Proposed Amendment to Rule 6.1.01 of the *Rules of Civil Procedure*

Submitted to:	Bifurcation Subcommittee of the Civil Rules Committee
Submitted by:	Ontario Bar Association
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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (**"OBA"**) appreciates the opportunity to provide this proactive submission to the Bifurcation Subcommittee ("**Subcommittee**") of the Civil Rules Committee ("**CRC**") regarding a proposed amendment to Rule 6.1.01 of the *Rules of Civil Procedure* ("**Rules**").

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to individuals and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public.

This submission has been prepared by members of the OBA **Insurance Law Section**, the **Civil Litigation Section**, and the **Employment Law Section.** These Section members have represented clients before every level of court in Ontario. These members are highly experienced users of the civil justice system in Ontario and have represented defendants, plaintiffs, or both.

Overview

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 CRC 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.

The Subcommittee's letter of March 3, 2023, states that 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 a tool that could lead to shorter trials and more settlements.

The OBA supports the Superior Court of Justice's objective to reduce the large trial backlogs created by the pandemic and pre-existing pressures on the courts and to secure "the just, most expeditious and least expensive determination of every civil proceeding on its merits".[1] However, we submit the proposed amendment to Rule 6.1.01 may not reduce large trial backlogs because bifurcation does not necessarily eliminate any portions of the trial and it could contribute to delays due to appeals and complexities created by decoupling liability and damages issues in more complex cases, particularly involving issues of causation and remoteness. If the case is complex, bifurcation becomes more difficult. Parties should retain the ability to choose to present liability and damages issues in a single proceeding. Additionally, it could also have the perverse effect of discouraging settlement of the quantum of damages (which parties are incented to do to decrease trial time and get a sooner trial date); a step which does necessarily eliminate the need to try damages issues in Court.

Comments & Recommendations

Question 1

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**

[1] R.R.O. 1990, Reg. 194: *Rules of Civil Procedure* under *Court of Justice Act*, R.S.O. 1990, c. C.43, Rule 1.04(1).

b. All cases, jury or non-jury, any party may move for bifurcation.

Proposed Solution

The OBA submits that jury and non-jury trials should not be treated differently under Rule 6.1.01. Any party may move for bifurcation in all cases regardless of whether it is a jury or non-jury case. The Court of Appeal held in *Duggan v. Durham Region Non-Profit Housing Corporation,* 2020 ONCA 788 (CanLII) that Rule 6.1.01 does not differentiate between an action to be tried by a judge alone or by a judge and jury; on its fact, it applies to all proceedings [21].

OBA members have noted that bifurcated trials dealing only with liability can be short and efficient. However, there are corresponding factors which may lengthen other aspects of the proceeding. An example is found in the case of *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation,* 2021 ONCA 601 (CANLII) where The Court of Appeal held that it was not in the interests of justice to expedite the liability appeal to be heard before the damages trial was heard. The Court stated that "[t]he ordinary practice is to pursue a single appeal from decisions on liability and damages. The moving party must establish that it is in the interests of justice to do otherwise. Fragmenting appeals, particularly in large and complex cases such as this, may well delay the overall administration of justice at both the trial and appeal court level by having appeals of different aspects of the case heard at different times" [38].

There is also concern that this amendment could lead to both additional delay and substantially more costs to the plaintiff. In employment law and many other areas, where legal issues can be interconnected, bifurcation could lead to redundancy, extra steps, and increased costs in the pre-trial process. It is also not clear from the amendment if a single judge would be seized of the case and that would obviously not be case for a jury trial. In more complex medical negligence cases, findings with respect to causation can impact both liability and damages, which makes them poor candidates for bifurcation.

Question 2

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?**

Proposed Solution

The OBA submits that neither a judge nor an associate judge should be able to bifurcate an action on their own initiative. If the intention of the proposed amendment is to remove the consent mechanism and to provide judges with discretionary power on a motion, that would be a vastly different control mechanism than is currently in effect.

The Court of Appeal in *Duggan v. Durham Region Non-Profit Housing Corporation,* 2020 ONCA 788 (CanLII) also held that although proponents of a Rule change cite case management and efficiency, the CRC determined that in the context of bifurcation, **fairness requires that it only be ordered on consent.** There are valid reasons as to "why" a party may not consent, these include the cost of preparing twice for a trial and also the potential of an appeal on liability, which results in added costs and delay [49] [emphasis added].

The OBA agrees with the reasoning in the *Duggan* case and submits that Parties should not have their trial bifurcated without consent.

With respect to timing, the OBA submits that it is too late to bifurcate at the outset of trial and the discussion about whether to bifurcate a trial should occur sufficiently *before* the trial.

When bifurcation should be considered relative to the pre-trial depends on when the pre-trial is occurring relative to the trials, which varies across regions. In some regions, pre-trials may only be scheduled only a month or up to 120 days before trial. Those regions, leaving the issue of bifurcation to the pre-trial would be potentially inefficient in many cases.

Furthermore, now that the rules have changed with deadlines for exchange of expert reports tied to the pre-trial, clarity as to the impact of bifurcation of these rules would be important. For example, if a pre-trial is scheduled within 120 days of a scheduled bifurcated liability

trial, are expert reports on damages also required prior to the pre-trial or will there be a further pre-trial on damages? Without clarity on these considerations, unnecessary expenses may be incurred on expert reports which need to be served and later updated for a later trial. The OBA submits that bifurcation of appropriate trials should justify delay in the exchange of expert reports on damages as these are important to permit parties to properly assess risk and consider settlement in advance of a trial on liability.

Question 3

3. **At what point in the litigation ought the motion be brought?**[2]

Proposed Solution

The OBA submits that a motion to bifurcate an action should be brought early in the trial scheduling process and, depending on the practice in the region, often prior to a pre-trial. However, the OBA recognizes there are big disparities as to how trials are scheduled in different jurisdictions. We also understand that there is also a delay in getting trial dates in different jurisdictions and some regional differences may be appropriate. Nevertheless, the

[2] The Bifurcation Subcommittee's letter of March 3, 2023, states that the concerns of the CRC 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 personally injury, it may be clear to all that a decision on liability must be made in order to further settlement discussion. However, in order to get to trial, the plaintiffs and defendants will be put to the expense of preparing both cases. This may provide to be a barrier to smaller firms that cannot fund disbursements while a liability action makes it way through trial, waiting for judgement and appeals.

The Subcommittee also states in the letter that, at a pretrial, the parties are expected to know how their case will be presented, 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.

motion should be brought as early as possible and ideally before the matter is set down for trial.

Question 4

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 a motion. Permit a motion judge to adjourn it to the pretrial in an appropriate case.**

Proposed Solution

Yes, the OBA agrees that the timing is an issue for determination by a judge on a case-by-case basis.

Question 5

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?**

Proposed Solution

If bifurcation occurs at the pretrial stage, the OBA submits that the pretrial judge should not have the jurisdiction to award costs of damages disbursements. If bifurcation is deemed appropriate, there should be no cost consequences on the party seeking it. Any increase costs should be in the cause and should always be left to the trial judge hearing the matter.

Question 6

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?**

Proposed Solution

The OBA submits that it is not appropriate for new wording for Rule 6.1.01 to adopt that contained in Rule 21.01(1). The effectiveness of Rule 21.01(1)(a) is that it can be predicted in certain cases that a determination of a legal issue, without the need to adduce evidence, could have a predictable and material impact of the disposition of the action, regardless of which parties succeed in the determination. Conversely, in all cases bifurcation of liability and damages, it could be said that bifurcation *may* dispose of all of the action or shorten the trial and reduce costs, or it *may not*. The answer will be indicated chiefly by the outcome of the liability trial and the parties' positions on damages.[3] That Rule 21 test cannot be fairly applied to the issue of bifurcation and liability and damages trial in a prospective manner.

Conclusion

The OBA submits that the Civil Rules Committee may wish to consider more fundamental rules changes, as opposed to only considering discreet changes to the Rules. The collaborative approach the Subcommittee has taken with stakeholder engagement is much appreciated, and we would welcome the opportunity to arrange a call to discuss any of our comments if that would be helpful.

[3] If the defendant wins on liability, there is no damages trial and the trial is shortened. If the plaintiff wins on liability, there a damages trial may be required and the trial is not shortened at all. Or, the plaintiff may win of liability and the parties may settle damages, such that the trial is shortened after all. These outcomes are not predictable when viewing the possibility of bifurcation prospectively without knowing the outcomes of the liability trial and the parties reactions to a victory by the plaintiff. This analysis is further by any appeals and the possible reversal of a decision or order for a retrial.