SIMPLIFIED PROCEDURES (RULE 76) ACTIONS: **BRAVE NEW WORLD OF CHANGES**

Simplified Procedure – A New Hope (with apologies to Star Wars)

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Litigation in Ontario is expensive. Cases generally move slowly. They consume a huge amount of time, and a large volume of judicial and other publicly funded resources. Add to that the exposure to significant costs and disbursements, the stress of each step in the litigation process, and the uncertainty of the result, and it is easy to see that litigants in Ontario are faced with extraordinary challenges. This is particularly true when the amount at stake is not large.

The Simplified Procedure under Rule 76 of the *Rules of Civil Procedure* was enacted many years ago in an attempt to remedy some of these issues in smaller claims. While litigators generally have different opinions about the efficacy of Rule 76, it is clear that personal injury lawyers have not embraced the Simplified Procedure, for good reason. That is likely going to change now that the Rule 76 amendments have come into effect. Personal injury lawyers in particular, and litigators in general, will now be able to see the real benefits of proceeding under the Simplified Procedure.

History

In 1994, a subcommittee of the Civil Rules Committee concluded that the *Rules of Civil Procedure* were unsuited to disputes involving smaller amounts of money, due largely to the prohibitive costs of litigation. It described one of the dilemmas facing lawyers:

> …If the lawyer does not invoke all of the procedures available…the lawyer may…be exposed to an allegation of negligence. Alternatively, a lawyer simply may be unable to steer an inexpensive course because the opponent invokes all of the procedures available. [1]

The subcommittee concluded that a streamlined procedure for lower monetary claims would be the solution. When the Simplified Procedure first came into effect in 1996, the monetary jurisdiction was $25,000, before increasing to $50,000 in 2002. These early versions notably featured:

- Mandatory application to civil actions within the monetary jurisdiction, with financial consequences for the failure to opt in;
- Elimination of oral examinations for discovery, cross examinations on affidavits in interlocutory proceedings and examination of a witness on a motion;

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[1] Holmested and Watson: *Ontario Civil Procedure, Commentary on the Rules of Civil Procedure*, R. 76§2 — HISTORY AND POLICY OF THE RULE (Toronto: Thomson Reuters, 2019).

- Lower threshold for granting summary judgement than that provided under Rule 20; and
- An optional summary trial process where evidence is adduced by affidavit, with limited time slots for cross-examination, re-examination, and oral arguments.

In 2010, a number of amendments were enacted, leading to the Simplified Procedure that existed immediately before the January 1, 2020 amendments came into effect.

The Simplified Procedure Before January 1, 2020

Prior to the January 1, 2020 amendments, Rule 76 applied to a claim for money, real property, or personal property valued from $25,000 to $100,000. Cost consequences existed for parties who failed to use the Rule for claims that were within this monetary limit.

Under the old Simplified Procedure, after the exchange of pleadings, each party must serve an Affidavit of Documents that included a list of names and addresses of persons who might have knowledge of the matters in issue. Examination for discovery by a party was permitted for a total of two hours, regardless of the number of parties to be examined. Cross examinations on affidavits were not permitted. There were a few other procedural limitations, all designed to reduce the cost of the litigation process.

The summary trial was provided as an option to an ordinary trial under the prior version of Rule 76. While evidence was largely adduced by affidavit, a party may examine in chief the deponent for 10 minutes. A party's cross examinations must all be completed within a total of 50 minutes, and 45 minutes were allotted for closing arguments. However, a judge had the discretion to extend any of those time limits.

The Simplified Procedure pre-January 1, 2020 only permitted a trial to proceed in the summary fashion on consent of the parties, or if the pretrial judge or case management master determined that the summary trial was appropriate in all the circumstances. It is difficult to envision a situation where a judicial officer would override the will of a party to have an ordinary trial where liability, damages, credibility, etc. are all in issue, as is the case in most personal injury matters. For all of the procedural niceties prescribed by the previous Simplified Procedure, there were no effective restrictions on a party demanding that the matter proceed by way of an ordinary trial, with all of the associated time and cost consequences.

Issues with the Simplified Procedure Pre-January 1, 2020 Amendments

Rule 76 was rarely used in personal injury litigation, for good reason - there was little, if any, incentive for plaintiffs to bring an action under the Simplified Procedure. While they must relinquish the potential for a recovery in excess of $100,000, and the associated settlement leverage of that potential higher recovery, the benefit was really nothing more than minor procedural conveniences. Plaintiffs would almost certainly be faced with an ordinary jury trial at the end of the day, against a well-funded insurer who can afford to hire multiple experts and

spend weeks at trial, regardless of the amount at issue. The trade-off was just not worth it for most plaintiffs.

Inefficient Use of Judicial Resources

While the efficient use of judicial resources had always been a systemic priority, this became particularly significant in the context of recent developments that have put additional demands on the Superior Court. In 2016, the Supreme Court of Canada in *R v Jordan*[2] imposed mandatory timelines of 18 to 30 months (depending on the type of trial) for criminal offence matters to reach a trial, failing which the accused could have their cases stayed for delay. The Supreme Court of Canada found that delays above this ceiling were presumptively unreasonable, save for exceptional circumstances.

As a result of *Jordan*, the Superior Court has been doing everything possible to meet those timelines in criminal matters, further limiting resources to deal with the civil caseload. Once trial ready, litigants must often wait years before their trial date.[3] It is easy to point the finger at the federal government, and their failure to increase the judicial complement appropriately for several decades (not to mention the failure to fill judicial vacancies on a timely basis over the years), but the system obviously cannot count on any help coming from that corner in the near future.

We must find ways of dealing with cases more efficiently within the available judicial resources. The Simplified Procedure as it stood prior to January 1, 2020, was used rarely in personal injury claims for the reasons described, did little to assist in that respect. Defendants served a jury notice in almost every single personal injury claim. A jury trial utilizes substantially more judicial and other court resources than a judge alone trial. Even in relatively simple personal injury matters, a jury trial can easily take 3 weeks or more when one considers jury selection, logistical issues, down time related to objections and the order of witnesses, preparing and vetting the charge, and deliberations. From a resources perspective, this process is wholly disproportionate to the monetary amount at issue in smaller claims.

Inadequate Streamline of the Litigation Process

Waiting for a trial date is not just a timing problem. Those delays add significant expense to the litigation process. Productions and expert reports need to be updated repeatedly over the intervening years. There is far more opportunity for interlocutory motions. The personal and financial stress to the plaintiff grows exponentially.

While the Simplified Procedure restricted discoveries to only two hours, this concession was rather inconsequential in practice. Discoveries typically did not take longer than 4-5 hours in most cases, and preparing for a discovery under the Simplified Procedure takes just as much time as preparing for one under the ordinary procedure. In short, by maintaining the ordinary trial

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[2] *R* v *Jordan*, 2016 SCC 27.

[3] https://www.thestar.com/news/gta/2017/01/23/ontario-lawyers-warn-civil-court-delays-a-worsening-disaster.html

process, the few procedural benefits offered by Rule 76 became mostly meaningless and had no real impact on streamlining the litigation process.

Financial Risk

The previous Simplified Procedure did nothing to ameliorate the disproportionate financial risk of litigation for matters within its cost jurisdiction. An action for less than $100,000 culminating in an ordinary jury trial would result in costs and disbursements between the parties that are many times the value of the case. If the purpose of the Rules was "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits", the Rules failed miserably when applied to smaller monetary claims. The involvement of a jury injects significant risk and uncertainty to both sides. It is understood that the parties in personal injury litigation are not equally equipped to deal with that uncertainty and risk. The result is that plaintiffs have been forced to walk away from modest valued claims (irrespective of whether the claim falls under Rule 76) because of the disproportionate risk of a jury trial relative to the potential value of their claims. While plaintiffs in Ontario have historically treated the right to a jury trial as sacrosanct, that right has become a luxury that the average plaintiff can no longer afford in the current litigation environment. Is the right to a jury worth potentially losing your home?

The New Hope: Incoming Amendments Effective January 1, 2020

Litigation needs to move faster. It needs to be less expensive. And the cost needs to be proportionate to the value of the claim. The amendments to Rule 76 that came into effect January 1, 2020 will hopefully help to achieve these goals. Those amendments may prove to be monumental for personal injury lawyers, if utilized effectively. The amendments include the following:

- Increased monetary jurisdiction to **$200,000**;
- **No party may file a jury notice** – trials must proceed by judge alone;
- Evidence-in-chief at trial must be adduced by affidavit;
- Oral discovery is limited to **three hours**;
- The evidence of an expert will be by affidavit, wherein the expert adopts the contents of their report;
- **Trial must be completed within 5 days** (including all opening statements, closing arguments, and cross examinations) in accordance with an agreed upon Management Plan;
- **Maximum cost award of $50,000** plus HST; and
- **Maximum disbursement award of $25,000** plus HST.

These amendments create a real opportunity to decongest the court system while allowing timely and cost effective adjudication for matters that fall under Rule 76. The amendments attempt to address the significant problems with the current Simplified Procedure for those of us who

practice personal injury law, and provide real incentives for parties to limit their claims in order to bring actions under Rule 76.

Elimination of Jury Trials

Perhaps the most controversial amendment is the elimination of jury trials for actions under the Simplified Procedure, which involved a legislative amendment to the *Courts of Justice Act*. Section 108 now states:

> Note: On January 1, 2020, subsection 108 (2) of the Act is repealed and the following substituted: (See: 2019, c. 7, Sched. 15, s. 2)
>
> Trials without jury
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> (2) The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:
>
> ...
>
> 2. The action is proceeding under Rule 76 of the Rules of Civil Procedure. 2019, c. 7, Sched. 15, s. 2.
>
> (2.1) Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice has been delivered in accordance with the Rules of Civil Procedure before January 1, 2020. 2019, c. 7, Sched. 15, s. 2.

Effective January 1, 2020, no party may file a jury notice in actions under the Simplified Procedure. This is a very big deal indeed. Insurer defendants almost always prefer trials by jury, which strategically exposes the plaintiff to increased cost and risk. That is especially so in "subjective injury claims" such as chronic pain and mild traumatic brain injuries. Justice Myers famously commented in *Mandel v Fakhim* that,

> "...jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than facilitate injured parties being judged by their peers..."[4]

Plaintiff counsel, including those with extensive jury trial experience, have mixed views on the elimination of juries in general. Some would like to see them eliminated altogether, others would eliminate them in motor vehicle claims due to the complexity and regulatory overlay, and some are concerned about any interference with the plaintiff's right to a jury. But the elimination of juries for more modest valued claims (i.e. those worth less than $200,000) has been met with widespread support. The shorter trial, the shorter delays, and the increased predictability of the result are all seen as worthy trade-offs for the elimination of the jury, especially in light of the types of claims that lend themselves to the Simplified Procedure.

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[4] *Mandel v Fakhim*, 2016 ONSC 6538 at para 9.

The elimination of juries in modest valued claims would go a long way towards achieving more proportionate justice.

The Trial Amendments

The amendments also provide important measures to streamline the trial process. A plaintiff will no longer have to rely upon the consent of the defendant, or the discretion of a pre-trial judge, in order to take advantage of a summary trial process. Instead, this has been replaced by a mandatory summary trial process, limiting the trial to a maximum of 5 days. In addition to drastically reducing the length of the average trial, strict limits will be placed on the mode and volume of evidence – all evidence in chief will be admitted by way of affidavit, with an expert adopting the contents of their expert report in their affidavit. Most significantly, counsel will have to figure out how to get everything done within what is expected to be a 5 day hard cap on trial length.

The changes also limit the financial exposure for both sides by setting a hard cap on disbursement and cost awards. The intention is to ensure that cost awards are proportional to the quantum at issue in the claim. This also serves to protect the downside risk for a plaintiff who will no longer be threatened with the loss of their home or bankruptcy following an unsuccessful trial. It will also be easier to purchase ATE insurance to cover the entire cost risk for the plaintiff. The drastic changes and limitations will require counsel to entirely rethink the work up and trial process for claims under Rule 76.

Tactical Considerations

The Pros and Cons of Juries

Many plaintiff lawyers quite like jury trials, this writer included. They are more dynamic, more interesting, and create upside risk that does not generally exist in a judge alone trial. However, the types of cases that are ideal for the new Simplified Procedure are, generally speaking, much better suited for a judge alone trial. These cases would include chronic pain or mild traumatic brain injury claims with a limited loss of income. Experience tells us that juries have not been kind to plaintiffs pursuing these types of claims over the last decade or so.

Under the pre-January 1, 2020 system, juries sit through weeks of evidence where plaintiffs talk about how they are in pain, or how they have headaches and cognitive issues, with no "objective" evidence. They are then cross examined, sometimes for days, about every small inconsistency in their GP records, treatment records, employment file, etc. After that death by a thousand cuts, the jury must listen to defence experts talk about failed validity testing, the lack of any discernable "impairment", and offer opinions based on a medically outdated understanding of these conditions. Then the jury has to watch videos of the plaintiff shopping and going for coffee. It is of little wonder that, at the end of weeks of this evidence, the jury is usually fed up and in no mood to be generous.

The fact that the jury members do not know about the deductible, and have no understanding of the complicated overlay with collateral benefits, creates even more risk for the plaintiff. These types of cases are ideal for a summary trial in front of a judge alone. That does not mean that a plaintiff who has not sustained a threshold injury, or who lacks credibility, or who has not marshalled sufficient evidence to support their claims, is going to fare any better with a judge alone than they would with a jury. It is, however, less likely that judges will be swayed by some of the extrinsic factors common in personal injury trials, noted above. Regardless of the ultimate result, the trial will be conducted efficiently and in a manner that substantially contains the costs.

In many cases, lawyers will have to make difficult decisions about whether to recommend that the plaintiff limit their claims to $200,000 in order to take advantage of this new process. If the lawyer believes that the claim could reasonably be worth a maximum of $250,000 on a great day, and less than $200,000 for the purposes of settlement, it is possible that the client would be better off agreeing to limit the upside potential in return for the procedural advantages and cost protection of the Simplified Rule. Just because a claim **could be** worth more than $200,000 does not mean that Rule 76 should be dismissed as a viable option. Lawyers will have to be very careful to advise their clients about this option when the potential value of the case is in the range of the Rule 76 jurisdiction, and to take instructions in writing regarding proceeding one way or the other.

Conduct of a Trial under Rule 76

A trial under the new Simplified Procedure involves unique considerations that are substantially different from an ordinary trial. Personal injury lawyers traditionally have not focused their practice on preparing detailed and substantive affidavits for witnesses. This will have to change if one is going to conduct a successful summary trial under the new Rules. On the one hand, the benefit of being able to write your witnesses' evidence, in a format and manner that is powerful, succinct and entirely controllable, is a trial lawyer's dream. But there is a downside to presenting evidence in this fashion. A trial judge does not hear the witness' story first-hand. Subject to the ability to examine the witness for a brief "warm up" (which may or may not be permitted by the trial judge), cross-examination would be the first and potentially only time witnesses are actually heard by the judge. This would be the sole opportunity for a judge to assess credibility. As such, it is crucial for witnesses to be thoroughly familiar with their sworn affidavit, and for the affidavit to be an accurate and honest reflection of their evidence in order to maintain their credibility during the cross-examination.

The substantial time restrictions involved in conducting a personal injury trial in 5 days will mean that difficult evidentiary choices will have to be made. Cross examinations will have to be restricted to only those matters crucial to the successful prosecution of the claim. The number of witnesses will likely be limited to only those most important to prove the case. Opening and closing argument will have to be succinct and must direct the judge to large portions of evidence that were not heard viva voce. To be clear, none of this is a bad thing – in fact, there are significant potential advantages to the plaintiff compared to the ordinary trial process. However, it is very different from the trial process that has developed, for better or worse, over the past few decades.

Experts will have to be chosen understanding that judges will almost certainly evaluate those witnesses from a different perspective than would members of a jury. Judges know how to read a CV. Judges are far more likely to know when an expert is exhibiting a bias towards one side or the other. Judges tend to put as much or more weight on what credible treating physicians have to say than on the opinions of hired guns. Judges know the identities of the "frequent flyer" experts who routinely provide evidence for only one side in a case. Care must be taken to choose experts who can withstand judicial scrutiny.

Most importantly, plaintiff lawyers will have to be prepared to go to trial, albeit a much shorter trial, that should be much easier to conduct, with much lower risk. Just because a judge might, in theory, be more likely to award a reasonable sum of money to a credible plaintiff with chronic pain than would a jury, does not mean that an insurance company will all of the sudden agree to resolve those cases short of a trial. Lawyers are likely going to have to prove to insurers that they are ready, willing and able to conduct a summary trial before the threat of facing a judge alone decision becomes a credible one. Insurers know, and track on an ongoing basis, which lawyers are willing to go to trial. With the new summary trial process mandated for Rule 76, all lawyers should be able to conduct trials, and can do so in a much more controlled, much lower cost, environment. Those who are willing to do so may well see a change in the position of certain notorious insurers who currently follow the "just say no" philosophy.

Unanswered questions

Even though the amendments have been released and are already in effect, time will tell on how these amendments will ultimately operate. As we dive into this new regime, the answers to some of these questions will undoubtedly crystallize.

Are cost awards still discretionary? – The Rule restricts costs to a maximum of $50,000 – but costs are still within the jurisdiction and discretion of the trial judge. What does that mean for Rule 49 offers? Is the discretion provided in Rule 57 and s. 131 of the *Courts of Justice Act* applicable to Rule 76 trials? If not, what is the purpose of making an offer to settle and will this restriction serve to limit the incentive for defendants to reasonably resolve claims? These are open questions at this time.

How will the available 5 days of trial time be divided between the parties? – Under the new Simplified Procedure, at least 30 days before the pre-trial conference, the parties must agree on a proposed trial management plan. The plan must set out a division of time between the parties, allotting times to each party for: opening statement, presentation of evidence in chief by affidavit and under rule 31.11, cross-examination, re-examination, and oral argument.

The pre-trial conference judge will fix the number of witnesses other than expert witnesses and approve the trial management plan, subject to any changes specified. The trial judge will maintain discretion over the conduct of the trial within the 5 days. It remains to be seen how this discretion will be exercised.

It is likely that strict limits will have to be imposed on the amount of time one can spend cross-examining a witness in order to complete the trial in 5 days. Lawyers are going to have to really focus these examinations, and their submissions, or risk being cut off before all important areas are covered.

How can I limit disbursements to $25,000 and still conduct a trial? – As judges do not have discretion to award more than $25,000 even if a plaintiff beats his or her Rule 49 offer, it will be a challenge to control costs to this degree. The timing of expert reports will be a huge issue, as regular updates and supplementary or responding reports will drive up the costs unnecessarily. Consideration will have to be given to relying upon treating physicians and their records, instead of litigation experts, whenever reasonably possible. Medical illustrations, accident reconstructions, etc. may not be feasible expenses under Rule 76 for many claims. Lawyers are going to have to change the way that they work up claims under the Rule.

Will judges be more inclined to penalize plaintiffs with cost awards when the new Simplified Procedure is not utilized? – Most of the case law in this respect has been very forgiving to plaintiffs under the former Rule 76. Even if the plaintiff only claimed general damages for a "permanent, serious injury", it can reasonably be argued that the claim **could have** been worth in excess of $100,000, despite a substantially lower amount being ultimately recovered. Cost sanctions have rarely been used to penalize plaintiffs for their failure to recover more than the former $100,000 limit under the prior Rule. However, now that the limit has increased to $200,000, that same argument becomes much more difficult to make. There is a fear that plaintiffs who recover less than $200,000 under the ordinary procedure could face significant cost consequences. Again, clients must make informed decisions with the advice of counsel before choosing to proceed under the ordinary procedure.

Conclusion

The Simplified Procedure was created to provide a fast-tracked, more efficient and less costly way to deal with litigation involving more modest amounts. Having an effective process to accomplish those goals is more important than ever before, as scarce judicial resources are being balanced between the competing demands of the civil and criminal justice system. As the pre-January 1, 2020 Simplified Procedure was not effective in achieving those goals, it was time for a drastic change. That change is now here.

The overhaul of the Simplified Procedure will substantially change personal injury, and broader litigation, practice as we know it. Lawyers generally do not like or embrace change, and they certainly do not do so very quickly. Litigators would be well advised to get on board with these changes, in an effort to help their clients in a way that will, hopefully, result in more proportional and effective justice.

The amendments provide good lawyers with opportunities to make new law, and create a litigation process that will benefit Ontarians with real, but modest valued claims. However, in

order to do so, plaintiff lawyers are going to have to be ready, willing and able to conduct summary trials. Dust off your robes, and together we can create a better system for our province.

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