June 15, 2020

Via email: *amanda.iurusso@ontario.ca*

The Honourable Douglas Downey
Attorney General of Ontario
200 – 20 Toronto Street
Toronto, ON

Dear Mr. Attorney General,

You have extended an invitation to stakeholders to comment on the possibility of altering or eliminating the use of juries in civil actions in Ontario. Please accept this letter on behalf of the Board of Trustees of the Middlesex Law Association in that regard.

The Middlesex Law Association is a regional law association with a membership of approximately 900 practitioners in Middlesex County. The county includes the City of London and the nearby population centres of Strathroy, Mount Brydges, Dorchester, Thorndale, Parkhill, Glencoe and Lucan. Our association is based in London and, in addition to providing representation, education and social events for our members, we operate a regional law library located in the London courthouse.

In response to the request for comment, received by FOLA on June 5, 2020 and sent to the attention of the MLA board on June 8, the MLA convened a video conference meeting inviting the participation of all members for the purpose of discussion and seeking input on this issue. That meeting was held on June 9, 2020 and was attended by over 50 members. We also invited e-mail comment to our association. This letter is our attempt to summarize the thoughts of our members for your consideration.

Consultation Timeline

We feel we must respectfully take issue with the timeline allowed for consultation in this matter. This was no more than one business week. It is critical to acknowledge that this is in the midst of the Covid-19 pandemic, making communication, consideration and collaboration more difficult than usual. Even in an ideal, "business as usual" environment, one week to formulate and provide input on such a central tenet to our

existing legal system was shocking and frustrating to our members. We are aware that past studies and consultations have been done in Ontario and elsewhere (notably related to the drafting of and amendments to Rule 76 of the Rules of Civil Procedure) and it would seem misguided to ignore those. One week simply does not permit the required study and review. We have provided this submission, notwithstanding these concerns, but we feel strongly that further and better consultation would be invaluable and really should be permitted and encouraged.

Differing Viewpoints

It became clear almost immediately that there is no consensus within our membership on whether civil actions should be heard and decided by juries. While there are various reasons on both sides, the most obvious pattern arises in the area of motor vehicle related personal injury actions. There is a strong tendency for defendants to support trials by jury and for plaintiffs to oppose them; it is almost universally the case that jury notices in these matters are filed by defendants and not plaintiffs. Input from practitioners in sexual abuse/assault cases revealed a trend toward plaintiffs preferring jury trials more than defendants. In medical negligence cases, again, plaintiffs often favour having juries, although the complexities of standard of care cases may be felt by some to be more appropriate for judge alone proceedings.

We sought the input of practitioners in the areas of estate, commercial and construction litigation. As a general rule, it seems that jury trials are rare or non-existent in these practice areas.

Our association cannot put forward "a position" on whether civil juries should or should not remain a part of Ontario's judicial system. Rather, we can provide you with the careful and considered thoughts of our members both for and against the use of juries in these matters.

In Support of Juries

Among those favouring the retention of juries, there is a concern that any proposed changes are merely in response to the current health pandemic. While resulting backlogs and delays are obvious, many question the logic and wisdom behind making broad and permanent changes to a longstanding system to respond to what we all hope is a temporary situation.

Juries exist as one of the finer examples of a democratic judicial system in operation. Having disputes between members of the community decided by other members of that community helps to establish the acceptable standards for that same community.

As noted above, those representing defendants in personal injury (especially MVA) cases have something close to consensus in their support of maintaining the jury system. We are without empirical evidence to explain why, but anecdotally, practitioners on both sides perceive that juries are less "friendly" or supportive of injured plaintiffs than are judges. Indeed, several members (both plaintiff and defence counsel) noted damage assessments from juries (made without written reasons) that are surprisingly

low in light of evidence tendered. Obviously from a risk exposure perspective, this favours defendants, and in the vast majority of cases, liability insurers who insure those defendants. There may be a perception that because defendants are insured, as individuals they don't benefit from the role of a jury. It should be noted that while it is most often the case, not all personal injury cases involve an insured defendant; even where an insurer is involved, a claim could exceed the coverage limits, making the defendant personally exposed. Many believe that juries are critical in cases in which credibility is in issue. This is often significant in non-objective or so-called "soft tissue" cases. It may be that as a group and without the requirement of providing written reasons, jurors are more able to make negative credibility assessments than judges might be.

Somewhat in contrast, in medical negligence cases, plaintiffs frequently request a jury. This is especially true in informed consent matters where a subjective/objective standard applies; it is felt by some that a jury might be more receptive to a plaintiff's position in these cases. One might speculate that jurors being fellow "consumers" of the impugned services would be more sympathetic to an injured plaintiff. There is a perception that causation issues in medical negligence are more challenging for plaintiffs in a judge alone matter.

Also in the area of injury but with numerous unique aspects are sexual abuse and sexual assault cases. These have already been treated differently than other causes of action in order to address victims' hesitation to disclose incidents and to pursue legal remedies, the best of example of which is the removal of limitation periods in both criminal and civil matters. Members practising in this area suggested advantages to the jury system including having society's moral and community standards judged by members of that society, improving the balance of victim and perpetrator's rights and the distrust of authority that inflicts and inhibits many victims who might be more comfortable being judged by their fellow community members than a presiding judge. Obviously delays due to the length of jury trials as compared to judge alone trials are a strong motivator for any discussion about eliminating juries. Our members have indicated that jury trials in sexual abuse cases tend not to be long or complex, mitigating against this concern. Finally, there is a perceived imbalance in a system in which an accused could decide that seeking vindication from a jury is preferable but be denied that route in a civil action.

Woven throughout these discussions is an assumption that a judge alone trial moves more quickly than one with a jury. There is logic to this assumption in that evidentiary rulings before a judge alone tend to be less cumbersome, fewer explanations and directions are required, procedure moves more quickly due to the familiarity of counsel and the judiciary and there is no need for an often lengthy charge. However, it is all too common that we see long periods during which trial decisions in judge alone matters are under reserve; this can go on for many months. If the goal is to serve justice and to do so expeditiously, the assumption that jury trials are slow may be a false one.

Some of our members noted the absence of any data regarding settlement rates, the timing of settlements of jury and non-jury cases, the allocation of court resources for

each, etc. Some analysis should be undertaken of the success rate of appeals based on jury error as opposed to judicial error or findings of perverse verdicts, for example. Perhaps input should be sought from jurors themselves to determine whether the process is unpleasant, inconvenient or taxing or an experience they appreciate and enjoy. If this information can be obtained and analysed, it may be irresponsible to impose a significant change to the existing system without accessing it.

Abandoning Juries

With some exceptions, most members who represent primarily plaintiffs in personal injury (ie. MVA) matters would favour dispensing with juries. There are a number of expected benefits in doing so:

- improved fairness and transparency where decisions do not appear to come from within "the system"

- shortening trials (quicker evidentiary rulings, fewer procedural explanations, shorter sittings, no charge to the jury)

- concerns about whether juries truly represent present day society (all aspects of diversity)

- improved consistency in damage assessments

- statutory deductibles in auto cases not disclosed to juries ultimately erode juries' verdicts

- should shorten the backlog, both existing and due to the pandemic's impact on court operations

All of these potential benefits should lead to improved access to justice in the civil context; this is a goal that is perhaps more important than any right to a trial by jury. These practitioners would note that to say that a judge alone cannot provide justice is not an acceptable premise.

It is well-known among the bar that civil matters fall third in the Superior Court's priorities after criminal and family matters. Combined with the above noted backlogs, this has resulted in barely manageable uncertainty as to whether scheduled matters will proceed and be heard and not be adjourned. Eliminating the procedural and time requirements of involving a jury should shorten trial time and improve overall scheduling.

The Superior Court has already established a simplified procedure whereby matters in which the damages are $200,000.00 or less proceed without juries. This figure seems rather arbitrary and raises many questions as to how or why cases just above or below that figure are treated substantively differently. Abolishing juries would eliminate this disparity.

In MVA cases there are key elements that impact verdicts but are not part of a juries' knowledge base. These include the existence and operation of insurance policies, the statutory "threshold", the statutory deductible and the involvement of experts (often familiar to the court). The experience and knowledge of judges enables them to navigate cases and reach decisions with these factors in mind, hopefully resulting in fair, just and efficient adjudications.

Our system of common law is built upon *stare decisis*. In a civil jury system in which reasons for decisions are not provided, there is no precedent on which to rely and as such, little consistency in decisions. This imposes great difficulty on parties who have to decide on whether a matter warrants proceeding to trial. That difficulty is arguably greater for plaintiffs in personal injury actions who may be at a financial disadvantage as compared to a liability insurer behind the defence of an action. The unpredictability of a jury is raised by Defendants as a primary consideration for the vast majority of Plaintiffs to drive them into settlement. That uncertainty may drive more matters to trial that could otherwise have been settled and may cause matters to settle unjustly due to fear or incapacity for assuming the risk of trial.

In the absence of a requirement that written reasons be provided, there is a concern that the jury is not accountable for its decision. Unless there is an error in the charge, it is extremely difficult to appeal a jury decision.

Alternative Approaches

Several of our members recognized that some change may be necessary, especially in light of the circumstances that have played out as a result of the current pandemic. Some alternate solutions were raised, although, primarily due to the short timeline for consultation, there has been no opportunity to explore these more fully. Among the ideas brought forward were:

- have all civil matters tried by a judge alone with specific and limited exceptions (sexual abuse cases as a possible example)

- amend the Courts of Justice Act to allow for applications and/or motions seeking to leave to have a jury notice permitted

- allow juries in cases where both parties consent

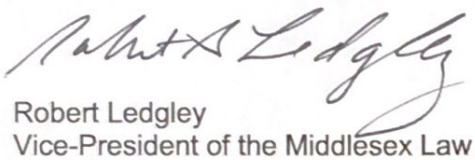
- given the particular impact evident, consider a separate (ie. non-court) process for personal injury matters

Going Forward

There are numerous ideas presented above, some in harmony and many in conflict. It would seem that most practitioners' views are informed by their particular area of practice, which was to be expected. What is clear is that the possibility of abolishing civil

jury trials raises a number of strong opinions. Given the province's long history of having civil juries play a vital role, any process that could significantly alter or abolish that practice should result from serious, careful and exhaustive consultation. We have suggested that broader consultation be undertaken and, based on the feedback from our membership, there are many members of the bar who would eagerly participate in a more fulsome process. As a regional law association representing a significant and passionate membership group, we would welcome the opportunity for further involvement in this consultation process.

Yours Truly,



Robert Ledgley
Vice-President of the Middlesex Law Association