Girao v. Cunningham: Lessons on Trial Practice and Fairness for Self-Represented Litigants

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In *Girao v. Cunningham*, 2020 ONCA 260, the Ontario Court of Appeal addressed several important issues regarding trials, particularly in personal injury actions. The specific issues are:

- the use of joint document books;
- introducing evidence of participant experts and non-party experts;
- the distinction between section 35 and section 52 of the *Evidence Act*;
- whether the jury can be advised of an accident benefits settlement; and
- working with self-represented litigants at trial.

Background

The action arose out of a car accident in 2002. The plaintiff alleged that she sustained pain in her back and neck that eventually became chronic, as well as other symptoms, including major depression. She was not able to continue with her job as a cleaner.

The defendants' position was that the accident was minor and did not cause the plaintiff's problems. They pointed to pre-accident psychiatric issues. They also argued that the plaintiff was a malingerer. They elicited evidence that the plaintiff received more in a statutory accident benefits settlement than she would have received in her job as a cleaner.

The jury awarded the plaintiff non-pecuniary general damages of $45,000. However, the trial judge held that the plaintiff did not meet the threshold. The jury also awarded damages for past loss of income in the amount of $30,000, but this was reduced to zero after deducting statutory accident benefits.

As a result, the plaintiff did not recover anything. She was ordered to pay the defendants' fees and disbursements of over $300,000.

The plaintiff was self-represented at trial and on the appeal. She has substantial difficulty with the English language.

The Court of Appeal held that there was a substantial wrong or miscarriage of justice. A new trial was ordered

The Court of Appeal stated that there was particular unfairness because an accident benefits assessor called by the plaintiff was not permitted to testify on the substance of his report and because the defence relied on the report of a doctor for the truth of its contents without making the doctor available for cross-examination by the plaintiff.

Moreover, the Court of Appeal held that defence counsel improperly cross-examined the plaintiff on her accident benefits settlement.

Joint Books of Documents

The Court of Appeal stated that counsel frequently do not turn their minds to the purpose and use of joint document books, and that this must change as a matter of ordinary civil trial practice.

The Court of Appeal expanded on its previous decision in *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, wherein it was stated that the use of document briefs at trial may range from "acting merely as a convenient repository of documents, each of which must be proved in the ordinary way, through an agreement about the authenticity of the documents, all the way to an agreement that the documents can be taken as proof of the truth of their contents".

In *Girao*, the Court of Appeal indicated that counsel and the court have to address the following questions regarding joint books of documents:

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
6. Does any party object to a document in the document book, if it has not been prepared jointly?

The Court of Appeal stated that it is preferable for counsel to have a written agreement addressing these matters in all civil cases. Further, it is preferable for the trial judge and counsel to go through the agreement line by line on the record to ensure that there are no misunderstandings.

In summary, counsel must consider what use is going to be made of joint document books. Frequently, joint document books are prepared shortly prior to trial. As a matter of practice, it is preferable for counsel to have a discussion on joint document books well in advance of trial.

Unless there is agreement between counsel on the use of documents, and subject to sections 35 and 52 of the *Evidence Act* (discussed below) and any admissions by the opposing party, counsel should be prepared to call the authors of the documents at trial.

Exhibits at Trial

The Court of Appeal in *Girao* said that any document introduced by any party that does not become a numbered exhibit should become a lettered exhibit. The important distinction between numbered exhibits and lettered exhibits is that, subject to the trial judge's discretion, lettered exhibits do not go in with the jury during its deliberations, but numbered exhibits do.

Regarding expert reports, it is normally understood that the admissible evidence of the expert is his or her oral evidence, particularly in jury trials. However, the best practice in jury trials is to make expert reports lettered exhibits in order to preserve the integrity of the trial record for the purpose of an appeal.

Expert Evidence

In *Girao*, the Court of Appeal addressed some of the general principles of expert evidence.

A person who has expertise, but who is not qualified as an expert witness under rule 53.03 of the *Rules of Civil Procedure*, may be entitled to provide opinion evidence. Such experts were described in *Westerhof v. Gee Estate*, 2015 ONCA 206, as "participant experts" and "non-party experts".

Participant experts, such as treating physicians, form opinions based on their participation in the underlying events.

Non-party experts are retained by a non-party to the litigation and form opinions based on personal observations or examinations that relate to the subject matter of the case, but for another purpose. An example is a medical assessor in a claim for statutory accident benefits.

The test for admissibility of opinion evidence from participant experts and non-party experts is the same that applies to litigation experts. The evidence must be relevant; it must be necessary in assisting the trier of fact; no other evidentiary rule should apply to exclude it; and the expert must be properly qualified.

Then, the trial judge must execute the gatekeeper function by assessing the benefits of admitting the evidence against its potential risks. The cost-benefit analysis "is a specific application of the court's general residual discretion to exclude evidence whose prejudicial effect is greater than its probative value": *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at para. 65.

In *Westerhof*, the Court of Appeal stated that participant experts and non-party experts may give opinion evidence without complying with rule 53.03 if:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

The case of *Imeson v. Maryvale (Maryvale Adolescent and Family Services)*, 2018 ONCA 888, involved alleged sexual assaults. The Court of Appeal held that it was improper for the plaintiff's treating mental health clinician to provide opinion evidence as a participant expert on whether the alleged sexual assaults occurred (liability) and on whether the plaintiff suffered harm that was caused by such assaults (causation).

This evidence fell outside the proper scope of evidence tendered by a participant expert. The evidence on liability was based on the clinician's knowledge of problems typical of survivors of childhood sexual abuse, not on his observations or treatment of the plaintiff. The evidence on causation was based on what the plaintiff told the clinician, which the clinician accepted to be true. It was not based on the clinician's skill, knowledge, training, and experience.

In ordering a new trial, the Court of Appeal concluded:

> …despite the trial judge's recognition that the role of a participant expert is restricted, she permitted Dr. Smith to exceed his proper role by allowing him to testify about anything contained in his reports, and in admitting the reports into evidence, without first carefully examining what opinions were included in the reports, and the purpose for which it was proposed that the jury consider such opinions [para. 75].

In *Davies v. The Corporation of the Municipality of Clarington*, 2016 ONSC 1079, the plaintiff intended to call 18 litigation experts and 18 participant experts. Justice Edwards held that the plaintiff did not have to seek leave to call, as participant experts, any of the plaintiff's treating doctors to the extent their evidence related to the history taken from the plaintiff; the treatment afforded the plaintiff; the diagnosis; and the prognosis as revealed in the clinical notes.

If the opinions of the doctors went beyond these issues, compliance with rule 53.03 was required, and leave would need to be sought. Justice Edwards indicated:

> In a situation where the plaintiff intends to call more than one expert in the same specialty, it would be a rare occasion where that leave should be granted. The party seeking to call more than one expert in the same specialty has, in my view, a very high onus to establish why the court should allow

> evidence that would be repetitious of evidence already received. Such expert evidence would not be necessary, as it would not assist the court in coming to its decision on what damages to award. Fundamentally, it would fail to meet one of the important requirements of *Mohan* [para. 39].

Therefore, in determining whether the evidence of a participant expert is admissible, consideration needs to be given to whether the evidence is relevant, whether the expert is properly qualified, and whether the benefits of admitting the evidence outweigh the potential risks.

Moreover, the evidence must be within the proper scope of a participant expert. If it is not, compliance with rule 53.03 is required, and the evidence may still be inadmissible if it is not necessary (for instance, if it is duplicative of other evidence).

Distinction Between Sections 35 and 52 of the *Evidence Act*

Hearsay evidence is presumptively inadmissible. However, there are certain exceptions to the hearsay rule under which a statement may be adduced for the truth of its contents. Two such exceptions are found in sections 35 and 52 of the *Evidence Act*.

Business Records

Section 35 of the *Evidence Act* relates to business records. It provides that "any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter".

In *Girao*, the Court of Appeal stated that section 35 is not a proper basis on which to admit opinion evidence and noted the following comment from *Westerhof*: "[b]ecause these reports were tendered under s. 35 of the *Evidence Act*, the opinions concerning causation were not admissible for the truth of their contents".

Therefore, if a party seeks to admit documents under section 35 of the *Evidence Act*, the opposing party should ensure that the documents do not contain impermissible opinion evidence. The documents may need to be redacted.

Although not mentioned in *Girao*, opinion evidence in business records may be admissible under the common law exception to the hearsay rule set out by the Supreme Court in *Ares v. Venner*, [1970] SCR 608.

In *McCabe v. Roman Catholic Episcopal Corporation*, 2019 ONCA 213, the Court of Appeal stated:

> To be admissible under the common law rule in *Ares v. Venner*, [1970] S.C.R. 608, business records must be made contemporaneously by someone with personal knowledge of the matters being recorded and under a duty to make the entry in the record. This exception as to hearsay deals with the recording of facts by individuals with first-hand knowledge and observation of the matters being recorded [para. 23].

In addition, the absence of a motive to mislead is an element of the common law rule in *Ares v. Venner*.

In *Hajrizi v. Ottawa-Carleton School Board*, 2018 ONSC 2408, a student's report cards, including the opinions and comments therein, were held to admissible as business records under the common law.

Even if business records are admissible, it does not preclude a party from challenging the accuracy of the records, as stated in *Ares v. Venner*.

Medical Reports

Section 52 of the *Evidence Act* relates to medical reports that are signed by a practitioner. It is more expansive than section 35. Section 52 permits the court to allow the report to be admitted in evidence without the need to call the practitioner. The opinion can be entered for the truth of its contents.

However, the trial judge must, at the request of an opposing party, require the medical practitioner to testify in order to permit cross-examination. If the practitioner is not made available for cross-examination on request, then his or her opinion is not admissible for any purpose.

In *Doran v. Melhado*, 2015 ONSC 2845, Justice Emery held that a report of a litigation expert cannot be filed under section 52. Justice Emery stated a litigation expert is required to attend and give his or her opinion evidence at trial.

In order to file reports under section 52, a notice of intention to rely on the reports must be served. The deadline for a section 52 notice is 10 days prior to trial.

Care should be taken when preparing these notices. In *Reimer v. Thivierge*, [1999] OJ No 4074 (CA), the Court of Appeal indicated:

> The mistake counsel for the defence made in this case was in serving a notice under s. 52 of the Evidence Act. Since he had obtained the reports from the plaintiffs through the discovery process, he did not have to give notice that he might make use of them in cross-examination or otherwise. The plaintiffs knew he had them. The only reason for serving the notice under s. 52, assuming counsel put his mind to it, was to have them introduced as evidence for the proof of their contents. Once he did that, based on the authorities referred to above, it is my opinion that the reports were tendered by the defence, that the authors became de facto defence witnesses, and that therefore the trial judge erred in not allowing plaintiff's counsel to cross-examine the authors of the reports [para. 17].

Therefore, a notice of intention under section 52 of the *Evidence Act* is only required when a party wishes to admit into evidence a report of a medical practitioner for the truth of its contents. When a report is listed by a party in a section 52 notice, the medical practitioner becomes that party's witness and is subject to cross-examination by the opposing party.

In *Girao*, the defendant relied on a pre-accident report of the plaintiff's treating psychiatrist, Dr. Sanchez, for the truth of its contents, to substantiate the theory that, prior to the accident, the plaintiff was suffering from the same mental health issues that she manifested after the accident. The report played a major role in the cross-examination of the plaintiff and other witnesses, as well as in argument.

The Court of Appeal held that section 35 of the *Evidence Act* was not a proper way to admit Dr. Sanchez's opinion for the truth of its contents. The report could have been filed under section 52. However, in order to so, Dr. Sanchez had to be presented for cross-examination because the plaintiff requested same.

Since Dr. Sanchez was not presented for cross-examination, the hearsay content of Dr. Sanchez's report was not admissible for any purpose. The Court of Appeal held that admitting the report was procedurally and substantively unfair to the plaintiff, and was an error of law.

Another issue was the admissibility of a catastrophic impairment assessment report that was prepared in the context of the plaintiff's accident benefits claim. The plaintiff wanted to rely on the opinion of Dr. Becker, who had summarized the opinions of other experts. The trial judge only permitted Dr. Becker to testify on the system for determining a person's catastrophic impairment status, not on the substance of his report.

The report was favourable to the plaintiff. The opinion of an expert psychiatrist, Dr. Rosenblat, was incorporated into the report of Dr. Becker. Dr. Rosenblat was of the opinion that the accident played a substantial role in the plaintiff's current psychiatric functioning.

The Court of Appeal stated that "…it was an error to not allow Dr. Becker to testify about the substance of his report and it was also an error to exclude his report from the record, given that Ms. Girao had served a notice under s. 52 of the *Evidence Act*". The Court of Appeal held that Dr. Becker should have been permitted to testify about what reliance he placed on Dr. Rosenblat and others, subject to any demand by the defence for Dr. Rosenblat to be available for cross-examination.

The Court of Appeal likely meant that the report of Dr. Becker should have been admitted under section 52 <u>or</u> that Dr. Becker should have been permitted to testify on the substance of his report, not both. It seems to be well-established that, in most cases, a party must elect to either file a report under section 52 or call the medical practitioner to provide oral testimony: e.g., *Ferraro v. Lee* (1974), 2 OR (2d) 417 (CA); *Iannarella v. Corbett*, 2015 ONCA 110 at para. 131.

<u>Disclosure of Accident Benefits Settlements</u>

The Court of Appeal in *Girao* considered whether defendants can reveal to the jury details of a plaintiff's statutory accident benefits settlement. The Court noted that trial judges have wrestled with this issue and that the cases are mixed.

The Court of Appeal indicated that a trial judge has broad discretion to control the proceedings to ensure that trial fairness results.

It falls to the trial judge in a tort action to decide contextually whether and to what extent evidence regarding an accident benefits settlement is to be admitted. The principles of evidence law guide the decision.

The first question is whether the evidence is relevant to a fact in issue in the tort action. The second question is whether the probative value of the evidence would exceed its prejudicial effect.

The Court of Appeal stated that evidence regarding some of the individual benefits received in the accident benefits settlement would be relevant and admissible if the allegation is made that the plaintiff's abuse of a benefit will have an impact on the calculation of the tort damages.

For example, if the defence pleads that the plaintiff failed to use the earmarked settlement proceeds to mitigate certain future losses, then certain details of a settlement will be directly relevant to whether the defendant or the plaintiff is liable for the future losses.

Before introducing such evidence, the pleadings must have put the issue into dispute with appropriate particularity. Further, there must be an air of reality to the issue, which

is to be addressed in a *voir dire* with supporting evidence, including expert evidence if necessary.

This same proviso applies to a defence allegation that a plaintiff is malingering or lacks the motivation to work. However, on these matters, the Court of Appeal said that the core issue is whether the plaintiff is able to return to work, not the motivation to work.

A plaintiff's motivation to work is a collateral issue related to the credibility of the assertion that she or he is unable to work. In determining the extent of evidence to permit on the issue of a plaintiff's alleged malingering or motivation to work, a trial judge has to balance of prejudicial effect and probative value of such evidence.

Although counsel are afforded broad scope for cross-examining a witness on matters related to credibility, there are limits. Counsel must have a good faith basis to ask the questions, cannot take "cheap shots", and cannot be "sarcastic, personally abusive and derisive".

In addition, the Court of Appeal stated that the totality of an accident benefits settlement would rarely be relevant and would usually be more prejudicial than probative, particularly in a jury trial, even when the defence alleges that the plaintiff is malingering or lacks the motivation to work. These allegations are easy to make and difficult for a plaintiff to defuse.

The Court of Appeal said that there are public policy grounds for being cautious about admitting evidence on the totality of an accident benefits settlement. It can undermine the tort claim and can expose the plaintiff to unfairness.

Further, making this evidence generally admissible in tort actions can create a perverse incentive on a plaintiff to keep the accident benefits claim alive so that it does not become a defence weapon in the tort action. This goes against the general principle of encouraging settlement.

Lastly, where an accident benefits settlement is in evidence before the jury, the jury instructions should carefully explain how the motor vehicle accident compensation system in Ontario functions, including the fact that the plaintiff was entitled to the accident benefits, and the distinct roles of the trial judge and the jury in setting the tort damages and accounting for benefits received.

The jury should be instructed to not reduce the award of damages on the basis that it believes the benefits have compensated the plaintiff adequately for the accident.

In summary, the details of particular benefits received by a plaintiff may be admissible if they are relevant to issues such as misuse of a benefit, mitigation, and lack of motivation to work. The probative value and prejudicial effect of such evidence have to be weighed.

Defence counsel have to draft their pleadings with particularity to put these matters squarely in issue. Further, the trial judge must be satisfied that there is an air of reality to these arguments.

The details of the totality of an accident benefits settlement will rarely be admissible in a tort trial.

Self-Represented Litigants at Trial

Referring to the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) issued by the Canadian Judicial Council, the Court of Appeal in *Girao* noted that a trial judge has to do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented litigants. Self-represented litigants should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

Trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence.

However, the Court of Appeal stated that there are clear limits to a trial judge's duty to assist a self-represented litigant. The actuality and the appearance of judicial impartiality must be maintained.

Counsel, as officers of the court, have to assist the trial judge on legally complex topics, including by providing "briefing notes" or statements of law. The trial judge should request such assistance where necessary.

Further, although the right to a jury trial in a civil action is fundamental, it is not absolute and must sometimes yield to practicality. In exercising his or her discretion to discharge the jury, a trial judge may consider whether the self-represented status of a litigant might unduly complicate or lengthen the trial.

However, in many if not most cases, a trial judge should be able to fairly manage a civil jury trial with a self-represented litigant, with the willing assistance of counsel acting in the best traditions of officers of the court.

Conclusion

In *Girao*, the Court of Appeal addressed several important issues regarding trials. The key points are:

- Counsel and the court must have a clear understanding of what use will be made of joint books of documents.

- The court must keep a clear record of all documents introduced at trial, regardless of whether the documents are entered into evidence.

- Section 35 of the *Evidence Act* is not a proper basis on which to admit opinion evidence.

- Section 52 of the *Evidence Act* is more expansive than section 35. It permits signed medical reports to be entered for the truth of their contents. The medical practitioner must be made available for cross-examination, if requested by the opposing party.

- If defence counsel wants to introduce evidence of particular accident benefits received by a plaintiff for the purpose of showing misuse of a benefit, failure to mitigate, or lack of motivation to work, the statement of defence must be drafted with particularity, and counsel must be able to show that there is an air of reality to the argument in a *voir dire*. The details of the totality of an accident benefits settlement will rarely be admissible.

- In a trial involving a self-represented litigant, counsel for the opposing party must be particularly mindful of his or her duty to assist the trial judge on legally complex issues.