SUPREME COURT OF NOVA SCOTIA
Citation: Anderson v. QEII Health Sciences Centre, 2009 NSSC 242

Date: 2009/07/31
Docket: Hfx. 155158
Registry: Halifax

Between:

Victoria Renata Anderson, Mildred Anderson
and Victor Anderson

Plaintiffs

v.

QEII Health Sciences Centre, Dr. S.A. Gee,
and Dr. S. Sharma

Defendants

Judge:	The Honourable Justice David MacAdam
Heard:	July 31, 2009, in Halifax, Nova Scotia
Written Release of Oral Decision:	August 14, 2009
Counsel:	Raymond F. Wagner and Michael Dull for the Plaintiffs Daniel M. Campbell, Q.C. and Harry Thurlow, for the Defendants, Dr S.A. Gee and Dr. S. Sharma Roderick (Rory) Rogers and Karen Bennett Clayton for the Defendant, QEII Health Sciences Centre

By the Court:

[1] The plaintiffs filed a Notice of Trial, with jury, and certificate of readiness dated November 29, 2007. By Notice of Motion filed on July 21, 2009, the defendants, Dr. S. A. Gee and Dr. S. Sharma, [herein the "individual defendants"], moved for an Order directing that, notwithstanding the issuance of a jury notice, the issues of fact, as well as damages be determined by a judge, without a jury.

[2] According to the Notice of Trial, expert evidence will be adduced on behalf of the plaintiffs. The plaintiffs attached twenty-three expert reports, primarily from medical specialists. Since the Notice of Trial there have been additional expert reports filed, including two more by the plaintiffs, as recently as the end of May or beginning of June 2009. The individual defendants and The Queen Elizabeth II Health Sciences Centre, [herein the "corporate defendant"], have also filed expert reports. It also appears that there will also be at least one additional expert report to be filed by the individual defendants.

Background

[3] Counsel for the individual defendants, in his written submission outlines the background. Counsel for the plaintiffs takes no exception to the outline provided by counsel for the defendants. Following is the outline by counsel for the individual defendants, with the deletion only of comments on the nature and appropriateness of the conduct of any of the parties:

> 2. On April 2, 1997 the Plaintiff, Victoria Anderson ("Ms. Anderson"), was admitted to the Victoria General Hospital to be treated by Dr. Jonathan Love, a gastroenterologist, for recurrent inflammatory bowel disease. Dr. Love anticipated that she would require surgery, and prescribed total parenteral nutrition to be administered by a central venous line ("central line") – a catheter inserted into one of several large veins in the core of the body. On April 3rd and 4th, residents from the Department of Surgery attempted to insert a central line for Ms. Anderson via the left and right subclavian veins. They were unsuccessful. On April 4th, Dr. Love left the hospital for the weekend and transferred Ms. Anderson to the care of Dr. Gerald Schep, another gastroenterologist. On April 5th, the Defendant Dr. Sharma was the medical resident responsible for the floor where Ms. Anderson was located. He was asked to establish the central line for Ms. Anderson because Dr. Love's prescribed feeding had not yet been initiated. Dr. Sharma sought the assistance of a senior resident, the Defendant Dr. Gee, and they attempted to insert the central line via the internal jugular vein. They, too, were unsuccessful.
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> 3. In the course of their attempt, the needle used by Dr. Gee entered an artery which she believed was the carotid artery on either one or two occasions. She . . . ,(withdrew the needle and applied) pressure. The expert reports . . . acknowledge that it is possible that there were arterial entries in the course of the attempts by the surgical residents on April 3 and 4, although they were not explicitly documented....

> 4. The attempt by Drs. Gee and Sharma took place late on Saturday afternoon. The following morning Ms. Anderson developed neurological symptoms which became progressively more severe, culminating in her present condition of "locked-in syndrome". Subsequent angiograms showed that this was caused by an occlusion of her right vertebral artery and basilar artery, which supply blood to the brain.
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> 5. The Plaintiffs filed a Statement of Claim on April 1, 1999, ...
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> 6. The Plaintiffs alleged that the conduct of Dr. Gee and Dr. Sharma was negligent, and that it caused the stroke. The Defendants deny this, and state they treated her in a manner which was competent, careful and in accordance with the appropriate standards for physicians in their respective positions. The condition suffered by Ms. Anderson came about despite this careful and competent care. If the condition Ms. Anderson developed was causally connected to this procedure, which is denied, it was not foreseeable that this might be a result or that there was a risk of such an occurrence.
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> 8. The trial was scheduled for ten weeks, to begin on September 15, 2009 (at a time when the court generally sat 5 days per week). As directed at the Date Assignment Conference, the Defendants filed their expert reports in October 2008. The Defendant Doctors filed reports of Dr. Lawrie Garnett, an anaesthetist and critical care physician, and Dr. Stephen Phillips, a neurologist. Dr. Garnett addressed the standard of care and Dr. Phillips addressed causation. The Defendant Hospital delivered the report of Dr. R.J. Riopelle, a specialist in neurology.
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> 9. In May 2009, the Plaintiff delivered two additional expert reports from specialists in different disciplines – Dr. R.A. Willinsky is a neuroradiologist and Dr. Steven Kravcik is a specialist in general internal medicine. The Defendant Doctors advised the Plaintiffs that they would be seeking consultants to respond to this new evidence, and that any new reports would be available in August.

[4] In his written submission counsel for the plaintiffs says they anticipate calling four expert witness on the issues of standard of care and causation, and two

or three experts on damages. In his oral submission counsel acknowledged that the plaintiffs may call some of the other experts listed in the Notice of Trial, depending on how the trial progresses.

[5] Counsel for the corporate defendants filed a written submission supporting the individual defendants' motion to strike the jury notice. On the hearing of the application, Counsel declined to make any oral submission.

Issues

[6] As noted by the plaintiffs, the issues are:

1. Should the Defendants' motion be dismissed for their having failed to bring it with due dispatch?

2. Are there substantial, cogent reasons for this Honourable Court to exercise its discretion to deprive the Plaintiffs of their entitlement to have the trial proceed by way of judge and jury?

1. Delay:

[7] The plaintiffs seek to have the motion dismissed on the basis the defendants did not object to the Notice of Trial with jury that was filed on November 20, 2007. Counsel references the *Civil Procedure Rules* 1972, at *Rule 28.05*:

> 28.05.
>
> (2) Any party who has filed a notice of trial without a jury and certificate of readiness pursuant to Subsection (1) of this Rule, or who has consented to the filing of such a notice, shall not, after the filing of the notice, initiate or continue any interlocutory proceeding or form of discovery without leave of the court except discovery of expert witnesses within sixty (60) days of the issuance of the notice.
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> * * *
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> (4) Upon receiving a notice of trial without a jury and certificate of readiness, a party shall be deemed to have consented to the filing of the notice unless, within ten (10) days from the filing of the notice, the party files a letter of objection with the court and the other party and requests a conference with a judge.

[8] The plaintiffs also reference rule 28.08 (1):

> 28.08.
>
> (1) Upon receiving a copy of a notice of trial with or without a jury and certificate of readiness, and after the expiration of the time period mentioned in rule 28.05(4)

> without an application having been made pursuant to that section, the prothonotary shall forthwith fix a date for trial that shall not, unless the court otherwise orders, be less than sixty (60) days from the filing of the notice, and the prothonotary shall place the proceeding on the Weekly List of Halifax and shall forthwith mail a notice of the date of trial to each of the parties at their address shown on the notice and to the prothonotary.

[9] The plaintiffs submit that any objection to a Notice of Trial with jury must meet the timelines stipulated in Rule 28. The submission is that the "plaintiffs have exerted significant time and costs into preparation to present their case before a jury." They note that the date for the jury trial has been set for some time with no stated objection by the defendants. They say they will be prejudiced as it will render their efforts for the preparation of a jury trial "insignificant. The time and costs spent by the plaintiffs will have been for nothing." Counsel references the decision of Justice Goodfellow in *Moss v. Great West Life Insurance Company* (1993), 119 N.S.R. (2d) 198, [1993] N.S.J. No. 21 (S.C.), where he denied a defendant's request to have the plaintiffs attend for an independent medical examination. In denying the application Justice Goodfellow stated that, "[t]he length of time the defendant had to the date of the Notice of Trial coupled with the length of time since the filing of the Notice of Trial does not warrant intervention of the Court that will cause adjournment." (QL version, p. 6).

[10] Counsel for the individual defendants says the decision to advance this motion arose upon receipt of the two additional expert reports received around the beginning of June 2009. In particular, counsel says, the report of Dr. Steven Kravick raises issues of scientific complexity, which, together with the complexities of the medical evidence contained in the other reports, warrant the striking of the jury.

[11] Counsel also submits that the *Civil Procedure Rules* noted by counsel for the plaintiff are not here applicable. The rules, counsel says, do not preclude the court's discretion, in appropriate circumstances, to strike a jury.

[12] Accepting counsel's submission that the reason for this application was the filing of the recent medical reports by counsel for the plaintiffs, I am not prepared to dismiss his application on the basis of delay. At this stage of trial preparation, normally an application such as this, would be rejected. However on the basis that it was the filing of further medical reports by counsel for the plaintiffs that precipitated this application, I am not persuaded to deny the application on this basis.

2. The Jury Notice

[13] As to the right of parties to have issues in dispute determined by a civil jury, the plaintiffs reference section 34 of the *Judicature Act*, R. S. N. S. 1989, c. 240, which provides, in part:

> 34 Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:
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> (a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:
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> * * *
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> (ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,
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> (iii) where the judge at the trial in his discretion directs that the issues of fact shall be tried or the damages assessed or inquired of with a jury . . . .

[14] The entitlement to a trial by civil jury was commented on by Justice Grant in *A.D. Smith Lumber Ltd.* v. *General Home Systems Ltd*., [1986] N.S.J. No. 26, where at page 3 (QL version), he stated that, " [t]he courts of this province have very jealously guarded a litigant's right to have the issues of fact and/or the damages tried or assessed by a jury. We are one of the few provinces in the country where this is a right that each citizen enjoys and not a privilege."

[15] The individual defendants nevertheless raise a number of factors they say warrant the striking of the jury. Among these are the practical difficulties that they say will be encountered in conducting a jury trial which is now scheduled for two months, including the availability of jurors to participate in a trial of this length, the difficulty in scheduling so many experts, the difficulty in drafting appropriate questions in view of the anticipated complex, and sometimes contradictory expert evidence, and the difficulty in ensuring that the witnesses are limited to giving evidence pursuant to the Rules of Court. Although to some extent these are problems more related to jury trials than judge alone trials, nevertheless, neither individually nor collectively are they factors which would warrant the striking of a jury. The right to a jury, as set out in section 34 of the *Judicature Act*, *supra.* is not

to be denied because the court, or counsel for that matter, will have more difficulty in conducting the trial or their case.

[16] The individual defendants also raise the issue of the experts, and the volume of materials, relating to the assessment of damages claimed by the plaintiffs. I am not satisfied that either the volume of documentary evidence to be introduced in respect to the assessment of damages, nor the fact the jury would have to evaluate and assess contending expert reports, actuarial or otherwise, is a basis for striking a jury. In my view there is no reason that a jury could not make such assessments, after having considered both the oral and documentary evidence.

[17] The remaining issue raised by the individual defendants relates to the myriad of medical reports and the degree of scientific complexity relating to how the plaintiff, Ms. Anderson, suffered a catastrophic stroke that has resulted in her present condition.

[18] The individual defendants reference the statement of Chief Justice Chisholm, in a decision affirmed in *Marshall v. Curry (No.2)* (1933), 6 M.P.R. 267, at page 269, that " [i]f the trial requires a scientific investigation, I think it might be

conceded that the investigation cannot be conveniently made with a jury." On appeal, Hall, J., for the panel, said, “[t]he learned Chief Justice, realizing that this issue must be determined upon expert surgical testimony, decided that this scientific investigation could not conveniently be made with a jury” (p. 272).

[19] The individual defendants written submission continues:

> 23. Justice Saunders (as he then was) noted in *Crocker v. MacDonald*, [1992] N.S.J. No. 461, affirmed at [1992] N.S.J. No. 489, that this rule is not absolute, but that nevertheless cases involving difficult or complex scientific analyses are inappropriate for juries.
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> 24. In that case, Justice Saunders set a jury notice aside, finding that in order to rule on the issue of causation the trier of fact would need to have a basic understanding of a number of relatively nuanced medical science issues. At para. 23, he wrote:
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> > I am satisfied that in order to do justice between the parties the case should not be left with a jury. The matters in issue are of complex and technical nature and would be better heard by a judge sitting alone who would then be free to reserve decision and take whatever time was necessary to analyze the detailed and complicated medical record.
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> 25. While numerous complex legal and factual issues may not in themselves always be sufficient to meet the standard required, the mere existence of a single complex medical issue can be sufficient, as in *Leadbetter v. Brand* (1979), 37 N.S.R. (2d) 660 (T.D.) (*"Leadbetter"*).
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> 26. *Leadbetter* has much in common with the Defendants' case. It concerned an allegation that a physician was negligent in the administration of a general anaesthetic, causing cardiac arrest. To determine the causation issue a significant

> analysis of specialized medical evidence about fluid electrolyte balances and the effect of diuretic drugs had to be undertaken. Justice Hallett found that the degree of complexity was the key issue in striking the Notice. In order to determine the cause of a cardiac arrest the trier of fact would have to analyze medical evidence as to the possible causes of cardiac arrest. Justice Hallett stated at para. 13:
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> > To analyze the medical evidence as to the cause of the cardiac arrest will require far more than an exercise of common sense; it will be necessary to understand and weigh the specialized medical evidence as to all the possible causes of the cardiac arrest to determine the probable cause, which is essential in reaching a conclusion as to whether or not the defendant's negligence (if proved) was the cause. In my opinion, this essential issue is too complex and scientific to be decided by a jury.
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> 27. The present case also involves the jury being asked to weigh large quantities of expert opinion to determine whether the Defendants' actions caused the injury claimed by the Plaintiff. It is arguable that the present case will involve a more complex determination, given Ms. Anderson's relevant prior medical history of hypercoagulation and the relative complexity of locked-in syndrome as opposed to cardiac arrest. "

[20] On the other hand, the plaintiffs assert that in recent years there has been a greater reluctance to strike juries even in cases of scientific investigation. Counsel says there has been an "evolution", which was described by Justice Hall in *Wentzell v. Kydd*, 1997 CarswellNS 453, where, after citing *Marshall*, *supra*, he wrote at paras. 14-16:

> Following that lead, the Courts of this Province seemed to have demonstrated little reticence to strike a jury in malpractice actions but in more recent years that trend seems to have been reversed. As Jones, J., as he then was, said in Hearn v. Bear et al (1974), 16 N.S.R.(2d) 62 (N.S.S.C.T.D.) at page 64:

> The defendants maintain that the practice in Nova Scotia is that malpractice actions are not tried with a jury. While this appears to be the rule in Ontario, I am unable to find any authority to support that proposition in this Province. There have been a number of cases in which the motion to strike out the jury notice in malpractice cases has been allowed. Based on the decision in Marshall v. Curry (supra) it is arguable that in every case where a scientific investigation is required then "the investigation cannot conveniently be made with a jury". I do not think the rule goes that far. The Judge must exercise his discretion in each case, bearing in mind the plaintiff's right to a jury trial and the nature of the action. In the most recent case of malpractice in this Province, Eady v. Tenderenda [unreported], Mr. Justice Dubinsky refused to strike out the jury.

As pointed out by Illsley, C.J., in *MacNeil v. Hill the Mover* (1961) 27 D.L.R.(2d) 734 (N.S.S.C., in banco), a party has a prima facie right to trial by jury. He said at page 737:

The plaintiff, having given a jury notice, had a prima facie right to a jury: Starratt v. Dom. Atlantic R. Co. (1912), 5 D.L.R. 641 at p. 644, 46 N.S.R. 272 at p. 276, Butler v. Charlottetown et al. (No. 1), [1944] 3 D.L.R. 343, 17 M.P.R. 193.

See also Burton v. Harding & Marks, [1952], 3 D.L.R. 302 at p. 306, O.W.N. 126 at p. 128, per Mackay, J.A.:

> Subsection (3) of s. 57 [the counterpart of the proviso of our s. 42(1)(b)] by its very nature presupposes the intervention of some outside circumstances or occurrences making it just and desirable, because of such intervention, that the action should be tried without a jury.

King v. Colonial Homes Ltd, 4 D.L.R. (2d) 561 at p. 566, [1956] S.C.R. 528 at p. 533 per Cartwright, J.: "This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except from cogent reasons." and Neelands & Neelands v. Haig, 9 D.L.R.(2d) 165 at p. 167, [1957] O.W.N. 337 at p. 339, per Laidlaw, J.A.:

> The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to

> be deprived of his right to have the trial proceed in that way. A trial Judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. It must be exercised in a judicial manner and there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him.

It is interesting to note that when Marshall v. Curry and MacNeil v. Hill the Mover were decided, order XXXIV, rule 4, of the Nova Scotia Rules of Court made specific reference to the authority of the Court, or a judge to direct that a trial be without a jury where a scientific investigation was involved. The rule stated:

> r. 4 The court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury.

This provision was not included in the current Civil Procedure Rules which replaced the former Rules of Court in 1972.

[21] Also referenced by counsel for the plaintiff is the decision of Justice Kelly in *McLellan v. Shea*, [2004] N.S.J. No. 473, where he declined to set aside the jury notice on the application of one of the defendants. At paragraph 4, Justice Kelly observed:

> In Marshall v. Curry (No. 2), [1933] 3 D.L.R. 198 (N.S. C.A.), Chisholm C.J. concluded that "[i]f the trial requires a scientific investigation, I think it must be conceded that the investigation cannot conveniently be made with a jury" (p. 200). This decision was subsequently affirmed (see pp. 200-201). Since that time the education and experience of the average juror has improved considerably and it has been acknowledged by our

> courts that some level of complex and scientific evidence could comfortably be left with the jury.

[22] With the observations of Justice Hall, in *Wentzell v. Kydd, supra.* and Justice Kelly in *McLellan v. Shea, supra.* I agree.

[23] Counsel for the individual defendants references the decision of Justice McDonald in *Young et al. v. St. Rita Hospital*, (1985) 68 N.S.R. (2d) 293, 1985 CarswellNS 76 (leave to appeal refused,(1985), 69 N.S.R. (2d) 270), 1985 Carswell NS 75 where at paras. 50 – 52 he observed:

> 50 The developmental retardation appears to be the basis, or has a common origin, with all the other grave disabilities and defects. It will be the duty and problem of the trier of the fact to locate and determine what caused this terrible accident. For this, they will have to rely only upon what might be contradictory evidence of five or more expert witnesses. All of which, so far, only speculate on the possible cause.
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> 51 There is no doubt that a jury's discernment of the issues will improve when the jargon of the medical experts is reduced to terminology more easily understood. However, the complexity of the issues will remain. In this case, there will have to be a very fine weighing of subtle contradictions and indistinct variances of evidence, all based on certain premises.
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> 52 Conclusions in this case will be made almost entirely on expert evidence, much of which, because of the rarity of some of the problems, will be opinions based on very little information and a paucity of personal experience. I find that the scientific investigation required into the evidence to be heard, cannot conveniently be made with a jury.

[24] Justice R. MacLeod Rogers, in *Myra v. Langille*, (1987), 80 N.S.R. (2d) 135, 1987 CarswellNS 254, at paras 12 – 17, commented:

> 12 I agree with Mr. Justice Jones in Hearn v. Bear and the Halifax Infirmary (1974), 16 N.S.R. (2d) 62 , that the rule stated by Chief Justice Chisholm does not go as far as to say that in every case where a scientific investigation is required the investigation cannot be conveniently made by a jury.
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> 13 Not all malpractice suits, perhaps not even the majority, involve that kind of complexity, although with technical expert testimony, that a jury cannot come to grips with the evidence with which they have been presented, particularly with the help of counsel and the court directing their attention to the relevant evidence and law, and particularly if they have the necessary time to deliberate.
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> 14 In my view, a reasonably educated and informed jury is just as capable, perhaps even more so, because there are seven of them, of assessing expert medical testimony, as a single judge. This is so, particularly if that evidence is presented to it, as it should be, in a way that a reasonably educated and informed group of lay people can understand it. No more is done when a single judge hears the case. The judge is not an expert in medicine when he hears a medical malpractice suit and must assess what are often conflicting medical opinions without a medical expert's background. He is faced with the same difficulties a jury is faced with when medical evidence is introduced. He and they must assess the evidence, the weight of it, the conflicts in it, and make findings with respect to it.
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> 15 Complicated medical evidence is often presented in criminal jury trials, yet the trials go forward and the juries deal with the issues raised by that evidence.
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> 16 The knowledge of no profession which deals with the public should be clothed in so much mysterious com-plexity that it cannot be explained in understandable terms to a reasonably intelligent jury of fellow citizens.
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> 17 In applications to strike out a jury notice otherwise properly made a judge must weigh the complexity of the evidence that will be adduced at trial against the

> longstanding, traditional and substantive right of a plaintiff in Nova Scotia to a jury trial. There must be cogent reasons to remove a case from a jury.

[25] Plaintiff's counsel suggests the technical and scientific jargon can be reduced to language in terms understandable to a jury. His submission mirrors the observations of Justice Tidman in *MacIntyre v. Nova Scotia Power Corporation*, [1995] N.S.J. No. 425, where, at para. 17, he said:

> I am confident counsel will ensure that the experts reduce the technical jargon and theory to language and terms understandable to the jury. Moreover, I am not convinced that a judge, even after a long period of study of the reports, would be in any better position to assess the relative merits of their opposite conclusions than would a jury...

[26] Whether the trier of fact is a jury, or a Judge sitting alone, the medical and scientific evidence anticipated in this case will require the reduction of the technical jargon and theory to language understandable to either a jury or a Judge. In this regard, at least, there is little difference in how the parties will have to present their expert evidence.

[27] At issue here, however, is not only the technical and scientific jargon, but the various conflicting expert reports respecting what occurred, what may have occurred and what is theorized to have occurred. As was stated by Justice Jones in

Hearn v. Bear et al., supra. at p. 64, "[t]he judge must exercise his discretion in each case, bearing in mind the plaintiff's right to a jury trial and the nature of the action."

[28] Simply because a case is one of medical malpractice is not a basis to strike a jury notice. As noted by Justice Rogers in *Myra v. Langille, supra.*, not all medical malpractice trials involve the degree of complexity that a properly instructed jury could not deal with.

[29] Counsel for the plaintiffs would formulate the questions for the jury along the following lines:

> Did the Defendants fall below the standard of care by attempting the needle insertions without informing or failing to obtain the supervision of a senior doctor?
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> Did the Defendants assume responsibility for a surgical procedure that they were not assigned to perform?
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> Did the Defendants obtain informed consent?
>
> Did the Defendants perform the insertion attempts in a manner that fell below the standard of care due to inability, inexperience, and incompetence?

> Did the Defendants puncture Ms. Anderson's vertebral and basilar artery? If yes, did it cause or materially contribute to the stroke?
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> Did Ms. Anderson's inflammatory bowl condition without the involvement of the artery injury coincidentally and totally cause the stroke?

[30] Counsel for the individual defendants says the issues are entirely "scientific" and outlines them as follows:

> The issues in the case are entirely "scientific" and deal with matters beyond the knowledge and experience of ordinary people. These issues relate to the technique of insertion of a central line catheter and the causal connection, if any, between the attempt by Drs. Gee and Sharma and the stroke suffered by the patient.
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> 13. The first issue is whether the attempt by Drs. Gee and Sharma was performed in accordance with the appropriate standard of care. The second issue is whether, even if the medical residents failed to meet the standard of care, the attempt caused the stroke which led to Ms. Anderson's catastrophic injuries. Consideration of each issue will require a detailed understanding of the anatomy of the blood vessels and bony structures of the neck (which must be visualized in three dimensions). The evidence will indicate that, if the stroke was precipitated by an injury to an artery, this could not possibly have been an injury to the carotid artery; it must have been an injury to either the subclavian artery (in a "down stream" location) or to the vertebral artery. However, the carotid artery is adjacent to, and parallel with, the internal jugular vein, while the other two arteries are some distance removed from, and at different angles to, the internal jugular vein.
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> 14. Consideration of the potential causal connection involves an inquiry into whether the blood clot which led to the stroke was caused by an injury to the artery at all. Dr. Willinsky's evidence is to the effect that the angiogram does not show evidence of any arterial injury.

> 15. The evidence will be that the Plaintiff was in a hypercoagulable state where she would have an abnormally high tendency to coagulate and form clots. The issue will be whether the thrombosis occurred simply because of this hypercoagulable state, or whether it was caused by the alleged arterial injury. Dr. Kravcik has expressed the opinion that the arterial "stick" injury was a necessary part of the cause. His report is being reviewed at the request of the Defendant Doctors, and it may be answered by one or more expert reports.
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> 16. The anatomy of the blood vessels and the blood chemistry of thrombosis and coagulation are complex, and will be very difficult to explain to the jury. It will also be difficult to formulate proper jury questions, making a simple general verdict clearly inappropriate in a case such as this.
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> 17. There are also issues of law which are intricately interweaved with the factual discussion. The Defendant Doctors submit that it was completely unforeseeable that the procedure which they were undertaking might cause a devastating stroke. Instructing the jury with respect to the law on standard of care and causation will be extremely difficult.
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> 18. The quantification of damages presents few issues of fact. The nature of the Plaintiff's injuries is undeniable, as she is totally disabled and has no material likelihood of recovery. She has and will have no capacity for earning income. Her non-pecuniary damages will be controlled by the jurisprudence. A calculation of pecuniary damages will turn on the competing actuarial/economic experts. This, too, is an area which is not well suited for examination by a jury.

[31] As noted earlier, difficulty in formulating the proper jury questions and explaining the law of the standard of care and causation are the responsibility of the court and not a basis, in my view, to strike a jury. Neither, as also suggested by counsel for the individual defendants, is the difficulty in assessing the damages and weighing competing actuarial/economic experts an issue for which the jury notice should be struck.

[32] In his oral submission, counsel also stated:

> In this case the technical issue relates to the mechanism of thrombosis, the mechanism of embalization of thrombus, the relevance of subsequent events, the relevance of the evidence with respect to the patient's state. Very complex as described in the expert reports.

[33] Later in his submission, Counsel added:

> And Justice Hallett's words apply with even more force here I submit where the question of causation is very controversial. It's not just a question of deciding which of the experts is preferred, the question has to be analyzed in a scientific way to determine which of the evidence is scientifically soundly based and that's going to involve an exploration of the medical evidence and the literature that the experts have referred to.
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> Here we have conflicting evidence as to whether it can be said that the stroke was the result of an arterially injury, a hypothetical injury because the evidence, I think its clear that all the experts acknowledge that there is no radiological evidence of such an injury. The debate isn't going to involve a consideration of the mechanisms for the formations of clots in the blood, the mechanisms of injury to blood vessels, ah the relationship between those events. It's going to involve a consideration of the nature of hypercoagulation that's an enhanced tendency of the blood to clot and there is evidence there will be evidence of that in this case and the hyper coagulatible state of the plaintiff. And as I said, it's going to involve a consideration of whether the conclusions expressed by the plaintiff's witnesses is supported by medical theory and literature. This is a level of medical complexity requiring a sophisticated assessment which is, we submit, far beyond what we can reasonably ask of a, even a representative jury.

[34] Counsel for the individual defendants, added:

> My Lord, I must say that I was a little uneasy when my friend started referring to soupy blood and thick blood. If this is an example of the way that the issues are going to be clarified for the jury, that is troubling indeed. Ah. there's a difference between making things simple and being simplistic. And simplistic is when you leave out necessary and important factors and that is a real risk when you are trying to make very complex matters simple for a jury.
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> * * *
>
> The anatomy I agree with, although there are a lot of subtleties in there that will be the subject of evidence, but the question of whether or not there was an injury to the vertebral artery is absolutely, that's the essence of the issue. That's the biggest issue between the parties. I say that they are inferring the existence of this and my friend said it, that it had to be in the vertebral artery because that's the only one that could have caused the injury.... if you assume that the stroke was caused by an injury to the artery, then you have to infer an injury to that artery. That's the very essence of the issue that we have to deal with and that's what the differing scientific evidence is about.

[35] Notwithstanding these arguments, I am not persuaded that given sufficient time, and an opportunity revisit areas of uncertainty, a jury of seven is not in as good a position to examine, weigh and determine scientific or any other issues, as a judge sitting alone. On what basis a judge, untrained in the scientific or technical area under review, is better qualified to determine whether a person with education and training related to the particular scientific or technical area in question, has acted properly or improperly, is unclear. Nothing in the submissions of counsel, particularly counsel for the individual defendants, satisfies me that this is either probable, or even a serious possibility.

[36] There is, however, one difference in how a jury, as opposed to a judge alone, would be able to conduct a review of the evidence, including particularly the expert evidence, and the weighing of the submissions of counsel. Although it has been stated a jury can take as long as required, practically, they are limited to making an "almost" immediate decision. Whether it be hours, days, or even, in some cases, a couple of weeks, there are effectively time restraints on their reaching a conclusion. The current *Civil Procedure Rules* recognize as much, stipulating at *Rule 52.17(2)* that:

> [a] verdict may be given, and a question may be answered, by five jurors after four hours of deliberations.

[37] A judge, on the other hand, is not similarly limited. Justice Saunders in *Crocker v. MacDonald, supra*., recognized this distinction in the opportunity for review and consideration by the trier of fact, when he said, "a judge sitting alone . . . would then be free to reserve decision and take whatever time was necessary to analyze the detailed and complicated medical record."

[38] A similar observation was made by Justice Grant in *Corkum v. Sawatsky*, [1992] N. S. J. No. 156, when at p. 4, he observed:

> Civil juries in this province consists of seven sequestered persons. They are sequestered until they render their findings. They take the exhibits with them, which in this case will include the various expert reports. They may or may not have taken notes. This is in contrast to a judge who may reserve her/his decision and consider it over whatever period of time is convenient and necessary.

[39] In the large majority of cases, including most medical malpractice lawsuits, this distinction is not so significant as to warrant the striking of a party's *prima facie* right to a jury. If jurors can decide murder and other serious criminal cases, often with contradictory complex technical, including scientific, evidence, they can certainly decide civil cases, including when there is contradictory complex technical, including scientific, evidence.

[40] What, in the circumstances, is different is the apparent uniqueness or rarity of what happened in early April, 1997 at the Victoria General Hospital, in Halifax. The plaintiff, Ms. Anderson, is now in a "locked-in syndrome." The anticipated expert evidence, particularly the recently filed report of Dr. Kravick, suggests a theory as to what occurred rather then a particular factual assertion. The summary of his report reads:

> In summary, there is the appropriate and highly suggestive temporal sequence, timing and pathophysiological basis to strongly support a casual link between inadvertent arterial injury during attempt central venous cannulation and Ms.

> Anderson's vertebrobasilar. Numerous case reports exist in the medical literature documenting the occurrence of vertebral artery injury during attempted internal jugular or subclavian vein cannulation. There is no good alternative cause, and review of the medical literature does not support a significant association between ulcerative colitis and stroke.

[41] The individual defendants' counsel says they will be filing an expert report, in response.

[42] The contradictory expert evidence can then be expected to not only involve weighing and considering what the other experts say happened, and with what effect on Ms. Anderson, but also weighing theoretical scientific opinions. Such weighing cannot, and for the sake of all parties, should not, be conducted hastily, particularly when the person or persons weighing the suggested opinions, is/are not trained in the scientific or technical discipline involved in the question at issue.

[43] A judge, unlike a jury, can take extensive time to weigh, analyze and consider the respective theories, and, if need be, can request further assistance of counsel. For this reason, in the particular circumstances of this case, I am persuaded the jury notice should be struck.

J.