

malpractice. Under s. 34 of the **Judicature Act**, R.S.N.S. 1989, c. 240 the appellants have a **prima facie** right to have the action tried by a jury. The principles applicable to a motion to strike a jury notice have been reviewed by this Court in **Zinck v. Allen** 1 N.S.R. (2d) 655. Cooper, J.A. in delivering the judgment of this Court in that case stated at p. 667:

"It is apparent in my view from what Judson, J. said that a Court of Appeal may inquire into the question as to whether or not the discretion has been exercised upon proper grounds. If, as a result, the Court is satisfied that the discretion has been exercised judicially, then there is no jurisdiction to review the exercise of the discretion even if the Court on appeal should be of opinion that it was exercised mistakenly."

In the present case the trial judge carefully reviewed the decisions in the Trial Division dealing with a motion to strike. The trial judge reviewed the evidence and concluded that the issues were complex and would require a careful review of the medical evidence. The weighing of the issues and the evidence was a matter within his discretion.

With respect we see no reason to interfere with the exercise of his discretion. The appeal is dismissed with costs in the cause.

J.A.

Concurred in:

Matthews, J.A

Freeman, J.A.