

Court of Appeal Upholds Striking of Jury Due to Inaccurate Trial Duration Estimate and Late Disclosure

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In an interesting decision released by the Court of Appeal on October 13, 2020, the Court appears to have swiftly dealt with a defendant's broad appeal on the merits of a trial judgment in an action arising from a motor vehicle accident.¹

The case of [Rolley v. MacDonell](#) arose from a pedestrian/motor vehicle collision in 2012 and proceeded to trial in 2017, which continued into 2018. Ultimately, after discharging the jury mid-trial, the trial judge awarded the plaintiff's damages totalling \$2,023,016, plus interest, costs and disbursements.

The trial gave rise to a number of procedural and substantive issues, the subject of various rulings by the trial judge, the most notable of which included striking the jury², refusing to grant a mistrial³, and refusing to admit surveillance evidence⁴. Indeed, these were three of the grounds on which the defendant driver appealed the trial judgment.

Motion to Strike the Jury/Motion to Declare a Mistrial

At first instance, the trial judge granted the plaintiffs' motion to strike the jury for two reasons.

First, inaccuracies with respect to the estimated length of trial were going to result in a 44-day delay before the trial would resume and a notable gap in the calling of evidence, which the trial judge found would have the potential to prejudice the jury's reasoning process and its ability to fulfil its role.

Second, there was late, mid-trial disclosure of coverage under an umbrella policy available to the defendant, which resulted in the plaintiffs reformulating a significant claim for attendant care. The trial judge agreed with the plaintiffs that this would result in prejudice to the plaintiffs, including in respect of subsequent differences in the way the

attendant care claim was presented to the jury following the late disclosure versus in plaintiff counsel's opening statement.

On appeal, the defendant contended that the trial judge erred in striking the jury, resulting in a miscarriage of justice. The Court, however, was not convinced of any such error in the trial judge's exercise of discretion in that regard.

The Court noted that counsels' "gross underestimation of the length of trial" resulting in the 44-day delay, and the late disclosure of the umbrella policy resulting in a reasonable change in the attendant care claim each provided sufficient basis for discharging the jury. Indeed, the Court held that the latter was ample basis for the trial judge to conclude that there would be potential prejudice to the plaintiffs in the eyes of the jury.

The defendant also argued that the trial judge erred in failing to grant the defendant's subsequent motion to declare a mistrial, once the jury was struck. The Court, however, simply agreed with the trial judge's conclusion that the motion for a mistrial "was an attempt to re-argue the respondents' motion to discharge the jury", such that this ground of appeal "necessarily fails".

Admissibility of Surveillance

At trial, the defendant twice brought a motion for leave to rely on surveillance video footage as substantive evidence – one prior to and one after the discharge of the jury. On both occasions, however, the trial judge dismissed the defendant's motion, finding that gaps in the surveillance footage did not render the footage to be a fair and accurate depiction of the events it purported to depict.

Although consequently not required to do so, she further concluded that the recordings had minimal, if any, probative value, noting that nothing depicted in the recordings challenged, contradicted or impugned the plaintiff's evidence.

On the appeal on this ground, notably, the Court held that the trial judge *should* have admitted the surveillance videos tendered by the defendant, although no analysis was provided in that regard. Implicitly, however, the Court must have rejected the trial judge's reasoning that gaps in surveillance or the lack of inconsistencies between surveillance and a plaintiff's evidence renders surveillance inadmissible, which accords with its analysis in *Nemchin v. Green*.

Nevertheless, the Court concluded that the admission of the surveillance would not have made a difference to the outcome at trial and did not cause a miscarriage of justice, relying on the trial judge's determinative assessment that the video had minimal, if any, probative value.

The Court does not examine the trial judge's determination in that regard within the context of the analysis in *Nemchin v. Green*, wherein the Court in that case concluded that the trial judge erred in determining that surveillance could only be shown to the jury if it contradicted the plaintiff, as such evidence can provide context and can qualify a plaintiff's testimony as to true functionality.⁵

Take-Aways

The Court of Appeal's decision in *Rolley*,¹ although brief, serves as a reminder of the importance of properly estimating the duration of trials, given the potential outcomes that can result with inaccurate estimates – including the loss of a jury, despite a party's substantive right to a jury trial.

Indeed, this task may bear even more significance in the present times, given the backlog and trial delays faced by courts in light of the COVID-19 pandemic. Counsel may well have to balance considerations of the appropriateness of a jury, trial logistics (e.g. remote or in-person), and resulting delays when advising clients who are on course for trial in any given case.

¹ *Rolley v. MacDonell*, 2020 ONCA 642.

² 2018 ONSC 508.

³ 2018 ONSC 1403.

⁴ 2018 ONSC 164 and 2018 ONSC 1292.

⁵ *Nemchin v. Green*, 2019 ONCA 634.