Civil Procedure
Law 225

Fall 2018

LECTURE NOTES NO. 7

A. TRIAL

1. Juries

- **There are limits to the types of matters that can be tried by a jury under *Courts of Justice Act*, s.108.** For example, outside of the types of jury cases are proceedings for injunctions, declarations, mortgage actions – matters that are essentially questions of law or exercise of the Court's discretion.

- **A party wishing to have the matter tried by a jury must serve a "jury notice":**

> **Rule 47**
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> 47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) 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.
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> **47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,**
>
> **(a) a statute requires a trial without a jury; or**
>
> **(b) the jury notice was not delivered in accordance with rule 47.01.**
>
> **(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 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.**

- **A party may move to strike out the jury notice on motion to a judge, but, if refused, a motion may be to the trial judge who may order the action to be tried without a jury; Rule 47.02.**

- **6 jurors on a civil jury.**

- **The *Juries Act* governs in respect of eligibility to serve - as soon as you start articling you're no longer eligible - and such matters as pre-emptory challenges (4 per side in civil matter).** Please note that challenges for cause (other than eligibility) are rare. When made, two jurors are selected to be 'triers' decide the challenge. The law on challenges for cause in civil matters is not especially clear. The balance of open leaves the matter to the discretion of the trial judge. Convention dictates that it would be a rare case to allow such challenges; if challenges are necessary, it may be that the case is unsuitable for a jury.

- **Outside of negligence actions (personal injury, medical malpractice, etc), juries are rare.**

Cowles v. Balac
2006 CanLII 34916 (Ont. C.A.)

This case deals with two related questions: ***when can a trial judge strike out the jury notice and try the matter without a jury***, and, ***when can that decision be impeached on appeal?***

O'Connor ACJO:

> [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 just cause or cogent reasons…
>
> [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...
>
> [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.
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> [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.
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> [40] Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited. In *Kostopoulos v. Jesshope*, (1985), 50 O.R. (2d) 54 at 69-70 (C.A.), Robins J.A. set out the well accepted standard for appellate review as follows:

> I think it manifest from the authorities that 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. The question to be addressed in this case is whether the trial judge committed an error of such a nature. If not, this Court is not entitled to interfere with his exercise of the discretionary power conferred by s. 60(3) [of the Judicature Act].

[41] Appellate deference for the exercise of discretion by lower courts is justified on several bases: it serves to recognize the expertise of the lower court; it promotes the integrity and autonomy of the proceedings in the lower court; it limits the number, length and costs of appeals; and, in some cases (not this one), it recognizes the advantage that the lower courts have from firsthand observation of the evidence...

[42] An appeal court should not interfere with the exercise of a trial court's discretion simply because it disagrees with the conclusion reached. That means 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 for that of the lower court. Interference is only justified when the lower court is shown to have committed the type of error referred to in *Kostopoulos*.

…

[48] Clearly, the complexity of a case is a proper consideration in determining whether a jury notice should be struck. Indeed, a 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.

…

[53] In her reasons, the trial judge pointed out that her conclusion was based on the cumulative effect of a number of factors. She considered the legal, factual and evidentiary complexities of the cases. While she did not appear to attach great weight to the legal complexity of the cases, she pointed out that there were two alternative causes of action, strict liability and negligence, and that there were potentially a number of defences available.

[54] The trial judge attached considerable importance to the factual and evidentiary complexities of the cases. There was going to be disputed expert evidence with respect to liability on two issues, the standards pertaining to a drive through safari zoo and the mechanics of automobile power windows.

[55] Moreover, she indicated that the damages issues were going to be very complex. The plaintiffs had suffered serious personal injuries and, during the argument of the motion, the parties indicated that there would be eighteen to twenty medical witnesses called. The trial judge had before her lengthy and complicated medical reports, including reports from plastic surgeons, orthopaedic surgeons, psychiatrists, psychologists and rehabilitation and clinical neuro-psychologists.

[56] In addition, it was anticipated that the actuarial evidence relating to the income potential for both plaintiffs would be more difficult than in many cases. Because the plaintiffs had not yet embarked upon permanent occupations, it would be necessary to consider potential income streams from a number of different scenarios. Finally, the trial judge observed that the trial would be lengthy, as counsel conservatively estimated it would last six weeks.

[57] Looking at all of the factors considered by the trial judge, I am satisfied that there was sufficient complexity to form a basis for her to conclude that justice to the parties would be better served if she tried the case without a jury. I must say that I find this case to fall at the low end of the complexity scale that would permit a judge to dispense with a jury. It is likely that some judges confronted with the same factors would exercise their discretion differently. That said, I do not think that it can be said that there was no reasonable basis for the trial judge's conclusion that the complexity of the cases warranted striking the jury notice.

[58] It has been suggested that, when weighing the issue of complexity, regard should be had to the fact that over the years juries in criminal trials have decided some very complex and lengthy trials, some exceeding a year in length. The suggestion is that if juries are able to manage lengthy and complex criminal trials, then the same should hold true for civil cases. I do not think that the comparison to criminal cases is particularly helpful. As Reid J. pointed out in Rahmaty v. Kentner, [1982] O.J. No. 2284 (H.C.J.), the problem with this suggestion is that it ignores the fact that in criminal cases 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. Factors that are absent in disputes between private litigants come into play in criminal trials. Accused persons have an absolute right to be tried by a jury when charged with specified offences. As such, juries must deal with some criminal trials no matter how complex and no matter what a judge may consider to be the best way to achieve justice in the particular case. The same is not true for civil cases. While parties in civil cases have a substantive right to a jury trial if they choose, courts are given a discretion to try a case without a jury "in a proper case".

A personal injury case went to the jury. The insurer for one of the parties admitted liability in principle but disputed damages. The jury awarded $0 for future income loss. The trial judge set aside that finding and awarded $117,200 Correct?.

Per Gillese J.A.:

> [20] There is no dispute as to the law that governs when a trial judge can refuse to enter judgment in accordance with the verdict of a jury. At common law, a trial judge can disregard the answers which form the jury verdict only: (i) if there is no evidence to support the jury finding; or (ii) the jury gives an answer to a question which cannot in law provide a foundation for a judgment...
>
> [21] Further, rule 52.08 of the *Rules of Civil Procedure*, R.R.O. 1990, O.Reg. 194, sets out certain conditions under which a trial judge can order that an action be retried or dismissed…
>
> [22] In my view, neither the common law test nor the conditions in rule 52.08 were met. Consequently, the trial judge was not entitled to disregard the jury's verdict on future income loss.
>
> [23] In respect of the common law, it cannot be said that there was no evidence to support the jury verdict of $0 for future income loss. There was evidence that the plaintiff earned as much income, or more, following the accident as he had earned before the accident. Also, the plaintiff suffered from serious credibility issues in respect of his income and his motivation to work. In addition, there was evidence that the plaintiff had alternative job opportunities available to him. For example, when asked in cross-examination about his sources of income in 2010, the plaintiff testified that he had done some cooking at a sports bar.
>
> [24] In these circumstances, it cannot be said that there was no evidence on which the jury could reject a claim for future income loss. Even assuming that the defence evidence on the plaintiff's injuries was "uncontradicted and uncontested", as the trial judge found, that evidence was not determinative of the question of future income loss – credibility and motivation to work were also relevant to such a determination.
>
> [25] As the trial judge placed significant reliance on *Teskey v. Toronto Transit Commission* (2003), 3 C.P.C. (6th) 181 (Ont. S.C.), a comment on that case is in order. In *Teskey*, the plaintiff's claim was for defamation and malicious prosecution. The jury was instructed to assess the plaintiff's damages regardless of their findings on liability. It returned a verdict of $0 for both torts. The trial judge rejected those verdicts.
>
> [26] The trial judge overturned the jury verdict in respect of defamation because of the presumption that once defamation is proven, nominal damages – at a minimum - follow. The jury award of $0 led her to conclude that the jury did not understand the instructions they had been given in respect of damages for defamation. That is, she found that the jury had given an answer to a question which could not, in law, provide a foundation for the judgment.

[27] As for damages for malicious prosecution, the trial judge in *Teskey* found the jury award of $0 not supportable based on the undisputed evidence of the plaintiff's legal expenses incurred in defending the charges against him. At para. 58 of *Teskey*, the trial judge explained that the only conclusion that the jury could have reached, had they understood their instructions, was to find damages of at least $2,140, the amount of the legal bills for which supporting documentation had been filed.

[28] In the present case, the trial judge stated that the ruling in *Teskey* in respect of damages for defamation did not apply because there is no presumption of damages for future income loss. I agree.

[29] However, I do not agree with the trial judge that the reasoning in *Teskey*, in relation to damages for malicious prosecution, is applicable to this case. In *Teskey*, the plaintiff incurred legal expenses in defending the charges and he proved those expenses. Had the jury understood their instructions, they would have been bound to have found damages of at least that amount. A $0 award, in those circumstances, was not sustainable. In the present case, however, there is no certainty that McLean would suffer future income loss. As already explained, the jury had to decide that question based on not only the medical and other expert evidence but also on McLean's work history and credibility.

[30] Finally, to the extent that the trial judge's determination in this case was implicitly based on the view that the jury's verdict on future income loss was unreasonable or perverse, as distinct from lacking an evidentiary foundation, I note that the issue of an unreasonable or perverse verdict is a matter for the appellate court: see *Lang v. McKenna* (2000), 2000 CanLII 16814 (ON CA), 135 O.A.C. 304 (C.A.), at para. 24, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 539.

[31] As for rule 52.08(1), it is readily apparent that none of the conditions set out in (a) to (c) were in play. And, for the reasons already given, it cannot be said that there was no evidence on which to base the jury verdict of $0 for future income loss.

[32] Having found that the trial judge erred in setting aside the jury's verdict on damages for future income loss, it becomes unnecessary to decide whether the trial judge had the power to substitute his own assessment of damages for future income loss.

[33] Nothing in the foregoing reasons should be taken as approving the trial judge's decision to set aside the jury verdict on damages for malicious prosecution in *Teskey* or to substitute her assessment of those damages.

2. Stages of the Trial

Stages:

1. Jury empanelled
2. Plaintiff's opening statement
   [Defendant's opening statement, with leave]
3. Plaintiff's case:
   a. Formal Admissions
   b. Witnesses
   c. Evidence from transcripts of Defendant's examination
4. Defendant's opening statement
5. Defendant's case
   a. Formal Admissions
   b. Witnesses
   c. Evidence from transcripts of Plaintiff's examination
6. Plaintiff's Reply (evidence)
7. Defendant's closing statement
8. Plaintiff's closing statement
9. Submissions on charge
10. Charge
11. Objections, if any, to charge; recharge
12. Verdict
    [rare: Judge may refuse verdict if unsupportable on the evidence or if there are inconsistent verdicts; see r.52.08.]

Please see Rules 52, 53.

3. Mistrial

Spittal v. Thomas
2006 CanLII 12731 (Ont. S.C.J.)

Counsel personally attacked the other party and appeared to give evidence in his opening statement. The offending passages of counsel's address:

> Primmum [the defendant insurer] has not made life easy for Tammy and Krystle [the plaintiffs struck by an uninsured motorist, allowing the plaintiffs to sue their own insurer under their policy]. In fact, it (the company) made it difficult, and I am going to give you an example. Despite the fact that this is a straightforward rear-end accident, they have not admitted liability. Mr. Thomas, the uninsured driver, was charged with careless driving pursuant to the Highway Traffic Act. There was a thorough investigation conducted by a trained police officer. There is no information whatsoever indicating that anyone other than Mr. Thomas was at fault in this accident. but would Primmum admit liability? No.
>
> ...
>
> But, more than just the inconvenience factor, Primmum's refusal to admit liability is simply an example of how unreasonable they have been with respect to assessing this lawsuit. Instead of assisting its own insureds, Primmum, during a very difficult time, Primmum has saw fit to make Tammy and Krystle's

> lives more difficult. Now, the failure to admit liability is interesting for another reason. as I mentioned earlier, Mr. Thomas had been noted in default. Our Rules of Civil Procedure, which no one ever wants to read unless they have to, will tell us that he is deemed to admit the truth of all allegations of fact made in the statement of claim because he never entered a defence. So, what does that mean? That means we already have an admission of liability from Mr. Thomas but not from Primmum.
>
> ...
>
> Tammy and Krystle have done nothing wrong. They were unsuspecting motorists who were rear-ended out of nowhere by an uninsured, reckless and unlawful driver. Primmum's failure to accept Tammy and Krystle's injuries as legitimate is why we are here. By the time we leave here, in a week or so, I am going to ask that you undo Primmum's failures and compensate Tammy and Krystle fairly for this very unfortunate accident.

Glass J.:

> [7] Mr. Dye submits that this language can be cured simply in the final jury charge by telling the members of the jury that what counsel says in opening and closing statements is not evidence. If I were to say any more than that, such as specifically pointing to Mr. Dye for what he said, it would be prejudicial to his clients.
>
> [8] **I find that the comments of Mr. Dye are improper. They reflect a personal attack on the other party to the trial. The words are inflammatory. His statement makes Primmum out to be an awful company that should be punished for not giving the plaintiffs money. It is hard to imagine that the jury will overlook that image that was painted at the beginning of the trial. The language used by plaintiffs' counsel fails to present the burden of proof correctly. Rather than simply acknowledging that the plaintiffs must prove their claims, counsel has stated that it is wrong for the defendant insurance company not to concede facts. To use innuendo that a jury should blame a defendant for making plaintiffs prove their case is to create a danger that the jury might improperly let this innuendo affect their decision.**
>
> **[9] The opening statement is sufficient to cause a mistrial or to release the jury. Mr. Isaacs does not ask for a mistrial but rather for an admonition to the jury about the opening statement of Mr. Dye. At the same time, Mr. Dye basically is saying that I should let sleeping dogs lie. That cannot be done if there is to be a fair trial.**
>
> [10] I assume that Mr. Isaacs does not want the jury to be excused because his client filed the jury notice.
>
> [11] I am prepared to forego a mistrial in light of Mr. Isaacs' position, but I am not persuaded to follow Mr. Dye's suggestion. I shall draw to the jury's attention the comments of Mr. Dye by reading them. Then, I shall advise the jury that they are not to pay any attention to those words because they amount to a

> personal attack on Primmum, they are inflammatory and make out Primmum to be a company that does unfair things to their customers. They should not have been said. At the same time, I will instruct the jury not to punish the plaintiffs for those words of their lawyer.

Abdallah v. Snopek
2008 CanLII 6983 (Ont. Div. Ct.)

The closing address of counsel included the following:

> Mr. Abdallah also talked about how much he loves Canada. Let's just review what he's done since he's been in Canada.
>
> He came to Canada, he got a job that he worked for five months and then quit. Then he made an EI claim. Six months later he was in an accident and made an accident benefits claim. He then goes on to work a total of three weeks over the next almost five years.
>
> He goes back to the Middle East twice for a total of 20 months and he moves his entire family back there. And now he's here asking for money from my client. Sure, he loves Canada. Why not? What's not to love? We're all immigrants or our forefathers are immigrants, but Canada wasn't built that way. It was built by hard working people who don't drop out of the workforce for five years because of a fender bender. Canada wasn't built by people who try to take advantage of a car accident to write their ticket.
>
> …
>
> Ask yourself what you think will happen if you order my client to pay him money. Do you think he will take that money and sit around the house for the next five years and use it for medical treatment, or do you suspect he may find the energy and back strength to start his own business, perhaps not even in this country? Which do you think is more likely to happen?
>
> Ladies and gentlemen, this car accident should not be an opportunity for Mr. Abdallah to get a leg up on everyone else who comes to this country trying to start a new life. This accident should not be a down payment for a house, it shouldn't be an early retirement fund or seed capital for a new business anywhere. And I ask you, do not let that happen.
>
> It's a serious matter to drag someone through a lawsuit and use this court's time. Does Ms. Snopek look happy to be here? The courts of Ontario are not an ATM machine. Please exercise common sense. This accident didn't happen the way he said. He's not injured. He hasn't proven his case. He should get nothing. That's all, thank you.

Was the passage so inflammatory as to render the trial unfair? The Divisional Court held that it was.

Molloy J.:

(i) Defence Counsel's Jury Address Was Inflammatory

[24] In my view, there can be little doubt that the concluding portion of defence counsel's jury address was irrelevant, inappropriate, and offensive.

[25] **There is considerable room for skillful advocacy in trial counsel's closing address to a jury. The advocate's purpose in addressing the jury is to summarize his or her client's case in a persuasive fashion and, in doing so, to convince the jury to return a favourable verdict. Counsel's address to the jury must be rooted in the evidence, rather than irrelevant considerations. There is nothing wrong with counsel being passionate in support of his client. However, jury addresses that are designed to influence jurors towards making decisions based on their emotional reactions to irrelevant issues, rather than on a rational and logical analysis of the evidence, are improper.**

[26] These limits on counsel have long been part of the rules by which jury trials are conducted in this country. In Dale v. Toronto R.W.Co., [1915] 34 O.L.R. 104 (C.A.), Riddell J.A. accepted the right, and perhaps even the duty, of counsel to make an "impassioned address", noting (at para 14) that "mere earnestness, fervour or even passion, is not in itself objectionable – so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects." In that case, the plaintiff had been injured while alighting from a streetcar in Toronto and sued the Toronto Railway, asserting that the reason for her fall was the negligence of the streetcar operator. The jury returned what was, for its day, a sizeable award for the plaintiff – $925. The defendant sought a new trial based on remarks made by plaintiff's counsel in his closing jury address, in which he made an allegorical reference to a giant named "Stranglehold" who had a castle on the hill, with his tentacles all over the city, and to whom his subjects had to pay a silver toll for being carried through the city. The Court of Appeal held that these remarks were clearly referable to the defendants and described them as "wholly objectionable from any point of view, taste . . . ethics, law": para 16.

...

[28] **A jury address that invites the jury to consider entirely irrelevant matters is improper.** That was the basis upon which the Court of Appeal determined a new trial should be ordered in Gage v. Reid (1917), 38 O.L.R. 514 (C.A.). Defence counsel in that case referred repeatedly in his jury address to the fact that the plaintiff was an Austrian, of the Serbian race, and suggested that he was likely to use any damages received in the case to assist the enemy in the First World War, which was then underway in Europe. Although that suggestion is more extreme than the comments made by defence counsel in this case, there is a common theme: national origin and how the damage award would be spent. **In the case at bar, it was improper of counsel to dwell on the plaintiff's national origin and to invite the jury to speculate about what the plaintiff would do with any award he received. These are simply irrelevant issues.**

[29] Further, many of the comments made by defence counsel went beyond irrelevant and were just plain offensive. For example, to make the statement "Sure, he loves Canada. Why not? What's not to love?" immediately after a recitation of facts insinuating that Mr. Abdallah is an immigrant ripping off Canada's social welfare system, is offensive in the extreme. Likewise, the statement, "The courts of Ontario are not an ATM machine." Such comments go far beyond the bounds of decorum. They are inflammatory. They are irrelevant to any legitimate issue before the jury and can only have been intended to appeal to the emotions of the jury in an attempt to influence them to find against Mr. Abdallah because he is an immigrant taking advantage of our health care and justice systems.

[30] Defence counsel then developed the theme that Mr. Abdallah, if successful at trial, would use any award he obtained in an inappropriate manner. This was a completely improper suggestion. It is not relevant for the jury to speculate on the consequences of their verdict, much less to allow disapproval of the likely use of an award to influence whether to make an award at all. Defence counsel asked the jury to consider what would happen if they ordered the defendant to give money to Mr. Abdallah. He suggested that Mr. Abdallah would not sit around the house for the next five years and use the money for medical treatment, thus incorrectly implying that this was the only purpose for which a damages award could be used. He then suggested a number of possible ways Mr. Abdallah might use the money, which he suggested the jury should not permit. These included an "early retirement fund", "a down-payment for a house" or "seed capital for a new business". **He even went one step further and invited the jury to speculate that Mr. Abdallah might take the money out of the country and start a new business elsewhere. First of all, these suggestions are not rooted in the evidence. There was no evidence at trial as to what Mr. Abdallah intended to do with any award he received, nor would such evidence have been relevant. Second, these suggestions are incorrect in law. There is no restriction on how a successful plaintiff may choose to use an award of damages. It is improper to even raise this as an issue with the jury. Third, there is nothing wrong with many of the examples insinuated by counsel to be abusive. Starting a new business might well be a constructive and sensible use of the money. For a person who has become permanently unable to work, it would be logical to use it as a retirement fund. Investing in a home would be sound financial planning for a person who would be unlikely to have a regular income flow because of an inability to work. Fourth, the clear implication from the jury address was that this type of impugned conduct was particularly repugnant if engaged in by an immigrant to this country, e.g. the comment "Canada wasn't built by people who try to take advantage of a car accident to write their ticket". That is an inflammatory suggestion and has no place in a jury trial.**

...

[35] Prior to reaching his concluding remarks that are the subject of this appeal, defence counsel had already made a forceful, impassioned address to the jury pointing out inconsistencies in Mr. Abdallah's evidence, reviewing

the evidence suggesting he was a malingerer and urging the jury to find that he had sustained no injuries whatsoever in the accident. There would have been nothing wrong with the address if he had stopped there. However, his final remarks took a different turn. Those remarks were not directed towards evidence and rationality, but towards prejudice and emotion. Further, there is a definite theme to these comments. They are not simple slips, or unfortunate stray comments made by counsel caught up in the heat of the moment. This was a prepared and calculated strategy. In Landolfi v. Fargione, the Court of Appeal considered this to be an aggravating factor, holding as follows, at paras 90-91:

> [90] Nor do I accept that the challenged comments concerning defence counsel were inadvertent minor lapses uttered during the 'heat' of an enthusiastic and forceful closing address. In developing the theme in his closing address that defence counsel made speculative statements to the jury that were not supported by the evidence, plaintiffs' counsel, a very experienced personal injuries lawyer, stated that defence counsel "made up" evidence concerning Landolfi's injuries to which no medical expert had testified. In so doing, plaintiffs' counsel referred to defence counsel, on six separate occasions, as "Dr." McCartney.
>
> [91] In the context of the theme of plaintiffs' counsel's closing address, these sarcastic and repeated references cannot be viewed as accidental or trivial. They can have had no purpose other than to further denigrate defence counsel in the eyes of the jury and to prejudice the jury against defence counsel and, through him, his client. This was improper. As observed by this court in R. v. Giesecke reflex, (1993), 82 C.C.C. (3d) 331 at 334, leave to appeal to S.C.C. refused (1994), 86 C.C.C. (3d) vii, in the context of a criminal case:
>
> While counsel is not held to a standard of perfection in his or her address to the jury, there is a significant difference between remarks or observations one can characterize as inappropriate but contextually acceptable, and those made by counsel… which, by their hyperbole, mischaracterization or insinuation, impair the possibility of a fair trial.

These comments are apposite here.

[36] Accordingly, I find that the impugned portion of defence counsel's address to the jury were clearly improper. The offending comments were prejudicial to the plaintiff and inflammatory. They invited the jury to decide the case based on extraneous considerations, rather than on the relevant evidence. This seriously risked diverting the jury away from its true task of considering the evidence impartially: Landolfi v. Fargione, at para 89; Brochu v. Pond, at para 16. As stated by the Court of Appeal in Brochu v. Pond (at para 16), "Such comments are 'inflammatory' in the sense that they appeal to the emotions of the jurors and invite prohibited reasoning. If left unchecked, inflammatory comments can undermine both the appearance and the reality of trial fairness."

The Court went on to hold that plaintiff's counsel was wrong not to object and that the trial judge was wrong not to intervene to address these offensive comments. A new trial was ordered but costs limited to partial indemnification.

Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis
2008 ONCA 463

Sleepy judges who don't allow oral submissions will not result in a new trial on appeal.

MacFarland J.A.:

> *2. Denial of Opportunity to Make Oral Argument*
>
> 31 On the close of evidence it was agreed among counsel and the trial judge that the parties would file written argument and thereafter would attend before the trial judge for oral argument. The following exchange took place in the final minutes of the trial:
>
> THE COURT: Well, what do you want to do about argument?
>
> MR. PALIARE: Well, subject to what you say, Your Honour, what we propose is this that, picking up on your suggestion that we file with you written submissions, and if we could do that fairly quickly, and we would have between us an agreement as to the page length as well so that you don't end up with an epic from both of us.
>
> THE COURT: All right.
>
> MR. PALIARE: And that what we had hoped was, if this is okay with you, is to find a half day somewhere, even if it's in the early fall, where we can argue. Here is our thought, but I leave it to you, that we would get our written submissions in by a week Monday. It's a long weekend.
>
> MS. ROSENTHAL: Tuesday
>
> MR. PALIARE: So it would be the Tuesday then, that's July the 4th.
>
> THE COURT: All right.
>
> MR. PALIARE: My friend would have a week to respond which would be July the 11th. We would be able to get our reply in a week later, July the 18th and each of us would provide you with a maximum of 30 pages of written submissions and our reply would be eight pages, to a maximum of eight.
>
> THE COURT: All right.
>
> MR. PALIARE: But does that make sense?
>
> THE COURT: Oh, yes.

MR. PALIARE: And that we would have that completed then by July the 18th and if we could then find — we just thought it would be useful to have a half day somewhere in case you had some questions or — I don't know when you're sitting, but we wouldn't want you to do it at a time you're not sitting.

THE COURT: I'll have to think about it. Are you both going away in July or either of you?

MR. PALIARE: I won't be away after July 18?

THE COURT: You will or won't.

MR. PALIARE: Will not. So I'm available in July. I'm away the week of August the 21st.

THE COURT: I'm going to be away all August.

MR. PALIARE: Okay.

32 On July 14, 2006, the trial judge's secretary telephoned counsel and set the date of October 10, 2006 for oral argument. On October 6, 2006, four days before oral argument was scheduled, counsel were informed by the court office that the trial judge was ill in hospital and would be unable to hear oral argument as scheduled. It was agreed the matter would have to be adjourned to spring. On October 20, 2006, the trial judge issued his reasons for judgment without the parties having presented oral argument.

33 The appellants argue that the failure to give counsel an opportunity to make argument is a denial of natural justice and entitles them to a new trial. The appellants rely on this court's decision in Felker v. Felker, [1946] O.W.N. 368 (Ont. C.A.). The Ontario Weekly Notes summarized the court's decision in Felker as follows:

At the conclusion of the argument, the Court delivered judgment orally, allowing the appeal and directing a new trial, on the sole ground that the trial judge had pronounced judgment before according to counsel the right to present argument, and that the defendant had thus been deprived of her substantive right to have her case fully presented.

34 In the present case, the appellants had the opportunity to make written submissions but argue those were subject to a page limit and submitted on the understanding that there would be an opportunity for oral argument.

35 However, on the facts of this case, I am not convinced that the absence of oral argument has resulted in a substantial wrong or miscarriage of justice.

36 The cases relied on by the appellant all involve factual situations where the right to present argument — in either oral or written format — was denied entirely. However, this is not a situation where the appellants were denied entirely their right to present argument. In this case, the appellants were

afforded the opportunity to file thirty pages of written argument. Also, the affidavit material filed on the mistrial application following receipt of the reasons for judgment does not disclose anything the appellants would have done differently or in addition had they been afforded the opportunity for oral argument.

37 In my view, while it might have been preferable had the trial judge followed the original plan, on the particular facts of this case his failure to do so has not resulted in any substantial wrong or miscarriage of justice. The interchange between the trial judge and counsel indicates that in this case the purpose of oral argument was to address any questions of the trial judge. It was not primarily to give the parties an opportunity to make submissions as they had already been given that opportunity through their written submissions.

38 As this court recently noted in FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd. (2007), 85 O.R. (3d) 561 (Ont. C.A.) at paras. 17 and 22:

[17] Not every error by a trial judge entitles an aggrieved party to a new trial. Section 134(6) of the Courts of Justice Act stipulates that this court should order a new trial only where "some substantial wrong or miscarriage of justice has occurred". This stringent standard reflects the underlying policy that new trials ordinarily are contrary to the public interest.

. . . . .

[22] Second, and critically important, Robert Laba [the appellant] has not shown that if he had been given an opportunity to make closing argument, the result would have been different.

39 If given the opportunity to present additional oral argument, I am not satisfied the result would have been different. I would dismiss this ground of appeal.

3. Trial Judge's Inability to Follow the Evidence (Fresh Evidence Application)

40 The appellants have moved in this court to admit fresh affidavit evidence showing that the trial judge was unable to follow the evidence because he fell asleep repeatedly during the trial. The fresh evidence consists of five affidavits authored by appellants' trial counsel and others. These affidavits suggest the trial judge fell asleep frequently but for only very brief periods of time.

41 During oral argument counsel for the appellants said that the subject matter of the fresh evidence application did not constitute a separate independent ground of appeal. Rather, he said it should be considered contextually in relation to the other two substantive grounds raised.

…

46 At trial, the appellants deliberately did not raise with the trial judge their concern that he might have been sleeping. Instead they made a deliberate tactical decision to in effect — as respondent's counsel put it — "hedge their

bets". Instead of confronting the trial judge, after discussions among appellants' counsel (including a senior litigator at the firm who remained at the office and was not directly involved in the trial per se), they made a deliberate decision not to raise the issue. As Mr. Bradley Sherman put it in his affidavit, they decided to "wait and see how things played out". Presumably, if the trial result was in their favour they would do nothing; if not, they would have this additional evidence to use as a basis for appeal arguing that they were denied the right to a fair trial.

47 Even after the reasons for judgment were released, the appellants did not base their motion for a mistrial on the drowsiness of the trial judge nor did they even raise the issue. The mistrial motion was based solely on the fact that the appellants had been denied the opportunity to make oral argument in addition to written argument. Only in this court, for the first time, is the issue raised that the trial judge was inattentive to the evidence.

48 There appears to be little case law on point. In fact, the parties have only drawn the court's attention to two similar cases. The first is a case decided by the Australian Queensland Court of Appeal. The second is a recent decision from the Alberta Court of Appeal which was only released several weeks after this appeal was argued.

49 In the Queensland Court of Appeal case, Stathooles v. Mount Isa Mines Ltd., [1997] 2 Qd.R. 106 (Queensland S.C.) the allegations were that the trial judge had dozed off or slept during part of the evidence. In making its decision, the court stressed the fact that the alleged drowsiness was not raised with the trial judge at any time during the trial, and dismissed the appeal. Macrossan C.J. noted at p. 111:

A broad discretion does exist for an appellate court to order a new trial in civil cases where a first trial has been unfair ... In civil, as in criminal cases, the discretion can be exercised when the first trial has resulted in a miscarriage of justice.

. . . . .

The exercise of the discretion to order a new trial on the basis that a miscarriage of justice has occurred may require a wide view to be taken of the circumstances but it is necessary to remember that our adversarial system requires parties to proceedings to accept responsibility for their own actions deliberately and consciously taken. Decisions taken by parties with a full awareness of relevant matters can strongly influence the way in which the discretion in cases of an alleged miscarriage of justice will be exercised.

…

55 … While appellants' trial counsel was not experienced (this was her first trial), the record discloses that she did consult with senior litigation counsel in her firm about the judge's inattention. Together they made the decision to do nothing about it at the time but to, as respondent's counsel put it, "roll the dice".

56 Counsel was obliged to bring the trial judge's inattention home to him at the time. Not having done so, and having decided to wait and see what happened, they cannot now raise that inattention for the first time as a ground of appeal on either a substantive or contextual basis. I would dismiss this ground of appeal.

57 In the result, I would dismiss the appeal.

4. Experts And Demonstrative Evidence

Greer v. Kurtz
2008 CanLII 37056 (Ont. S.C.J.)

Demonstrative evidence is really a misnomer. It's not evidence in the strict sense, like testimony or a thing that was used to commit a wrong. Rather, it is an aid – usually used in conjunction with expert evidence – to demonstrate or illustrate the expert's opinion evidence. For example, a 3D mould or a cast, a photograph, a chart, or an animated sequence. At issue here was an accident reconstruction video and a second video portraying the trajectory of the car after the accident. The first was allowed to be adduced but not the second; one was accurate according to the expert, the other was conjecture.

Matheson J.:

[9] In McCormick on Evidence, (5th) ed., Volume 2, at pp. 3-19 the authors make the following observations:

> "**Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect. Largely as a result of this potential, the use of demonstrative evidence of all types has increased dramatically during recent years, and the trend seems certain to continue in the immediate future. At the same time, demonstrative evidence remains the exception rather than the rule, and its use raises certain problems for a judicial system the mechanics of which are essentially geared to the reception of viva voce testimony by witnesses.** Some of these problems are so commonly raised by the offer of demonstrative evidence, and are so frequently made the bases of objections to its admission, that they deserve preliminary note.
>
> …
>
> Again, even if no essentially emotional response is likely to result, **demonstrative evidence may convey an impression of objective reality to the trier. Thus, the courts are frequently sensitive to the objection that the evidence is 'misleading,' and zealous to insure that there is no material differential between objective things**

> **offered at trial and the same or different objective things as they existed at the time of the events or occurrences in litigation.**
>
> …
>
> The cogency and force of the foregoing objections to the introduction of demonstrative evidence will obviously vary greatly with the nature of the particular item offered, and the purpose and need for its introduction in the particular case. Since the types of demonstrative evidence and the purposes for which it is sought to be introduced are extremely varied, it is generally viewed as appropriate to accord the trial judge broad discretion in ruling upon the admissibility of many types of demonstrative evidence.
>
> …
>
> **A still different set of problems is presented by photographs or videotapes which do not portray original facts in controversy, but rather represent one party's staged reproduction of those facts. Here the extreme vividness and verisimilitude of pictorial evidence is truly a two-edged sword. For not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit or, if the film is subsequently deemed inadmissible, to expunge by judicial instruction. The latter difficulty may be largely eliminated by a preliminary viewing by the court in chambers, and the decided cases suggest that this expedient is widely employed."**

[10] The introduction of demonstrative evidence must be done in a manner that will ensure the integrity of the evidence so tendered.

[11] **Having heard the evidence of Mr. Hrycay and Mr. Dwayne Ellis, I am satisfied that all safeguards have been met. The video of the accident reconstruction was based on the photos taken at the time of the accident and studies done on vehicles of a certain weight and speed. The positioning of the vehicles after the impact was based on these photos. The expert evidence of Mr. Hrycay in his determination of the speed of the vehicles, place of impact, and the final resting place of the vehicles was accurately reflected in the video. That does not say that the court agrees with some of his findings.**

[12] Therefore, the video of the collision was allowed in because all of the safeguards were met, and it was of assistance to the court.

[13] I did not allow the second video in. The reasons were that, in my opinion, the video was of no assistance to the court. It was conjecture on the part of the plaintiffs. One does not need be told that people should, if confronted with a car coming towards them, try and avoid the impact. It was of no assistance to the court to have a video that shows that.

[14] Therefore, I allowed the first video into evidence – that is, the one of the accident reconstruction. I declined to allow the second video in – that is, the car moving onto the shoulder of the highway.

Moore v. Getahun
2015 ONCA 55 (Ont. C.A.)

Sharpe J.A.:

63 **Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the Rules of Civil Procedure and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.**

64 **Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.**

65 Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.

66 For these reasons, I reject the trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end. However, as I will discuss below, the trial judge's unwarranted criticism of the appellant's counsel on this basis did not, in my view, affect the outcome of the trial.

(vi) Documentation and disclosure of consultations regarding draft reports

67 I now turn to the issue of the extent to which consultations between counsel and expert witnesses need to be documented and disclosed to an opposing party.

68 The starting point for analysis is that such consultations attract the protection of litigation privilege. Litigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation. As explained by the Supreme Court of Canada in Blank v. Canada (Department of Justice), 2006 SCC 39, [2006] 2 S.C.R. 319 (S.C.C.), at para. 27, the object of litigation privilege "is to ensure the efficacy of the adversarial process", and "to achieve this purpose, parties to litigation... must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." These concerns are important in the context of the preparation of expert witnesses and their reports.

69 In Blank, the court noted, at para. 34, that litigation privilege creates "a 'zone of privacy' in relation to pending or apprehended litigation." The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.

70 Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege, the same holds for the draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.

71 Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.

72 I recognize that the wisdom of extending litigation privilege to the preparation of expert reports has been questioned by some judges: see Browne (Litigation Guardian of) v. Lavery (2002), 58 O.R. (3d) 49 (Ont. S.C.J.), at paras. 65-71; Aviaco International Leasing Inc. v. Boeing Canada Inc., [2002] O.J. No. 3799 (Ont. S.C.J.), 2002 CanLII 21293, at para. 16. However, the law currently imposes no routine obligation to produce draft expert reports: Conceicao Farms Inc. v. Zeneca Corp. (2006), 83 O.R. (3d) 792 (Ont. C.A.), at para. 14; Chiang (Trustee of) v. Chiang, 2011 ONSC 2341 (Ont. S.C.J.), at paras. 20-24.

73 It is important to note that the litigation privilege attaching to expert reports is qualified, and disclosure may be required in certain situations.

74 The most obvious qualification is that the Rules of Civil Procedure require disclosure of the opinion of an expert witness before trial. If a party intends to call the expert as a witness at trial, rule 31.06(3) entitles the opposite party on oral discovery to "obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined".

75 As well, the party who intends to call the expert witness is required to disclose the expert's report and the other information mandated by rule 53.03(2.1). The result is that what has been called "the foundational information" for the opinion must be disclosed: Conceicao Farms, at para. 14. Bryant, Lederman and Fuerst refer to this as an "implied waiver" of privilege over the facts underlying an expert's opinion that results from calling the expert as a witness: Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada, 2014), at para. 14.220. These authors favour restricting the implied waiver "to material relating to formulation of the expressed opinion" (at para. 14.224). They state that caution should be exercised before requiring "wide-ranging disclosure of all solicitor-expert communications and drafts of reports", as such a practice could encourage "a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem" (at para. 14.226).

76 The second qualification is that, as stated in Blank, at para. 37, "litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration." Litigation privilege yields where required to meet the ends of justice, and "[i]t is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day": Blank, at para. 44.

77 In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions. See, for example, Ebrahim v. Continental Precious Minerals Inc., 2012 ONSC 1123 (Ont. S.C.J. [Commercial List]), at paras. 63-75, where the court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him.

78 Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness. Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view, the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed. She should not have ordered the production of Dr. Taylor's drafts and notes.

B. APPEALS

The law respecting appeals is complicated and we will only scratch the surface. An appeal is not a process that allows for a retrial of the dispute in another court - that would obviously be wasteful and undermine finality of decisions. Obviously we wish to have trials (or dispositions of motions or applications) be dealt with fairly and the law applied properly, but is every type of error one that would justify new proceedings or a different result? No.

Courts of Justice Act

132. A judge shall not sit as a member of a court hearing an appeal from his or her own decision.

133. No appeal lies without leave of the court to which the appeal is to be taken,
(a) from an order made with the consent of the parties; or
(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

134. (1) Unless otherwise provided, a court to which an appeal is taken may,
(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
(b) order a new trial;
(c) make any other order or decision that is considered just.

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,
(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
(c) direct a reference or the trial of an issue,
to enable the court to determine the appeal.

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

Principal routes of appeal:

Court Making a Decision	Type of (Civil) Decision	Appeal Court
O.C.J.		S.C.J.; CJA, s.40.
	Family Court	Div. Ct; CJA, s.21.9.1
Small Claims Court	Order for Damages	Under $2500: S.C.J. Over $2500: Div. Ct; CJA, s.31; O. Reg 626/00.
Master	Interlocutory	S.C.J.; CJA, s.17(a)
	Final	Div. Ct.; CJA, s.19(1)(c)
SCJ	Interlocutory (Leave required)	Div. Ct.; CJA, s.19(1)(b)
	Final (over $50,000)	C.A.; CJA, s.6(1)(b)
	Final (under $50,000)	Div. Ct.: CJA, s.19(1)(a), 19(1.2)
Div. Ct.	Single judge (motion to vary)	Panel of the Div. Ct.; CJA, s.21(5)
	Question of law or mixed fact and law (Leave required)	C.A.; CJA, s.6(1)(a)
C.A.	Single judge (motion to vary)	Panel of the C.A.; CJA, s.7(5)

Appeals from the Court of Appeal go to the Supreme Court of Canada, with Leave granted by either the C.A. or the S.C.C. The S.C.C. can also grant Leave to hear matters directly from the trial level.

Please note that individual statutes may provide otherwise.

1. Standards of Appellate Review

Housen v. Nikolaisen
2002 SCC 33

The plaintiff was the passenger in a truck; the defendant the driver. The defendant lost control of the truck, it rolled, and the plaintiff was left paralyzed from the shoulders down. The plaintiff also sued the municipality for failing to post proper signage warning of the bend. The plaintiff was successful against both. At trial, the judge rejected the municipality's argument that the claim was statute-barred against it as proper notice had not been given within 30 days (notice was a day late). The municipality's appeal went to the Saskatchewan Court of Appeal, who allowed the appeal holding that the trial judge had misdirected herself on the statutory standard of care applicable to maintaining roads by municipalities. A further appeal to the SCC was allowed on the basis that there was no 'palpable and overriding error' even if the trial judge had made mistakes in her judgment.

The case is important as it provides a comprehensive review of the law on the appellate court's jurisdiction to interfere with the trial judgement.

Per Iacobucci and Major JJ. (for the majority):

> 1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.
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> ...
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> 3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:
>
> > The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.
>
> 4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.
>
> 5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House*

Dictionary of the English Language (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

...

A. Standard of Review for Questions of Law

8 **On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, supra, at p. 90**.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations...

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by *Kerans*, supra, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 **The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error"...** While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 **A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as**

competent as appellate judges to ensure that disputes are resolved justly... Kerans, supra, at pp. 10-11, states that:

If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

...

15 ... the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. Standard of Review for Inferences of Fact

19 **We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from**

established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from Geffen is the following (per Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts. ... Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. ...
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> ...
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> 23 **We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.**
>
> ...
>
> 25 Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that

there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual...

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, supra, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence

> draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts...

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> **The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.**

...

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

...

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard

of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

...

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

2. Appeal from a Jury Verdict

Lazare v. Harvey
2008 ONCA 171

The plaintiff successfully sued in negligence in regards to a car accident but sought to appeal the jury's verdict not to award damages for loss of future income.

Lang J.A.:

3 The only issue on appeal is the jury's decision to award zero in damages to the appellant for loss of future income. The respondent did not cross-appeal the jury's non-pecuniary damages award and neither party appealed the award for loss of past income or for Family Law Act damages.

4 **The appellant does not challenge the instructions given by the trial judge, which all agree were both thorough and careful. The appellant only argues that the verdict with respect to damages for loss of earning capacity or loss of future income is so unreasonable and unjust that no jury, considering the evidence as a whole and acting judicially, could have reached it. The respondent argues that the appellant has not discharged the burden of establishing an unreasonable verdict** because there was evidence that the appellant's future income was not affected by her

injury and because the appellant's expert opinion, that may have otherwise supported a loss of future income, was successfully challenged on cross-examination.

...

18 In her charge regarding loss of future income, the trial judge explained correctly and repeatedly that the appellant need only establish that her loss was a real and substantial possibility. She emphasized that the appellant was not required to establish this loss on a balance of probabilities, which is of course a different and higher standard. In particular, the trial judge gave the following specific instruction:

> The onus is not on the plaintiff to prove on the balance of probabilities that her future earning capacity will be lost or diminished. The onus is a lower one. [The appellant] need only satisfy you on the evidence that there is a reasonable and substantial risk of loss of income in the future to be entitled to damages under this heading.
>
> What you have to decide, then, is whether there is a real and substantial risk that [the appellant] will suffer a loss of future income, because of the injuries she sustained in the accident. The higher and/or more substantial the risk of [the appellant] suffering such a loss, then the higher the award she should receive. However, in arriving at your assessment under this heading you should exclude from your consideration any remote, fanciful or speculative possibilities. I repeat again: The burden is on the plaintiff to satisfy you that there is a real and substantial risk that she will suffer a future loss of income by reason of the injuries she sustained in the accident.
>
> Put another way, the plaintiff must satisfy you that there is a real and substantial possibility that she will suffer such a loss.

19 The trial judge canvassed the medical evidence about the extent to which the appellant's condition would affect her income in the future. She explained to the jury that the appellant's rehabilitation expert, Dr. Tepperman, was not one of the appellant's treating physicians. She also pointed out that the expert had had no contact with the treating physicians, that he was retained by the appellant's lawyer for the purposes of the lawsuit, that he had spent a limited time examining the appellant, and that this was the first occasion he had given a medical-legal opinion regarding lymphedema.

20 In addition, the trial judge reminded the jury that Dr. Tepperman did not give the opinion that the appellant would be faced with retirement in ten years in his original report. Rather, at that time, he only opined that the appellant would always require sedentary employment, that she would lose time from work periodically, particularly if she suffered complications, that she may require a more protracted absence from work if she suffered more significant complications, and that she could be forced into early retirement.

21 The trial judge summarized the positions of the parties' counsel. The appellant's counsel argued that the appellant would likely have been forced to

retire at age 37. As a result, she would lose about $2.5 million if the jury found she would have practised law and $2.6 million had she successfully pursued her career with the Blue Jays. The respondents' lawyer argued that the appellant suffered no loss because she would not have gained entry to law school and because it was not a real and substantial possibility that she would be forced into early retirement by her injury.

22 At the end of her instructions on this issue, the trial judge again reminded the jury about the lower onus for loss of future income:

> Members of the jury, I remind you again that in considering the question of whether [the appellant's] working life will be cut short because of her injuries, it is not up to the plaintiffs to satisfy you that it is more probable than not that this is so. Their onus is a lower one. You must be satisfied that there is a real and substantial possibility that [the appellant's] working life will be cut short because of her injuries.

Standard of review

23 **The "reasonableness" standard of review of a jury verdict was set out in the seminal case of McLean v. McCannell, [1937] S.C.R. 341 (S.C.C.). In that case, Duff C.J. explained at p. 343 that, "the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it." Duff C.J. emphasized that the appellate court's authority to set aside a jury verdict should be exercised with caution.**

24 This test, and the principle that the standard for appellate review of a jury verdict in a civil case is "very high", have since been applied in numerous decisions of this court... **Most recently, in Bovingdon (Litigation Guardian of) v. Hergott, 2008 ONCA 2 (Ont. C.A.) , Feldman J.A. noted the high standard created by McCannell and commented that, "[c]onsequently, it is relatively rare for a jury verdict in a civil case to be overturned on appeal."**

...

29 Accordingly, the test of reasonableness in the civil context asks whether the jury's verdict is so unwarranted by the evidence as to justify the conclusion that the jury did not appreciate and acted in violation of its duty. In those cases where there is some evidence to support the jury's verdict, high deference will be accorded and the verdict will not be set aside even if another conclusion is available on the evidence. I am guided by these principles in assessing the jury's verdict in this case.

The appellant was not successful in this appeal for the fact that there was evidence upon which the jury could base its verdict; hence, it was rational.

3. Appellate Jurisdiction

See Rules 61 – 63.

Capital Gains Income Streams Corporation v. Merrill Lynch Canada Inc.
2007 ONCA 497

Here the Court of Appeal refused jurisdiction to appeal against a motion declining to enter judgment pursuant to an alleged settlement; the motions judge held that there was no settlement proved and that the matter should continue. The Court of Appeal held this to be an interlocutory order rather than a final disposition. If there had been a settlement and judgment ordered on its terms, that would have been a final determination and the Court would have jurisdiction.

Gligorevic v. McMaster
2012 ONCA 115

What is the standard of review for the appeal of an administrative body's decision where the allegation that the appellant was represented ineffectively? "The deferential standard of palpable and overriding error."

Per Cronk J.A.:

> (1) Standards of Review
>
> 43 The standard of review applicable to the Board's capacity decision is uncontroversial. The issue before the Board — whether Mr. Gligorevic was capable of making his own decision regarding treatment with antipsychotic medication — required the Board to apply the evidence before it to the statutory test for capacity set out in s. 4(1) of the Act. In Starson, at paras. 84-88, the Supreme Court held that this question of mixed fact and law is reviewable on a standard of reasonableness. See also New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.); Giecewicz v. Hastings, 2007 ONCA 890, 288 D.L.R. (4th) 587 (Ont. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 97 (S.C.C.). There is no suggestion that the Board erred in its interpretation of the statutory test for capacity.
>
> 44 In contrast, the appeal to the Superior Court involved an allegation that PGT Counsel's assistance was ineffective. The determination of this issue required the Superior Court Justice to consider the test for ineffective assistance of counsel and to apply that test to the facts of this case as established by the written record before her. This, too, is a question of mixed fact and law. However, it attracts the deferential standard of palpable and overriding error, unless the Superior Court Justice made some extricable error in principle with respect to her appreciation of the test or its application, in which case the error may amount to an error of law that is reviewable on the correctness standard. Further, where hearing fairness is fatally compromised, standard of review considerations assume less significance. See Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 37; Country

Pork Ltd. v. Ashfield (Township) (2002), 60 O.R. (3d) 529 (Ont. C.A.), at para. 41; Waxman v. Waxman (2004), 186 O.A.C. 201 (Ont. C.A.), at paras. 290-93, 296-97; L. (H.) v. Canada (Attorney General), 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 72-75; FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd., 2007 ONCA 425, 85 O.R. (3d) 561 (Ont. C.A.), at paras. 45-46; Fendelet v. Dohey, 2007 ONCA 475 (Ont. C.A.), at para. 4.