CIVIL LITIGATION/MEDICAL MALPRACTICE LAW SEMINAR

November 30, 2000
Canadian Bar Association Program

THE TRIAL OF MEDICAL NEGLIGENCE ACTIONS BY JURY

Jerome R. Morse and Sarah Godwin

I. Introduction

Some number of years ago, a paper discussing jury trials in medical malpractice cases would, by necessity, be brief containing all counsel needed to know in one sentence. The sentence would have read something like this: Athere has never been a medical malpractice jury trial in Ontario and none realistically contemplated.@ As in all things, much has changed and so this paper requires more to canvass the legal landscape of jury trials in medical malpractice cases.

II. Prima Facie Right to a Jury Trial

In Ontario, with a few legislated exceptions, parties to an action have a *prima facie* right to a jury trial. This right is articulated in section 108(1) of the *Courts of Justice Act* and rule 47.01 of the *Rules of Civil Procedure*:[1]

> *Jury Trials*

[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.108(1); Ontario, *Rules of Civil Procedure*, r. 14.01

108. (1) 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 ro the damages assessed, or both, by a jury, unless otherwise provided.

ACTIONS TO BE TRIED WITH A JURY

47.01 A party to an action may require that the issues of fact be tried ro the damages be assessed, or both, by a jury, by delivering a jury notice (Form47A) at any time before the close of pleadings, unless section 108 of the *Courts of Justice Act* or another statute requires that the action be tried without a jury.

The right to a jury trial is a substantive right, that has been accorded great respect by the courts. As expressed by Cartwright J.:[2]

> This Court has more than once affirmed that the right to a trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons.

The question then becomes: what reasons are cogent enough to take away a party=s right to a trial by jury?

III. Striking out Jury Notice

a) Legislated exceptions to the right to a jury trial

[2] *King v. Colonial Homes Ltd. et al.*, [1956] S.C.R. 528, 4 D.L.R. (2d) 561 at 566; see also *Majcenic v. Natale*, [1968] 1 O.R. 189 at 201, *Sloane v.Toronto Stock Exchange* (1991), 5 O.R. (3d) 412 at 412 (C.A.); *Cosford v. Cornwall* (1992), 9 O.R. (3d) 37at 43

There are several legislated exemptions to the right to a jury trial listed under section 108 of the *Courts of Justice Act*.[3] The most relevant of these exceptions to medical malpractice claims are when relief is sought under Parts I, II or III of the *Family Law Act* or under the *Children=s Law Reform Act*, or when equitable relief is sought. These exceptions are important in medical malpractice claims that allege breach of fiduciary duty. A breach of a doctor=s fiduciary duty to her/his patient is a claim for equitable relief.[4]

However, the existence, in a statement of claim, of a legislative bar to a jury trial will not always mean that the jury will or should be struck. The Ontario Court of Appeal has stated:[5]

---

[3] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.108(2).

[4] *447927 Ontario Inc. v. Pizza Pizza Ltd.* (1987), 16 C.P.C. (2d) 277 at 281-282 (the jury notice was struck because the plaintiff claimed breach of fiduciary duty, although in the corporate context); *Migos v. Zurich Co. of Canada*, (1998) 28 C.P.C. (4th) 268 at 271

[5] *Ryan v. Whitton* (1963), [1964] 1 O.R. 111 (C.A.)

> While the Courts of Justice Act specifically confers the power on a judge in motions court to strike a jury notice, that jurisdiction should not be exercised until a judge is satisfied that the inappropriate issue is a live one that will be proceeded with at trial...it is difficult to see how the mere pleading of such an issue could ever be sufficient. To deprive the defendants of their substantive right to a jury trial, on the basis of the pleading alone, would effectively nullify that right.

As well, it should be noted that a plaintiff can ask for leave to remove those grounds pleaded that disentitle her/him to right to jury trial. In *Crary v. Royal Bank* the defendant sought to strike the jury notice on the grounds that the plaintiff=s statement of claim had asked for relief that could not, under section 108 of the *Courts of Justice Act*, be granted by a jury.[6] In response, the plaintiff sought to amend her statement of claim to exclude those claims for relief. The judge granted the plaintiff=s request and refused to strike the jury notice at that time.

However, a plaintiff will not be able to use such means to avoid having the jury notice struck, if the substance or real nature of one=s claims fall within the legislated exceptions.[7] Similarly, if the excluded, or statutorily barred claim is intricately connected to the remainder of the claim, even if it is removed, the jury notice may be struck.[8]

b) Judicial discretion

---

[6] Crary *v. Royal Bank* (1997), 19 C.P.C (4th) 13.

[7] *Haskill v. London Life Insurance Co.* (1997) 17 C.P.C. (4th) 110, leave to appeal allowed [1998] I.L/.R. I-3607; *MacLennan v. National Life Assurance Co. of Canada,* 28 C.P.C. (3d) 35 at 41.

[8] *Adu-Gyamfi v. Kingsway General Insurance Co.* (1996), 8 C.P.C. (4th) 294.

Aside from the legislated exceptions to the right to a jury trial, Rule 47.02 (2) allows parties to make a motion to a judge to strike out a jury notice Aon the ground that the action *ought* to be tried without a jury@.[9] Under this provision, a motions court judge must exercise her/his discretion on an application to strike a jury notice.[10]

c) Complexity

[9] Ontario, *Rules of Civil Procedure*, r. 470.01(2)

[10] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 451; *Martin v. Deutch et al.*, [1943] O.R. 683 at 691.

One of the most commonly cited reasons that an action ought not to be tried with a jury is the complexity of the issues and the technicality of the evidence.[11] Medical malpractice cases often involve detailed descriptions of operative procedures, medical and lab tests and assessments, anatomy and complex detailed medical records. As well, particularly when more than one physician or procedure is involved, evidence on different standards of care could be introduced. As such, prior to 1976, it was a given that medical malpractice cases would not be tried by jury.[12]

However, with the decision in *Law v. Woolford* that practice changed. In a medical malpractice case where the jury was asked to assess damages, Osler J. stated:[13]

---

[11] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 454.

[12] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 450; *Such v. Dominion Stores Ltd.,* [1961] O.R. 190 at 195.

[13] *Law v. Woolford* (1976), 2 C.P.C. 197 at

> ...a jury may be perfectly competent to assess the damages and there is no good reason why a member of the medical profession should automatically be insulated from the judgment of members of the public so far as the cost of his mistake or his negligence is concerned.

This reasoning was extended beyond damage claims and held to be applicable for all purposes in medical malpractice cases in *Soldwisch v.Toronto Western Hospital.*[14] In that seminole case,[15] the court stated that the long-standing practice which requires a motions court judge to automatically strike out a jury notice in a medical malpractice action deprives the judge of a discretion explicitly conferred on the judiciary and is therefore unsound.[16] The court stated that a motions court judge is required to look at the particular circumstances of the specific case before her/him in order to make a decision on striking jury notice. In this regard, the court cited *Majcenic v. Natale*[17]:

> The order of the trial Judge to strike out the jury notice must be based on a juridical discretion. The trial Judge=s doubts as to the efficiency and efficacy of the jury system are not judicial grounds for dispensing with a jury nor is his personal high regard for the litigant=s right to a jury sufficient to reject a motion to discharge when the grounds in support of the motion are substantial. The sole question for determination on this issue is: *Will justice to the litigants in the particular case be better served by retention or discharge of the jury?* The various factors

---

[14] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449.

[15] John Sopinka, *The Trial of An Action*, 2nd ed. (Toronto: Butterworths, 1998) at 18.

[16] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 452; see also *Lalonde v. Sudbury General Hospital of the Immaculate of Mary*, (1980), 19 C.P.C. 147 (Ont. H.C.) and *McArthur v. McMaster University Medical Centre* (1979) 26 O.R. (2d) 285 (Ont. H.C.)

[17] *Majcenic v. Natale,* [1968]1 O.R. 189 at 201-202.

> relevant to the issue must be considered in a judicial manner and the decision must be responsive to the question enunciated. (Emphasis added)

The test articulated in *Majcenic*, and approved in *Soldwisch* - will justice to the litigants in the particular case be better served by retention or discharge of the jury? - has been followed by Ontario courts since.

i) *Complexity in the evidence*

As noted above, one reason for striking a jury notice is complexity of the evidence to be called. However, not all medical malpractice cases involve complex evidence. For instance, in *Strojny v. Chan*, a medical malpractice case, it was determined that a jury could aptly handle the evidence and issues of the case, and that the jury notice would not be struck. The judge stated: [18]

> In this case no special knowledge of anatomy is required. The jury will not be required to understand complex surgical procedures, issues of medical care, pharmacology, bacteriology or any other medical science. In short, the jury will require no medical education to decide this case.

Even in cases where it will be necessary to comprehend, recollect, analyse and eventually weigh expert testimony on complex and highly technical scientific matters, a jury notice may not necessarily be struck. It is true that it is often easier to educate one person than

[18] *Strojny v. Chan* (1988), 26 C.P.C. (2d) 38 at 40.

a group, and that a judge is likely better able to comprehend the evidence, to recollect it, to analyse it, and to weight it,[19] however, given the important substantive right to a jury trial, if, with a reasonable amount of education and aid, a jury could determine the issues at stake, or some of the issues at stake, then a jury notice should not be struck.

The Court of Appeal adopted this approach in *Campbell v. Singal*:[20]

> ...I believe that a Judge hearing a motion to strike the jury must determine the factual issues that will be before the jury, assess the complexity of the evidence to be led with respect to those issues and assess the complexity of the legal issues that will arise from the evidence. It seems to me that in most medical malpractice cases a certain amount of Amedical education@ of the jury will be necessary. However, it is only when Athe facts , the law or both are such that a jury cannot reasonably be expected to be able to follow the evidence properly or to apply the judge=s charge properly@ that the jury should be struck.

---

[19] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 454 and 455.

[20] *Campbell v. Singal* (1989), 35 C.P.C. (2d) 284 at 290.

The court in *Campbell* noted that appropriate aids will assist a jury in understanding complex or technical evidence.[21] It also noted that the trial judge is there to assist the jury in her/his charge and to explain the evidence about which it is not clear or to have the evidence read back to it. Even though this will require additional time, it must be determined whether the additional time required would not be so great as to be unreasonable.[22]

[21] *Campbell v. Singal* (1989), 35 C.P.C. (2d) 284 at 291.

[22] *Campbell v. Singal* (1989), 35 C.P.C. (2d) 284 at 292.

Similarly, Webber J. held in *De Boer v. Bosweld* that the right to a jury trial should not be taken away unless it is probable that a jury could not be expected to be able to follow the evidence properly or to apply the judge=s charge properly.[23] In *De Boer*, Webber J. determined that the jury would essentially be required to resolve issues of fact, i.e., Athe jury will not be required to analyse operative techniques but to decide if certain steps should or should not have been taken@.[24]

A party moving to strike a jury request on the basis that the evidence will be too complex, would be advised to submit affidavits, medical reports or other clear indications of the complexity of material with which the jury would be expected to grapple.[25]

Another factor to consider in determining whether the complexity of the evidence bears striking a jury notice is whether, if the jury chose not to rely on expert opinion, it would be Avirtually cast in the role of a physician or surgeon in determining what it would have or should have done in the circumstances@.[26]

---

[23] *De Boer v. Bosweld* (1991), 5 O.R. (3d) 413 at 416; but note that in *Merringolo v. Oshawa General Hospital* (1986), 10 C.P.C. (2d) 272 at 277, O=Driscoll J. appears to imply that the question to answer is who will be more likely to be able to comprehend, recollect, analyze and weigh expert testimony on the complex and scientific matters presented in a case.

[24] *De Boer v. Bosweld* (1991) 5 O.R. (3d) 413 at 415.

[25] *Coop v. Greater Niagara General Hospital et al.* (1983), 34 C.P.C. 6; D.H. Jack, AJury Notices in Medical Malpractice Cases@ (1984) 5 Advocates= Quarterly 119 at 127.

[26] *McMahon v. Giammichele*, [1980] O.J. No. 1048 at &10 (Q.L.) (Ont. H.C.J.)

ii) ***Complexity in the law***

If it is asserted that a jury notice should be struck because of complexity in the law, it is important to decide if the complexity in the law can be adequately explained by the judge in her/his instructions to the jury.[27] While it is clear that the mere presence of difficult and unsettled questions of law is not in itself grounds for striking a jury notice,[28] certain complex legal issues, such as vicarious liability, proportions of liability, contributory negligence, informed consent or mental distress, may simply be beyond a jury=s capacity.[29] Further, the determination of these issues cannot always be extrapolated from other issues, such as damages, indicating that a jury would be inappropriate to render a decision on any part of the case.[30] Indeed, the Ontario Court of Appeal has recently recognized that Amany cases of

---

[27] *Etienne v. McKellar General Hospital* (1998), 16 C.P.C. (4th) 141 at 142 (C.A.).

[28] *Murray v. Collegiate Sports Ltd.* (1989) , 40 C.P.C. (2d) 1 (Ont. C.A.)

[29] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 457; *Rahmaty v. Kentner* (1982), 31 C.P.C 300; *Fulton v. Town of Fort Erie* (1982), 40 O.R. 2d 235.

[30] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 457.

medical malpractice may more appropriately be tried without a jury@.[31] It should be borne in mind, however, that the complex legal question must be real, and not one that just might Amerely@ arise.[32]

d) Where in doubt, a jury should be allowed

[31] *Etienne v. McKellar General Hospital* (1998), 16 C.P.C. (4th) 141 at 142 (C.A.).

[32] *Ryan v. Whitton,* [1964] 1 O.R. 111 at 113.

The rule remains however, that if there is doubt about the matter, then the application to the motions court judge to strike the jury must fail.[33] The trial judge will still be able to make the decision later.[34] The action should proceed with a jury until it is apparent the matter should be taken away from the jury.[35] In essence, the courts are concerned that the right to trial by a jury not be taken away prematurely,[36] for once this right is removed, practically speaking it will not be re-instated later if the proceedings prove to be less complex than anticipated.[37]

Rule 47.02(3) ensures a party retains the ability to move again at a later date to strike a jury notice. Rule 47.02(3) reads as follows:[38]

---

[33] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 458.

[34] *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 458.

[35] *Migos v. Zurich Co. of Canada* (1998), 28 C.P.C. (4th) 268 at 270.

[36] *Sloan v. Toronto Stock Exchange* (1991), 5 O.R. (3d) 412 at 412; *Pipher v. Shelbourne Dist. Hospital* (1985), 5 C.P.C. (2d) 110.

[37] *Zeller v. Toronto Gen. Hospital* (1984), 45 C.P.C. 221 at 222.

[38] Ontario, *Rules of Civil Procedure*, r. 47.02(3).

Discretion of Trial Judge

(3) Where an order striking out 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.

This rule implicitly recognizes two important facts. First, often foreshadowed complexities do not materialize at trial.[39] In particular, because of compulsory pre-trials, many issues may be reduced, and the complexity presented in the pleadings may disappear.[40] Second, once the evidence has been given, the trial judge is likely better equipped than a motions judge (or the trial judge early on in the trial) to determine whether it was too complex for a jury to handle.

Thus, in medical malpractice cases where it is not clear early on that the evidence will be complex or involve equitable issues, then a jury will continue to hear the case until the contrary arises.

IV. Conclusion

Medical malpractice claims may be tried by a jury. However, the high likelihood that such a claim will involve complex evidence or law, increases the prospect that a jury notice

[39] *Cole v. Trans-Canada Air Lines* (196), 2 O.R. 188;John Sopinka, *The Trial of An Action*, 2nd ed. (Toronto: Butterworths, 1998) at 20.

[40] *Anderson v. Wilgress* (1985), 6 C.P.C. 172 at 175.

will be struck. Whether this is done before or during trial may depend, in part, on the nature of the evidence given to the motions court judge indicating the complexities involved in a case.