

The End of Civil Jury Trials? Jury Notice Struck Due to COVID-19

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September 2020

The recently released motion decision in *Belton v. Spencer*, 2020 ONSC 5327, is a very important one for anyone practicing civil litigation in the province.

The Case

The claim arises from injuries sustained by the plaintiff on May 21, 2010 when he was kicked by a horse owned the defendant.

The trial was adjourned on a few occasions, including at the request of the plaintiff due to a significant cognitive issue that had “perhaps been overlooked” and the corresponding need to obtain an expert report. There was also an adjournment request by the defendant and further delays due to placing the matter on the long trial list.

The trial was ordered by the Regional Senior Judge to be heard during the long trial sittings commencing October 5, 2020. The parties were subsequently advised during a conference call with the Regional Senior Judge on June 19, 2020 that civil jury trials would not likely take place in 2020 in that jurisdiction due to delays related to COVID-19.

As a result, the matter would be delayed by one year to eighteen months. The Regional Senior Judge expressed the view that if the matter proceeded by way of judge alone it could likely proceed in 2020.

The Position of the Parties

The plaintiff moved for an order striking the defendant's jury notice and directing that the action be tried by a judge alone. The plaintiff argued that, due to COVID-19, there are serious concerns that, if the action proceeds by a jury, the trial will be delayed by a year to eighteen months and justice would be better served by striking the jury notice.

The defendant opposed on the grounds that the duration of the delay is unknown and the court should adopt a “wait and see” approach and it should be left to the trial judge to determine if the jury notice should be struck. The defendant also argued that the plaintiff

caused the delay and the plaintiff should, therefore, not be permitted to now claim a fear of delay from COVID-19 as a reason to strike the jury notice.

The Decision

In the decision, Justice Sheard highlighted that the Hamilton Courthouse was expected to have one court in operation as of July 6, 2020 and, as of the writing of the decision, there were no new announcements detailing how and when the courts in that region would be able to continue conducting civil jury trials.

Justice Sheard noted that, in addition to the pandemic driven changes (plexiglass barriers, seating stations, etc.), another concern is whether it will be possible to secure sufficient jurors for various reasons (health concerns, parents at home to supervise children, etc.).

Other concerns include what will occur if a juror becomes infected or exposed to COVID-19 and whether others will need to be quarantined and whether the result will be a mistrial.

In terms of the delay, Justice Sheard held that there is no need to speculate as to whether requiring a jury will delay the trial for at least a year as that is the evidence on the motion.

While the cases were not decided with a global pandemic in mind, Justice Sheard reviewed the law regarding jury trials, including that, while they are fundamental, they are not absolute and must sometimes yield to practicality (see: [Girao v. Cunningham](#), 2020 ONCA 260, at para 171).

Justice Sheard held that it cannot be left to the trial judge to decide whether to strike the jury notice as the delay the plaintiff seeks to avoid will have already occurred when the judge is appointed on the eve of trial.

Her Honour also rejected the defendant's claim that the plaintiff's adjournment request due to a new condition can be considered "delay". In this regard, the defendant was also responsible for significant delay by reason of the defendant's holiday that also necessitated an adjournment.

Furthermore, while Justice Sheard gave some weight to the argument that evidence was recently obtained, including various witness statements already taken, which neutralizes concerns of fading memories, the justice of the parties would be better served if the matter is brought to trial sooner rather than later.

Ultimately, Justice Sheard struck the jury notice and concluded as follows (at paras 44-46):

[44] The parties are ready for trial. But for the pandemic, the trial would have proceeded in October 2020. The events that gave rise to the action are already a decade old. The defendant's right to a trial by jury, is outweighed by the need to provide the plaintiff with more timely access to justice.

[45] I accept the defendant's submissions that the scheduling of criminal jury trials will take precedence over civil jury trials. Indeed, that is one factor contributing to the anticipated delay in being able to schedule a long civil jury trial in this action.

[46] COVID-19 has created additional challenges to ensuring access to justice, which, in this case, requires the court to strike the defendant's jury notice in order to do what is possible to ensure an earlier and more efficient and more affordable trial.

The Takeaway

On June 5, 2020, the Ontario Ministry of the Attorney General delivered a letter to stakeholders regarding potential amendments to the *Courts of Justice Act*, including the potential elimination of some or all civil jury trials in Ontario. The Attorney General sought stakeholders' responses by June 15, 2020.

There is now this decision, which held that a delay of one year to 18 months in a civil jury trial is sufficient to warrant the jury notice being struck and to require the matter to proceed by judge alone.

This will not necessarily apply to all jurisdictions. The Toronto court has stated its intention to proceed with the civil jury sittings in October 2020.

However, for other jurisdictions where space is more limited, there is a possibility of jury notices being struck considering that most cases that get to the trial stage are quite dated.

Even for those courthouses that have more space, one wonders what will happen if there is a "second wave" and more delays. If Toronto is unable to hear as many matters as expected in October, will the delays similarly be projected at a year? What if the courts close again for any period of time? Furthermore, perhaps the jury pool will prove more sparse as noted by Justice Sheard.

As set out by the court at paragraph 77 of [*Kapoor v. Kuzmanovski*](#), 2018 ONSC 4770, “the substantive right to a civil trial by a jury has been long recognized. Over time, that right has become an integral part of Ontario’s civil justice system.”

The potential delays are no doubt concerning but so is the prospect that juries may be struck so long as courts remain backlogged, which is certain to be very prolonged.

While not argued in this case, it is the opinion of this writer that perhaps a better solution in this case and others is a trial entirely by a virtual platform. Although there may be some logistical issues with having a virtual jury trial, many things that were unthinkable a year ago are now being done. The courts and counsel have been able to adapt.

Perhaps that is the way forward for the time being rather than scrapping jury trials entirely and removing such an integral part of Ontario’s civil justice system.