

Access to Justice in the Time of COVID-19: Lessons from Classical Antiquity

Date: May 07, 2020

This article was originally published by *The Ontario Bar Association* (www.oba.org).

A judicial system that cannot hear cases and deliver fair, decisive, and timely results weakens social bonds and can sow distrust and disfavour of the government. What can lawyers and litigants do to help?

In Thucydides' *History of the Peloponnesian War*, a contemporaneous account of the vicious war between the enemy city-states of Athens and Sparta in the 5th century B.C., Thucydides writes of a plague which tore through Athens, killing a third of the population, or 75,000-100,000 people. He described a disease so virulent and causing so many deaths that there was no record of anything like it ever before.^[1] In one of his more searing passages, he wrote, "Words indeed fail one when one tries to give a general picture of this disease; and as for the sufferings of individuals, they seemed almost beyond the capacity of human nature to endure."^[2]

Perhaps even more intriguing is Thucydides' account of the breakdown of Athenian society resulting from the havoc wreaked by the plague. It killed indiscriminately, wiping out Athens' most wealthy and powerful citizens alongside its most impoverished. Mortality soared amongst doctors and other caregivers. It was a "catastrophe so overwhelming that men, not knowing what would happen next to them, became indifferent to every rule of religion or of law."^[3]

Amid widespread panic and despair, the public's trust in judicial institutions disintegrated and a state of "unprecedented lawlessness" ensued.^[4] No one expected to live long enough to be brought to trial and punished. By Thucydides' account, it did not take long before humankind's more sordid and base instincts began to surface: "it was generally agreed that what was both honourable and valuable was the pleasure of the moment and everything that might conceivably

contribute to that pleasure. No fear of god or law of man had a restraining influence.”^[5] While the devastation wrought by the plague no doubt contributed to Athens’ loss of the war against Sparta, it is widely believed to have sowed the seeds of distrust and instability that led to the ultimate collapse of Athenian democracy.

This crash course in ancient Greek history is not a purely academic exercise, for we ignore the teachings of history at our peril. So, what can we learn from Thucydides’ account? Perhaps that, even for robust democracies, social order is remarkably fragile. When the public sees governmental institutions failing, and justice not being done, moral panic and chaos can shortly follow.

In the past few weeks, the Ontario justice system has faced extraordinary and unprecedented challenges. As part of a critical, comprehensive effort to curb the spread of COVID-19, the Ontario Superior Court of Justice, one of the busiest trial courts in the world, closed its doors - along with the Small Claims Court, the Ontario Court of Justice, the Divisional Court, and the Court of Appeal for Ontario. In a matter of days, thousands of hearings, motions, pre-trial conferences, trials, and other courtroom appearances were indefinitely postponed. Only the most serious and urgent of cases continued to be heard by the courts, such as matters related to public health and safety or child protection. Everything else was put on hold.

While the courts are slowly beginning to resume operations remotely, the result of the closures is a sweeping crisis of access to justice for all Ontarians. In the pre-COVID era, “access to justice” was a moniker used to describe the challenge presented by the prohibitive cost of litigation which largely excludes low-income individuals from achieving justice through the courts. Now, the problem of access to justice has expanded. It is no longer applicable only to low-income Ontarians, but for all, as the delay in having cases resolved by the courts is likely to last many months, if not years.

So, what can we do to help?

First and foremost, lawyers, as officers of the court, must proceed with civility and a spirit of cooperation at top of mind. Now more than ever, as our court system faces an unparalleled backlog of cases, judges will be relying on counsel to work together to resolve differences, particularly those that are not determinative of the matter. As the Honourable Chief Justice Morawetz cautioned during a recent interview with the Advocates’ Society, judges will have no patience for counsel who drain the courts’ resources squabbling over minutiae. In other words, don’t even think about bringing a refusals motion.

Second, counsel must take responsibility for moving cases forward in any way that they can. Reporting centres are offering user-friendly videoconferencing solutions for discoveries and cross-examinations. Now is the time to explore these options. Litigation is not on hold, and it is wrong to assume that those who take advantage of the closure of the courts to frustrate the progress of their matters will be safe from judicial ire.

Third, counsel should be looking to alleviate the immense pressure on the courts by exploring alternative dispute resolution with their clients. Mediation and arbitration offer excellent opportunities for fast and effective resolution to litigants who want to avoid waiting years for a resolution through the courts. Encouraging clients to engage in settlement negotiations and take reasonable positions is critical. With times ahead so uncertain, and many possible bankruptcies looming, now is the time to cut losses and end disputes.

Finally, in the coming months, lawyers will increasingly find themselves with extra time on their hands. What better way to serve the community and support the justice system than offering free legal advice to low-income Ontarians through Pro Bono Ontario (PBO). At the outset of the COVID-19 crisis, PBO effected a seamless shift from in-person programs to a Free Legal Advice Hotline, ensuring that its programs are now entirely virtual. Through the tireless efforts of staff and volunteer lawyers, low-income Ontarians did not lose a single day of access to free legal advice and services in the process. However, with Ontario's vulnerable populations directly and disproportionately impacted by the crisis, the services offered by PBO will be stretched thin.

The COVID-19 pandemic has created a social and economic crisis on a scale never before seen in our lifetime. This is not business as usual. Now more than ever, all players within Ontario's justice system must step up and do their part to ensure that the system continues to function to the highest standard possible. As Thucydides so wisely observed, a plague does not make one's character; it reveals it.

[1] There is no consensus between paleopathologists as to what caused the Great Plague of Athens. Some believe it was bubonic plague caused by the bacterium *Yersinia pestis*, the same disease that devastated Europe in the 14th century. Others believe it may have been a viral hemorrhagic fever of African origin such as Ebola or Marburg, as it was widely believed, at the time, to have arrived in Athens through the ports of Piraeus after spreading through Ethiopia, Egypt, and Libya. To date, no one knows.

[2] Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin Books, 1954), 153.

[3] *Supra* note 2 at 155.

[4] *Ibid.*

[5] *Ibid.*

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