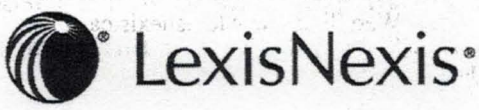
ONTARIO COURTROOM PROCEDURE

Third Edition

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Where the problem arises because of newly discovered evidence, the proper remedy is not exclusion (because the evidence was not obtained as the result of a *Charter* breach, section 24(2) does not apply) and the usual remedy is an adjournment or a mistrial.

A stay is not warranted: *R. v. Biscette*, [1995] A.J. No. 557, 99 C.C.C. (3d) 326 (C.A.), aff'd [1996] S.C.J. No. 103, [1996] 3 S.C.R. 599; *R. v. Antinello*, [1995] A.J. No. 214, 97 C.C.C. (3d) 126 (C.A.).

The appropriate remedy is usually an adjournment (*R. v. Hobel*, [1995] S.J. No. 762 (Prov. Ct.)) or a new trial or a mistrial (*R. v. McNair*, [1995] N.B.J. No. 89, 159 N.B.R. (2d) 234 (C.A.); *R. v. Antinello* (above)).

However, in unusual situations there may be additional factors which could justify a stay: *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 at para. 75*ff*. For example, a history of delayed disclosure and the resulting further delay caused by the discovery of new evidence may justify a stay: *R. v. Arsenault*, [1994] N.B.J. No. 417, 93 C.C.C. (3d) 111 (C.A.).

9. Excluding Evidence

This is discussed in **Chapter 19: Motions before the Trial, section C.31** and **Chapter 18: Raising Charter Issues**.

10. Best Evidence Rule

Issues relating to this so-called rule are discussed in **Chapter 34: Determining Admissibility**.

C. MOTIONS IN CIVIL CASES

1. For a Mistrial

- See **section B.1** (above)

Difficulties often arise because counsel employ inflammatory language during the address or misstate the evidence, inform the jury about evidence that is inadmissible, invite the jury to ignore the law or generally create a situation where the jury is likely to be irremediably prejudiced.

In civil jury trials the mention of insurance used to result in mistrial. However, in *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] S.C.J. No. 43, [1997] 1 S.C.R. 1092, the Supreme Court held that a jury should not be discharged automatically if something occurs from which the jury might reasonably infer that the defendant is insured. Instead, in assessing the likelihood of prejudice, the trial judge

should consider whether the fact that the defendant is insured is well known. In Canada, given that mandatory auto insurance is the rule, the mere mention of insurance will not usually result in a mistrial. It should generally be sufficient for the trial judge to direct the jury that it is irrelevant whether a party is insured.

Sometimes only a mistrial can prevent irreparable prejudice. Examples of situations where mistrials were declared are as follows:

- *Birkan v. Barnes*, [1992] B.C.J. No. 1440, 69 B.C.L.R. (2d) 132 (C.A.): counsel undertook not to refer to a matter, then did so during the address to the jury.
- *Brophy v. Hutchinson*, [2003] B.C.J. No. 47, 176 B.C.A.C. 258 (C.A.): defence counsel made argumentative, rhetorical, highly prejudicial and improper statements.
- *Brochu v. Pond*, [2002] O.J. No. 4882, 62 O.R. (3d) 722 (C.A.): counsel appealed to emotions and fears of the jurors and encouraged them to consider irrelevant matters.
- *Martin Estate v. Pacific Western Airlines Ltd.*, [1981] B.C.J. No. 1214, 24 C.P.C. 237 (S.C.): counsel commented that the goal of damages was to punish the defendant.
- *Taillefer v. St. Germain*, [1988] O.J. No. 2805, 26 C.P.C. (2d) 209 (H.C.J.): counsel for one defendant repeatedly referred to the criminal trial of another defendant.
- *Smith v. Harrington*, [1994] O.J. No. 2985, 36 C.P.C. (3d) 209 (Gen. Div.): counsel for the defendant inappropriately cross-examined the plaintiff before the jury.

In civil cases, costs of mistrials are almost invariably awarded against the offending party.

2. For an Adjournment

Under Rule 52.02 of the Ontario *Rules of Civil Procedure* (R.R.O. 1990, Reg. 194) ("Civil Rules"), a judge may order that a trial be adjourned to such time and place and on such terms as are just.

There is no specific family law rule regarding adjournments. However, in child protection proceedings, section 51 of the *Child and Family Services Act* (R.S.O. 1990, c. C.11) provides:

> *Adjournments*
>
> 51(1) The court shall not adjourn a hearing for more than thirty days,
>
> (a) unless all the parties present and the person who will be caring for the child during the adjournment consent; or