

Ontario Trial Lawyers Association Submission to the Attorney General

*Potential amendment to the Courts of Justice Act
regarding civil juries*

June 15, 2020

The Ontario Trial Lawyers Association (“OTLA”) is pleased to provide input to the Honourable Doug Downey, Attorney General on potential amendments to the *Courts of Justice Act* regarding the availability of civil juries.

OTLA was formed in 1991 by lawyers acting for plaintiffs. OTLA currently has nearly 1400 members throughout Ontario. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA welcomes the opportunity to provide this submission and supports this Government’s efforts to establish new and innovative ways of delivering justice during the COVID-19 pandemic. It is vital for the administration of justice to promptly open the courts to more services and address the ever-increasing backlog of cases within the civil justice system.

Overview

In order to maintain the administration of justice in the midst of the COVID-19 pandemic, OTLA recommends all current and future civil jury notices be immediately suspended until such time as the provincial health restrictions allow for civil juries to be empaneled and the COVID-19 delays and backlog of cases can be addressed. This temporary suspension of civil juries is critically necessary to preserve trial dates already set for the fall of 2020 and through 2021.

OTLA further recommends amendments to the *Courts of Justice Act* to eliminate civil juries altogether on a permanent basis, subject to the following cases which trigger a public interest and engage community values or a person’s character, where the right to a verdict of one’s peers serves an important function in a free and democratic society:

- a. Defamation
- b. Intentional Torts
- c. Professional and Institutional Negligence in Healthcare
- d. Assessment and Award of Punitive Damages

OTLA recently conducted a survey of its members with respect to this very issue. Our members overwhelmingly supported the temporary suspension of juries in all cases to ensure that access to justice continues notwithstanding these difficult times. Our members also gave clear direction to OTLA to move forward with the elimination of juries on a permanent basis in accordance with the recommendations contained herein.

With respect to the questions posed in Mr. Downey’s June 5, 2020 letter to stakeholders, OTLA specifically recommends as follows:

1. Should civil juries be eliminated altogether?

Yes. OTLA supports the elimination of jury trials subject to the enumerated exemptions listed below which trigger the fundamental need for community involvement in the adjudication of the issues to be tried. Jury trials are significantly more costly and lengthy than judge-alone trials and should be reserved for those cases which truly touch upon the public interest.

Access to justice should also mean access to swift and efficient justice. If most of the current jury trials are converted to judge-alone trials, it is expected that significant court resources will be saved. If jury trials are restricted to a small and clearly defined proportion of cases where the jury serves a useful and important community function, this would balance the need for those jury trials with a corresponding limitation on the stress otherwise placed on judicial resources.

To maintain access to justice during the COVID-19 crisis, OTLA also recommends that all current and future civil jury notices be immediately suspended until such time as the provincial health restrictions allow for juries to be empaneled and the COVID-19 delays and backlog of cases can be addressed. This temporary suspension of civil juries is required to preserve trial dates already set across the Province.

It is the position of OTLA that timely justice is required in all cases. When the pandemic struck, trials in Ontario came to a grinding halt. All trials scheduled to proceed between March and June 30, 2020 have been postponed indefinitely. The parties in most of those cases waited years to obtain these trial dates.

At this time, the prospect of resuming civil jury trials in the immediate future seems unlikely, creating an access to justice crisis. If something is not done to allow these cases to move forward as judge alone trials, OTLA fears that the current judicial backlog will be compounded, resulting in even further delays in the hearing and resolution of civil actions.

Ontario has long grappled with a backlog of civil cases, which has increased exponentially over time. This backlog is continuing to grow with every case that is delayed because of the current health crisis and state of emergency. Further complicating this issue is the 2016 Supreme Court of Canada decision in *R. v. Jordan* (<http://canlii.ca/t/gsds3>) which set new time limits for the completion of criminal cases. When trials are once again allowed to proceed, criminal cases will undoubtedly take precedence over civil ones.

The immediate suspension of all current and future civil jury notices is required to allow trials to proceed by judge alone, to preserve access to justice in light of the COVID-19 crisis and, particularly, to preserve the fall 2020 and 2021 trial lists across the Province. Our civil justice system cannot afford to adjourn any further trials. Doing nothing is not an option.

2. If civil jury trials were to be eliminated, are there certain action types that should be exempt? Please specify any action types that in your view should continue to have jury trials available, and the reasons for your view.

For example, some Canadian jurisdictions have maintained civil juries only for matters that engage community values and a person's character, such as defamation, false

imprisonment, and malicious prosecution. Quebec, on the other hand, has eliminated civil jury trials altogether.

Yes. In addition to the immediate suspension of all civil jury notices to address the COVID-19 crisis, OTLA recommends that the *Courts of Justice Act* be amended to eliminate civil juries altogether subject to the following cases which trigger a public interest and engage community values or a person's character, where the right to a verdict of one's peers serves an important function in a free and democratic society.

a. Defamation

As noted in Mr. Downey's letter to stakeholders dated June 5, 2020, defamation is one of the exemptions that exists in other Canadian jurisdictions. Since claims of defamation, libel and slander necessarily involve the plaintiff's character and reputation in the community-at-large, it is OTLA's position that the right to a civil jury trial be preserved.

b. Intentional Torts

In addition to the intentional torts cited in Mr. Downey's letter to stakeholders dated June 5, 2020 (i.e., false imprisonment and malicious prosecution), OTLA recommends that the adjudication of intentional torts such as sexual abuse claims be similarly exempted to allow for jury verdicts which would reflect changing societal norms and values.

Sexual abuse cases involve both parties' reputation and character. For survivors, in particular, it is important to be heard by their community and to have the community play a part in holding the abuser to account. They often distrust authority figures, blame themselves for the abuse and are hesitant to disclose and pursue legal recourse. The civil jury system provides survivors with an opportunity to be heard by six of their peers, to shift the blame to their abusers and to find closure.

c. Professional and Institutional Negligence in Healthcare

Professional and institutional negligence claims involve important public interest and community values regarding healthcare which benefit from a civil jury verdict. These include medical malpractice and nursing home neglect cases, both of which involve shared Canadian values and community standards because of our publicly funded healthcare system.

For medical malpractice cases, it is important to allow the community, as the most invested and impacted stakeholder, to set the community standards by which we are all to live. Similarly, it is important to engage the community in cases of nursing home or institutional neglect. These are issues that affect all Ontarians. As has been highlighted during the COVID-19 pandemic, seniors

and others who reside in long-term care facilities are among the most vulnerable citizens in our community. Juries serve the public interest in these cases by testing the boundaries of what is just in the circumstances.

d. Assessment and Award of Punitive Damages

Punitive damages constitute a pronouncement by the court against conduct which shocks the conscience of the community. They are intended as the community's collective condemnation of misconduct which departs from community standards and they play a key role in a free and democratic society. These types of cases are rare and, where warranted, the claim for punitive damages should be decided by a civil jury with both the legal and moral authority to punish and deter the conduct found to be deserving of such an exceptional award.

Conclusion

OTLA thanks this government for the opportunity to provide this submission. OTLA agrees that the needs of the civil justice system have changed during, and as a result of, the COVID-19 outbreak. Immediate action is required to maintain the administration of justice and particularly the fall 2020 and 2021 civil trial dates. As noted above, OTLA recommends:

- (a) the immediate suspension of all current and future civil jury notices to allow trials to resume by judge alone in a timely basis during the course of the pandemic thereby avoiding further backlog and delay; and
- (b) the permanent elimination of civil juries altogether subject to cases which trigger a public interest and engage community values or a person's character, where the right to a verdict of one's peers serves an important function in a free and democratic society as outlined in more detail above:
 - a. Defamation
 - b. Intentional Torts
 - c. Professional and Institutional Negligence in Healthcare
 - d. Assessment and Award of Punitive Damages

OTLA's proposal represents a fair balance, maintaining the right to a jury in a small subset of appropriate cases, while eliminating juries in all others to reduce the backlog in the courts that predated, but has been worsened by, the pandemic. These changes will provide access to justice to Ontarians while saving the Province and litigants substantial costs and delay. The proposed exemptions listed above represent a small fraction of the civil jury trials in the Superior Court of Justice.¹

¹ The Civil Justice Reform Project Report of the Honourable Coulter A. Osborne, Q.C., of November 2007 notes that in 2005 to 2006, 74% of the jury trials heard were claims arising from motor vehicle accidents.

OTLA urges this government to move forward with the initiatives proposed herein forthwith and without delay.

OTLA thanks this government for the opportunity to provide these submissions. We would be pleased to discuss them further should the need arise.

With a perception that this number would be even higher now, the proposed exemptions represent a very small fraction of jury trials being heard in the Ontario courts.