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Personal Injury

‘Bright line’ needs to be drawn around jurors searching Internet, lawyer says

By **Amanda Jerome**

(March 6, 2020, 9:16 AM EST) -- The issue of jurors searching the Internet for information during a trial, and the potential this has to skew verdicts, has been raised as a red flag by lawyers after the Ontario Court of Appeal dismissed an appeal in a personal injury case where the jury’s foreperson turned to a government website for information during deliberation.

“We can anticipate, whatever the future holds, that this will be more of an issue, not less,” said Allen Wynperle, of Wynperle Law and president of the Ontario Trial Lawyers Association.

Patrick Brown, of McLeish Orlando LLP, said it would be “naïve” to think that this issue isn’t widespread and that “simply a direction by the judge at the beginning of the case is going to change this.”

Allen Wynperle, Wynperle Law

In *Patterson v. Peladeau* 2020 ONCA 137, the court heard that the jury foreperson had found information on an Ontario provincial government website over the weekend, after the jury had started its deliberation. The foreperson then shared that information with the other jurors at trial, potentially impacting the “apportionment of liability” for the car accident they were deliberating.

The appellant, Robert Patterson, was struck by the respondent, Pascal Peladeau, while he was “standing on the road next to his truck.” According to court documents, the respondent’s car “clipped” the truck and then hit the appellant, which left him with “a fractured pelvis and other significant injuries.” The appellant, with his family as co-appellants, claimed over $4 million in damages.

The trial judge, Justice Charles Hackland of the Superior Court of Justice, had instructed the jury on s. 170(12) of the *Highway Traffic Act*, which provides that “no person shall park or stand a vehicle on a highway in such a manner as to interfere with the movement of traffic.”

According to court documents, Justice Hackland instructed the jury on this because it was “manifestly obvious” that the appellant had “contravened this provision” and was at “least partially” responsible for the accident. However, it was for the jury to decide “on the parties’ relative degree of fault.”

After an eight-week trial, the jury convened its deliberations on a Friday afternoon. According to court documents, the jury came back with several questions for the trial judge on Monday morning. One question, the judge and counsel agreed, was based on s. 17(2) of the *Fault Determination Rules*, a regulation under the *Insurance Act* used for “resolving property damage claims between insurers.”

According to court documents, these rules were “irrelevant to the liability issues in the action.”

Justice Hackland was to question the jurors individually in open court to find out how they’d come across the rules. He questioned the foreperson first, who admitted that he was source and was the only juror who had accessed the Internet. The judge decided not to question the other jurors and instructed them to “cease discussion of the liability issues.”

According to court documents, the appellants brought a motion to strike the jury and proceed with a judge alone trial. Justice Hackland dismissed the motion and issued a correcting charge, which instructed the jury that the relevant section to the case was s. 170(12) of the *Highway Traffic Act* and that the *Fault Determination Rules* had “no relevance” to the liability issue it was trying to determine.

The judge “reiterated the instruction he gave at the beginning of the trial that ‘it is completely improper to research or Google law and there must be no reoccurrence of this’ ” and instructed the jury to decide the verdict based on the evidence entered into the record at trial.

According to court documents, the jury then found the appellant 73 per cent contributorily negligent in the collision and the respondent 27 per cent at fault. The appellants moved for a mistrial, but Justice Hackland dismissed the motion.

This brought the appellants to appeal, arguing that: “(1) the trial judge failed to conduct a proper inquiry to determine the nature and scope of the extrinsic information that the jury obtained; and (2) the trial judge failed to appropriately analyze the prejudicial effect of this information.” If either argument is accepted, the appellants submitted that the remedy should be a new trial.

However, the Court of Appeal did not accept any of the appellants’ submissions and dismissed the appeal.

On the first ground of appeal, Justice James MacPherson wrote that Justice Hackland “did conduct a proper inquiry” and he was “entitled to conclude that he did not need to question or poll every juror or to permit counsel to do so.”

On the second ground, Justice MacPherson noted that Justice Hackland "undoubtedly did consider the prejudicial nature of the extrinsic information," which is why he gave the jury a correcting charge.

The judge stressed that, as the Court of Appeal noted in *R. v. Pannu* 2015 ONCA 677, "absent legal error, misapprehension of the evidence, or patent unreasonableness, an appeal court should accord deference to a trial judge's decision to provide a correcting charge rather than declare a mistrial."

With Justices Robert Sharpe and Mahmud Jamal in agreement, Justice MacPherson dismissed the appeal in a decision released Feb. 20.

Wynperle told *The Lawyer's Daily* that this case illustrated for him how the web and technology is changing the law.

"I left law school 26 years ago; we didn't have e-mail. We didn't do a lot of research on the web," he said, remembering that at that time there was QuickLaw, but it was only a dashboard-based computer program.

In terms of technology and juries, Wynperle believes that all justice system stakeholders "need to get together and work on how we are going to create rules and procedures for unplugging jurors during trials and dealing with breaches in a more uniformed fashion."

"I think that if we don't do that now, we are at risk of future deterioration of confidence in juries, especially in civil matters," he said.

Wynperle noted that in this case it's unclear to what extent the information from the Internet informed the foreperson, and by extension, the jury. However, information can't be walked back.

"They've read it, they've heard it, they've absorbed it. You can't wipe it away once it's done," he stressed.

"We still really don't know what the impact the foreperson's research had on the other jurors. The judge did question the foreperson about it but didn't poll the other jurors," he said, noting again that there has to be a process in place when a breach occurs.

"There also has to be a process in place when the trial starts, which is more rigid, more strict. There has to be a bright line drawn around this issue," he said, noting that if jurors can't "unplug" during a trial it throws into "jeopardy" the utility of civil trials by jury.

Patrick Brown, McLeish Orlando LLP

"That's the risk we're all facing and I think, as time goes on, we're only seeing the impact of technology being magnified in our daily lives, in our practices, and that doesn't stop when people get into the jury box," he added.

Brown said this case is an example of what "many lawyers already suspect," that juries are "Googling and obtaining other information that easily can skew verdicts."

He noted that sequestering jurors until their verdicts are given is not a financial option the justice system can afford, so "the only real solution to these types of things is to get rid of juries in civil cases and abolish them just like other jurisdictions have done because we simply can't control this from happening …"

Until the legislature abolishes juries, Brown stressed, counsel should be "very vigilant" in jury trials to "ensure that the direction from the judge is extremely strong to jurors about accessing outside information from the courtroom."

"It shouldn't be caught in the middle of a very long direction where it might be lost," he said, adding that he believes the judge should be giving this direction on daily basis as well as canvassing jurors at the end of a case to see if any of them "Googled outside sources during the course of the trial in relation to issues in the trial."

"I do think there should be further investigation and study into the nature and extent of jurors using social media [and the Internet] during the course of trials. I don't think that's been done to the full extent and I do think many people believe, certainly in the civil process, that it could be very well skewing verdicts," Brown stressed.

Counsel for the appellants, Tom Connolly of Connolly Obagi LLP, said the party is considering leave to appeal to the Supreme Court of Canada.

Counsel for the respondent did not respond to request for comment.

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