
June 12, 2020

Ms. Amanda Iarusso
Director of Policy and Legal Affairs
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street
11th Floor
Toronto, ON M7A 2S9

Dear Ms. Iarusso,

The Access to Justice Group ("AJG") is pleased to provide its input on the proposed amendment to the *Courts of Justice Act* that would eliminate some or all civil jury trials. This timely review in the context of the extraordinary times we are living in, and the challenges that the COVID-19 pandemic presents, is a critical step to promoting access to justice for litigants who require a resolution to their claims. We commend you for undertaking this review as it will further the goal of timely access to justice not only in the immediate future but in the post-COVID environment as well.

AJG is comprised of law firms and individuals who advocate for changes to Ontario's auto insurance product from a consumer perspective. We are especially pleased to support this current initiative, just as we supported the changes that eliminated juries from civil trials under the Simplified Procedure pursuant to Rule 76 of the *Rules of Civil Procedure*. These amendments have resulted in expedited hearings under a streamlined process that allows for an earlier resolution of claims in a more cost-effective manner.

We support the elimination of juries in civil trials and are pleased to submit our reasons for your consideration.

**COVID-19**

The COVID-19 outbreak is quite possibly the most significant life-impacting event of our lives. It is unprecedented; it is challenging; and it is affecting every aspect of our lives, including the justice system. Clearly, the health and safety of the public demands that we not place litigants, judges, jurors, court staff and the public in courtrooms for lengthy periods of time when the government and public health officials are prudently urging all of us to follow safe distancing

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protocols. This situation impacts access to justice and places further stress on litigants who have already experienced long delays in having their disputes heard and resolved.

As you are aware, there is a serious backlog of jury trials, a situation that has seen claimants waiting for many years to obtain trial dates. COVID has compounded this, creating further delays as trials have been postponed without any clear sense of when, in the foreseeable future, claimants will be able to access the courts. In these circumstances, this review is not only necessary to respond to these unique and extremely difficult circumstances but also presents a welcome opportunity to structure procedures for avoiding similar delays once the pandemic subsides. One such remedy is to remove the delays that result from continuing with jury trials in the civil justice system.

**Our Recommendations**

Continuing to allow jury trials adds to the strain on court resources by adding unnecessary delays, further impeding access to justice. More particularly, we urge the government to eliminate jury trials in civil matters for the following reasons.

1. Jury trials require more court resources and more preparation by trial counsel compared to trials by judge alone as evidenced by:

- scheduling backlogs created by longer jury trials
- the time and expense involved with court administering jury selection
- the time required for expert evidence, since: a. counsel spend more time qualifying experts in front of juries (even when expertise is admitted) and b. experts, themselves, have to spend more time explaining their expertise/opinion to a jury than would be required before a judge sitting alone
- the time it takes for the trial judge to provide lengthy instructions to the jury throughout the trial
- the potential for lengthy motions during trial regarding the jury, such as a motion to strike the jury for complexity or due to improper instructions or statements to the jury, and
- the added time required for counsel to prepare for and deliver opening statements and closing statements to juries given the need to explain the evidence and the law in ways that are not necessary when addressing the judge alone.

2. The current environment has provided an opportunity to advance the use of technology that will expedite the resolution of claims, provide greater access to justice for litigants and result in cost savings to consumers. This is more likely to be successful in judge alone trials where technology can be better adapted than in matters that include juries.

3. Judge alone trials will:

- provide enhanced transparency in the reasons for judgment, ensuring that justice is not only done but also seen to be done.
- provide greater certainty for litigants, thereby compelling serious consideration of whether to proceed with trials, and will
- allow the assessment of damages to be based on the expertise and experience of the judiciary.

**History of Reviews of Jury Trials in Civil Cases in Ontario**

Ontario has had a long history of reviewing the need for civil jury trials. In 1968, the Royal Commission Inquiry into Civil Rights recommended the elimination of juries in civil trials, except for claims in defamation. In 1973, the Ontario Law Reform Commission also reviewed civil juries, and observed that they were used most frequently in motor vehicle claims. Interestingly, the Commission's findings mirror what we know to be the case today: that civil juries, especially in motor vehicle claims, are often used for what it termed "tactical advantages". The Commission therefore recommended that "civil juries should be abolished except in the case of actions for libel, slander, malicious arrest, malicious prosecution and false imprisonment."

In 1996, after a consultation on the use of jury trials in civil cases, the Commission released another report on civil juries. However, there did not appear to be a consensus about whether juries should be eliminated. The Commission concluded that "it is not possible to identify, with any degree of certainty, those cases for which a jury trial is particularly appropriate, and that such a standard, therefore, would be extremely difficult to apply in practice." In the result, the Commission made recommendations that it believed would prevent abuses of the jury system that were identified during its consultations.

**Elimination of Trials in Civil Matters**

Jury trials are most often used in personal injury actions and as a result our recommendations will focus on their impact on motor vehicle accident claims.

Jury trials should be eliminated in personal injury actions as a means of reducing costs in the system while still ensuring that claims will be decided fairly, objectively and on the basis of evidence presented to a judge alone. There are sound public policy reasons for our submission.

The Ontario Court of Appeal has recognized that there is no constitutional right to a jury trial in civil matters. In *Legroulx v. Pitre*, 2009 OCA 760 (CanLii), the Court held that:

> The *Charter* confers a right to a jury trial only in certain criminal matters. The *Charter* does not confer a right to a jury trial in civil matters and we see no merit in the submission that ss. 7 and 15 should be interpreted to confer such a right. In our view, the appellants' claim that their ss. 7 and 15 rights have been denied exceeds by a very significant margin the reach of both the letter and the spirit of those *Charter* provisions.

**Other Jurisdictions**

England has eliminated jury trials in personal injury actions since the judgement of Lord Denning in *Ward v. James* [1965] 1 All E.R. 563. That case dealt with a claim in negligence advanced by a passenger in a motor vehicle who sustained serious injuries and who ultimately became a quadriplegic. Lord Denning held that the assessment of damages ought to be made by a judge alone and not a jury. He held:

> We have come in recent years to realize that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases. Yet the jury are not allowed to know what that conventional figure is. The judge knows it, but the jury do not. This is a most material consideration which a judge must bear in mind when deciding whether or not to order trial by jury. So important is it that the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances. Even when the issue of liability is one fit to be tried by a jury, nevertheless he might think it fit to order that the damages be assessed by a judge alone. [Page 576]

Dickson, J. supports this position in dictum in *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 wherein he noted the need for awards and damages to be predictable and uniform:

> The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss, but variation should not be made merely for the province in which he happens to live.

The reasoning in *Ward v. James* and *Andrews v. Grand and Toy* was applied by the Alberta Court of Appeal in *Goodfellow v. Knight* [1978] A.J. No. 706 wherein Justice Kirby held:

> I think it proper, in arriving at my decision in this matter, to take judicial notice of my own experience on the bench, during the course of which I have adjudicated many cases involving whiplash injury. I can say without hesitation that they are one of the most difficult types of injury in which to assess damages because of the very subjective nature of the evidence as to the injuries themselves and the effects of the injuries.
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> For that reason, I am of the opinion that involved in this case is a scientific medical investigation that cannot be conveniently made by a jury, and I must therefore dismiss the application.

It is important to note that other jurisdictions have eliminated jury trials in civil cases:

- Quebec and the Federal Court of Appeal in Canada have abolished civil jury trials
- Several states and territories in Australia do not allow civil jury trials and those that do, do not allow them for motor vehicle collision litigation.

**Access to Justice**

Access to justice considerations should be considered in any review of this issue. Access to the courts in a timely manner, especially in personal injury claims, is paramount given the need for claimants to obtain treatment and care for their injuries in a prompt and expedient manner. While the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 was faced

with reviewing alternatives to the judicial process of adjudicating disputes, the comments of Madame Justice Karakatsanis is nevertheless relevant to the issue of access to justice:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted. …
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> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. …
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> Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law. …

The drastic reduction in Statutory Accident Benefits Schedule benefits over the past few years has forced injured claimants to pursue medical, rehabilitation, attendant care and housekeeping benefits through the tort system. Unfortunately, claimants are then faced with interminable scheduling delays that result in a delay of up to three or four years for the claim to proceed to trial, all the while being denied compensation for the loss of income. Compounding the difficulties faced by claimants is the impact of the recent reduction in the pre-judgment interest rate for general damages. The stated rationale for the reduction was to reduce claims costs. However, the consequences flowing from this reduction includes:

- providing an incentive for insurers not to settle cases early to place financial pressure on plaintiffs
- increase insurer profits at the expense of plaintiffs whose compensation is delayed, and
- increase court backlogs as cases not being settled remain on the trial list.

One solution to this problem is the elimination of jury trials for personal injury claims which will ensure significant cost savings because it will:

- reduce the impact on court resources – it will reduce the administrative costs associated with conducting jury trials
- ensure that claims are heard sooner, and
- reduce the length of trials.

Insurers favour of jury trials because of the uncertainty of result for plaintiffs. That is, the current process compels plaintiffs to more often consider settlements even where the settlement would otherwise not be appropriate because of the uncertainty of outcome and the greater exposure to

increased costs. Mr. Justice Osbourne, who authored the "Report of Inquiry into Motor Vehicle Accident Compensation in Ontario observed: "I recognize the unfortunate reality that insurers in most negligence actions require their counsel to deliver a jury notice." He further stated that serving a jury notice is part of a defence strategy "to increase the risk to which the plaintiff is exposed. Manifestly on the basis that the insurer can absorb the risk better than almost all plaintiffs."

Mr. Justice Myers, in *Mandel v. Fakhim*, acknowledged that while "the jury system is still the law of the land" … jury trials in civil cases seem to exist in Ontario solely to keep damages award low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers." [2016, ONSC 6538, Para. 9]

**The Need for Greater Certainty**

There is a recognition that a trial before a judge alone has the advantage of introducing a level of certainty not present in jury trials because of the requirement for judges to follow case law, thereby forcing litigants to more seriously consider whether to proceed with trials. In short, trials before judges alone proceed more expeditiously and are therefore, less costly, than trials before juries. Moreover, not only do judges follow case law, unlike juries, they reduce their decisions to writing, thereby adding certainty to tort law.

The reasons underlying jury decisions are not transparent. In *Her Majesty the Queen v. Colin Sheppard* [2002] S.C.J. No. 30, Mr. Justice Binnie held that:

> Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.

**Exemptions for Certain Types of Actions**

Jury trials should be eliminated in civil matters. However, if the government decides to exempt certain actions, then it should be limited to those that involve defamation, false imprisonment and malicious prosecution. These cases involve issues of community values and standards and unjust harm to reputation and it may be appropriate to maintain the availability of juries for these claims.

We are pleased to submit our recommendations for your consideration and look forward to continuing our engagement with you on these issues.

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