The vanishing trial

THE HONOURABLE CHIEF JUSTICE WARREN K. WINKLER

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Although the term "vanishing trial" is not as widely used in Canada as it is in the United States, we too grapple with similar systemic issues that, if left unexamined, could render the civil system irrelevant to the public that we in the justice system seek to serve. The vanishing trial is an issue of continental concern.

At first glance, the issue may appear to be one that is only relevant for the legal profession. My view, however, is that the disappearing trial is a symptom of the much larger issue of vanishing, or at least decreasing, access to the justice system. That cases are not being taken to trial is a tangible indication that the public cannot, or does not, gain access to the justice system. A trial is the culmination of a legal proceeding; it is not an abstraction or a legal event in isolation. A discussion about vanishing trials is only part of a broader discussion about vanishing "access to justice."

As lawyers, we know that the vanishing trial means the demise of the trial lawyer. The disappearance of civil trials means that there is less need for trial lawyers to practise their profession.

It is no secret that many litigators who have been in practice two or three years, or even more, have never conducted a trial. We also know that there are senior advocates who, in a frank moment, will tell you that they have not taken a matter to trial for years. Indeed, judges on our long trial list sometimes complete an entire court term without sitting on a long trial. What this tells us is that there is truth to the adage that we are living in the era of the vanishing trial and, with it, the vanishing trial lawyer.

When we speak about access to justice, we usually think about those who encounter financial barriers to using the civil justice system for resolving disputes effectively. What about those who choose not to use the civil system, and opt instead for alternative dispute resolution models that better meet their needs? In the following remarks, I reflect on litigants who are opting out of the court system voluntarily. This is not an indication of any lack of interest on my part in continuing to address the pressing need to improve access to our justice system for low- and moderate-income earners. There are, however, non-financial barriers to the justice system, which we cannot ignore.

There are two key reasons why trials are disappearing. First, our civil justice system often fails to meet the needs of ordinary Ontarians who require at once the fair, timely and affordable resolution of their legal problems. Second, an increasing number of litigants are transferring their cases from the traditional justice system into private arbitration. That is, trials are vanishing for two distinct, but related, reasons. Ordinary litigants simply can't afford to take their cases all the way through trial, and "well-heeled" litigants are heading for the exits.

In my view, the litigants who voluntarily leave the civil justice system are not motivated to do so by the system's costs and delays. Unlike judges, arbitrators must be paid to adjudicate and, in many instances, the delay in obtaining dates from a respected arbitrator can be greater than the wait for a trial. If costs and delays are not the main motivators, why are some litigants choosing to have their disputes adjudicated outside of our traditional court system?

It has to do with value, not cost. Litigants who are ready, willing and able to pay for effective dispute resolution want value for their money. I have spoken with judges and lawyers from both Canada and the United States who are asking this same question, and I have heard three repeating themes:

- Arbitrations are less formal, less convoluted and more straightforward to navigate.
- Arbitrators offer more flexibility in timetabling than the courts and are more sensitive to the scheduling needs of the parties.
- Arbitrators are often seen to have "areas of strength" in relation to the subject matter in dispute.

Some people also mention that litigants are motivated by privacy concerns. I believe, however, that while the numbers are not insignificant, these cases are a small part of the growing trend.

Is the migration of cases from conventional courts to arbitrators a problem? In practical terms, the movement of cases helps relieve pressures on the court system by reducing caseloads, which might be a blessing in disguise. Moreover, it could be argued that the trend should not be a concern for the courts because it is unseemly for the judiciary to be out selling themselves or "soliciting business." Finally, it can be argued that there is no public interest in the way commercial, family, personal injury or estates disputes are resolved, as long as they are resolved. Perhaps it is no one's business but the parties' business.

Not surprisingly, I agree that the parties are free to take cases out of the system for private adjudication if they choose to do so, and I am not troubled by this phenomenon, as long as it happens for the right reasons. I am concerned, however, if cases are taken out of the public justice system simply because courts are not meeting the public's needs. The courts and the legal profession serve the public first and foremost, and if we are failing in this

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endeavour, we must re-examine our approach.

There are also systemic reasons why it is undesirable for cases to be leaving the dockets of our traditional courts. Importantly, the departure of civil cases to the private arbitration system has a direct impact on the development of our jurisprudence. The common law's greatest single strength is its ability to transform itself organically and to respond to changing social, economic and political values. However, it can evolve only if cases, including challenging and important cases, are being decided and appeals are being taken. If there are significantly fewer trials, the common law will stagnate and fail to develop with our society. Thus, the common law risks becoming antiquated and irrelevant.

As I have noted, the reduction in the number of trials has resulted in a commensurate decline in trial experience, especially for young litigators. There are very good reasons for calling it the "practice" of law. We develop our skills and keep them sharp only by appearing in court in real-life situations. Again, the vanishing trial means the vanishing trial advocate. A cadre of experienced trial lawyers is essential in a free and democratic society.

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Most importantly, and most worrisome to me, is that the courts may be perceived as failing to meet their institutional responsibility. The public rightly expects that courts will provide authoritative, fair and timely decision making. This is an issue of public service and accountability. We have a standing obligation to ensure that the legal system, as a cornerstone of democracy, remains strong, vibrant, accessible and relevant. It is critical, if we are to preserve the public justice system, that our courts and the profession examine the reasons why cases are both moving away from and staying within our court system.

First, let us consider some examples in Ontario of innovations that recognize the need for the courts to be modern, straightforward, responsive and effective. The Toronto Commercial List is a prime case in point. It provides expert decision making on a "real time" basis. This is due in large part to the efforts of a number of innovative and accomplished judges, including the late Marvin Catzman, Lloyd Houlden, Edward Saunders, Katherine Feldman, Robert Blair, James Farley and Sarah Pepall, who created and led the Commercial List, so that it has become the gold standard for Canada, if not internationally, in the timely and effective adjudication of commercial disputes. Another example of innovation and responsiveness in the court system is the use of "designated hitter" judicial mediators, who are having huge success in settling the most intractable cases on the eve of trial, when costs are already out of control and the parties and their lawyers are dug into apparently irreconcilable positions. We have also seen real advances in the recent past in assigning judges to cases based on their areas of strength (such as family, estates and criminal law matters).

In my consultations with stakeholders about the Toronto Region case management regime, one consistent theme advanced was the need for the timely assignment of judges to appropriate cases. The world is becoming more dynamic and more specialized, and the justice system is no exception – or at least it ought not to be. Stakeholders maintain that seasoned judges presiding over familiar topics are more efficient, more attuned to the nuances of a case and more receptive to the needs of the litigants.

I must be clear, however, about the need to maintain a court of generalist judges in a Superior Court with broad jurisdiction and covering a wide geographic expanse. We should do more to provide expertise in the adjudication of disputes where it is required, but if the common law is to continue to evolve organically in the very important way I mentioned earlier, the various disciplines within the common law must always talk to one another. The most important way in which they do this is through the adjudication of disputes in courts of plenary jurisdiction. My experience on the Court of Appeal has persuaded me of the value of bringing judges from different backgrounds together to analyze a legal problem.

Perhaps the most successful recent innovation in our traditional court system has been the introduction of the *Simplified Rules of Procedure*. This process is intended to streamline the litigation process for claims of up to $50,000. These provisions are designed to keep the pre-trial steps as simple and inexpensive as possible. For example, there are no examinations for discovery. This provides a less expensive way for litigants to have access to the justice system for smaller-dollar-value cases. The concept upon which it is designed is that of proportionality. In my opinion, it is a model from which we can learn and upon which we can build. The litigants in these cases receive value for the money they spend in moving cases toward the day of reckoning, an approach that yields a fair settlement or expeditious resolution.

If our trial system is to survive, both the bench and the bar must adopt a proportionate and less complicated approach to cases. During my time in the trial courts, it became clear that the "standard case" brought by a member of the public often involved only a single document, such as a lease, a deed, a mortgage, an agreement of purchase and sale, a simple contract and a sheaf of correspondence defining the dispute. A simplified procedure such as the existing one may be what is needed to enable these standard cases to be processed cost-effectively. This can happen only if they are dealt with in a proportionate manner – both prior to and during the trial.

One thought that I have been grappling with is whether a dollar-value cap is the most important determinant of whether a case should be dealt with in accordance with simplified rules. To illustrate the point, consider that in Toronto a purchase and sale of a residential home often involves hundreds of thousands of dollars (or more) – far in excess of the present $50,000 cap. The exact same legal dispute in a community with a less inflated real estate market might be a "simple" case. It seems to me there is a strong argument that there is a good "fit" for such a case within the simplified procedures and that it should be processed on the basis of proportionality principles without any limitation based on an arbitrary dollar value. To meet the demand for less formal procedures, we should closely examine whether lawyers or the

rules of procedure should be able to direct a process that is best suited for any particular lawsuit, and if this is disputed, a judge's ruling could be obtained. This up-front, proportionate approach would, indeed, be useful in others areas of practice, such as family or employment law, where both the social impact of the litigation and the need for expeditious resolution are most pressing. In other words, the amounts in issue do not necessarily determine a case's complexity or simplicity, and they are no measure at all of the need to resolve the case quickly and cost-effectively. Simple cases often exceed the specified amount, whereas a more thorny case may be of a smaller value. In both examples, neither one need go through a sophisticated process, designed for complex and/or multi-party litigation.

What next, then? To me, it seems that the direction is straightforward. We must design reforms that further the ability of litigants and their counsel to carry out litigation in a manner proportionate to the monetary value, complexity and social impact of the lawsuit.

From a systemic perspective, we must keep our legal processes simple and reduce the number of mandatory steps in each lawsuit that drain resources without adding much value. Cases with serious financial and emotional impact (for example, employment and family) may well require special procedures to reduce litigation costs and expedite resolution, regardless of the amount at issue.

Access to timely justice is a hallmark of a well-functioning civil justice system. A fair system of justice requires a courtroom, a judge and a non-adjournment policy. The certainty of early trial dates produces fairer settlements or timely adjudication and proves to be less costly to litigants. In some areas of practice, parties require, and are obtaining, "real-time" access to judicial decision making. Again, the Commercial List comes to mind as a leader in flexible court scheduling that is set up to meet the dynamic needs of the parties. Imagine if families in conflict could have access to dispute resolution as quickly as commercial litigants do. Consider the impact of the Rule 78 reforms in the Toronto region on short and long trial waiting times. I am told that, in most cases, it is the parties that are unable to find early dates, not the court.

Changing aspects of the legal culture will also benefit litigants. Lawyers should plan their litigation strategies to avoid unnecessary steps, confrontation and delays. Education and mentoring programs should promote a culture that values proportionate litigation, professionalism and civility. The judiciary should further examine how best to assist in streamlining cases that proceed to trial. Trials must be conducted in a way that makes them as affordable as possible. Judges should use costs to reward parties who approach cases in ways that reflect the actual amounts in dispute and to sanction those who needlessly or unreasonably complicate lawsuits.

We must be more creative about modernizing our system, and in this respect we must look to the bench and bar to help lead and inform the dialogue. The vanishing trial is a euphemism for failing to meet the needs of the parties it has been designed to serve. If we are to head off the trend toward the vanishing trial and, by extension, the vanishing trial lawyer, we must concentrate on the core values of proportionality, expert adjudication and timeliness and rely, in turn, on the professionalism of the bar. If we fail in this endeavour, we may find ourselves in the unenviable situation in which the only cases we have are held in university moot courts.