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When is a case too complex for a jury?

In Ontario, either party in a civil action can demand that its case be decided by a jury. In *Kempf v. Nyugen* (2015 ONCA 114), the Court of Appeal for Ontario addressed the question of when a case can be removed from a jury's hands because it is too complex, in a decision that strengthens the right to have civil cases decided in jury trials.

Kempf sued Nyugen in negligence, after suffering injuries when he collided with Nyugen during the Heart&Stroke Ride for Heart. In defence, Nyugen pled that by signing a waiver prior to participating, Kempf had voluntarily assumed the risk of the ride ("*volenti*") and also that Kempf himself had been negligent.

Kempf moved to strike the jury at the outset of the trial. First, he argued that by pleading *volenti*, Nyugen was seeking a declaration. Under the *Courts of Justice Act*, juries are disqualified from such cases. Second, even if the Trial Judge decided the *volenti* issue, the jury would not be able to understand the limited use they could make of the waiver, so it would unfairly influence its deliberations on liability.

The Trial Judge allowed Kempf's motion. Justice Darla Wilson concluded that even though she would decide the *volenti* question, the waiver was "inextricably bound up in the liability issue and the jury would not be able to ignore it and the evidence surrounding it during their deliberations". She reasoned that even her clear instructions to the jury could not eliminate this risk, as it would be "impossible" for the jury to use the waiver only for the narrow purpose for which it was relevant. She struck the jury and after a five-day trial, found Nyugen responsible for Kempf's injuries.

The Court of Appeal vacated the decision. Writing for the 2-1 majority, Epstein J.A. noted that *volenti* is a defence to a finding of negligence, not a claim for declaratory relief, so there was no statutory basis for disqualifying the jury.

The second – and tougher – question was whether evidence about the waiver made the case too complex for a jury. Epstein J.A. held that discharging the jury because it would be too difficult to explain the law was a reversible error. She noted that the Trial Judge had been able to analyze the waiver in one paragraph of her reasons, without finding any ambiguity or resorting to principles of contractual interpretation. The waiver

was not, therefore, particularly complex.

With respect to remedy, a new trial would not have been appropriate if any jury, acting reasonably, would have inevitably reached the same result. Epstein J.A. found that a properly instructed jury could have reached a different conclusion than the Trial Judge did, and ordered a new trial.

Laskin J.A. dissented. He noted that an appeal court has a very limited right to interfere with a trial judge's discretion to discharge a jury. The only question was whether the parties would be better served by dismissing or retaining the jury, and he emphasized that a trial judge is best positioned to make that determination. The Trial Judge's concern about how the jury would use the waiver in the deliberations "was a reasonable concern", thus he held that her decision should not be disturbed.

Laskin J.A. also disagreed with the remedy. In his view, the evidence could not support any result other than one reached by the Trial Judge, so a new trial was not in the interests of justice.

This case highlights the tension between a judge's discretion to manage trials, and a civil litigant's right to a trial by jury, which can only be forfeited for cogent reasons. Although the majority paid lip service to the discretion owed to the Trial Judge, it seems possible that because she made the decision at the outset of the trial, before seeing how the evidence played out, the Court of Appeal was more prepared to interfere with her decision. Even so, the decision strengthens the right to have civil cases – even complicated ones – decided by a jury.