THE TRIAL OF AN ACTION

Second Edition

John Sopinka
Late Justice of the Supreme Court of Canada

Donald B. Houston, LL.B.

Melanie Sopinka, LL.B.

Butterworths
Toronto and Vancouver

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train was going 55 m.p.h. In presenting the plaintiff's evidence, counsel sought to introduce this statement through one Campbell, but the judge ruled it out. After the evidence for the defendant, counsel for the plaintiff again sought to introduce it in reply. When this occurred, counsel for the defendant did not apply to strike out the jury but contented himself with the following statement on the record: "My lord I am very distressed at the fact that twice in front of the jury there has been reference to that."[95]

After this occurrence a discussion ensued with respect to the application of a complicated statutory provision. At this point, without any application by either counsel and without affording counsel for the plaintiff an opportunity to make submissions, the trial judge withdrew the case from the jury. The trial judge relied in part on the attempts made by counsel for the plaintiff to introduce the inadmissible evidence. A new trial was ordered in the Court of Appeal. The Court of Appeal was not satisfied that the references to the inadmissible evidence were sufficient to dispense with the jury. These references, the Court of Appeal said, could have been effectually erased by a few judicious words addressed to the jury by the learned trial judge.

The Court of Appeal further pointed out that the speed of the train was not a causative factor in any event. Although on the facts of this case it was held that references to inadmissible evidence were not a sufficient ground for dispensing with a jury, this is not to say that it would never be a ground. If references are made to inadmissible evidence which is germane to a vital issue in a case it would be the proper exercise of a judge's discretion to dismiss the jury.

In reading the reasons of the Court of Appeal in the *Sdrauling* case, one obtains the impression that the Court of Appeal was of the view that the prospect of having to unravel the complicated statutory provision weighed somewhat heavily on the judge's mind in coming to his conclusion.

In *Mazur v. Moody,*[96] the trial judge permitted the jury to take home and read the plaintiff's book of documents. The trial judge reviewed the documents after the fact, and determined that the brief contained an expert report that was inadmissible. As a result, the judge discharged the jury on the grounds of possible prejudice.

b. Mention of insurance

Early authorities[97] indicated that when the existence of insurance was mentioned, counsel was entitled to an election as to whether the case should be traversed to another jury or completed by the trial judge alone. It was not clear which counsel had the election.[98]

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[95] *Ibid.*, at 480.

[96] (1987), 14 B.C.L.R. (2d) 240 (S.C.).

[97] Reviewed by counsel and Laidlaw J.A., dissenting in *Theakston v. Bowhey,* [1950] O.R. 524.

[98] See *Fillion v. O'Neill,* [1934] O.R. 716; *Gower v. Glen Woollen Mills Ltd.* (1913), 28 O.L.R. 193 (C.A.); affd, 28 O.L.R. 198; *Smith v. Canadian Horse Shoe Co. and Powers* (1924), 26 O.W.N. 435.

In *Theakston v. Bowhey*,[99] after 19 witnesses had been called, the 20th witness was being examined for the defence. The following answer was elicited:[100]

> Q. Now, I believe you were interviewed by some person representing Mr. Theakston? A. Well, a lawyer came to our door at noon when I got home from work, and he wanted to know if I could tell him anything, and I did not know what to say because I did not know, and he said that he would meet me around eight o'clock and I said Well, I work, and I went back to work at eight o'clock, and so I did not know what to do, so I went to the insurance man in Meaford, and the man was not there, but a woman was there, and she told me to go to Bennett's office to find out if I had to answer any questions to this lawyer, and I went to Bennett's office, and it happened to be the very guy who came to our door at noon.

Counsel for the defendant moved to discharge the jury and claimed the right to have the case traversed to the next sitting to be tried by another jury. He submitted that the cases gave him an election to proceed before the trial judge without a jury or to be tried by another jury. He preferred the latter course.

Counsel for the plaintiff indicated he was content to have the trial judge proceed alone or continue with the jury trying the case. He resisted an adjournment of the trial.

The trial judge, after hearing counsel's submission, decided to proceed with the jury.

The Court of Appeal[101] set down the following principles to be followed in a jury trial when insurance was mentioned:[102]

1. Where the evidence discloses to the jury either the fact that the defendant is insured, or facts from which the jury could reasonably infer that the defendant was insured, the services of that jury should be dispensed with.
2. Having dispensed with the jury, the trial judge should hear the submissions of counsel as to the procedure then to be followed.
3. After consideration of the submissions of counsel, the trial judge should decide, in the exercise of his discretion, whether to try the case alone or proceed with another jury.

The court further stated that counsel did not have an election as to the mode of trial which was to be decided by the trial judge. Moreover, the trial judge enjoyed a wide discretion in determining whether the mere mention of insurance was sufficiently specific that a miscarriage of justice would be occasioned if the trial were continued before the same jury. In other words, it was really a matter for the trial judge to decide whether the circumstances calling into play the first principle were present. In the instant case the majority was of the view that the

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[99] *Supra*, note 97.

[100] *Ibid.*, at 527.

[101] Laidlaw J.A., dissenting.

[102] *Supra*, note 97 at 534-535.

trial judge was correctly of the view that the evidence would not disclose to the jury that the defendant was insured. The court was not prepared to interfere with this decision made in the exercise of a "very wide discretion".[103]

The case was appealed to the Supreme Court of Canada[104] and was dismissed.[105] Justice Cartwright, writing the decision of the majority, agreed with the three-point procedure laid down by the Court of Appeal when evidence of insurance was brought home to the jury. His Lordship preferred the view expressed by Laidlaw J.A. in his dissent as to the effect of the evidence. Since, therefore, the trial judge did not dispense with the jury, he had run afoul of the first principle enunciated by the majority of the Court of Appeal. Justice Cartwright did not agree that the decision of the trial judge as to the effect of the mention of insurance was a discretionary matter to be determined on the basis of miscarriage of justice. He would, therefore, have directed a new trial but for the fact that counsel for the defendant had not accepted the offer made by the trial judge to try the case alone.

Justice Kellock, in his dissent, agreed with Laidlaw J.A. He dealt specifically with the submission that the appellant was required to bring himself within the provision of s. 27(1) of the *Judicature Act.*[106] It was to be assumed, he reasoned, that there was a miscarriage if evidence was given from which a jury might conclude that the defendant was insured. His Lordship, however, left the door open for a re-evaluation of the rationale of Falconbridge C.J. in the following passage:[107]

> While it may come about that as a result of compulsory insurance or other circumstances, the mention of insurance before a jury may lose the significance which, up to the present, it has been considered to have in cases of the character under discussion, I do not think that circumstances have sufficiently changed since that decision to render its principle no longer applicable.

The first edition of *The Trial of an Action* questioned whether the principles in *Theakston* still applied and suggested they should be re-assessed. *Theakston* was re-assessed by the Supreme Court of Canada in *The British Columbia Rugby Union v. Hamstra.*[108]

In lieu of the tri-partite test in *Theakston*, the court adopted a test consisting of one rule: "the trial judge should consider whether the reference has caused a substantial wrong or miscarriage of justice so that it would be unfair to continue with the present jury." In the course of his reasons on behalf of the court, Major J. stated:[109]

> The suggested approach has been neatly summarized in *The Trial of an Action, supra*, at p. 33:

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[103] *Ibid.*, at 536.
[104] [1951] S.C.R. 679.
[105] Kellock and Estey J.J., dissenting.
[106] R.S.O. 1937, c. 100, now the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6).
[107] *Supra*, note 104 at 687; *ibid.*, s. 31(1).
[108] (1997), 145 D.L.R. (4th) 193 (S.C.C.).
[109] *Ibid.*, at 202.

> It is submitted that the change in circumstances alluded to by Kellock J. in his dissent has occurred and it is time to re-assess *Theakston v. Bowhey*, in light of that change. This change has been recognized by our trial courts and by the highest court. Juries know about insurance and there is no evidence that their verdicts have been unduly affected. There is therefore no justification for assuming that a mention of insurance is *ipso facto* a miscarriage of justice. The tri-partite rule in *Theakston v. Bowhey*, should be replaced by one rule. A party complaining of a reference to insurance should be required to persuade the trial judge that a substantial wrong or miscarriage has been occasioned. The Court of Appeal should not interfere with the trial judge's decision unless it has not been judicially exercised.

At the present time it would appear to be a more serious matter to tell the jury that the defendant is not insured. This would almost invariably be a misstatement of the facts. The point was considered by the Ontario Court of Appeal and the Supreme Court of Canada in *Hellenius v. Lees*.[110]

In this personal injury case, in which the plaintiff was shown to have sustained permanent disabling injuries, counsel for the defendant, in addressing the jury, stated that if a verdict was rendered against the defendant he would have to bear it for the rest of his life. Immediate objection was taken to this statement and the trial judge was asked specifically to warn the jury that they were to take no account of the arrangements for paying an adverse judgment. The trial judge's response to this request was a standard warning to the jury that they were not to be swayed by sympathy in delivering their verdict. The Court of Appeal, while recognizing that today all motorists are insured either by private insurance policies or statutory indemnity funds, refused to direct a new trial. Justice Laskin, delivering the judgment of the court on this point, referred to the *Theakston v. Bowhey*[111] rule "as somewhat ingenuous today in the light of common knowledge of the prevalence of motor vehicle insurance, a fact underlined by the *Motor Vehicle Accident Claims Act* . . .".[112] He refused to extend this rationale to the reverse stipulation presented by the facts in the *Hellenius* case. The Supreme Court of Canada affirmed the judgment for the reasons given by Laskin J.A.

A different view was taken in an American case, *Georgeson v. Nielsen.*[113] The action arose out of an accident between a motor vehicle owned and driven by Dennis, in which the plaintiff was a passenger, and a vehicle owned and driven by Nielsen. The principle issue was whether the negligence of Dennis or Nielsen caused the accident. A statement to the jury by counsel for Dennis, that if the jury found Dennis to blame he could carry it on his shoulders for the rest of his life and that not one penny of it would be collected, was the basis in part for directing a new trial.

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[110] [1971] 1 O.R. 273; affd, [1972] S.C.R. 165.

[111] [1950] O.R. 524.

[112] *Supra*, note 110 at 280.

[113] 260 N.W. 461 (Wis. Sup. Ct., 1935).