Toronto Law Journal

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]

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[1] *Girao v. Cunningham*, 2002 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?*

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[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 Procedur*e, 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:*
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> - *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*

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[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.

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[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:

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[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.

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Reopening a Safe Workplace: To test employees temperatures or not?

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As the economy reopens and restrictions on businesses are eased, the question at the top of mind for many employers is how to keep their workplaces and people safe. There are several measures employers can take, including rearranging the workplace to ensure social distancing, sanitizing high-touch areas, asking employees to self-report symptoms of COVID-19 and to stay home if they are ill. In addition, many employers are considering implementing temperature screening when employees enter the workplace, and others have already begun doing so.

Testing temperatures before permitting employees to report to work may be an aid in screening for sick employees and preventing the spread of COVID-19 within the workplace. However, it may also expose employers to risks under applicable human rights and privacy law.

This article sets out a series of considerations for employers concerning the implementation of temperature screening as part of their reopening plans, and, in particular, the return of employees to the physical workplace. Please note that this article considers governmental and public health announcements and guidelines available as of June 2020.

The Efficacy of Temperature Screening

According to the World Health Organization and the Public Health Agency of Canada, one of the most common symptoms of COVID-19 is a fever. A fever is indicated by a temperature over 38˚C or 100.4˚F. While fevers are not exclusive to individuals with COVID-19, they do provide an objective symptom to test for, unlike other screening measures that are highly reliant on employee self-reporting. Temperatures can be taken through non-invasive methods such as touchless infrared scanners. Therefore, temperature testing may be useful in increasing the safety of the workplace.

Employers' Duty to Provide a Safe Workplace

Employers in Ontario have a general duty under the *Occupational Health and Safety Act* ("OHSA") to take every precaution reasonable in the circumstances for the protection of a worker. The potential consequences for failing to comply with OSHA include charges by the Ministry of Labour, Training and Skills Development. The maximum penalty that a corporation may face is $1,500,000.

In anticipation of workplaces reopening, and to support employers, the Government of Ontario has provided sector-specific guidelines to help prevent the spread of COVID-19 in workplaces. Among other things, the guidelines recommend avoiding contact with potentially infected

people and ensuring that workers stay home if they have symptoms. Temperature screening may help employers to follow these recommendations in a generally non-invasive manner.

Potential Impact of Temperature Screening on Human Rights

Employees are also protected against adverse treatment due to illness or disability (whether perceived or actual) under applicable human rights legislation. During the 2003 SARS outbreak, the Ontario Human Rights Commission published a statement clarifying that the ground of "disability" covered diseases such as SARS, and that differential treatment of persons who had or were perceived to have SARS, for reasons unrelated to health and safety precautions prescribed by medical and public health officials, was prohibited under the Ontario *Human Rights Code*. While there have not yet been any cases expressly stating that COVID-19 falls under the ground of disability, it will likely be treated similarly to SARS.

Human Rights Commissions in various provinces including Ontario have recently posted policy positions stating that under the unique circumstances created by the COVID-19 pandemic, temperature screening may be permissible. They qualify this by adding that temperature screening does not permit discrimination against persons with disabilities (*i.e.*, COVID-19), and employers still have an obligation to ensure privacy is maintained. Nonetheless, the Commissions generally acknowledge the importance of the employers' rights and obligations for employees' health and safety at work.

Currently, larger cities like the City of Toronto are encouraging employers to step up employee screening efforts. Employers are not being told to mandatorily conduct temperature testing, but there is certainly a growing view that employers can help stop the spread through enhanced screening.

While we have not yet seen any human rights cases involving temperature screening, human rights cases have arisen in similar circumstances in connection with workplace requirements implemented by employers. For example, *Wheatley v. Emergency Health Services Commission (No.3)* ("*Wheatley*")[1] concerned a human rights complaint made shortly after the SARS outbreak in connection with an employer's implementation of a respiratory protection program for paramedics. The program required the paramedics to be clean shaven in order to be fitted with an N-95 protective mask. The applicant asserted that he had a skin condition that was irritated by shaving, and he requested a costly respirator as a form of accommodation (which did not require him to shave his beard). The applicant was generally uncooperative in the process and ultimately his request was not accepted. While the British Columbia Human Rights Tribunal ultimately found that the applicant's skin condition was not a disability for the purposes of the British Columbia *Human Rights Code*, it went on to state that even if the applicant *had* a disability, the employer's respiratory protection program was a *bona fide occupational requirement*, as it was a reasonably necessary measure instituted to accomplish a legitimate

[1] 2009 BCHRT 106 at para. 195.

work-related purpose — in this case, protecting paramedics and the public from SARS and other airborne diseases.

In *Vasey v. St. Michael's Hospital* ("*Vasey*"),[2] a registered nurse with a chronic lung disorder was forced to stay home from work when the hospital she worked at implemented an N-95 mask requirement during the second SARS outbreak. She was unable to wear an N-95 mask because of her disability. The Ontario Human Rights Tribunal found that there was nowhere the applicant could have worked at the hospital, given the workplace-wide mask requirement, and by requiring her to stay home, she was not singled out on the basis of her disability, or treated differently from any other employee who could not wear an N-95 mask.

The issues that arise in cases like *Wheatley* and *Vasey* demonstrate that medical tests or related employer workplace requirements in the context of COVID-19 may potentially have an adverse impact on employees with other disabilities. To avoid this, employers should only get information from medical screening that is reasonably necessary to the employee's fitness to perform on the job and any restrictions that may limit this ability, while excluding information that may identify a disability (perceived or otherwise). Among other things, to minimize exposure to human rights claims, employers should ensure that the temperature screening policy is applied uniformly to all employees. This is consistent with an employer's obligation to keep the workplace free from discrimination on the basis of prohibited grounds like disability.

Potential Impact of Temperature Screening on Privacy Rights

In general, Canadian employers must justify any rule, policy, or program that involves an invasion of privacy by balancing the effectiveness of the policy or program in achieving a legitimate workplace goal, against the impact on the privacy interest of employees. A "greater good" must result from the policy or program's application in comparison to the harm done towards employee privacy.

Privacy laws vary by jurisdiction. Federally regulated corporations are subject to the *Personal Information Protection and Electronic Documents Act*. Privacy legislation also exists in British Columbia, Alberta, and Quebec. In Ontario, the common law governs privacy for provincially-regulated employers. For example, the tort of inclusion upon seclusion was recognized in Ontario in the 2012 decision, *Jones v. Tsige*.[3] A finding for this cause of action requires the following elements: (1) the defendant's conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (3) a reasonable person must regard the invasion as highly offensive, causing distress, humiliation, or anguish.[4] In the context of COVID-19, assuming that an employer has implemented a proper policy and procedure concerning temperature screening, the risk of a successful tort action in this respect is likely low, given the relative sensitivity of the information collected, and the high threshold of "intentional or reckless" conduct on the part

[2] 2011 HRTO 1257.

[3] 2012 ONCA 32.

[4] *Jones* at para. 71.

of an employer. Additionally, if a healthcare practitioner is collecting the information on behalf of an employer, the Ontario *Personal Health Information Protection Act* may apply to the collection, use and disclosure of such information.

There are several steps employers may consider taking to minimize potential infringements on employee privacy rights in connection with temperature screening. Employers should provide an employee-facing notice that informs employees of the collection, use and disclosure of their personal information, including the COVID-19 temperature screening. Adequate security safeguards should be implemented to protect the information, such as minimizing the amount of people with access to employee temperature data, and anonymizing data where possible. Additionally, employers should securely retain the personal information in accordance with any applicable legislation.

Temperature screening should also be conducted in a private area. Employers should discreetly direct individuals with high temperatures away from the workplace — for example, an employer should avoid having an employee who is sent home with a fever walk past a line of his or her colleagues.

Conclusion

The idea of temperature screening has evolved recently as a result of the increased risks to the health and safety of workplaces brought on by COVID-19. In these evolving circumstances, it remains important for employers to implement appropriate screening procedures in order to mitigate existing human rights and privacy risks. Lastly, it is important to acknowledge that temperature screening may not capture asymptomatic carriers of COVID-19 and depending on how the screening is conducted, it may not accurately capture people with a fever. In short, an employee with an elevated temperature does not necessarily have COVID-19 or any other respiratory illness, and individuals may in fact have COVID-19 and not have an elevated temperature. This is one of the reasons why pairing any temperature screening with, for example, a self-assessment questionnaire/declaration is generally recommended.

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Post Pandemic: The New Normal for Tax Litigation

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With the closure of the Tax Court of Canada due to the COVID-19 pandemic, the progress of most proceedings slowed, while others were brought to a halt. Although other Canadian courts had similarly restricted operations during this time, some resorted to the use of technology to address outstanding matters, including through video and teleconferencing. The Tax Court did not take such measures. The Tax Court was not viewed as providing essential services and did not have the technological capability to operate remotely. As a result, it was closed for business in all respects.

On June 25, 2020, Chief Justice Rossiter and Associate Chief Justice Lamarre provided an update on the reopening of the Court and outlined new procedures that the Court intends to implement to address the backlog created by the pandemic.

Timelines and Protocols for Reopening

The Tax Court expects to reopen for business on July 6, 2020. Highlights of the reopening process include:

- increasing the number of judicial sittings and scheduling them back to back (including throughout the summer);
- scheduling hearings by region (Western, Central, Québec, Atlantic) and only in select cities with the highest volumes;
- proceeding with hearings already scheduled for a date after the Court reopens;
- giving priority to rescheduling trials that were in progress and other hearings that were adjourned as a result of the pandemic;
- dealing with all motions in writing unless the parties request otherwise, in which case they will have to wait for a hearing date;
- prioritizing the release of decisions that are currently under reserve;
- reconfiguring all courtrooms to ensure the health and safety of attendees; and
- holding video conferences and virtual hearings in the future, where possible, for case management conferences, status hearings, applications and motions where there are no witnesses.

New Fast-Track Settlement Conference Initiative

The Tax Court has also announced a new initiative to encourage settlement. More particularly, the Court is implementing a fast-track settlement conference system for general procedure appeals. This will be a temporary measure, affording the Court an opportunity to assess its effectiveness. It is anticipated that, on July 20, 2020, parties will be able to submit requests and hearings will be scheduled beginning in October and November 2020.

Key features of the new procedure are as follows:

- It will be available only if both parties agree to it.
- Parties who are interested will file a joint conference request brief to which they will attach the pleadings, and in which they will identify the key issue(s), their respective positions, the basis for their positions and the amount of tax at issue. The brief will be written in the official language in which the parties will want the settlement conference to be conducted.
- If the appeal is considered suitable, the judge will contact the parties, provide them with a date for the conference, indicate who will need to attend the conference and make any other request deemed necessary to ensure that the conference proceeds efficiently.
- The judge will also determine whether the conference will be held virtually or in person in Vancouver, Montreal or Toronto.
- Should the matter fail to settle, the judge who presides the settlement conference will not preside over the trial.

Concluding Observations

Litigants with appeals that are underway, and those on the verge of commencing litigation in the Tax Court, may fear that the bottleneck created by the pandemic will have a cascading effect on the system, causing further delay once the Court returns to full service. Although the current crisis has no doubt disrupted court proceedings, there may be a silver lining.

The Court is conscious of the financial difficulties being experienced by individuals and businesses. It remains committed to clearing the backlog as quickly as circumstances will allow. Despite the Court's best efforts, there will inevitably be delays in getting matters to trial. However, as the Court adapts to new realities, it is considering different methods of operating and other new initiatives, potentially resulting in greater efficiencies for all involved.

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A Notice of Rescission by Any Other Name: Pleadings May Double as Notices of Rescission

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Under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*Wishart Act*"), franchisees are given a broad right to rescind their franchise agreement within the two year period, if the franchisor has failed to provide adequate disclosure, or if the franchisor provided no disclosure at all. The *Wishart Act* does not specify any form of notice of rescission, but requires that notices of rescission be in writing and delivered to the franchisor in a manner prescribed by the *Wishart Act*.

In *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, 2009 ONSC 4055, the court stated that for a notice of rescission to be valid, it must adequately inform the franchisor that "the franchisee is exercising its statutory right of rescission under the [*Wishart Act*] and to inform the franchisor that the clock has begun to run". In that case the court found that a pleading in the context of litigation was not sufficient notice to the franchisor of the franchisee's right to rescind.

The recent case of *2352392 Ontario Inc. v. MSI*, 2020 ONCA 237 ("*MSI*"), has however concluded that an originating process can sometimes double as a valid notice of rescission.

Factual Background

In a previous action on the same facts, the former franchisee's bank commenced an action against the former franchisee. In response, the former franchisee, through its former solicitors, issued a third-party claim against the franchisor, wherein it claimed rescission, and damages, due to inadequate disclosure. In *MSI,* both the former franchisee and the former franchisor argued that the third-party pleading did not constitute a valid notice of rescission, while the former franchisee's former solicitors argued that it did. There is a certain amount of irony here in that the franchisor and the former franchisee were on the same side, so to speak, against the former franchisee's former solicitor. If the pleading did not constitute a notice of rescission, then the former franchisee would have a claim in negligence against the former solicitor. The parties brought a Rule 21 motion to determine this issue.

The motion judge held that the third party claim did not constitute sufficient notice under the *Wishart Act*. According to the motions judge, an originating pleading is distinct from a notice of rescission because the two documents serve different purposes. Moreover, since the *Wishart Act* states that a franchisor has sixty days to pay rescission amounts after the notice of rescission is delivered, an action for damages cannot be commenced until that time period has expired.

Legal Analysis

In *MSI*, the Court of Appeal reversed the motion judge's decision. According to Feldman J.A., there was nothing in the *Wishart Act* that precluded a valid notice of rescission being delivered through a third-party claim, as long as it was delivered within the prescribed time period.

The reasoning for this is because the *Wishart Act* is remedial legislation, and as such, "it should be interpreted in a generous manner" and in a way that balances the rights of both franchisees and franchisors.

Moreover, according to Feldman J.A., a notice of rescission is not always a precondition to litigation, and should not be treated as such. The *Wishart Act*'s only requirements for a valid notice of rescission are that it be in writing and that it be delivered to the franchisor.

A pleading may comply with these requirements, as it did in this case, because it notified the former franchisor of the former franchisee's intention to rescind its franchise agreement, without prejudicing either party.

Practice Takeaways

The Court of Appeal's decision reinforces that in franchise law disputes, substance will be prioritized over form. It must be noted that, although in this case a pleading (the third-party claim) was held to be a valid notice of rescission, a separate statement of claim was issued for the actual rescission damages. It is unclear whether a notice of rescission contained within the statement of claim for rescission damages will constitute sufficient notice.

Moreover, in *MSI,* a key distinguishing factor from previous jurisprudence was the high level of detail included in the third-party claim. The third-party claim referenced the *Wishart Act* and adequately informed the former franchisor of the former franchisee's intent. Franchise law practitioners should ensure that any documents that are meant to be notices of rescission are detailed and follow all requirements set out in the *Wishart Act*.

The Court of Appeal also emphasized that this approach is not ideal or recommended. As such, practitioners ought to be careful, at least until *MSI* becomes widely adopted, and best practice should dictate that practitioners should issue a separate, stand-alone notice of rescission.