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Striking a Jury Notice: When Is It Appropriate to "Wait and See"?

In *Chandra v. CBC*, 2015 ONSC 2980, Justice Graeme Mew rejected the CBC's argument that the jury notice should be struck because the issues and the expert evidence were too complex for the six randomly-drawn members of the public. However, the Court held that it might revisit that ruling as the trial progressed – the "wait and see" approach.

The plaintiff Dr. Chandra is a world-renowned professor and researcher in the field of nutrition and immunology. He sued the CBC for defamation following its broadcast of a documentary that claimed he fabricated his research results and committed academic fraud. The CBC pleaded defences of truth, fair comment and responsible communication on a matter of public interest.

Before settling with the Plaintiff, the CBC's co-defendants had served a jury notice in the action. The CBC brought a motion to strike that notice.

The CBC argued that a jury was ill-suited to the task of choosing between competing experts whose evidence would be highly complex and technical. According to the CBC, the case would turn on Dr. Chandra's scientific integrity, and the trier of fact would need to have an in-depth understanding of his work and its place in his field. At least six experts would be testifying over the course of a nine-week trial.

Dr. Chandra painted a very different picture of the trial. He argued that the central issue in the case was whether or not he had fabricated research results and misappropriated money. The jury would not be called upon to decide whether the studies reached sound conclusions, but merely whether Dr. Chandra actually carried out the research at all — a task well within the jury's traditional bailiwick.

Justice Mew noted the parties' divergent predictions on how the trial would unravel. The court held that it was unable to determine which version of events would ultimately prove correct, and accordingly dismissed the motion to strike the jury notice. Relying on the Supreme Court's decision in *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, Justice Mew held that the right to a trial by jury was a substantive right "of which a party ought not to be deprived except for cogent reasons."

The court held that the issue could be revisited during the trial "if the combined effect of the legal issues and the factual issues as they emerge at trial so warrants." (para. 50) In other words, "wait and see".

However, as some courts have recognized, the "wait and see" approach is often inappropriate. In *Cowles v. Balac* (2006), 83 OR (3d) 660 (C.A.), the majority of the Court of Appeal affirmed the trial judge's decision to strike a jury notice at the outset of trial on the basis of scientific complexity. Justice Borins, in dissent, would have preferred that the trial judge take a "wait and see" approach.

The "wait and see" approach will often be a less efficient process. Among other things, it means that the jurors may spend weeks hearing evidence, only to be sent home by the judge without deciding the case.

It also forces a party who wishes to strike a jury notice to make some difficult tactical decisions. The more complex and technical the expert evidence a party leads, the more likely they are to succeed in striking the jury notice during trial. However, if the motion fails, the party may be stuck with having adduced evidence that the jury may have difficulty comprehending.

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