

“Wait and See”: Court Says Jury Notices Should Not Be Prematurely Struck

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I wrote an article about two months ago entitled “[The End of Civil Jury Trials? Jury Notice Struck Due to COVID-19.](#)” At the time, I discussed the case of *Belton v. Spencer* 2020 ONSC 5327,¹ wherein the motion judge held that the defendant’s right to a trial by jury was outweighed by the need to provide the plaintiff with more timely access to justice (the COVID-19 related delay in that case being a year to eighteen months).

There have been other cases where a jury notice was also struck (see, for example, *Louis v. Poitras*, 2020 ONSC 5301).

Conversely, in the decision of *Jiang v. Toronto Transit Commission*, 2020 ONSC 5727, Justice Wilson did not strike the jury notice on the grounds that Toronto was in a position to hold jury trials.

Two recent decisions were decided on a “wait and see” basis, which shows that the courts are perhaps more willing to allow jury trials to proceed should the circumstances allow.

The Decisions

MacDougall v. Sisley

In [MacDougall v. Sisley](#), 2020 ONSC 6632, Justice McKelvey noted that, on September 17, 2020, the Regional Senior Judge in the Central East Region issued a notice regarding the resumption of civil proceedings.

The notice advised of the cancellation of the November 2020 trial sittings and that the status of the May 2021 sittings remains uncertain. A running trial list for both jury and non-jury trials was implemented, commencing on October 5, 2020. Due to a spike in COVID-

¹ Motion to stay the order was dismissed with reasons at *Belton v. Spencer*, 2020 ONCA 623 (CanLII).

19 cases, jury selection in the Region of York was suspended for 28 days starting on October 16, 2020. This impacted Newmarket, but not Oshawa and Barrie.

Justice McKelvey noted that three courtrooms have been renovated in the Central East Region to put in place the appropriate COVID-19 safeguards. In early 2021, it is expected that two additional jury courtrooms will be available in Midland and Lindsay. Furthermore, consideration is being given to having a courtroom in Barrie dedicated to trying civil jury cases at the beginning of January 2021.

Justice McKelvey found that the prior decisions on the jury issue are not inconsistent as he found that they “reflect the fact that circumstances matter.” For example, he highlighted that, in the *Belton* case, the cause of action arose in May 2010 and the trial had already been adjourned on two occasions. The evidence accepted by the court was that a jury trial would be delayed by somewhere between 12 to 18 months. The evidence may very well be different in other cases.

Ultimately, Justice McKelvey adopted a “wait and see” approach. He referred to the available courtrooms and the additional planned courtrooms, and also noted that priority would be given to those matters on the running trial list that need to be tried earlier than others.

In Justice McKelvey’s view, the running trial list protocol should be permitted to evolve in order “to see whether it is possible to provide resources to civil cases (including civil jury cases) consistent with a rational and reasonable allocation of scarce resources.”

If the jury notice was struck, it was not certain that a non-jury trial could proceed without further delay. Justice McKelvey stated: “[w]hile timely justice is important the unfortunate reality we face as a result of the pandemic is that significant delays in trying cases have occurred in all areas of the courts’ work. The result is a significant backlog of trials; both jury and non-jury.”

Justice McKelvey ultimately dismissed the plaintiff’s motion to strike the jury notice, although he did so without prejudice to the right of the plaintiff to renew the motion as the court’s ability to try civil jury cases in the region becomes clearer.

Piette v. Haskins

The motion to strike a jury notice in *Piette v. Haskins*, 2020 ONSC 6633, was also brought before Justice McKelvey. In that case, a pre-trial conference took place in August 2020 and the earliest date it could have proceeded to trial was November 2020. Those sittings were cancelled.

While Justice McKelvey agreed with the plaintiff that timely justice is an important objective for our court system, he indicated that “we do not live in a perfect world”. He further stated that it appears likely that civil jury cases can be accommodated when a criminal jury case does not proceed or when a dedicated civil trial courtroom is set up in Barrie.

Accordingly, he held that “we should allow the protocol to evolve to see whether it is possible to provide adequate resources to civil jury cases consistent with a rational and reasonable allocation.” He further opined that this “wait and see approach” is the most appropriate in the circumstances.

Nevertheless, he clarified that, “if it appears that there will be an inordinate delay in trying civil jury cases, then it would be appropriate to reconsider whether that delay merits striking a jury notice in this or other cases.” As such, similar to the *MacDougall* case, the decision was made without prejudice to the right of the plaintiff to renew the motion to dismiss the jury at a later time.

Takeaway

This is a very reasonable and sensible approach from Justice McKelvey. As I stated in my previous article, “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.”²

While some amount of delay may be frustrating to plaintiffs waiting for their day in court, we must allow the process to play out in jurisdictions where the courts have gone to great lengths to maintain the substantive right to a jury trial.

² See: *Kapoor v. Kuzmanovski*, 2018 ONSC 4770, at par 77.