

Girao v. Cunningham, 2020 ONCA 260: A Cautionary Tale Regarding Trial Fairness and Self-Represented Litigants

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The Court of Appeal’s decision in *Girao v. Cunningham*, 2020 ONCA 260, provides a warning to trial judges and counsel alike to take due care when approaching trials involving self-represented litigants. As was the result in *Girao*, failing to ensure trial fairness may result in the ordering of a re-trial.

BACKGROUND

The plaintiff, Girao, commenced a tort action after allegedly suffering injuries as a result of a motor vehicle accident. She claimed \$500,000 in general damages and another \$500,000 in special damages for injuries including, *inter alia*, chronic back pain, chronic neck pain and major depression.¹ The defendant, Cunningham, denied all liability and alleged that an unidentified motorist was responsible for the accident.² Girao was self-represented and required an interpreter throughout the litigation. In contrast, the defendant was represented by two highly experienced litigation lawyers.³

At trial, the jury found the defendant fully liable for the accident. However, the trial judge dismissed the plaintiff’s action for failing to meet the statutory threshold to qualify for general damages under the *Insurance Act*. Further, the jury’s \$30,000 award for income loss was reduced to nil after the trial judge offset the award to account for the plaintiff’s accident benefits settlement award. Partial indemnity costs were ordered against Girao in the amount of \$205,542.38 plus disbursements of \$106,302.96, for a total of \$311,845.34.⁴ The plaintiff appealed.

The Court of Appeal allowed the appeal. Girao had shown that a “*substantial wrong or miscarriage of justice*” had occurred in accordance with Section 134(6) of the *Courts of Justice Act* and, in rare circumstances such as the circumstances of this case, a new trial was ordered because “*the interests of justice plainly require that to be done.*”⁵

In reaching this decision, the court particularized four bases upon which Girao suffered substantial trial unfairness: 1) the preparation, content and delivery of a joint trial brief, 2) the treatment of expert evidence, 3) the use of the plaintiff’s accident benefits settlement information, and 4) the role of the trial judge and counsel where a party is self-represented.⁶

¹ *Girao v. Cunningham*, 2020 ONCA 260 at para. 1 [*Girao*].

² *Ibid.* at para. 11.

³ *Ibid.* at para. 5.

⁴ *Ibid.* at paras. 2, 4.

⁵ *Ibid.* at para 7; *Courts of Justice Act*, R.S.O. 1990, c. C-43 at s. 134(6).

⁶ *Girao*, *supra* note 1, at para. 19.

SOURCES OF UNFAIRNESS TO THE SELF-REPRESENTED LITIGANT

1. *The Joint Trial Brief*

On the eve of trial, the defence dropped a massive and selectively redacted sixteen-volume ‘joint’ trial brief on the plaintiff which later became the basis of the trial record in what the Court of Appeal called “*an unfair way that was inconsistent with the trial practice directions of this court.*”⁷

The brief was prepared by the defence without input from Girao and the trial judge simply accepted all volumes marking each document as a numbered exhibit.⁸ To the plaintiff’s detriment, medical reports in support of her injury claims were included in the brief but heavily redacted by the defence. Virtually all evidence in favour of Girao’s claim was excised.⁹

The Court of Appeal held that the flaws in the management of the trial record were unfair and enabled the defence to keep expert evidence that was favourable to Girao from the jury and from the trial record. Notwithstanding this, the court concluded that the unfairness occasioned by the plaintiff as a result of the joint trial brief was not fatal on its own.¹⁰

When submitting a joint brief, counsel and the court are urged to consider the following questions, the answers to which should not be considered implicit upon the filing of a joint brief:¹¹

1. *“Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?”*
2. *Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?*
3. *Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?*
4. *Are the parties able to introduce into evidence additional documents not mentioned in the document book?*
5. *Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?*

⁷ *Ibid.* at para. 21.

⁸ *Ibid.* at paras. 28-29; **NB:** The distinction between numbered and lettered exhibits is an important one as lettered exhibits do not go in with the jury during deliberations while numbered exhibits do. Any document introduced that does not become a numbered exhibit shall become a lettered exhibit. For example, the best practice in jury trials is to make expert reports lettered exhibits in order to preserve the integrity of the trial record in anticipation of a potential appeal (see *Girao*, *supra* note 1, at paras. 23-24; *1162740 Ontario Ltd v. Pingue*, 2017 ONCA 52 at paras. 17, 21).

⁹ *Girao*, *supra* note 1, at para. 31.

¹⁰ *Ibid.* at para. 32.

¹¹ *Ibid.* at paras. 32, 35.

6. *Does any party object to a document in the document book, if it has not been prepared jointly?*¹²

In practice, the court recommends that the parties to the litigation enter into a written agreement addressing each of these questions and submit it together with the joint trial brief. Ideally, the trial judge should then go through the agreement line-by-line on the record to ensure that there are no misunderstandings.¹³

2. The Use of Expert Evidence

Two issues arose on appeal relating to the use of expert evidence. First, the court discussed who may be called as an expert. Second, the court addressed Sections 35 and 52 of the *Evidence Act*, each of which provides exceptions to the use of hearsay evidence.

The Court of Appeal ultimately held that errors in the admissibility of evidence created unfairness to the plaintiff and therefore created a sufficient basis upon which to allow her appeal.¹⁴

i) The Practitioners

Dr. Becker was the director of the clinic whose team members examined Girao with respect to her accident benefits claim. The covering report authored by Dr. Becker summarized his team members' reports including psychiatrist Dr. Rosenblat, whose findings substantiated the plaintiff's claim that she suffered psychological trauma as a result of the accident. The Becker Report was the most favourable expert evidence the plaintiff had.¹⁵

To the plaintiff's disappointment, the trial judge did not permit Dr. Becker to testify on his opinions of Girao's injuries and the substance of his report. Rather, Dr. Becker was only allowed to testify about the system for determining an individual's entitlement to statutory accident benefits for catastrophic impairment.¹⁶

The trial judge did, however, allow a two-page letter written by Dr. Sanchez to be adduced by the defence in order to substantiate its theory that the plaintiff had pre-existing psychological issues. Dr. Sanchez had treated Girao prior to the accident only. Despite the plaintiff's objection, defence counsel was able to rely upon Section 35 of the *Evidence Act* as a basis for introducing the Sanchez Letter. At the same time, counsel was able to avoid having to call him as a witness and avoided cross-examination of the doctor.¹⁷ The trial judge further allowed counsel to rely on the Sanchez Letter while cross-examining the plaintiff and allowed counsel

¹² *Ibid.* at para. 33.

¹³ *Ibid.* at para. 34.

¹⁴ *Ibid.* at para. 78.

¹⁵ *Ibid.* at paras. 36, 52.

¹⁶ *Ibid.* at para. 53.

¹⁷ *Ibid.* at para. 73.

to put Dr. Sanchez's opinion to several other experts. Even a portion of the jury charge relied upon the Sanchez Letter.¹⁸

ii) Defining 'Expert'

The Court of Appeal summarized the threshold requirements for the admission of expert evidence. Namely, the evidence must be relevant, it must be necessary in assisting the trier of fact, no other evidentiary rule should apply to exclude it, and the expert must be properly qualified, assuming there is no novel science issue. The trial judge must then execute his or her gatekeeper function.¹⁹

In circumstances where a person has expertise but does not qualify as an expert under Section 53.03 of the *Rules of Civil Procedure*, such person may give opinion evidence if: 1) they are 'participant experts' who form opinions based on their participation in the underlying events, such as treating physicians; or 2) they are 'non-party experts' who are retained by a non-party to the litigation and who form opinions based on personal observations or examinations that relate to the subject matter of the case, but for another purpose, such as a medical examiner for the purposes of a plaintiff's accident benefits claim.²⁰ The court cited Simmons J.A. in *Westerhof v. Gee Estate*, 2015 ONCA 206:

I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:

- *the opinion to be given is based on the witness's observation of or participation in the events at issue; and*
- *the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.*²¹

iii) Expert Evidence & The Hearsay Exceptions Under SS. 35 & 52 of The Evidence Act

On appeal, the court analyzed two exceptions to the hearsay rule found under Sections 35 and 52 of the *Evidence Act*.²²

Section 35 of the *Act* relates to business records: if a record is made "*in the usual and ordinary course of business and if it was in the usual and ordinary course of such business to make such*

¹⁸ *Ibid.* at para. 73.

¹⁹ *Ibid.* at para. 39; *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23 at paras. 47-48.

²⁰ *Girao*, *supra* note 1, at para. 40; *Westerhof v. Gee Estate*, 2015 ONCA 206 at para. 6.

²¹ *Westerhof v. Gee Estate*, 2015 ONCA 206 at para. 60.

²² *Girao*, *supra* note 1, at para. 43.

writing or record at the time of such act” then the record is admissible. It would be improper to admit opinion evidence or medical notes on the basis of this section.²³

Section 52 of the *Act* relates to medical reports, it is more expansive than Section 35 and allows a report to be admitted without having to call the practitioner. Unlike Section 35, “*Section 52 was designed as an alternative to oral testimony.*”²⁴ While the practitioner’s opinion can be accepted for the truth of its contents, the trial judge must oblige the practitioner to testify, at the request of a party, in order to permit cross-examination.²⁵

iv) The Court’s Disposition

The Court of Appeal found that the trial judge’s exclusion of Dr. Becker’s evidence was an error. Girao had properly served a notice under Section 52 of the *Evidence Act* and was therefore entitled to refer to and rely upon the Becker Report and the reports that it summarized and attached, including the Rosenblat report. Moreover, the plaintiff was entitled to have Dr. Becker explain his opinion to the jury. Had the defence wished to dispute the Becker Report, counsel could have cross-examined him and could have summoned Dr. Rosenblat to testify on his psychiatric opinion.²⁶

With respect to Dr. Sanchez, the court concluded that the trial judge had incorrectly allowed Section 35 to be used by the defence as a way to admit medical opinion evidence for the truth of its contents despite the fact that the Sanchez Letter was not a business record.²⁷ While Section 52 of the *Evidence Act* was indeed applicable, the plaintiff’s objection to the use of the Sanchez Letter, and her request to cross-examination the doctor, ought to have resulted in the trial judge refusing to admit the letter for the truth of its contents unless Dr. Sanchez was presented for cross-examination.

The hearsay content of the Sanchez Letter was not admissible for any purpose yet it formed a substantial part of the defence’s position and questioning and was used by the trial judge in his instructions to the jury. This error of law was found by the Court of Appeal to be procedurally and substantively unfair to the plaintiff.²⁸

3. The Use of Accident Benefits Settlement Information in a Tort Action

The defence used information about Girao’s accident benefits settlement to impugn her own credibility and reliability as well as that of the witnesses she called.²⁹ Specifically, the defence relied upon the plaintiff’s future income loss settlement details as the foundation for their argument that she was physically able to work but simply lacked motivation to do so.

²³ *Ibid.* at paras. 46, 48.

²⁴ *Ibid.* at paras. 45, 47; *Robb Estate v. Canadian Red Cross Society*, [2001] O.J. No. 4605, 109 A.C.W.S. (3d) 1002 at para. 152.

²⁵ *Girao*, *supra* note 1, at para. 45.

²⁶ *Ibid.* at para. 75.

²⁷ *Ibid.* at para. 74.

²⁸ *Ibid.*

²⁹ *Ibid.* at para. 79.

When assessing the admissibility of accident benefits settlement information, the court ought to consider:

1. *Whether evidence of the details or existence of the statutory accident benefits settlement is relevant to a fact in issue in the tort action; that is, whether as a matter of logic and human experience it renders the existence or absence of a material fact in issue more or less likely; and*
2. *Whether the prejudicial effect exceeds the probative value of the evidence such that it ought not to be admitted?*³⁰

Since the core issue in a tort action is whether the plaintiff is able to return to work, not whether she is malingering or motivated to work, the latter is a collateral issue relating to the plaintiff's credibility. When assessing the extent to which evidence is admissible the trial judge must weigh the prejudicial and probative effects of the information.³¹

The Court of Appeal held that the inclusion of the plaintiff's accident benefits settlement details indeed resulted in unfairness to her. In reaching this decision, each of the following principles was considered and applied:

1. A trial judge has broad discretion and control over the proceedings so as to ensure trial fairness.³²
2. Tort action trials should include instructions to the jury to make their damages award on a gross basis absent deductions for collateral benefits. It is for the trial judge to later reconcile the accident benefits and tort award in order to prevent double recovery.³³
3. The trial judge must contemplate the rules of evidence when deciding whether to admit information about the plaintiff's accident benefits settlement. This is discretionary; the trial judge must consider relevance and whether the probative value of the evidence exceeds its prejudicial effect.³⁴
4. Evidence outlining individual benefits received by the plaintiff in her accident benefits settlement may be relevant and admissible if the defence alleges that the plaintiff's abuse of the benefit has impacted the calculation of tort damages. The plaintiff is open to use the proceeds of the accident benefits settlement as she wishes. However in some circumstances it is appropriate to require a plaintiff to account for the expenditure of settlement funds. To allow for such disclosure, the pleadings must clearly state the issue in dispute and there must be an air of reality to the issue, to be assessed in a *voir dire*, with support of evidence including expert evidence if needed.³⁵
5. The full particulars of the accident benefits settlement will rarely be relevant and the prejudicial effect of this evidence will usually outweigh the probative value. This is

³⁰ *Ibid.* at paras. 94, 113; *R. v. Truscott*, [2006] O.J. No. 4171, 213 C.C.C. (3d) 183 at para. 22.

³¹ *Ibid.* at para. 112.

³² *Ibid.* at para. 130.

³³ *Ibid.* at para. 131.

³⁴ *Ibid.* at para. 132.

³⁵ *Ibid.* at paras. 133-134.

especially true for jury trials, even when the defence alleges that the plaintiff is malingering or lacks motivation to work.³⁶

6. There are public policy concerns surrounding the use of accident benefits settlement information in tort trials because the plaintiff may be exposed to unfairness. First, “*the use of collateral entitlements premised on disability to support arguments of ability, in order to undermine residual claims for recovery not addressed by such collateral benefits, seems not only ironic but unfair.*”³⁷ Second, the use of accident benefits settlement information may discourage plaintiffs from settling those claims in advance of the tort action out of a fear that the information will be used against them.³⁸
7. When statutory accident benefits settlement information has been admitted into evidence, the jury should be given clear instructions about how Ontario’s hybrid motor vehicle accident scheme functions. The trial judge should explain his or her role as well as the role of the jury and should instruct the jury not to reduce the tort award on account of previous accident benefits amounts received by the plaintiff.³⁹

4. The Duty to Assist a Self-Represented Litigant

The Court of Appeal opined on the role of the trial judge and counsel where one party is self-represented. It concluded that conduct occasioned by the court and by counsel was a further basis for finding that the trial had been unfair to Girao.⁴⁰

“*The overarching principle is that the trial judge is responsible for controlling proceedings to ensure trial fairness.*”⁴¹ In doing so, the following considerations should be observed by the court:

1. “*Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.*”
2. “*Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.*”
3. “*Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.*”
4. “*When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants’ equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may: a) explain the process; b) inquire whether both parties understand the process and the procedure; c) make referrals to agencies able to assist the litigant in*”

³⁶ *Ibid.* at para. 135.

³⁷ *Ibid.* at para. 136; *Ismail v. Flemming*, 2018 ONSC 5979 at para. 34.

³⁸ *Girao*, supra note 1 at para. 136.

³⁹ *Ibid.* at para. 137.

⁴⁰ *Ibid.* at para. 157.

⁴¹ *Ibid.* at para. 148.

*the preparation of the case; d) provide information about the law and evidentiary requirements; e) modify the traditional order of taking evidence; and f) question witnesses.*⁴²

While doing so, the trial judge must exercise actual and perceived judicial impartiality. There are limits to a judge's duty to assist a self-represented party.⁴³

Under the *Rules of Professional Conduct*, the professional ethical obligations owed by counsel to a self-represented litigant are fairly limited. Still, lawyers have more general ethical obligations such as the duty to bring to the court's attention any binding authority that the lawyer considers to be directly on point and which has not been mentioned by the opposing party.⁴⁴ In the case at bar, defence counsel was advancing problematic evidentiary positions on legally complex topics. As a result, it was within the purview of the trial judge to request counsel's assistance when faced with these legally contentious issues.⁴⁵ For example, it was open to the trial judge to request that defence counsel prepare a briefing note on the interplay between Sections 35 and 52 of the *Evidence Act* when considering the admissibility of expert evidence or on the introduction of accident benefits settlement information in tort actions.⁴⁶

STRIKING THE JURY

Girao moved to strike the jury in accordance with Section 108(3) of the *Courts of Justice Act* and Rule 47.02 of the *Rules of Civil Procedure*.⁴⁷ Her motion was not granted. However, the trial judge did not set out the basis for his refusal on the record. On appeal, the court addressed the criteria for striking a jury when one litigant is self-represented.

When seeking leave of the court to strike the jury, the moving party bears a substantial onus because "*trial by jury is a fundamental right.*"⁴⁸ This right, however, is not absolute and the court must take into consideration the context in which the relief is sought.⁴⁹ The complexity of the case – including the facts, evidence and legal principals – is a proper consideration and the trial judge must assess whether justice will be better serviced by dismissing or retaining the jury.⁵⁰

The legal and factual issues underpinning Girao's case did not markedly depart from those regularly presented to juries. Nevertheless, the fact that the plaintiff was self-represented ought to have been taken into consideration.⁵¹ Namely:

⁴² *Ibid.* at para. 149.

⁴³ *Ibid.* at para. 151; *Pintea v. Johns*, 2017 SCC 23 at para. 4; *Statement of Principles on Self-represented Litigants and Accused Persons (2006)*, issued by the Canadian Judicial Council.

⁴⁴ *Girao*, *supra* note 1, at para. 152.

⁴⁵ *Ibid.* at paras. 154-155.

⁴⁶ *Ibid.* at para. 156.

⁴⁷ *Ibid.* at para. 158; *Courts of Justice Act*, R.S.O. 1990, c. C-43 at s. 108(3); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

⁴⁸ *Girao*, *supra* note 1, at para. 160; *McDonald-Wright v. O'Herlihy*, 2007 ONCA 89 at para. 13.

⁴⁹ *Girao*, *supra* note 1, at para. 163; *Kempf v. Nguyen*, 2015 ONCA 114 at paras. 43, 119.

⁵⁰ *Girao*, *supra* note 1, at para. 161-162; *Kempf v. Nguyen*, 2015 ONCA 114 at paras. 43, 119.

⁵¹ *Girao*, *supra* note 1, at para. 166.

- Girao was self-represented and was not familiar with the law;
- Proceeding with a jury trial may have impeded the trial judge's ability to assist the self-represented plaintiff;
- She required an interpreter to testify and conduct cross-examinations which caused undue difficulty;
- Counsel for the defence were highly experienced jury-trial lawyers; and
- The jury was frequently excused from the courtroom when the defence objected to the plaintiff's questions or statements; this reduced the efficacy of the trial and added to the frustrations of all involved, likely to the plaintiff's detriment.⁵²

The court acknowledged that striking a jury is the exception, not the rule. The presence of a self-represented litigant should not invariably result in the jury being struck: "*In many if not most cases, a trial judge should be able to fairly manage a civil jury trial with a self-represented litigant, with the willing assistance of counsel acting in the best traditions of officers of the court.*"⁵³

In the totality of the circumstances, the Court of Appeal concluded that the trial judge ought to have revisited and reconsidered the plaintiff's request to strike the jury.⁵⁴ Despite this, the court refused to strike the jury. It would be more appropriate for the trial judge at the re-trial of the action to make any such determination.⁵⁵

CONCLUSION

Where a self-represented litigant is involved, there are several potential sources of unfairness that may influence a proceeding. Counsel must remain vigilant when preparing a joint trial brief to ensure that it is collaborative. Both the court and counsel should ensure that all parties understand and agree with the contents of the joint brief and should establish consensus on the record. The court must also employ its gatekeeper function when contemplating the admission of evidence, including expert evidence and accident benefits settlement details. The latter requires a nuanced analysis of relevance and a weighing of the prejudicial and probative effects. Counsel must assist the trial judge, especially when advancing complex legal positions. In turn, the court must remain impartial while providing assistance to a self-represented litigant. Ensuring trial fairness is paramount. Failure to take these considerations into account can be costly and may result in a re-trial.

⁵² *Ibid.* at paras. 168-169.

⁵³ *Ibid.* at para. 171.

⁵⁴ *Ibid.* at para. 172.

⁵⁵ *Ibid.* at para. 173.