Legate INJURY LAWYERS

March 3, 2023

VIA EMAIL to Peter Kryworuk: pkryworuk@lerners.ca

Peter Kryworuk
The Advocates' Society
250 Yonge Street
Suite 2700
Toronto, ON
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Dear Mr. Kryworuk:

Re: Proposed Amendment to Rule 6.1.01 Consultation to the Subcommittee of the Civil Rules Committee

I write to you in my capacity as Chair of the Bifurcation Subcommittee of the Civil Rules Committee. I understand that you or your organization are experienced users of the civil justice system in Ontario.

As you may be aware, in recent years the Superior Court of Justice's ability to assist in settling and in trying civil cases has been under increasing pressure. The reasons are many, but two of the most significant are the Supreme Court of Canada's insistence that criminal cases be tried expeditiously as a matter of priority and the increasing devotion of system resources to family law cases. The pandemic has only added to that pressure.

These demands for judicial time and attention make it critical for the civil justice system to operate as efficiently as possible to the benefit of the parties. They are entitled to timely justice that focuses on the true issues between them. One area under consideration is the bifurcation of trials to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".[1]

Background

Rule 6.1.01 of the *Rules of Civil Procedure* states:

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

Chief Justice Morawetz requested that the Committee consider amending Rule 6.1.01 to provide that a bifurcated trial could be ordered where the parties do not consent, and that the court may propose that a trial be bifurcated on its own initiative.

[1] Rule 1.04(1)

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Previously, the court had inherent jurisdiction to bifurcate, except in the case of jury trials. The 2007 Osborne Report recommended that the Rules should allow jury trials to be bifurcated on consent of the parties. Rule 6.1.01 was drafted without the distinction between jury and non-jury trials and has been interpreted to mean that all trials require consent of the parties to bifurcate.

In light of the backlogs created by the pandemic and pre-existing pressures on the courts to deal with large trial backlogs, permitting an amendment to the rule allowing trials to be bifurcated between liability and damage issues is one tool that could lead to shorter trials and more settlements.

Consultation

The purpose of this letter is to ask for information from you, as a user of the civil justice system, to assist in the formulation of recommendations to the Civil Rules Committee designed to address the problems identified.

I would ask you or your organization to prepare a written response to several questions. The response need not be longer than about five pages. I would ask that these submissions be sent electronically to Laura Craig, counsel, Office of the Chief Justice, at: laura.craig@ontario.ca and me, Barbara Legate at: blegate@legatelaw.ca.

In preparing your response, I would be grateful if you would use the sequence of questions so that the responses from various organizations can be efficiently combined:

1. Should jury and non-jury trials be treated differently under the Rule.

    a. As proposed in the Osborne report, bifurcation could continue to be available to the parties in a jury action if consented to. In all other cases, any party could move for bifurcation; or
    b. All cases, jury or non-jury, any party may move for bifurcation.

2. Should a judge be able to bifurcate an action on their own initiative? Should this be limited to the pretrial judge? Is it too late to bifurcate at trial?

3. At what point in the litigation ought the motion be brought?

The concerns of the committee relate to cost and the ability to evaluate whether the action is amenable to bifurcation. Earlier motions will potentially avoid the costs of experts and pretrial preparation, but may be too early in the litigation. For example, in personal injury litigation, it may be clear to all that a decision on liability must be made in order to further settlement discussions. However, in order to get to trial, the plaintiffs and defendants will be put to the expense of preparing both cases. This may prove to be a barrier to smaller firms that cannot fund disbursements while a liability action makes its way through trial, waiting for judgement and appeals.

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At a pretrial, the parties are expected to be in a position to know how their case will be put in, and they and the pretrial judge will be in a better position to evaluate whether the case would benefit from bifurcation.

Case management may be an appropriate venue for consideration of such a motion, before a judge who may already be involved in an action.

4. Should the timing be an issue for determination by a judge on a case-by-case basis? In other words, leave it to the parties to assess when to bring the motion. Permit a motion judge to adjourn it to the pretrial in an appropriate case.

5. If bifurcation occurs at the pretrial stage, should the pretrial judge have the jurisdiction to award costs of damages disbursements where they will have to be updated should that part of the action proceed to trial?

6. Would new wording in Rule 6 that adopts that contained in Rule 21.01(1) to permit bifurcation where it may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, be acceptable?

Time Line for Response

We are seeking your input by April 30, 2023.

Responses should be made to Laura Craig, counsel, Office of the Chief Justice, at: laura.craig@ontario.ca and to me, Barbara Legate at: blegate@legatelaw.ca.

Yours very truly,

LEGATE INJURY LAWYERS

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