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Pandemic Prejudice: Striking Civil Jury Notices During COVID-19

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As a result of COVID-19, effective March 17, 2020, the Superior Court of Justice suspended in-person court operations. As of that date, civil jury selection and jury trials were suspended until September 2020. Only urgent criminal, family and civil matters continued to be heard. On June 25, 2020, Chief Justice Morawetz issued a Notice to the Profession announcing a phased return to in-person hearings.

Despite this phased return, the current and extraordinary circumstances present unique challenges to court operations and the exercise of judicial discretion in the application of the relevant case law.[1] This is particularly true with respect to motions to strike jury notices.

This article contemplates the effects of COVID-19 on civil jury trials and summarizes the court's reasons on leave motions for same. What is clear is that no two courthouses are the same. While some jurisdictions have been quick to strike jury notices, others such as Toronto have avoided doing so.

***Belton v. Spencer* (Hamilton Action)**

In *Belton v. Spencer*,[2] the plaintiff commenced an action seeking damages arising from injuries he sustained in 2010 when he was kicked by a horse owned by the defendant. The claim was issued in May of 2012 and the defendant delivered a defence and jury notice in July of 2013.

In September of 2020, the plaintiff moved to strike the jury, arguing that justice would be better served. In contrast, the defendant argued that:

- The court should not assume that a judge alone trial could be reached sooner than a trial before a judge and jury;
- The caselaw recognizes the need to follow a "wait and see" approach and that it should be left to the trial judge to decide whether to strike the jury notice;
- The British Columbia Supreme Court's decision in *Vacchiano v. Chen*[3] was distinguishable from the case at bar because the decision to strike the jury notice, in that case, was based on delay and fading memories of key liability witnesses; and

[1] *Louis v. Poitras*, 2020 ONSC 5301 at para. 2 [*Louis*].
[2] 2020 ONSC 5327 [*Belton*].
[3] 2020 BCSC 1035.

- It would be unfair for the plaintiff, who the defendant alleged was responsible for five years of delay, to now point to the possible delay caused by the pandemic as a reason to remove the defendant's substantive right to trial by jury.[4]

In addressing this novel COVID-19 issue, Justice Sheard of the Ontario Superior Court first looked to legislation for guidance. Sections 108(1) and (3) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, provide:

> **108 (1)** In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.
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> **108 (3)** On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

In addition, the court cited Rule 47.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which states:

> **47.02 (2)** A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

Justice Sheard then referred to the Superior Courts decision in *Rolley v. MacDonell*,[5] wherein Justice Corthorn delineated the test for a motion to strike the jury:

> A decision frequently cited with respect to the test on a motion of this kind is the Ontario Court of Appeal decision in *Cowles v. Balac (2006)*, 2006 CanLII 34916 (ON CA), 83 O.R. (3d) 660, 216 O.A.C. 268. The principle or test to be taken from paragraph 37 of that decision is:
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> a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
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> b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.
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> The plaintiffs acknowledge that they bear the onus of demonstrating that they satisfy the test to be met on the motion.
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> In deciding whether to make an order that the jury notice be struck, the trial judge has "considerable discretion" (*Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, at para. 44). In a number of its recent decisions, the Ontario Court of Appeal addressed the manner in which a trial judge is to exercise his or her discretion on a motion to strike the jury notice:

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[4] *Belton*, above, at paras. 28-31.
[5] 2018 ONSC 508.

- This discretion must not be exercised arbitrarily or on the basis of improper principles (*Kempf*, at para. 44); and
- The right to a jury trial is not to be taken away lightly (*Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc. (2002)*, 2002 CanLII 45019 (ON CA), 60 O.R. (3d) 665, 162 O.A.C. 186, at para. 73).[6]

The court further cited *MacLeod v. Canadian Road Management Company*.[7] In that case, Justice Myers described the principles from *Cowles* as follows:

(a) The court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury;

(b) The object of a civil trial is to provide justice between the parties, nothing more; and

(c) A judge may strike a notice even before the trial has begun if the judge considers that there is no advantage to beginning the trial with the jury because the situation makes it apparent that the case should not be tried with a jury.[8]

In *MacLeod,* Justice Meyers looked to the Supreme Court of Canada's decision in *Hryniak v. Mauldin*[9] for the proposition that, "to be just, a civil resolution of a dispute must not either take too long or be too expensive."[10] Further still, Justice Meyers opined:

- Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised;
- Undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes; and
- 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.[11]

Returning to the *Belton* decision, Justice Sheard adopted the Court of Appeal's wording in *Girao v. Cunningham,*[12] which affirmed the principles governing the discharge of a jury per *Kempf v. Nguyen*.[13] Namely, the court confirmed that "the question for the trial judge is simply this: will justice to the parties be better served by dismissing or retaining the jury?"[14] Perhaps more importantly, the court in *Girao* further opined: "While I recognize that the right to a jury trial

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[6] *Rolley v. MacDonell*, 2018 ONSC 508 at paras. 15-17 [*Rolley*]; *Belton*, above, para. 15.
[7] 2018 ONSC 2186.
[8] *Ibid.* at paras. 23-24 [*MacLeod*]; *Belton*, above, at para. 16.
[9] 2014 SCC 7.
[10] *MacLeod*, above, at para. 30; *Belton*, above, at para 17.
[11] *MacLeod*, above, at para. 30; *Belton*, above, at para 18.
[12] 2020 ONCA 260.
[13] 2015 ONCA 114.
[14] *Girao v. Cunningham*, 2020 ONCA 206 at para. 162 [*Girao*]; *Kempf v. Nguyen*, 2015 ONCA 114 at para. 119.

in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality."[15]

Following a review of the caselaw and the parties' submissions, the court struck the jury notice, concluding that, in doing so, justice would be better served.

Justice Sheard acknowledged the defendant's position that the law recognizes the need to follow a "wait and see" approach and that the matter would best be left to the trial judge. Despite this, the court reasoned:

> Firstly, the defendant suggests that the generally accepted and preferred procedural route is a "wait and see" approach. By that, I understand the defendant to suggest that it should be up to the trial judge to decide whether to strike the jury notice. The difficulty with that position is that the trial judge will not be appointed until the Friday afternoon prior to the Monday commencement of the long trial. Therefore, if a "wait and see" approach is taken, the delay in the scheduling of the trial that the plaintiff seeks to avoid, will have already occurred. For that reason, I find that the "wait and see" approach to be [sic] unsuitable.[16]

Justice Sheard did not accept the defendant's submission that the plaintiff had delayed the trial by waiting so long to set the matter down and also did not accept the defendant's argument that a non-jury trial would result in equal delays in comparison to jury trials.[17] The court also acknowledged that the risk of fading memories was reduced given witness statements, recent discoveries and expert reports. Notwithstanding this, Justice Sheard concluded that "Justice to the parties would be better served if this matter is brought to trial sooner, rather than later."[18]

On appeal, the Ontario Court of Appeal held that the three components of the test in *RJR-MacDonald v. Canada (Attorney General)*[19] favoured refusing to grant a stay of the judgment. That test considers the following questions: (1) is there a serious question to be tried (*i.e.*, to be determined on the appeal); (2) will the moving party suffer irreparable harm if the stay is not granted; and (3) does the balance of convenience favour granting the stay?[20]

Ultimately, the court concluded that by not granting the motion, the parties, who were otherwise ready for trial, would likely be required to wait over one year to have the matter returned before a civil jury. This, the court stated, "would be an unconscionable wait."[21] Justice Brown, writing for the Court of Appeal, explained:

> This action is long overdue for trial, concerning as it does events that took place 10 years ago. The parties are ready for trial and have been for some time. COVID-

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[15] *Girao*, above, at para. 171.
[16] *Belton*, above, at para. 38.
[17] *Ibid.* at paras. 40, 43.
[18] *Ibid.* at para. 44.
[19] 1994 SCC 117.
[20] *Belton v. Spencer*, 2020 ONCA 623 at para. 20.
[21] *Ibid.* at para. 78.

> 19 came out of left-field and upset the trial court's scheduling apple cart. But the Central South Region can make a judge available this coming Monday to try this personal injury case. If not tried then, the record shows that it will likely be over a year before the matter can return before a civil jury. That would be an unconscionable wait. The qualified right to a civil jury trial cannot dictate such a result, as it would be completely contrary to the interests of justice. Consequently, I dismiss the appellant's motion for a stay of the Order.[22]

***Louis v. Poitras* (Ottawa Action)**

Louis v. Poitras[23] involved claims for injuries sustained as a result of a motor vehicle accident which occurred in May of 2013. Following issuance of the Statement of Claim in May of 2015, the defendant, Jacques Poitras, delivered a defence and jury notice in August of that year. It was subsequently ordered in 2018 that this action and the related accident benefits carrier action be tried together. The plaintiff's OPCF 44R carrier was also added as a defendant to the action. But for COVID-19, the trial would have been heard in April of 2020; however, as a result of the pandemic, the plaintiffs moved to strike the defendant's jury notice.

Counsel for the plaintiffs argued that they had already waited seven years for the trial and should not have to bear the weight of the uncertainty; any further delay could be substantial. Second, additional delays would have consequences with respect to recovery for past income loss. As is common knowledge, the *Insurance Act*, R.S.O. 1990, c. I-8 limits past income loss to 70%. Third, the plaintiffs argued that the defendants in the tort had failed to show that they would suffer any prejudice if the jury was struck. Last, it was submitted that the defendants in the accident benefits action, as insurers, owed a duty of good faith to the plaintiff.[24]

The tort defendants submitted that:

- The motion was premature;
- The plaintiffs had not established that a ten-week trial before a judge alone could take place and/or be completed any sooner than could a ten-week trial before a judge and jury;
- The plaintiff has failed to show that she would suffer any income loss because she continues to receive long-term disability and CPP disability benefits;
- The court ought not to be making policy decisions about the right to a jury trial on a case-by-case basis; and
- The plaintiffs have not met the heavy onus on them with respect to an order discharging a jury notice.[25]

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[22] *Ibid*.
[23] 2020 ONSC 5301.
[24] *Ibid*. at paras. 23-28.
[25] *Ibid*. at paras. 30-32.

The accident benefits carrier argued that the motion was premature, that the plaintiff had not met the onus on her to deny the defendants of their right to trial by jury and that the court should adopt a "wait and see" approach.[26]

Justice Beaudoin of the Ontario Superior Court began his analysis by describing the two tests for leave to hear the motion. His Honour explained:

> As these actions have been set down for trial, the Plaintiffs require leave to bring these motions. There are two tests for granting leave. The more established test requires the moving party to show a substantial or unexpected change of circumstances subsequent to the filing of the trial record. The second, more flexible test, provides that leave may be granted if it is in the interests of justice to do so. In the context of the ongoing COVID-19 pandemic, the more flexible test has been preferred. On either test, I am satisfied that the Plaintiffs should be granted leave to bring these motions.[27]

As was the case in *Belton*, the court referenced *Cowles v. Balacas* the seminal case where the Court of Appeal confirmed: "the right to trial by jury in a civil case is a substantive right that should not be interfered with without just cause or cogent reasons."[28]

Amongst other cases, the court also cited the above-discussed decisions of *Rolley* and *MacLeod*. Concerning the latter, Justice Beaudoin adopted the following reasons of Justice Meyers:

> … Proportionality is a vital component of the civil justice system. It is enshrined in Rule 1.04 (1.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 as an omnipresent consideration in the assessment and balancing of all procedural issues. Mr. Rachlin argues, with much logical force, that in addition to complexity alone, if it can be shown that a jury trial will take much longer or cost much more than a non-jury trial; or if, because of its added length or <u>just because it is a jury trial, systemically, it will not be held until a much later date, then the use of a jury trial may fail to meet the interests of justice</u>. I agree.
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> … <u>The court must react to the realities facing civil litigants and the civil justice system</u>. It is not news to anyone that delays, and the high cost of civil proceedings impair access to justice. The Supreme Court has declared that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[3] Systemic issues like the insufficient judicial compliment, resource deployment away from civil cases as a result of *R. v. Jordan*, 2016 SCC 27 (CanLII), and other pervasive funding concerns affect the realities facing civil litigants. <u>The court's ability to provide long civil jury trials in an expeditious, affordable, proportionate way may be suffering as a result. Where this is so, the systemic realities may impair access</u>

[26] *Ibid.* at para. 33.
[27] *Ibid.* at para. 22.
[28] *Cowles v. Balac* (2006), [2006] O.J. No. 4177, 151 A.C.W.S. (3d) 1044 at para 154 [*Cowles*]; *Louis*, above, at para. 40.

> to civil justice. The right to a civil jury trial might therefore have to yield in appropriate cases in order to provide the parties with an expeditious, affordable, and proportionate resolution that is fair and, especially, one that is "just" as we currently comprehend that term.[29]

Following a fulsome review of relevant jurisprudence, the court ordered that the jury notice be struck because justice would be better served. It was found that "real and substantial prejudice arises simply by reason of delay."[30]

The decision also acts to confirm the court's decision in *Belton*. In this regard Justice Beaudoin commented:

> Justice Sheard identified several very practical concerns in empanelling and continuing with a jury during the pandemic which would be exacerbated in a long trial. She reviewed the relevant caselaw. Justice Sheard observed that COVID-19 has created additional challenges to ensuring access to justice. She concluded that the defendant' [sic] right to a jury trial was outweighed by the need to provide the plaintiff with a more timely access to justice.[31]

The court rejected the "wait and see" approach and concluded:

> In the matters before me, the Plaintiffs have waited seven years for the trials of the actions. All parties are ready. Any delay will likely require costly updated expert reports. It is unknown when or how a new jury trial may be heard. When I questioned counsel as to how a jury trial could proceed without a physical return to the courtroom, they conceded that they had not turned their minds to the logistics.
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> …
>
> None of the parties to these actions has an unfettered right to a jury trial. These parties should not be required to wait for a policy decision from the legislature. I decline to take a "wait and see" approach nor am I prepared to revisit the issue. I am satisfied that these are appropriate cases in which to exercise the discretion currently conferred upon me to strike a jury notice. I find that justice to the parties will be better served by these actions proceeding to trial, in a timely manner, before a judge alone.[32]

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[29] *MacLeod*, above, at paras. 31-32; *Louis*, above, at para. 50.
[30] *Louis*, above, at para. 46.
[31] *Ibid*. at para. 56.
[32] *Ibid*. at paras. 58, 62.

***Higashi v. Chariot* (Ottawa Action)**

In *Higashi v. Chariot*,[33] the plaintiff moved to strike the jury following the indefinite adjournment of the trial, which had originally been scheduled for March of 2020.

After hearing the parties' submissions, Justice Roger of the Ontario Superior Court held that the applicable test was that contained in the decision of *Cowles v. Balac*. Justice Rogers referred to the oft-cited proposition in that case, that "the right to a jury trial in Ontario is a substantive right that should not be lightly interfered with unless there is just cause or cogent reasons to do so".[34]

Justice Rogers also relied upon the court's comments in *Gervais v. Kapasi*.[35] In that case, Justice Bockenshire stated:

> In my view there comes a time when matters in dispute have to be resolved. There comes a time when the cost of litigation outweighs what can be hoped for as a result. I think in this case the time has come. I have considered the grounds put forth. I feel they are novel. I feel they are practical. I feel they meet the needs of present litigation and the needs of parties to be served by the judicial system. I do not think it would be doing justice to the positions of either the plaintiffs or the defendants to again put this off to another day. They have come here prepared and ready to go and ready to present their respective cases to a tribunal for decision. I am prepared to allow them to proceed forthwith. The jury is struck.[36]

The court ultimately struck the jury. Justice Rogers rejected the defendants' argument that prejudice could not truly be measured without knowing when a jury trial might be heard. To do so would create added uncertainty which would not be in the interests of justice and would add to the parties' expenses. The following reasons were cited:

- At the time of the decision, it was not known when a civil jury trial might be heard in Ottawa.
- A four-week judge alone trial could be heard in Ottawa in the very near future.
- The parties were ready for trial and neither party disputed its readiness to proceed to trial.
- Expert reports had been prepared and it would be much more costly to update these reports at a later date.
- The plaintiff would statutorily lose 30% of any pre-trial loss of income she may have had prior to trial.

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[33] 2020 ONSC 5523.
[34] *Cowles*, above, at para. 154; *Higashi v. Chariot*, 2020 ONCA 5523 at para. 34 [*Higashi*].
[35] [1995] O.J. No. 3128, 58 A.C.W.S. (3d) 572.
[36] *Gervais v. Kapasi*, [1995] O.J. No. 3128, 58 A.C.W.S. (3d) 572 at para 26 (Ont. Gen. Div.).

- It seemed more probable that civil jury trials would be delayed for quite some time considering the resulting backlogs.
- The state of uncertainty resulting from COVID-19 was very much unknown. At this point in time, the state of not knowing favoured a trial by judge alone. Balancing the risks and the rights of the parties seemed to favour striking the jury notice, considering this existing state of uncertainty.
- Uncertainty or added uncertainty would result if the motion were to be adjourned for an unknown period of time to allow for a "wait and see" approach. This unknown or this uncertainty, or level of uncertainty, was not in the interest of justice as it would probably delay the trial and would result in increased expense to both parties.
- As indicated by the Supreme Court of Canada in *Hryniak v. Mauldin*, a fair trial requires a process that is proportionate, timely and affordable, and the high level of uncertainty about when a jury trial might proceed in the future would make the probability of achieving these goals much more unlikely.
- The unknown delay *vis-à-vis* the availability of a civil jury trial in Ottawa could be substantial. A "wait and see" approach could not be employed and the matter ought to move forward given the circumstances of the case.[37]

Of interest, the court provided a glimmer of hope for the defendants. In the event that the timeframe for the return of jury trials was not as long as anticipated, Justice Rogers would allow the parties, in the circumstances of this case, the possibility of returning before the court to review if the interests of justice then balance differently. Justice Rogers continued: "If it's timely then the opportunity is available to the parties. If it's untimely, it's not."[38] That said, his honour levelled the defendants' expectations by remarking that civil jury trials were uncertain and would probably not be available in a timely way.

Jiang v. Toronto Transit Commission (Toronto Action)

Despite the trend in the above decisions, there is a separate line of authority which might arguably apply to all Toronto civil jury trials. In *Jiang v. Toronto Transit Commission*,[39] the court considered the plaintiff's motion to strike the jury.

The plaintiff argued that COVID-19-related court backlogs would cause substantial delay. Further, the plaintiff would be prejudiced because jurors who take Toronto transit may blame the plaintiff for their having to attend. Last, the plaintiff submitted that the action in itself was complex and therefore not suitable for trial by jury.[40]

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[37] *Higashi*, above, at para. 42.
[38] *Ibid*.
[39] 2020 ONSC 5727.
[40] *Jiang v. Toronto Transit Commission*, 2020 ONSC 5727 at paras. 2, 4.

Defence counsel argued that the case was not a complex one and that the defendant has a fundamental right to have her matter adjudicated by jury. This right ought not to be taken away without compelling reasons.[41]

Justice Wilson of the Superior Court distinguished this case from others and explained that Toronto is offering civil jury trials. As such, the court rejected the plaintiff's submissions about time delays and explained:

> I am well aware that we are in unprecedented times. The Court must be flexible and adaptable to accommodate the needs of the parties and to ensure that cases proceed in a fair and equitable fashion. In Toronto, we are very fortunate that we have courtrooms that have been retrofitted to accommodate the social distancing that is required to conduct jury trials. We also are able to conduct jury selection at an off-site premise which has been created to allow for social distancing; it has been approved by the appropriate authorities to ensure it is safe for choosing juries. Further, counsel can decide what witnesses can give their evidence virtually and what evidence can be filed electronically and what evidence may be necessary to have heard in the courtroom.
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> I am aware that in other jurisdictions that cannot at the present time offer civil jury trials, my colleagues have granted motions striking juries: see *Higashi v. Chiarot*, 2020 ONSC 5523 (Ont. S.C.J.), *Louis v. Poitras*, 2020 ONSC 5301 (Ont. S.C.J.) and *Belton v. Spencer*, 2020 ONSC 5327 (Ont. S.C.J.). In all these decisions, the prejudice to the Plaintiff as a result of an undetermined delay had to be weighed against the right of the Defendant to have the action tried by a jury. In the case at hand, I do not have to consider these issues as there is no prejudice to the Plaintiff and no access to justice issue to be balanced since civil jury trials are available in Toronto.[42]

Justice Wilson also rejected counsel's argument that the jury would be biased against the plaintiff. While jurors may or may not have to take public transportation, there was no evidence doing so would result in bias to the plaintiff.[43]

The court was seemingly unpersuaded that the complexity of the action warranted a judge alone trial. There is a high onus when seeking leave to strike a jury due to complexity; however, this was said to be an issue best left to the trial judge after some evidence has been heard.[44]

Justice Wilson concluded the brief decision with the following remarks:

> In conclusion, there is no urgency to this motion nor is there merit to the suggestion that a jury trial will somehow prejudice the Plaintiff. There may be other reasons why counsel prefer to have a case decided by a judge alone as

[41] *Ibid*. at para. 5.
[42] *Ibid*. at paras. 6-7.
[43] *Ibid*. at para. 9.
[44] *Ibid*. at paras. 10-11.

> opposed to a jury; if that is the case, the reasons must be clearly and cogently set out for the judge to consider. Mere speculation is not sufficient to justify depriving a party of its right to a trial by jury.
>
> I decline to order this motion heard on an urgent basis or prior to the trial. If the solicitor for the Plaintiff wishes to bring a motion to strike the jury on the basis that the case is too complex for a jury to understand, he is to do so to the trial judge.

Closing Remarks

It is apparent that various court jurisdictions are hesitant to delay proceedings that are otherwise ready for judge alone trials. While the majority of cases suggest that a plaintiff will succeed on a motion to strike, the ever-changing circumstances and uncertainty that arise from COVID-19 militate in favour of continuing to oppose such motions for certain jurisdictions.

As we have seen, various courthouses including Toronto are now prepared to hear civil jury trials. Other jurisdictions such as Barrie have also followed suit.

It may be that those court jurisdictions that are currently striking jury notices will be prepared for civil jury trials sooner than anticipated. In such circumstances, the court's perspective on motions to strike a jury notice may also change.

For the time being, we will all have to wait and see.