STRIKING THE JURY – WHY, WHEN AND HOW

by Craig Brown

Why

In most personal injury cases in Ontario a jury notice is served by the plaintiff, the defendant or both at the commencement of the action and the case proceeds to trial with a jury. Occasionally, however, motions to strike a jury notice are called for – most often where the complexity of the case has increased to the point where counsel feels that a jury, properly instructed, would have considerable difficulty coping with the evidence.

Where the jury notice is served by the defence in a case where the plaintiff would have preferred a trial by judge alone, tactical issues (discussed below) may provide additional motivation for a motion to strike the jury on the grounds of complexity in a proper case.

Complexity

The leading case on the striking a jury in a civil action is *Cowles* v. *African Lion Safari*[1]. The trial took place before Madame Justice Jean MacFarland in 2004. The defendants' appeal was heard in June 2006 with majority reasons dismissing the appeal written by O'Connor A.C.J.O. Justice Borins dissented in lengthy reasons largely devoted to the issue of whether the trial judge was correct in taking the case away from the jury at the opening of trial. The defendants' application for leave to appeal to the Supreme Court of Canada was dismissed without reasons.

The applicable section of the *Courts of Justice Act* is s. 108(3) which provides:

> *"On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury."*

Rule 47.02 gives further direction by providing that the motion to strike will be made to a judge who has discretion to try the action without a jury.

The point of departure for any motion to strike a jury notice is the decision of the Supreme Court of Canada in *King* v. *Colonial Homes Ltd.*[2] which stands for the principle that the right to trial by jury in a civil case is a substantial right and should not be interfered with without just or cogent reasons. This places the onus on the moving party to show the court that there are special features about the case before it that merit the discharge of the jury[3]. The test is whether justice to the parties will be better served by the discharge of the jury[4].

The Ontario Court of Appeal in *Graham* v. *Rourke* makes it clear that the judge hearing the motion must exercise "a judicial discretion"[5]. In *Cowles*, the trial judge heard a motion to strike the jury brought by counsel for David Balac (Cowles' co-plaintiff) at the opening of trial on the basis that the case was too complex to be heard by a jury. No evidence had yet been called, so very substantial material was filed on the motion to inform the trial judge of the nature of the evidence that was likely to be called and of the legal issues that would probably arise. The case involved two very severely injured plaintiffs and facts which raised a number of novel legal arguments on the strict liability of owners of wild animals and the availability of defences to strict liablity.

Justice O'Connor pointed out that an appellate court's review of a trial judge's exercise of her discretion is limited. He quoted Robins J.A.:

> *"Before an appellate court may properly intervene it must be shown that the discretion was exercised arbitrarily or capriciously or was based upon a wrong or inapplicable principle of law."*[6]

Since there was no suggestion that the trial judge had acted arbitrarily or capriciously, the appeal turned on whether she had based her decision on a wrong or inapplicable principle of law. The principle set out in

Graham was properly identified by Justice MacFarland as the applicable one, so the debate centered on whether she had applied it correctly.

In finding that MacFarland J. had properly applied the appropriate principles, Justice O'Connor provided some useful indicators as to the level of complexity which will be deemed sufficient to permit a trial judge to take a case away from a jury. To begin with he dismissed the frequently-made comparison to complex criminal trials as unhelpful because there is "no room for the exercise of a judge's discretion with respect to whether a case would be better tried with or without a jury" (because of the accused's absolute statutory right to a jury trial when charged with certain offences).[7]

He also accepted that the anticipated nature of expert evidence as well as the predicted length of the trial can be used as a gauge of the complexity of the case - without the necessity of actually hearing the evidence.

Justice O'Connor went on to provide useful guidance on the subject of the interplay of factual complexity and legal complexity in determining whether a jury is able to cope with a particular case. The appellants argued that the trial judge is not entitled to take legal complexity into account when making her determination because issues of law are the exclusive responsibility of the trial judge to decide and to explain to the jury where appropriate. Justice O'Connor agreed that it would be a reversible error to strike a jury on the basis that it would be too difficult to explain the law to a jury. However, he found that even where complex legal principles are adequately explained to a jury they "may have difficulty in applying the legal concepts as instructed..."[8].

In response to the appellants' suggestion that mixed questions of fact and law are not necessarily complex[9], Justice O'Connor pointed out that in some cases they can be "very complex" and agreed that MacFarland J. was entitled to consider the *legal* complexities of the case "as one of those complexities that would affect the task of the jury."[10]

In his dissenting reasons Justice Borins referred to an element of the test set out by the Supreme Court of Canada in *King* v. *Colonial Homes Ltd.* for appellate review of the exercise of a trial judge's decision to strike a jury. In *King* the court said that deference would be accorded even if the judge was wrong at law but only "when the appellate court is also satisfied that any jury acting reasonably must have reached the same result as did the trial judge."[11]

Without expressing any reservation about the difficult and highly speculative task which the SCC gives to appellate courts of predicting what "any jury" would "inevitably" have done in a particular case, Justice O'Connor found that since Justice MacFarland had not been found to have exercised her discretion wrongly, it was not necessary to delve into the merits of the case to try to answer that difficult question. Since the appellants would have been successful had the majority found an improper exercise of discretion, it is hard to imagine how the application of the *King* test would ever be necessary.

Other factors may influence counsel's decision to bring a motion to strike the jury in a case which, although complex, is at the low end of the complexity scale. These factors may become more apparent as the trial approaches or even when final trial preparation is being done.

In some cases the character of your client may be so unattractive that you can reasonably conclude that the average juror will be repelled by the client. This does not mean that the jury will necessarily treat him unfairly but it certainly adds a challenge for counsel to overcome. Some common examples of character flaws include: a client with a history of domestic violence; a client with a significant criminal history (which is relevant to the consideration of employment history and potential); or a client who cannot refrain from argumentative, aggressive, or self-pitying behavior. In addition you may have a case where your client's contributory negligence is likely to make a bad impression - for example where he is severely intoxicated at the time he is involved in the incident which causes his damages.

The same kinds of problems can surface with the character of a key witness or important member of your client's family. If you know that you must call the person as a witness to establish an important fact, you may be concerned about the effect that a bad impression will have on the jury's willingness to accept that fact.

A trial by Judge alone is no guarantee that an impartial approach will be taken by the trier of fact but we can normally assume that an experienced trial judge will be better able to rise above personal feelings for or against a party or witness in order to achieve a fair result than will members of a jury. In any event, counsel is likely to have much more information about the trial judge's ability in this area than she can ever hope to have about members of the jury.

Whether the motion to strike the jury is brought at the commencement of trial or later, the material should be assembled well in advance of trial.

In negligence cases there are many examples of culpable error having been committed by delightful and decent people - sometimes personalities well known to the public for their benevolence or generosity. Defence counsel love these clients because they know a jury can be influenced by their personal regard for the defendant when deciding liability in the case.

Where you are facing a defendant with unusually appealing character or history, you may wish to remove the possibility of jury bias in his or her favour.

Finally, after selecting the jury you may be of the view that one or more of its members are not likely to be able to cope with the complexities of the case that you will be calling. Although this problem can arise with any jury, the somewhat arbitrary means of selecting juries in Ontario can leave you with some jurors who lack the educational or intellectual resources that may be necessary to deal with difficult medical or economic evidence.

When

TIMING OF THE MOTION TO STRIKE A JURY

Some motions to strike a jury notice can properly be brought before trial – for example, where a defendant such as a municipality is added to a jury action after commencement. In those cases, where there is a clear statutory prohibition[12], there is no need to wait to bring the motion before the trial judge. In most other cases the motion will be brought before the trial judge and *Cowles* offers some interesting insight into the timing of such a motion since the appellants' second argument on the jury notice issue was that the trial judge erred in failing to take a "wait and see" approach to the motion.

Justice O'Connor acknowledged that in many cases the initial appearance of complexity does not materialize "or at least not to the extent originally asserted"[13]. However he went on to say:

> *"A trial judge has a discretion whether or not to take a wait and see approach. In many cases it is the most prudent course to follow. In some cases, however, trial judges will consider that there is no advantage to beginning the trial with the jury because the situation as presented at the outset makes it apparent that the case should not be tried with a jury. There is thus no point to waiting and seeing."*[14]

In his dissenting reasons Justice Borins pointed out that, after the trial began, a number of issues were settled (including general damages) and many expert reports were filed rather than calling the experts to give *vive voce* evidence. This, he suggested, was proof that the case was not really as complex as it had been suggested at the outset, and was a good reason why the trial judge should have waited until the trial was well underway before deciding to take the case away from the jury.

Justice O'Connor's view on this issue was stated thus:

> *"It is always possible that a case or some issues in a case will settle during the course of a trial. When that happens, the complexity of the proceedings may well be reduced. While a trial judge may wish to consider the possibility of settlement as one of the factors in determining whether to dispense with the jury at the outset of the trial, I do not think that a trial judge who strikes a jury notice or discharges a jury makes an error in law because of a failure to "wait and see" if the case might be simplified by settlement during the course of the trial. Were it otherwise, trial judges would never dispense with a jury before a case was completed because only then would it be known for sure whether the case or some issues in the case would be settled.* The Courts of Justice Act, *the rules and the case law do not restrict a trial court's discretion to dispense with a jury in this manner. Courts have the authority to dispense with a jury even before a trial begins."*[15]

While the most cautious approach is to bring a motion to strike the jury at some point after the trial begins, it can be challenging to put together the necessary materials when witnesses are being called. A compromise tactic is to prepare material for a motion at the outset of the trial with the submission that the trial judge reserve her decision until some evidence has been heard.

How

Material

Whether the motion to strike the jury is brought at the commencement of trial or later, the material should be assembled well in advance of trial. Since in most cases the motion will be brought on grounds of complexity, a comprehensive affidavit from counsel is necessary to outline and emphasize the areas that will give a jury difficulty.

In *Cowles*, counsel put together a thick brief of experts' reports on both liability and damages which gave the trial judge a comprehensive preview of the evidence that was likely to be called during trial. The affidavit also spoke at length of the legal issues that the jury would have to apply to the facts of the case. The sum total of the material amounted to a detailed outline of the entire trial.

Argument

A careful review of the majority reasons in *Cowles* will provide moving counsel with his or her argument in most cases. In addition, the dissenting reasons of Justice Borins contain all of the arguments that are likely to be raised in opposition. A factum containing the key points will assist the trial judge in writing her reasons for decision which, if my experience is any indicator, will likely be one of the grounds of any defence appeal.

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NOTES

[1] *Cowles* v. *African Lion Safari* (2006), 216 O.A.C. 268

[2] [1956] S.C.R. 528

[3] *Cowles*, supra, at para 37

[4] *Graham* v. *Rourke* (1990), 75 O.R.(2d) 622 at 625 (C.A.)

[5] *Graham*, supra, at p.625

[6] *Kostopoulos* v. *Jesshope* (1985), 50 O.R.(2d) 54 at 69-70

[7] *Cowles*, supra, at para.58

[8] *Cowles*, supra, at para 61

[9] *Hunt* v. *Sutton Group* (2002), 60 O.R.(3d) 665 (CA)

[10] *Cowles*, supra, at para 67

[11] Paraphrase from *Cowles*, supra, para. 173

[12] e.g. s.108(2)12) of the *Courts of Justice Act*

[13] *Cowles*, supra, para. 70

[14] *Cowles*,supra, para. 72

[15] *Cowles*, supra, para. 76