were promulgated in 1998.

D. Summary: Civil Trials in England

What is clear from this analysis is that the number of civil trials has been dropping in England. Undoubtedly, a significant portion of the decline can be attributed to the changes that have occurred in jurisdictional boundaries and procedural rules. However, the timing of declines does not closely match the structural and

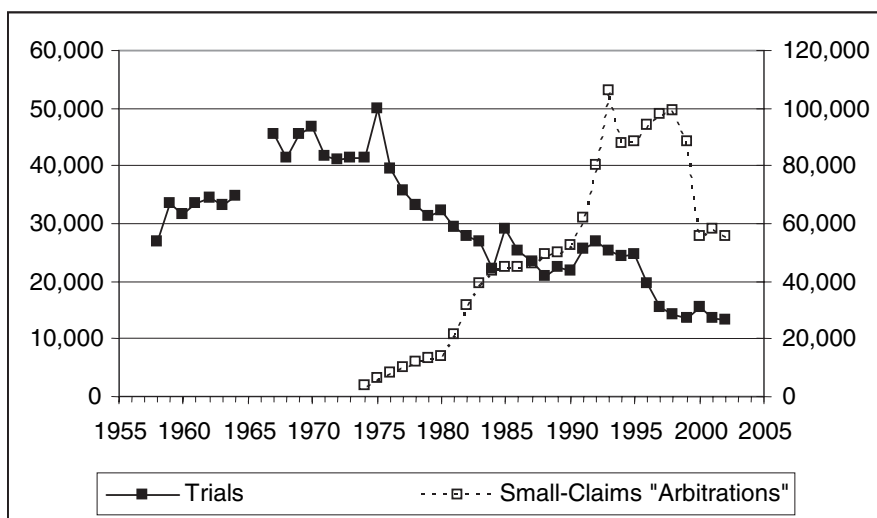
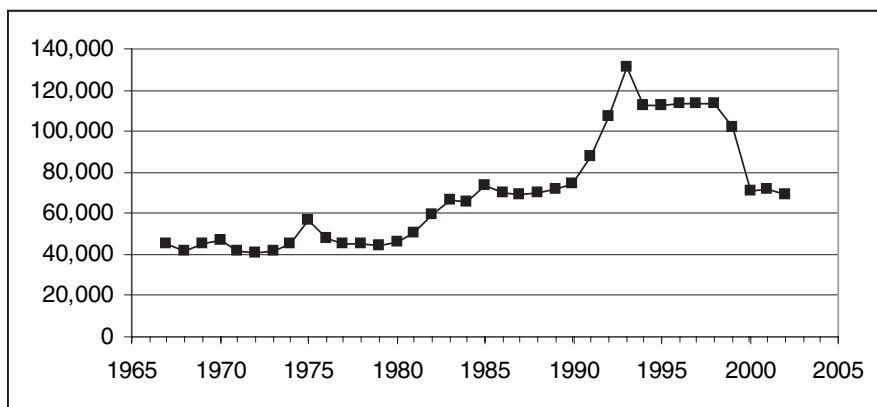
³²The original small-claims limit, set in 1973 when the small-claims procedure was created, was £75; it was increased to £100 in October 1974, to £200 in July 1978, to £500 in October 1981, to £1,000 in July 1991, and to £3,000 in January 1996; see John Baldwin, *supra* note 19, at 6. The current limit has been effective since 1998; see Civil Procedure Rules 1998, r26.6(1).

³³See Cowie & Bradney, *supra* note 28, at 61.

³⁴The discontinuity in the trials line reflects two years in which the reports used noncomparable figures.

³⁵The adjudicative procedure for small claims is referred to as “arbitration,” reflecting the more informal process that is used. It is not ADR as that term is typically used, except in the sense that it differs from trial in larger cases.

Figure 5: Number of trials in the County Courts, 1967–2003. (a) Small claims and other cases combined. (b) Small claims and other cases separately.



NOTE: "Set down for trial" refers to cases being ready for trial.

SOURCE: Lord Chancellor's Department, *Judicial Statistics, England and Wales*, various years.

procedural changes, often occurring, or at least beginning, in advance of the formal changes.

Some of the variation, particularly in the High Court, which has a relatively small group of judges all based at the Royal Courts of Justice in London, probably reflects specific actions of the judges. For example, at various periods of time, the

judges may have decided to schedule more cases for trial in order to ensure that judges scheduled to hear trials did not suddenly find themselves with no cases to hear because of a rash of settlements. This could initially cause a drop in the number of trials in a later period because the trials that would have been scheduled for the period had been bunched up.³⁶

Part of the drop during the 1990s may also reflect increasing interest in and use of alternative dispute resolution (ADR) techniques. In the early part of the decade several reports on this subject were produced, and there was recognition that it would be appropriate for lawyers to act as mediators.³⁷ The potential of ADR was institutionalized somewhat by the Woolf reforms in the late 1990s (e.g., authorizing judges to take a more interventionist stance in the processing of cases), although as noted above these changes did not really come into play until after the period covered by the Queen's Bench data reported above.

III. CRIMINAL TRIALS IN ENGLAND

In England and Wales, criminal matters are handled in either the Magistrates' Court or the Crown Court. All jury trials take place in Crown Court, and all dispositions by trial in the Crown Court are heard by juries (i.e., there are no bench trials). In the Magistrates' Court, contested cases are decided by either a bench of lay magistrates or by a single professional magistrate (formerly called a "stipendiary magistrate" now called a "district judge"). Minor cases must be dealt with at the magistrates level and very serious cases (e.g., homicide) must be dealt with in the Crown Court; a significant number of cases involve "either way" offenses, and can be heard either by magistrates or by the Crown Court (a defendant can demand a jury trial or the magistrates can refer the case to Crown Court). It is also possible for the magistrates to accept a guilty plea or find a defendant guilty and then refer the case to Crown Court for sentencing if they believe a sanction more severe than they can impose is warranted.

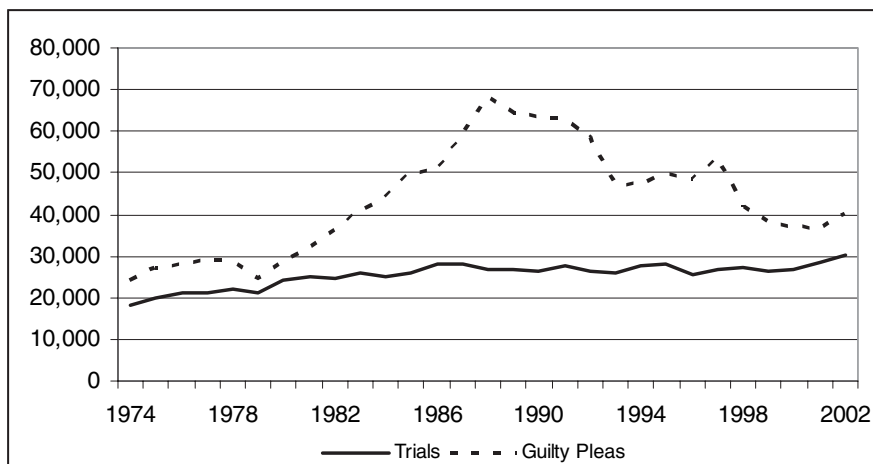
Here I focus on criminal cases that come to the Crown Court for a determination of guilt; that is, I omit cases referred solely for the purpose of determining the sentence. Figure 6 shows the number of such cases disposed of by guilty plea and after trial.³⁸ The pattern in Figure 6 is intriguing: the number of trials has been

³⁶Cyril Glasser suggested this possible explanation to me.

³⁷See Simon Roberts, *Institutionalized Settlement in England: A Contemporary Panorama*, 10 *Williamette J. Int'l L. & Disp. Resol.* 17, 24–26 (2002); see also Simon Roberts & Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (2004).

³⁸I have focused on "cases" rather than "defendants" because I am interested in the number of trials, and multiple defendants can be dealt with in a single trial.

Figure 6: Number of dispositions by trials and guilty pleas in the Crown Court.



NOTE: The unit of analysis is the “case” rather than the “defendant.”

SOURCE: Lord Chancellor’s Department, *Judicial Statistics, England and Wales*, various years.

remarkably steady, ranging between about 25,000 and 30,000 over the last 20 years. During that same period, the number of cases disposed of by guilty pleas has risen sharply, and then fallen back. Exactly why the number of trials is so constant is not clear.³⁹

IV. CIVIL TRIALS IN ONTARIO

Canada is much like the United States in that its courts are organized and managed largely at the subnational level. In fact, the federal trial court in Canada has a very limited jurisdiction, and trial is a provincial responsibility to an even greater extent than the role played by states in the United States. One problem with the federalized nature of courts is that each Canadian province collects and maintains its own statistical data. Because of the difficulty of assembling data across the provinces (there is nothing equivalent to the National Center for State Courts), I have limited my analysis to Ontario, and further limited my consideration to the main

³⁹I consulted with several experts on criminal process and criminal statistics in England, and none could give an explanation for the pattern. One obvious hypothesis is that this reflects a capacity issue (i.e., the Crown Court can “produce” only so many trials), but no one I consulted was willing to attribute the pattern to a capacity issue.

civil trial courts.⁴⁰ The data discussed in this section come from the *Court Statistics Annual Report* prepared each year by the Ministry of the Attorney General.⁴¹ The continuous data cover fiscal years ending during the years 1978 through 2000; I also have trial frequency data for the fiscal year ending during 1974. I have combined jury and bench trials (for most years bench trials comprised about 90 percent of the trials).⁴²

The frequency of trials in Ontario is shown in Figure 7. Figure 7a shows a clear pattern of decline, whether one looks at Ontario as a whole, the Toronto region, or Ontario other than Toronto. There is an upward bump around 1993 or 1994, but then the decrease resumes from the new level. Figure 7b shows Toronto and outside Toronto on separate scales; the correspondence between the two trends is striking. There is a sudden, sharp increase in Toronto for 1999–2000 and 2000–2001, but then the number of trials drops back to the level it was in 1998–1999 and drops further in the final year of the series. It is likely that the brief increase reflected an administrative quirk (i.e., a drive to clean up the court's docket of cases awaiting trial); two informants told me that there had been a "blitz" to clean up a backlog of cases around 1999–2000, and thus the jump *probably* reflected that blitz.⁴³

One dilemma with these data is that they may reflect a decline in caseload rather than a change in the pattern of trials. To assess this, I computed trials in a

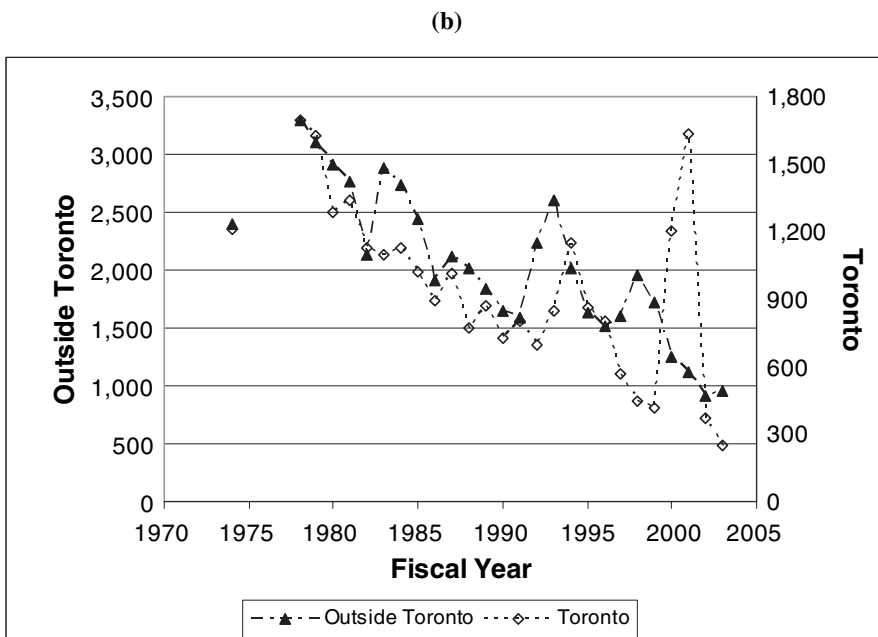
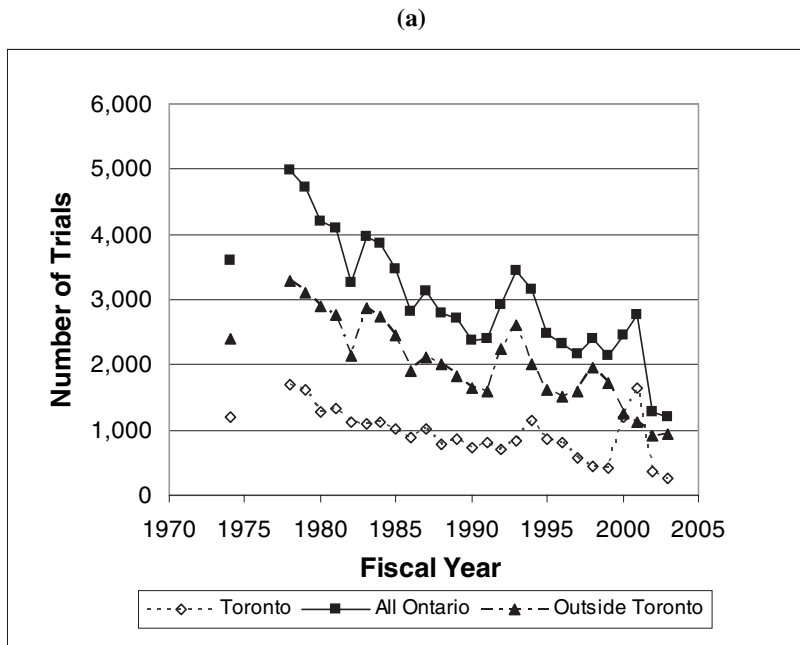
⁴⁰In the earlier years of the period I examine, cases were handled by one of two courts, the Supreme Court and the County or District Court; the Courts of Justice Act 1990 merged these two courts into the Ontario Court (General Division); for the earlier period, I have combined the cases for the two courts. I do not include in my analysis cases handled by the Small Claims Court.

⁴¹Some of these data are reported in John Twohig, Carl Baar, Anna Meyers & Anne Marie Predko, *The Landscaping of Civil Disputing in Ontario: What Do We Know?* in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (1996). John Twohig (Ontario Ministry of the Attorney General) generously provided me with photocopies of relevant pages from many of the annual reports; additional data were provided to me by Gerard Lee Chong and Jim Andersen (both of the Ontario Ministry of the Attorney General). Professor Garry Watson (Osgoode Hall) provided me data he had assembled on civil filings in Ontario from 1978 through 1999.

⁴²One issue in these data is at least some uncertainty about exactly what the number of reported trials actually represents. Two informants I spoke with indicated that they believed that the trial counts produced for the statistical reports do not constitute actual trials; one person suggested that the trial count might include cases that were settled "at the courthouse door" (i.e., got to the day of trial), and another person suggested that it might even include all cases that got to the point of being scheduled for trial (unless the case was removed from the trial list in the same month that it was placed on that list). However, an official with the Court Services Division in the Ministry of the Attorney General reported to me that: "Trials held [i.e., the numbers of trials reported in the statistical publications] are only supposed to be counted for trials that were actually started. Matters that were settled after the trial commenced are included in this category."

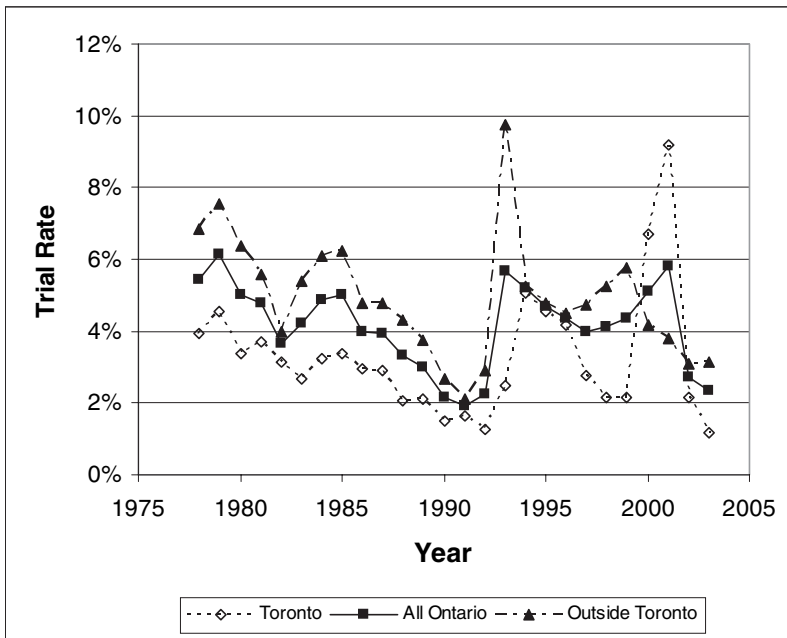
⁴³I say "probably" because no one I have spoken to has expressed any certainty over this issue, and the data I received from the Ministry of the Attorney General included the caveat: "In 1999/2000 and 2000/2001 there were significantly higher numbers of non-jury trials in Toronto. Possible explanations for these higher numbers are being investigated."

Figure 7: Frequency of civil trials in Ontario, 1974, 1978–2000.



SOURCE: Ontario Ministry of the Attorney General, *Court Statistics Annual Reports*, various years. Data for 2000–2003 provided by Court Services Division, Ontario Ministry of the Attorney General.

Figure 8: Ontario trials as a percent of cases filed, 1978–2000.



SOURCE: Computed from Ontario Ministry of the Attorney General, *Court Statistics Annual Reports*, various years; rates for 2001 through 2003 estimated based on data provided by Court Services Division, Ontario Ministry of the Attorney General and filings data reported in *Courts Annual Report, 2002–03* available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/couts_annual_03.asp>.

given fiscal year as a percentage of cases filed in that year; these trial rates are shown in Figure 8. The pattern in Figure 8 is more mixed. Although the overall trend in the trial rate tends to be downward, there is a bit of a cyclical pattern, with decline followed by an increase (to a lower level than the previous decline started from) followed by a new pattern of decrease. The two periods of increase, leaving aside the sharp, apparently temporary increase in trials in Toronto, are in the early to mid 1980s and again in the early to mid 1990s.

There were three changes of note in the 1990s. The first was a reorganization of the courts, with a consolidation of two courts and two sets of judges. The second was an increase in the jurisdiction of the Small Claims Court from \$3,000 to \$6,000 in 1994. The third was the introduction of no-fault auto insurance in the early 1990s, which eliminated all but the most serious auto injury cases from the court. The impact on filings of this last change was dramatic: the number of auto accident cases

dropped from 22,930 provincewide in FY 1992⁴⁴ to 7,032 in FY 1993 and then to a low of 3,651 in FY 1994 before beginning to rise again, reaching 7,349 in FY 1999 (and then back down to 6,629 in FY 2000).⁴⁵ In relative terms, auto accident cases went from being almost a third of cases filed to a low of 6 percent in FY 1994 before settling at around 11–15 percent for the most recent years for which data are available. If one assumes that auto accident cases had a lower probability of trial than did nonauto cases, and that cases in the \$3,000–6,000 range that were moved to the Small Claims Court were less likely to be tried, then it would not be surprising that the trial rate increased in the early to mid 1990s when these changes took place. However, I have no evidence about differential trial rates for either smaller cases or auto accident cases, and hence this is purely speculative.

V. CONCLUSION

The purpose of this article is to discern whether the pattern of declining incidence of trial described by Marc Galanter for the United States, particularly the U.S. federal courts, is evident in other common-law systems. To assess this, I have looked broadly at trial patterns in England and Wales, and more narrowly at trial patterns in Ontario.

Galanter found clear evidence of declining trials, both in relative and absolute terms in the federal courts, and for both criminal and civil cases. In England and Wales, there is a pattern of decline in civil cases, but no such pattern in criminal cases. Much of the decline in trials in civil cases can be attributed to changes in procedural rules and changes in the jurisdictional division between the High Court and County Courts. Some of the variation in the High Court probably also reflects internal decisions made by the relatively small group of judges who preside in that court. At the same time, it is likely that the alternative dispute resolution movement has had at least some impact in England, and this probably has contributed to the decline in trials in the more recent period. Unfortunately, there is no clear way to distribute the drop in trials among the various explanations beyond acknowledging that it is likely that all played a part in the decline over that last decade.

The pattern for criminal cases is more puzzling. Why has the number cases going to trial in the Crown Court stayed so constant over a 25-year period when the number of cases coming to that court has varied substantially, as have the number of defendants? The most obvious, a priori, explanation is that the Crown Court has a capacity for a certain number of trials, and the judges of that court have been able

⁴⁴Auto accident cases appear to have peaked at 35,874 in FY 1990, the same year that total filings peaked at 110,327.

⁴⁵These data were compiled by Garry Watson (Osgoode Hall Law School), and appear in his unpublished paper, *Where Have All the Cases Gone* (draft, May 2000).

to control the number of trials to stay within that capacity. However, no one I contacted in England is aware of specific activities by the judges along these lines. Moreover, there does appear to be substantial variation in the rate of trial across the "circuits" into which the Crown Court is divided for administrative purposes, and those variations have remained relatively stable and persistent over time.⁴⁶ An explanation for the criminal-trial pattern must await some detailed research focused on that pattern.

For civil cases in Ontario, I also find evidence of declining trials. Some of the decline reflects a decline in filings, but the trial rate (trials as a percentage of filings) has also shown a pattern of decline. The patterns in Ontario are not as clear as those in England, and there have been some jumps in the number and rate of trials. Still, over the 25-year period I looked at, it is fair to say that Ontario has witnessed a declining incidence of trial.

One obvious explanation for the changes in Ontario is that they are mimicking some of the same pattern as is happening in the United States. As in the United States, there has been an emphasis on judicial facilitation of settlement,⁴⁷ and an emphasis on alternative dispute resolution.⁴⁸ Moreover, many of the major litigants (e.g., large corporations, insurers, etc.) operate both in the United States and in Canada, and the internal norms of those litigants are likely to be applied on both sides of the border. I would feel more confident with this explanation if I had data for several Canadian provinces; more generally, it would be interesting to know what the pattern looked like on a national basis for Canada, and whether there was consistency across the various regions.

So where does that leave us? Does this comparative examination tell us anything that would help in understanding the U.S. patterns described by Galanter? The clearest message from the English data is that changes to jurisdiction and procedure do make a difference, at least in the short term, and probably in the longer term as well. The changes in the U.S. federal courts have not been as drastic as the various changes in the English courts handling civil cases, but over time there may well have been a cumulative effect. That is, while no one change has a major impact on the trial rate, the individual changes have had cumulative effect, much like a woodpecker that comes day after day to peck on the wooden siding of your house will eventually peck a nice hole all the way through that siding.

⁴⁶See Michael Zander, *What the Annual Statistics Tell Us About Pleas and Acquittals*, 1991 *Crim. L. Rev.* 252 (1991).

⁴⁷See Michael Stevenson et al., *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment*, 15 *Osgoode Hall L.J.* 591 (1977).

⁴⁸See Julie Macfarlane (ed.), *Dispute Resolution Readings and Case Studies* (1999); Andrew Pirie, *Alternative Dispute Resolution Skills, Science and the Law* (2000); Allan J. Stitt (ed.), *Alternative Dispute Resolution Practice Manual* (1996).

A second question suggested by the comparative analysis is to what degree the patterns described by Galanter in the U.S. federal courts are consistent across the country. What happens to the pattern if it is disaggregated by region (i.e., circuit)? Is there a consistency across the country, or does the apparent national pattern reflect several very large circuits with other, smaller circuits showing quite different patterns? If this is the case (and the state-level data do not show anything like the consistency of the aggregated federal data), does this tilt the explanation toward the actions of local judges, or perhaps to something akin to local legal culture?⁴⁹ This is clearly a question for future research as scholars continue to analyze the patterns of disposition of court cases in the United States and in other common-law countries.

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⁴⁹See Thomas W. Church, *Examining Local Legal Culture—Practitioner Attitudes in Four Criminal Courts* (1982); Thomas W. Church, *Examining Local Legal Culture*, 1985 *Am. Bar Found. Res. J.* 449 (1985); Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 *L. & Soc'y Rev.* 535 (1993); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 *Harv. J.L. & Pub. Pol'y* 801 (1994); S.R. Sherwood & M.A. Clarke, *Toward an Understanding of Local Legal Culture*, 6 *Just. Sys. J.* 200 (1981); Stephen A. Schiller & Peter M. Manikas, *Criminal Courts and Local Legal Culture*, 36 *DePaul L. Rev.* 327 (1987); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 *Nw. U. L. Rev.* 1498 (1996).