



Positioning the Win:

From Intake to the Courthouse Steps

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Choices, Choices, Choices

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Mode of Trial – Choices, Choices, Choices

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Introduction

The sphere of litigation is not a perfect orb! Clients must rely on the good judgment of their counsel to guide them through the vagaries of this uncertain process. Decisions respecting mode of trial should be a paramount consideration.

Jury Trials

As the rules are presently constituted, one party may unilaterally elect a trial by jury. Insurers frequently make this election. There are two reasons why insurers do this.

The first reason is a micro consideration. The insurer may identify an individual file that it perceives will make for a good jury trial. From the perspective of plaintiff counsel, these decisions may appear to be solely the result of the subjective analysis of the defence lawyer and examiner. While there is always some subjective component to these decisions, insurers keep enormous amounts of casualty data and are able to identify certain types of files that have historically produced good defence verdicts with a jury. The value that this data can add to an analysis is not something that should be discounted.

The second reason is a macro consideration. A jury magnifies risk. An insurer is in the business of underwriting and managing risk and is better able to absorb the additional risk associated with a jury trial. This provides the insurer with incredible negotiating leverage.

These are two natural advantages that accrue to insurers. There are no similar advantages that exist for plaintiffs. It is the writer's personal view that plaintiffs should look to avoid jury trials where possible.

Jury Advocacy

The plaintiff bar has made tremendous advances in jury advocacy over the past 20 years. This improved advocacy resulted in the demise of the LVI program. The advocacy skills of the plaintiff bar are probably superior to that of the defence bar owing to various factors (longer tenure at the bar, more trial experience, high defence counsel attrition rates, etc.). There are now purposeful and effective strategies that plaintiff's counsel use to improve jury verdicts.

However, the writer urges caution! There is a litany of instances where the best plaintiff's counsel have been bested at a jury trial. As well, the jury strategies commonly used are not infallible. These are compensatory strategies intellectually engineered to offset the jury bias that already exists. This bias is

palpable in B.C. where we have a monopolistic auto insurer that can count on having several policy holders on each civil jury trial. This is not something that should be discounted.

Good Judgment

No counsel should capitulate simply because a jury notice has been filed. However, there simply must be recognition that having good skills and good strategies is not enough to best a seemingly inferior defence opponent.

Collectively, we need to exercise better judgment when selecting the cases that are to be heard by a jury. We need to have realistic conversations about the risks with our clients and give them the benefit of our objective assessments.

The cases that do proceed to hearing must be well prepared and prepared well in advance of trial. It is improvident for counsel to proceed to trial without first reviewing the facts of the case with at least one other lawyer who has experience with jury trials. The use of a jury consultant should be considered as should the use of a focus group.

Avoiding Jury Trials

If the writer's thesis is to be pursued, there are strategies that can be used to avoid jury trials.

The most reliable is the use of Fast Track. A unilateral request for Fast Track trumps a jury notice. This is an appropriate course of action for cases that do not involve large sums of money or that can be completed quickly. The vast majority of cases are appropriate for Fast Track. Strategic use of limitation periods and service deadlines should be used to create a period of time to evaluate whether or not a case is appropriate for Fast Track. In total, a period of 3 years can be had to evaluate the appropriateness of a case for Fast Track.

A less reliable strategy is to apply to strike a jury notice. The recent case law in this area is not encouraging as the Courts appear willing to allow juries to deal with longer and more complex cases.

Exceptions

There are likely some cases that make for good plaintiff jury trials. Based on the writer's experience as a defence counsel, he is of the view that the following issues may present well before a jury:

1. Cases that evaluate the standard of care of a professional;
2. Cases that dealt with causation; and
3. Cases where the defence must raise a morally repugnant defence such as a reduced life expectancy resulting from the defendant's insult.