

Four Issues From Recent Jury Trial

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In [*Cheeseman et al v. Credit Valley Hospital et al*](#), 2019 ONSC 4996, the court examined four issues in relation to a jury trial.

The plaintiffs sued four physicians, a hospital, and several nurses. Prior to trial, the plaintiffs entered into a Pierringer Agreement with the hospital and the nurses. The trial proceeded only against the physicians on the issue of liability.

1. Addressing Unfairness From Partial Settlement Agreements

As a result of the Pierringer Agreement, the plaintiffs did not want liability to be found on the nurses since it would reduce their recovery against the physicians. On the other hand, the physicians had an interest in showing that the nurses were liable.

The physicians argued that it would be unfair to require them to call the nurses as witnesses and to be limited to examining them in chief. They argued that they had rights of cross-examination by virtue of their crossclaim which should not be taken away by the Pierringer Agreement.

Justice Koehnen noted that many courts have recognized that partial settlements can create substantive or procedural unfairness for non-settling defendants.

Justice Koehnen held that the fairest solution would be to permit the physicians and the plaintiffs to cross-examine the nurses, regardless of who calls them as witnesses.

2. Jury Questions

Civil jury trials should start with a working set of jury questions to guide the court, subject to revision as the evidence unfolds.

Jury questions should not contain embedded assumptions or compound questions. They should be phrased neutrally and should not “nudge” the jury to a particular result.

In negligence cases, a jury should generally determine whether a defendant breached the standard of care before addressing causation. Without a breach of the standard of care, the question of causation is irrelevant.

Regarding causation questions, Justice Koehnen held that, in cases involving multiple defendants who are pointing the finger at each other, it is appropriate to use “cause or contribute” language, instead of referring to the “but for” test.

3. Demonstrative Aids In Opening Addresses

The test for using demonstrative aids in opening addresses is:

- Will counsel proposing to use the demonstrative aid undertake to prove it?
- Is it likely relevant?
- Is it likely to assist the trier of fact in understanding the case?
- Is there anything unusually prejudicial about the demonstrative aid that would require it to be excluded?

Even though damages had been agreed to, Justice Koehnen permitted plaintiffs' counsel to show the jury graphic photographs of the main plaintiff's amputated toes, forefeet, and fingers.

4. Experts' PowerPoint Slides

Justice Koehnen provided the following guidelines for an expert's use of PowerPoint slides while testifying:

- The PowerPoint slides must be educational, not advocacy pieces.
- The information on the slides must be found in the expert's report, although it may be presented in a visually different manner than in the report.
- The slides should not contain external marketing/accreditation information.
- The slides should not be a way of getting the expert's report into the jury's hands.

The decision of Justice Koehnen provides helpful guidance on issues that can arise in jury trials.