

PREFACE

Twenty years into the 21st century, the trial remains the anchor of a civil justice system that is often criticized for being slow and inefficient. Studies are performed, reforms proposed, and those changes implemented often meet with mixed reviews from critics and do not fulfil the goals of their proponents. The struggle for efficiency and economy continues, taken up by successive generations of lawyers and government officials, all looking to build a better mousetrap.

As the manuscript of this edition of *Sopinka on the Trial of an Action* neared completion, the COVID-19 pandemic struck, closing the courts for a time. While appellate proceedings adjusted more quickly through use of technology and social distancing, the requirements of the trial, including its reliance on live witnesses, was more seriously impacted. Due to the exigencies of the situation, jury trials came under scrutiny, and a proposal has now been put forward in Ontario to abolish the civil jury altogether. It is not the first time such a suggestion has been made; only time will tell whether it is the last.

I offer this thought: that a large part of the issue is not an inherent problem with the trial, or the jury trial, but rather that we as a profession need to constantly seek to improve and hone our skills, to distil what is important from what is not, and to become more efficient with the process at hand. I offer a view that there are inherent inefficiencies in a trial that are essential to its purpose, while other inefficiencies arise from the misuse of the process, or a failure to use it with sufficient discipline. The difficulties we are facing in this regard are exacerbated by the lack of opportunity for lawyers (and not just young lawyers) to get into court and learn their craft.

John Sopinka was a great jurist and an incomparable advocate. He was also a wonderful teacher of advocacy. He taught courses in civil procedure and trial practice at the Osgoode Hall and University of Toronto law schools for many years. In addition, he taught other barristers who were fortunate enough to work with him. No one worked on a case with John Sopinka, either as his junior or his adversary, without learning something new about the art of advocacy. Many of Canada's leading and aspiring barristers learned much about their craft from John Sopinka.

John Sopinka's mentor in his early years at the Bar was the late Walter Williston. John wrote the first edition of this book for the benefit of aspiring advocates who did not have the privilege of such a mentor. John wrote:

Those privileged few aspiring barristers who are trained by one of the leaders of the Bar have no need to resort to a text which deals with the tools and techniques of a trial lawyer. Unfortunately, for the rest, the legacy of experienced trial lawyers in Canada has not found its way into print. This work was motivated by a desire to address in some small measure this void in our legal literature.

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Like Walter Williston before him, John Sopinka acted as mentor and teacher to many young advocates. The first edition of this book was a valuable resource for those who did not have the privilege of working with him personally.

John Sopinka passed away suddenly in November 1997, when the manuscript for the second edition of *The Trial of an Action* was close to completion. His daughter, Melanie, and Donald B. Houston included his changes and added appendices from one of John's celebrated cases, the representation of Susan Nelles at the Commission of Inquiry into baby deaths at The Hospital for Sick Children in Toronto, in that edition.

This fourth edition preserves all of the valuable appendices from the second edition, and the additional chapter from the third, while updating the text as a whole to account for development in the law. Mobility in the practice throughout the common law provinces has truly taken root, so I have also attempted to take some account of certain significant differences in trial practice across the country. My goal in completing this edition has been to preserve and update the invaluable wisdom of the prior editions to the best of my ability.

I gratefully acknowledge the valuable assistance of Hailey Laycraft and Saheli Sodhi in the preparation of this work.

Ken McEwan, Q.C.
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