Lessons from *Gopie v. Ramcharran*: A Case Comment and Review of Issues on Appeal in Civil Jury Trials

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The Ontario Court of Appeal recently dismissed an appeal brought by the plaintiff following an adverse outcome after a trial that occurred in 2016. In doing so, the Court dealt with five major issues, highlighting and clarifying the law in a manner which demonstrates just how difficult – although certainly not impossible – it can be to overturn a civil jury verdict.

What follows is a brief summary of the decision and the major issues addressed, including: the admissibility of criminal convictions in a civil action, the scope of permissible expert evidence, causation, the failure to object to a jury charge, and costs.

A review of these topics as they appear in *Gopie v. Ramcharran*[1] provide a useful summary of many of the key issues that commonly arise in the context of civil appeals.

Background

Following an eight week trial, the jury returned a verdict of $186,000, which was significantly less than the defendant's pre-trial settlement offer of $500,000 plus costs. Once the damages, pre-judgment interest and costs awarded to the plaintiff were set off against the costs the trial judge awarded to the defendant, the plaintiff recovered nothing and owed the defendant a further $22,406.37.

In short, it was a disastrous result for the plaintiff who, having turned down half a million dollars plus costs, was now in debt to the tortfeasor for over $20,000. So an appeal was launched – and dismissed. This outcome serves to highlight many of the key issues which arise in appellate advocacy and the uphill battle facing all appellants who pursue an appeal of a civil jury verdict.

Evidentiary Issue: Criminal Convictions

On appeal, the plaintiff argued that it was improper for the trial judge to have allowed the jury to consider evidence of the plaintiff's criminal convictions for the purposes of assessing his credibility.

The Court of Appeal noted that Mr. Gopie was the first to call evidence of his character and bad behaviour, including evidence regarding his convictions and other prior unlawful conduct. The plaintiff's argument at trial was that he was of good character before the accident and his bad behaviour following the accident was the result of an ongoing emotional disability caused by a brain injury he sustained in the accident. The Court of Appeal found that, having introduced evidence of Mr. Gopie's character, the respondent was entitled to challenge it.

Moreover, the Court of Appeal found it was proper and appropriate for the trial judge to instruct the jury that they could use the evidence of the plaintiff's criminal record and other unlawful conduct, for two purposes: first, to assess how, if at all, the accident impacted the plaintiff's judgment; and second, for the purposes of assessing Mr. Gopie's credibility. The Court found that the trial judge properly charged the jury in this regard.

Further, the Court noted that the trial judge provided a draft of her charge to counsel for review and comment prior to the delivery of the charge to the jury. Trial counsel for the plaintiff made no objection regarding the portions of the charge which dealt with the plaintiff's prior convictions.

The Court's finding in this regard illustrates that, in certain circumstances, a witness' criminal record may be admissible as evidence relevant to the issue of credibility. This is particularly so when the convictions contain elements of "moral turpitude", or speak to the party's propensity to tell the truth – or not (e.g.: fraud, perjury etc.). [2]

Evidentiary Issue: Scope of Expert Evidence

<u>The Number of Experts</u>

The plaintiff also appealed on the basis that the judge erred in permitting the defence to call two expert psychiatrists.

However, the Court of Appeal found that the trial judge recognized her role as gatekeeper and exercised that role reasonably. The trial judge properly considered a number of issues when determining whether to permit the defence to adduce evidence from two psychiatrists, including the quantum of damages claimed ($10,000,000), and the probative versus prejudicial impact of admitting, or not admitting, the evidence of the two experts.

Although they were both psychiatrists, the judge found that the experts' perspectives were quite different, and their evidence would not be unduly repetitive and would assist the jury. Further, there was no prejudice caused to the plaintiff by allowing the two psychiatrists to testify, whereas the defendant might be prejudiced if they were not

permitted to give evidence. The Court found this was a proper exercise of the judge's discretion as it related to admitting expert evidence.

The Admissibility of Reports Without Witnesses

The plaintiff also alleged that the trial judge erred in law in ruling that medical records admitted as business records under s. 35 of the *Evidence Act* were not admissible as medical opinions without the benefit of the author of the records attending and giving oral evidence.

The Court of Appeal disagreed with the plaintiff's argument, and noted that an opinion contained in a medical record may be admissible as a medical report if the report is signed by the practitioner **and leave of the court is obtained.** The Court further noted that opinions contained in medical records are admissible in this manner pursuant to s. 52(2) of the *Evidence Act* (dealing with medical reports), and not s. 35 (dealing with business records).

The authors note that it has otherwise been held that an "opinion" is not a proper business record either pursuant to the *Evidence Act* or at common law. As such, opinions contained in otherwise properly tendered business records ought to be redacted as, by definition, a business record is that which records an "act, transaction, occurrence or event." An opinion is none of those things.[3]

In this case, the Court of Appeal indicated the trial judge correctly exercised her gatekeeper function with respect to the admission of the opinions contained in the medical records and reasonably concluded that they were not admissible in the absence of attendance and testimony from the practitioner.

This is an issue on which a trial judge has considerable discretion.

It is the authors' view that it is prudent, from any party's perspective, to indicate that, if an opposing party intends to tender an expert report pursuant to s. 52 of the *Evidence Act*, they will require that the author of the report be made available for the purposes of cross-examination at trial.

There remains some debate in the case law as to which party, in those circumstances, is responsible for coordinating and paying for the expert's attendance at trial.[4] Nevertheless, it remains a matter of best practice for counsel (assuming they wish to reserve such rights) to indicate in writing that they require the author of any opinion sought to be introduced by the party opposite to be available for cross-examination at trial.

Charge to the Jury and the Failure to Object

Complaints Regarding the Charge

The plaintiff also alleged that the trial judge did not provide an appropriate direction to the jury with respect to their role as fact finders, particularly in light of the fact that the trial judge has also reviewed the evidence and implicitly made certain findings of fact.

The Court of Appeal disagreed, indicating that the trial judge made clear to the jury their respective roles when the judge stated:

> "*The law permits me to comment or express opinions about issues of fact. If I do that, you do not have to reach the same conclusion. You, not I, decide what happened in this case.*"

Furthermore, the Court of Appeal rejected the plaintiff's argument that the jury charge was unbalanced and prejudicial to the plaintiff. The Court found the jury charge was comprehensive, fair and well balanced.

Moreover, the Court noted that the trial judge had provided a draft of her charge to counsel for review and comment. Trial counsel made no objection with respect to the issues raised on appeal, either before or after the delivery of the charge.

Counsel's Obligation to Object

This outcome highlights the critical impact of counsel's failure to object to the trial judge's charge, particularly where, as here, the trial judge gave ample opportunity for counsel to do so.

The authors note that the failure to object is treated considerably differently in the criminal and civil context.

It has been held, in the criminal context, that the failure to object may be of no consequence, that it is not a "make weight" and it cannot convert the inadequate to the sufficient.[5]

However, in the civil context, the failure to object, particularly to the characterization of evidence in the jury charge, is nearly always fatal. The absence of an objection in the civil context is said to bespeak the atmosphere in the courtroom and serves to undermine a later assertion of some serious impropriety, or otherwise highly prejudicial effect, of the charge. It has been held that, if trial counsel found the impugned comments had such a deleterious effect, they would have found themselves on their feet and objecting.[6]

To that end, courts have consistently held that, in the civil context, the failure to object will be fatal unless the objected to irregularity in the trial process constitutes a substantial wrong or a miscarriage of justice.[7]

One may wonder whether the profound difference in the treatment of a failure to object in the criminal versus the civil context continues to make logical or coherent sense. Nevertheless, it remains, at least for now, the state of the law.

Fortunately, there has been some movement in the common law in this regard. For example, in *Landolfi v. Fargione*, the Court of Appeal held that defence counsel's failure to object to a personal attack made on him by opposing counsel did not diminish the trial judge's responsibility to intervene to avoid the risk of prejudice.[8]

Similarly, the Court of Appeal in *Bruff-Murphy v. Gunawardena* held that the absence of an objection does not impair a trial judge's ability to intervene to exclude prejudicial evidence in order to ensure trial fairness.[9]

Moreover, the situation with respect to a judge's instruction or charge to the jury on a matter of law is arguably quite different. It should be incumbent upon the trial judge to properly instruct the jury as to the law and a failure to object in that regard should be of much less – if any – consequence. If, as a result of a misdirection by the trial judge, the jury is given the wrong test at law, or is misdirected as to which party bears the burden of proof on a particular issue, trial counsel's failure to object should not matter.[10]

Causation and the Standard of Proof

The plaintiff also argued that the judge erred in her direction regarding the proper test for causation and the standard of proof applicable to a claim for future pecuniary damages.

The Court of Appeal held that the trial judge clearly and carefully instructed the jury that, for the defendants to be liable in damages to the plaintiff, the plaintiff must prove that he would not have suffered the injuries **but for the accident**.

The trial judge also explained the standard of proof. After describing the balance of probabilities standard (as it relates to pre-trial losses), she went on to explain that a different standard of proof applies to claims for future damages, and that standard is "whether there is a real and substantial possibility" that the future damages would be incurred.

The Court found that the trial judge's direction regarding these issues was proper and did not mislead or confuse the jury with respect to causation and the standard of proof.[11]

Costs: A Matter of Discretion

The plaintiff also sought leave to appeal the costs award even if he was unsuccessful in having the outcome at trial overturned. The plaintiff argued that, although they acknowledged there must be some cost consequences when offers to settle are greater than the judgment in accordance with a jury verdict, in all of the circumstances, the trial judge's approach was disproportionate, and the consequences of the costs order were too harsh.

The Court of Appeal held that there was no basis to interfere with the trial judge's costs order. The Court found that the judge considered the appropriate factors in fixing costs and that her order was not "*plainly wrong.*"[12] Accordingly, leave to appeal the costs order was refused.

The Court's approach in affording wide discretion to a trial judge with respect to the matter of costs illustrates that in only very limited circumstances will an appeal of a costs award (as a stand-alone issue) be granted.

Conclusions

The Court of Appeal's approach in the *Gopie* decision serves as a useful example of the limited scope of appellate intervention in civil jury trials. The Court's approach with respect to: the admissibility of evidence of prior criminal convictions, expert evidence, causation, the failure to object to a jury charge, and costs provides a useful review of how such matters are handled in our court system today.

The moral of this story is that it is incredibly difficult, although not impossible, to overturn a civil jury verdict and consequent judgment. Given the significant expense of judicial and other resources inherent in a lengthy jury trial, it is perhaps sensible that jury verdicts not be overturned unless a substantial wrong or miscarriage of justice has occurred.

We hope this article proves helpful in demonstrating the scope of permissible appellate intervention and the nature of the high, though not unassailable, bar when it comes to overturning a civil jury verdict.

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[1] 2019 ONCA 402.

[2] Geoffrey D.E. Adair, *On Trial: Advocacy Skills, Law and Practice*, 2nd edition (LexisNexis 2004) at page 274. For an excellent discussion of the evidentiary issues surrounding the admissibility of criminal convictions

in the civil context and the application of the *Evidence Act* provisions (*i.e.* s.22) in this context, see Geoffrey D.E. Adair, *On Trial* at pages 267 - 279.

[3] *Adderley v. Bremner*, [1968] 1 O.R. 621, 67 D.L.R. (2d) 274 at para 8; *Blake v. Dominion of Canada General Insurance Co.*, 2015 ONCA 165 at para 59. For under the common law doctrine see: *McCabe v Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada*, 2019 ONCA 213 at para 23.

[4] See for example *Lurtz v Duchesne*, [2003] O.J. No. 1541 at para 17.

[5] *R. v. Burnett*, 2015 ONCA 790 at paras 148 & 149. However, it has been held recently that if the absence of an objection was a tactical decision made by trial counsel, the failure to object can be fatal to an appeal even in the criminal context: see *R v Calnen*, 2019 SCC 6 at paras 38 – 41.

[6] *Marshall v. Watson Wyatt & Co.* [2002] O.J. No. 84 (ON CA) at para 15.

[7] *Bruff-Murphy v. Gunawardena,* 2017 ONCA 502 at para 69.

[8] *Landolfi v. Fargione*, [2006] O.J. No. 1226 at para 101.

[9] *Bruff-Murphy v. Gunawardena,* 2017 ONCA 502 at para 70.

[10] In *Iannarella*, the court noted where there is an error of law on the onus of proof, the failure to object has no relevance. *Iannarella v. Corbett*, 2015 ONCA 110 at para 22.

[11] *Gopie v. Ramcharran,* 2019 ONCA 402 at para 10.

[12] The Court of Appeal has previously held that "a costs order should not be set aside unless the trial judge made an error in principle or the order is plainly wrong," see *Carroll v McEwan*, 2018 ONCA 902 at para 58.