The Beginning of the End? What Recent Decisions Could Mean for Jury Trials in Ontario

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Introduction

The Province of Ontario has been considering abolishing jury trials for civil matters, although no official decision has been announced. However, the closure of the Ontario courts due to COVID-19 and the impact of same on the legal system has potentially fast-tracked the end of juries.

This is concerning. The Supreme Court of Canada has stated that the "right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".[1]

As some regions, including Toronto, prepare to begin civil jury trials this fall, the majority of regions have determined that civil jury trials will not proceed for the foreseeable future. In the following cases, the court struck the jury notice of the defendant, allowing the matter to be heard by judge alone, on the basis that doing so would prevent further delay.

Benson v. Spencer, 2020 ONSC 5327

Background

The plaintiff in this case alleges personal injury as a result of being kicked by a horse owned by the defendant. The incident occurred in May 2010.

The action was initially set down for trial in May 2017 and was scheduled to proceed in November 2018. Several months prior, the trial was adjourned due to the plaintiff experiencing new symptomology, perhaps related to the accident, that had not been previously addressed. An adjournment was granted to allow more time for expert reports

[1] *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528

to be proffered in respect to the plaintiff's new symptomology. The trial was bumped to the May 2019 trial sittings.

Several months later, the trial was again adjourned as the defendant was unable to attend a May 2019 trial due to a scheduled vacation. The trial was adjourned several more times thereafter, ultimately landing on the October 2020 long trial list.

In June 2020, the parties were advised by the Regional Senior Justice that civil jury trials would not be proceeding in the region in 2020 due to ongoing COVID-19 concerns. It was suggested that if the matter was to proceed by judge alone, it could be heard in 2020.

Arguments

The plaintiff moved for an order striking the defendant's jury notice. The plaintiff argued that the delay the action would endure in waiting for jury trials to resume in the region was such that justice would be better served by striking the jury notice and proceeding by judge alone.

The defendant argued that the concerns raised with respect to future delay of proceedings due to COVID-19 and pandemic related concerns that may arise once jury trials resume, were unknown and speculative and therefore the court should implement a "wait and see" approach, leaving it to the trial judge to ultimately decide whether to strike the jury.

The Decision

Justice Sheard found that adopting a "wait and see" approach would not mitigate against delay, as with a standing jury notice the parties would have to wait until civil jury trials resumed before a trial judge would be appointed on the eve of trial, and at that juncture the matter of striking the jury notice would likely be moot as the delay would have already been sustained.

With respect to the background of the action and the numerous adjournments of trial, Justice Sheard was more deferential to the plaintiff's position and did not find that the plaintiff had caused delay to the extent the defendant suggested.

In coming to this decision, notable attention was given to the hurdles that the courts will likely face running a jury trial during the pandemic, including whether it would even be possible to secure a jury due to concerns that would likely result in potential jurors being granted exemptions or deferrals to serve.

In light of these likely hurdles and the established principle that jury trials, while fundamental, are not absolute and must sometimes yield to practicality[2], Justice Sheard struck the defendant's jury notice.

***Louis v. Poitras*, 2020 ONSC 5301**

Background

This action arises from personal injuries allegedly sustained in a motor vehicle accident that occurred in 2013. The trial was originally scheduled to proceed in May 2018. The pre-trial was adjourned due to a conflict involving plaintiffs' counsel and thereby the trial could not proceed as originally scheduled.

In June 2018, it was ordered that the tort and accident benefit actions arising from the same 2013 accident involving the plaintiffs be heard together in April 2020. Given that the courts operations were suspended as of April 2020, the trial did not proceed.

Arguments

The plaintiffs moved to have the jury notice struck on the basis that proceeding with a jury would cause delay with respect to rescheduling the trial.

The defendants argued that they had a substantive right to a jury and the plaintiffs' motion was premature as it was unknown whether a 10-week trial by judge alone could be heard before a 10-week trial with a judge and jury.

Furthermore, the defendants argued that the original date was adjourned due to plaintiffs' counsel being unable to attend the original pre-trial date. The defendants requested that the court take a "wait and see" approach.

The Decision

Justice Beaudoin noted that the test with respect to striking a jury was set out by the Ontario Court of Appeal in *Cowles v. Balac* 2006 CanLII 41806 (ON CA), which states that the party moving to strike the jury bears the onus of showing that the legal or factual issues to be resolved, the evidence, or the conduct of the trial would merit the discharge of the jury. The court must be satisfied that the moving party has shown that justice to the parties will be better served by the discharge of the jury.

[2] *Girao v. Cunningham*, 2020 ONCA 260, at para 171.

Justice Beaudoin noted that while there were no features of the legal/factual issues, evidence, or conduct of the trial that would merit the discharge of the jury in and of itself, the parties had not put forth evidence that a jury would be more capable than a judge alone in this case.

Justice Beaudoin found that prejudice would arise with respect to the plaintiff simply by reason of delay of the action being heard. He did acknowledge, importantly, that the delay of trial is not determinative on its own with respect to the right of the matter being heard by a jury. Nonetheless, he found that the delay was determinative in this context because the delay arose in the context of a global pandemic.

His Honour cited the reasoning in *MacLeod v. Canadian Road Management Company*, 2018 ONSC 2186, that the right to a civil jury trial may have to yield in appropriate cases in order to provide parties with an expeditious, affordable and proportionate resolution that is fair and just.

Ultimately, the jury notice of the defendants was struck as His Honour was satisfied that this was an appropriate case in which to exercise the discretion of the court to strike a jury notice as justice to the parties would be better served by the matter proceeding to trial in a timely manner with a judge alone.

***Higashi v. Chiarot*, 2020 ONSC 5523**

Justice Roger, in *Higashi v. Chiarot*, struck the jury notice of the defendant with oral reasons which have recently been transcribed and reported.

Arguments

While no background information with respect to the facts of the action was reported, the motion was brought by the plaintiff to have the defendant's jury notice struck for reason that the ongoing delay due to the pandemic would cause prejudice to the plaintiff.

The defendant argued that the motion to strike was premature given that it was unknown whether a 4-week trial by judge alone could be heard sooner than a 4-week trial with a judge and jury.

The Decision

Justice Roger consulted with the Regional Senior Justice of Ottawa (where the trial was to proceed), his colleagues and court staff with respect to an estimate of when civil jury trials may proceed in Ottawa. It became evident to Justice Roger as a result of his inquires

that it was unknown when civil jury trials could proceed, although a trial by judge alone could likely proceed by January 2021 if not sooner.

Justice Roger recognized that the right to a jury trial in Ontario is a substantive right that cannot be lightly interfered with unless there is just cause to do so. However, a jury trial is not an absolute right.

Justice Roger struck the defendant's jury notice. He reasoned that, at the time of the decision, the timelines surrounding reinstatement of jury trials in Ottawa were unknown, it was evident a trial by judge alone could proceed sooner, the parties' expert reports may have to be updated if the trial was further delayed, the parties were ready for trial, and the plaintiff statutorily loses 30 percent of any pre-trial loss of income she may have had before trial.

Nevertheless, Justice Roger noted that the pandemic situation is fluid and it remains unseen when this trial, even by judge alone, could ultimately be heard. He therefore stated that his decision on the very specific facts of this case could be reviewed if jury trials proceeded before this trial was heard.

What Does this Mean Moving Forward?

At this time, with no appellate authority addressing the appropriateness of striking a jury based on COVID-19 related delay, the foreseeable future of the jury trial will fall to the hands of individual judges guided by the specific regulations of the region in which the trial is to take place.

For example, given that jury trials are set to proceed in Toronto in October, a judge within the Toronto region would likely have no justifiable reason to grant a plaintiff's motion to strike a jury notice on the basis of a COVID-19 imposed delay.

However, it remains to be seen how far the courts will go in striking juries. Given that plaintiffs' counsel throughout the province are strongly in favour of the foregoing decisions, it is likely that we will see an influx of motions to strike jury notices.

While the foregoing cases have given weight to previous delay already endured in moving the matters to trial, it is curious whether the court will be so quick to strike a jury notice in a matter that has not previously been adjourned.

It should be expected that appellate authority will ultimately be released on this issue, unless the Ministry of the Attorney General moves forward to abolish jury trials in the interim.

For the time being, and as we continue to navigate the unknown, defence counsel should be wary of adjourning pre-trials and trial dates to the extent that it is possible, even when same would be done on consent. It is evident based on the foregoing decisions that any prior adjournment or delay can be used as grounds to strike a jury notice during these times.

If a consent adjournment cannot be avoided, which understandably may be in the case in these times, it may be worthwhile to agree with plaintiffs' counsel that such adjournment will not be used as a basis to strike the jury notice in future.

Conclusion

While it remains unknown what will happen to civil juries in Ontario in the future, the jury trial continues to be a pivotal aspect of the civil justice system and the abolishment of same, whether it be by way of striking jury notices on a case by case basis, or altogether by the Ministry of the Attorney General, has and will be met with fervent resistance.

Consideration should be given to how the court may implement procedures that would allow for a jury trial to proceed despite the current pandemic, such as the utilization of further virtual measures. We do not know whether such measures will work unless we try. What we do know is that the courts and counsel have shown a tremendous ability to adapt during the pandemic.

As stated by Justice Myers in *Arconti v. Smith*, 2020 ONSC 2782:

> "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.
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> In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency.

It is likely that the upcoming trial sittings slated for October in regions such as Toronto will offer some guidance as to the viability of conducting civil jury trials throughout the balance of the Ontario regions.

Rogers Partners LLP will continue to closely follow developments in this regard and provide ongoing updates as further decisions and practice guidelines are released.