TAB D

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MEMO TO:	Lerners LLP - Andrew Murray
FOLDER:	
RESEARCH ID:	#4000881bcbe19
JURISDICTION:	Ontario, Canada
ANSWERED ON:	September 10, 2019
RE:	striking a jury notice
STATUS:	Complete
CLASSIFICATION:	Civil practice and procedure

Issue:

What factors do Ontario courts consider, under rule 47 of the Rules of Civil Procedure, when a party seeks to strike its own jury notice?

Conclusion:

The decision to discharge a jury is a discretionary one. While it is possible for a jury to hear and decide even a medical malpractice case, a jury notice may be struck where there are many complex aspects in the factual, medical, and legal issues in the case (*MacGregor v. Potts*).

The moving party bears the burden of persuasion, and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of a jury. The court must decide whether the moving party has shown that the justice to the parties will be better served by the discharge of a jury. The court has a broad

discretion. Neither party has an unfettered right to determine the mode of trial. Instead, the court plays the role of an impartial arbiter, and has the power, when disagreement arises, to determine whether justice to the parties will be better served by trying a case with or without a jury (*Cowles v. Balac*).

A judge should look to issues of complexity, legal, factual, and evidentiary in approaching the question of whether they should strike a jury notice. The length of a trial may be an indicator of the complexity of a case. A longer trial with more witnesses and probably more issues will in many cases be more complex (*Cowles v. Balac*).

Where the line is drawn with respect to complexity of a particular case is not an exact science. Juries may decide very long and complex criminal matters, but those matters have different considerations. A jury notice may not be struck simply on the basis that it would be difficult for the judge to explain the law. Trial judges are presumed to know the law and to be able to explain it to a jury (*Kempf v. Nguyen*).

Kempf and *Cowles* were recently applied in *D'Alessandro v. D'Alessandro (Estate)*, *McIsaac v. MacKinnon*, and *Ismail v. Fleming*.

Facts:

The underlying action is an occupier's liability case. The statement of claim was issued July 27, 2009. The statement of defence was filed February 1, 2010. The defendant delivered a jury notice on February, 1, 2010. The action has been pretried. The action is proceeding to trial in November 2019. The defendant has advised the plaintiff and the court that it will be bringing a motion seeking to strike its jury notice and proceed with a judge-alone trial.

Law:

Plaintiffs sought to strike their own jury notice in *MacGregor v. Potts*, 2012 ONCA 226 (CanLII) which was a medical malpractice case involving a problematic delivery of a baby. At trial, the judge agreed to strike the jury notice, recognizing that while it was possible for a jury to hear and decide a medical malpractice case there were many complex aspects in the factual, medical, and legal issues in the case.

The decision to discharge a jury is a discretionary one. The Court of Appeal held that appellate intervention was not warranted as the trial judge exercised his discretion reasonably:

> [35] The decision to discharge a jury is a discretionary one. Appellate intervention is not warranted if there is a reasonable basis for the exercise of the trial judge's discretion: see Cowles v. Balac, at paras. 40-42. Based on the trial record and, frankly, based on the record and the nature of the legal argument in this three-day appeal, the trial judge's decision to discharge the jury, and his reasons for doing so, were entirely reasonable.

An appeal was made from an order of a judge striking a jury notice in *Cowles v. Balac*, 2006 CanLII 34916 (ON CA).

The moving party bears the burden of persuasion, and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of a jury. The court must decide whether the moving party has shown that the justice to the parties will be better served by the discharge of a jury. This test confers a broad discretion on a court confronted with such a motion. Nevertheless, it is a sensible test. Neither party has an unfettered right to determine the mode of trial. Instead, the court plays the role of an impartial arbiter, and has the power, when disagreement arises, to determine whether justice to the parties will be better served by trying a case with or without a jury:

[30] Pursuant to s. 108(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, a party in a civil action may require that the issues of fact be tried and the damages assessed, or both, by a jury, except when the relief sought falls within the enumerated exceptions in s. 108(2). The claims underlying this appeal do not come within any of those exceptions.

[31] A party may require a jury trial by serving a jury notice pursuant to rule 47.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[32] A party's entitlement to a jury trial is, however, subject to the power of the court to order that the action proceed without a jury. Section 108(3) of the Courts of Justice Act provides, "On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury."

[33] Rule 47.02 provides further direction with respect to a motion that a trial be conducted without a jury. Rules 47.02(2) and (3) read as follows:

47.02(2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

(3) Where an order striking a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.

(Emphasis added)

[34] The French version of rule 47.02(3) provides that a trial judge may dispense with a jury "s'il l'estime opportun" suggesting an even broader discretion.

[35] It is worth noting that the Courts of Justice Act and the rules provide very little guidance with respect to the manner in which judges should exercise their discretions to dispense with a jury. As I discuss below, over time courts in Ontario have developed a test for what is considered to be "a proper case" to try an action without a jury.

[36] It is settled law that the right to trial by jury in a civil case is a substantive right and should not be interfered with without [page670] just cause or cogent reasons: *King v. Colonial Homes Ltd.*, 1956 CanLII 13 (SCC), [1956] S.C.R. 528, [1956] S.C.J. No. 32.

[37] A party moving to strike a jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial which merit the discharge of the jury. In the end, a court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury:
Graham, supra.

[38] While that test confers a rather broad discretion on a court confronted with such a motion, it is nonetheless a sensible test. After all, the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.

[39] The application of this test should not diminish the important role that juries play in the administration of civil justice. Experience shows that juries are able to deal with a wide

> variety of cases and to render fair and just results. The test, however, recognizes that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible.

A judge should look to issues of complexity, legal, factual, and evidentiary in approaching the question of whether they should strike a jury notice:

[28] In her ruling of November 4, 2004, reported at *Cowles v. Balac*, [2004] O.J. No. 4534, [2004] O.T.C. 972 (S.C.J.), at para. 29, the trial judge began her reasons for striking the jury notice by quoting from this court's decision in *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 75 O.R. (2d) 622, [1990] O.J. No. 2314 (C.A.), at p. 625 O.R.:

If a litigant is entitled to trial by jury, that right is a substantive one which should not be interfered with without just cause: *King v. Colonial Homes Ltd.*, 1956 CanLII 13 (SCC), [1956] S.C.R. 528, 4 D.L.R. (2d) 561, at p. 533 S.C.R. When a trial judge is asked to discharge a jury, she or he must decide whether justice to the parties will be better served by the discharge or retention of the jury. The moving party bears the burden of persuasion and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of a jury. *Majcenic v. Natale*, 1967 CanLII 267 (ON CA), [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.), at pp. 201-02 O.R. A trial judge faced with a motion to discharge a jury must exercise a judicial discretion. (Emphasis added)

[29] The trial judge continued at paras. 30 to 34 as follows:
In my view the complexities which arise in these cases and which I have detailed above cause me to conclude that justice to the parties will be better served if the jury notice is struck out and these matters proceed before me alone.

The legal liability arguments are complex, whether the doctrine of strict liability applies on the facts of this case is at best a question of mixed fact and law. Further there is disagreement about whether strict liability admits of any defence. The alternative ground of negligence advanced here clearly admits

the defence of contributory negligence. It may be difficult for a lay jury to keep the concepts separate. There is disputed expert evidence on the liability aspects outlined earlier in these reasons and the medical evidence will be detailed, lengthy and complex and may even be disputed in some respects, I am told that ALS has delivered two defence medical reports -- but even absent any dispute -- the evidence remains detailed and complex. The actuarial evidence, which is never easy, is even more difficult where a plaintiff is at a stage in life where he/ she has not moved yet into a permanent vocation where there is some reliable indicator of income potential. Of necessity streams of income from a number of scenarios are usually considered when these sorts of claims are made.

These and the other complexities outlined cause me to believe that justice requires these matters be tried without a jury. While each of the factors I have outlined may -- alone -- not be sufficient, when considered cumulatively together with the fact that counsel conservatively estimate that the trial will take six weeks there really in my view is little choice.

Mr. Wright suggests we take a wait and see attitude. He says that perhaps as the evidence unfolds the issues may become less complex. I must [page669] respectfully disagree with his submission. All of the evidentiary complexities I have outlined to this point in time are the reality now. They are not merely possibilities which may arise in the future; they arise by reason of the very nature of the actions themselves. While I appreciate there are times where it is preferable to take a wait and see approach in my view, this is not one of those cases.

In addition to these complexities, when I consider the number of counsel involved on behalf of the primary plaintiffs in their various capacities and the difficulty of explaining that to a jury let alone having them comprehend it, I am more convinced that it is appropriate here to strike the jury notices and I so order [underline in original, italics added].

...

[46] Before turning to the specific errors the appellant alleges that the trial judge made, it is important to note that the trial judge correctly set out the principles of law applicable to a motion to strike a jury notice. [See Note 1 below] She started her reasons by specifically quoting the test set out in Graham, supra -- whether justice to the parties would be better served by striking the jury notice. The appellant does not argue that this was not the correct legal test for a motion of this kind.

[47] Having set out the proper test, the trial judge went on to conclude that this test had been satisfied because of the complexities, legal, factual and evidentiary of the two cases.

[48] Clearly, the complexity of a case is a proper consideration in determining whether a jury notice should be struck. Indeed, a [page672] review of the case law indicates that the complexity of a case is by far the most common reason why courts dispense with juries in civil cases, the rationale being that a judge, because of his or her legal training and experience, may be better able to render justice in a case that is complex. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science.

[49] A consideration of the complexity of a case relates not only to the facts and the evidence, but also to the legal principles that apply to the case. While it is the trial judge who is responsible for determining questions of law and instructing a jury on the appropriate legal principles, it is the jurors who must decide whether and how those principles apply to the facts as they find them on the evidence.

[50] The jury's task in applying the law to the facts may be more or less complex depending on the issues in a particular case. The point is, however, that in looking at the complexity of the case insofar as it may affect a jury, it is proper for a judge to consider the complexity of the factual as well as the legal issues, bearing in mind the jury's particular role with regard to the latter.

[51] The trial judge in this case quite properly looked to issues of complexity, legal, factual and evidentiary, in approaching the question of whether she should strike the jury notice.

The length of a trial may be an indicator of the complexity of a case. A longer trial with more witnesses and probably more issues will in many cases be more complex:

> [81] The fact that a jury trial might last for a lengthy period of time is not, in itself, a reason to strike a jury notice or dismiss a jury. However, the length of a trial may be one indicator of the complexity of a case. It seems logical that a longer trial with more witnesses and probably more issues will, in many cases, be more complex.
>
> [82] Importantly, the trial judge's comment about the anticipated length of the trial was linked to her conclusions about the complexity of the cases. Her point, as I understand it, was that these were complex and difficult cases which were going to last for a considerable period of time.
>
> [83] I see no error in the way the trial judge considered the anticipated length of the trial as part of her decision-making process.

Cowles was applied and summarized in *Kempf v. Nguyen*, 2015 ONCA 114 (CanLII). Where the line is drawn with respect to complexity of a particular case is not an exact science. Juries may decide very long and complex criminal matters, but those matters have different considerations. A jury notice may not be struck simply on the basis that it would be difficult for the judge to explain the law. Trial judges are presumed to know the law and to be able to explain it to a jury:

[41] The right to a trial by jury in civil actions is set out in s. 108 (1) of the Courts of Justice Act:

In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

[42] Section 108(2) contains a list of claims for relief that cannot be tried by a jury. Declaratory relief is one such claim.

[43] In the majority reasons in *Cowles v. Balac* (2006), 2006 CanLII 34916 (ON CA), 83 O.R. (3d) 660 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 496, O'Connor A.C.J.O. set out a comprehensive list of principles governing striking out a jury notice and appellate review of such a decision, as paraphrased here:

1. The right to a trial by jury in a civil case is a substantive right and should not be interfered with without just cause or cogent reasons (at para. 36). See also *King v. Colonial Homes Ltd.*, 1956 CanLII 13 (SCC), [1956] S.C.R. 528, at p. 533: "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".

2. A party moving to strike the jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence or in the conduct of the trial, that merit the discharge of the jury. The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury (at para. 37).

3. Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited. The reviewing court can only intervene if the appellant can show that the discretion was exercised arbitrarily or capriciously or was based on a wrong or inapplicable principle of law (at para. 40). See also *Kostopoulos v. Jesshope* (1985), 1985 CanLII 2047 (ON CA), 50 O.R. (2d) 54 (C.A.), at p. 69, leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 93. Put another way, the appellate court should inquire into whether there was a reasonable basis for the trial judge's exercise of discretion. If not, the trial judge will have made a reversible error (at para. 52).

4. The reviewing court should not interfere with the trial judge's exercise of discretion simply because it disagrees with the conclusion reached. Put another way, an appeal court should not merely pay lip service to the concept of deference and then proceed to substitute its own view as to what the proper result should be (at para. 42). In many situations, the trial judge's discretion may, with equal propriety, be exercised for or against discharging the jury (at para. 91). See also *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 75 O.R. (2d) 622 (C.A.), at p. 625.

5. The complexity of a case is a proper consideration in determining whether a jury notice should be struck. Complexity relates not only to the facts and the evidence, but also to the legal principles that apply to the case. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science (at paras. 48-49).

6. While it is true that juries decide very long and complex criminal matters, the comparison is not particularly helpful. Accused persons in criminal trials have an absolute right to be tried by a jury when charged with specified offences, even if a judge is of the view that a jury trial is not the best way to achieve justice. The same is not true for civil cases (at para. 58).

7. It is reversible error for a trial judge to strike a jury notice on the basis that it would be difficult for her to explain the law to the jury. Trial judges are presumed to know the law and to be able to explain it to a jury (at para. 63). See also *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 2002 CanLII 45019 (ON CA), 60 O.R. (3d) 665 (C.A.), at para. 70.

8. In some cases, it is preferable to take a "wait and see" approach before deciding whether to discharge the jury. Experience has shown that in many instances the anticipated complexities of a case or other concerns do not materialize or at least not to the extent originally asserted. By "waiting and seeing", courts are better able to protect the substantive right of the party who wants a jury trial and to only dismiss the jury when it becomes necessary (at para. 70).

9. While in many cases the "wait and see" approach is the most prudent course to follow, it is not a rule of law. The Courts of Justice Act and the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, contemplate that a judge may strike a jury notice even before a trial has begun (at paras. 71-72).

10. If the reviewing court concludes that the trial judge erred in striking the jury notice, the merits of the action must be considered (at para. 92). As stated in *King*, at p. 533, a new trial

> is not warranted "if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge."
>
> [44] While several of these principles speak to the considerable discretion that is vested in the trial judge when deciding whether to strike a jury notice and the limited appellate review of the exercise of that discretion, cases such as *Hunt and Brady v. Lamb* (2005), 2005 CanLII 46734 (ON CA), 78 O.R. (3d) 680 (C.A.), illustrate that this court will order a new trial when it has found that a trial judge has exercised that discretion arbitrarily or based on improper principles so as to enforce the statutory right to a jury trial.

Kempf and *Cowles* were recently applied in *D'Alessandro v. D'Alessandro (Estate)*, 2019 ONSC 5174 (CanLII), *McIsaac v. MacKinnon*, 2019 ONSC 2954 (CanLII), and *Ismail v. Fleming*, 2018 ONSC 6780 (CanLII).

Authorities:

MacGregor v. Potts, 2012 ONCA 226 (CanLII)
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