SHOULD A TRIAL JUDGE'S UNCERTAINTY AS TO THE ADMISSIBILITY OF EVIDENCE CONSTITUTE A GROUND FOR DISCHARGING THE JURY?

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This is an analysis of several matters considered but not decided in the recent case of *English* v. *Richmond*[1] and is offered in the hope (however thin) of reducing the risk that they will be decided but not considered in subsequent cases.

During the course of a trial, one counsel frequently offers evidence to which opposing counsel objects, and the trial judge is not too sure whether the evidence is admissible or not. He avoids trouble by pondering and parrying while he hopes that either the evidence or the objection will not be pressed to the point where he must make a ruling. If both sides insist, a trial judge more frequently admits over objection than he excludes over objection. The reason for this is that courts of appeal tend to decide that improperly admitted evidence caused no real prejudice more frequently than they decide that improperly rejected evidence would have had no effect on the trial.

Recently a Canadian trial judge sitting with a jury invented a new technique. When a difficult question of admissibility arose he discharged the jury in order that he might reserve the question of admissibility because, as he explained, he did not want to keep the jury waiting while he considered the problem. At the end of the case he found it unnecessary to determine whether the evidence was admissible or not because, as he said, he could ignore the questionable evidence and still reach the conclusion to which it led. The most surprising thing about this most surprising case is that three out of five members of the Supreme Court of Canada

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[1] [1956] S.C.R. 383; (1956), 3 D.L.R. (2d) 385.

approved everything the trial judge did and said. Two members of our final court of appeal wrote vigorous dissenting judgments.

In *English* v. *Richmond*,[1] English was the owner and driver of a motor car which was in collision with the defendant Richmond's car. English was prosecuted for the crime of dangerous driving[2] and apparently in the same proceeding was also prosecuted for the no-crime of driving "without due care and attention or without reasonable consideration for other persons using the highway."[3] The only reports I found make no attempt at completeness, but English probably pleaded not guilty to both charges. The Crown called all its evidence. When the defence had called two only of its witnesses, counsel for the Crown interrupted the proceedings to state that he realized that he could not make the criminal charge stick, and that he therefore proposed to make a deal with counsel for the accused for a withdrawal of the dangerous driving charge in return for a plea of guilty to the non-criminal but merely penal charge under the Ontario legislation. The terms of the compromise were carried out. Each side had its moment of partial victory.

Whatever English may have got off the bargain counter before the magistrate he and his sister paid for many times in the later civil action in which English sued Richmond for damages to English's car. In the collision Laing, a passenger in English's car, had been killed, and the widow Laing (English's sister) had her action (under the Ontario version of Lord Campbell's Act) heard in the same proceeding as the action brought by English for damages to his car. This double action was set down and opened as a jury trial. English testified. On cross-examination English was asked whether any charge arising out of his driving at the time of the collision had been laid. At this point the trial judge very properly excluded the jury. On the *voir dire*, counsel who had acted for the prosecution testified before the trial judge and established in detail the circumstances surrounding the arrangement under which the plea of guilty had been entered by counsel who had acted for English at the time. English testified to the same effect.

Counsel for Richmond was trying to get English's plea of guilty admitted. The mere fact that English had been charged was hearsay too unmitigated, and clearly inadmissible; and what-

[2] This is the expression used in the case. There is no indication of the date of the prosecution.

[3] This is the wording of the provincial offence under the Ontario legislation (Highway Traffic Act, R.S.O., 1950, c. 167, s. 29).

ever the law may once have been, *Hollington* v. *Hewthorn*[4] and *Manuel* v. *Manuel*[5] had made it clear that English's *conviction* was inadmissible on the issue of English's negligence. There appears to have been no effort made by counsel for Richmond to work in English's conviction for the purpose of impeaching English's credibility as a witness.[6]

The trial judge may have seen that English's plea of guilty was probably more prejudicial than probative, and did not know whether to admit the evidence or not. He expressed concern over the fact that whatever he did might not meet with favour on appeal. At this point he decided that the best thing for him to do was to get rid of the jury because he wanted time to decide the difficult question of admissibility and he did not want to keep the jury waiting while he decided it. He appeared to assume that it was impossible to reserve on a question of admissibility with the jury in the picture, but that it was quite proper for him to reserve on the question of admissibility with no jury involved, and also that it was proper for him to discharge the jury in order that he might reserve on the question of admissibility. The jury was therefore discharged, the difficult question of admissibility shelved, and the trial proceeded.

Later, in delivering judgment for the defendant, the trial judge again avoided deciding the question of admissibility on the ground that counsel for English had admitted in his argument that his client was guilty of some negligence. The nature and occasion of this admission are not specified: but in the Supreme Court of Canada one of the arguments made on behalf of English was that the trial judge had erred in failing to apportion the damages, and my inference is that the so-called admission was made when counsel for English made his alternative argument for division.[7]

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[4] [1943] K.B. 587 (C.A.).

[5] (1955), 1 D.L.R. (2d) 429. In this case Mr. Justice V. C. MacDonald held inadmissible in an action for divorce the respondent's previous conviction on a charge of rape. See the discussion in *La Fonciere Compagnie d'Assurance de France* v. *Perras*, [1943] S.C.R. 165.

[6] Had he done so, this would have raised another problem. Our legislatures appear to assume that persons convicted of crime or even provincial offences are such willing and convincing liars that the jury must be put on special guard against their skill and enterprise.

[7] The trial judge found that English's negligent driving was the sole cause of the collision. Whether on the ground that English had or ought to have had the last chance or on the ground that the defendant's car was not negligently operated at all does not appear, although the language of the judge makes one suspect that he was a continuing last chancer. Furthermore *unless* the Richmond car was negligently operated the negligence of English was irrelevant. Unless the trial judge finds Richmond negligent neither English's negligence nor the impossible problem of de-

Such an admission is a purely hypothetical alternative assumption neither intended nor normally understood as *admitting* anything.

English and the widow both appealed through the Ontario Court of Appeal to the Supreme Court of Canada which divided three to two. Apart from apportionment (on which the report sheds no light), three main arguments were dealt with in the Supreme Court. These I will discuss briefly in the order in which they appear in the majority judgments.

(1) Was the plea of guilty admissible? The majority, three, quoting a casual dictum from *Hollington* v. *Hewthorn*[8] and disregarding an earlier strong expression of opinion by the Ontario Court of Appeal,[9] said that it was; the minority, two, said that it was not. Although the trial judge talked obscurely about admitting the evidence subject to objection, he very definitely abstained from ever making a ruling on admissibility. By his own statement the evidence was neither admitted nor considered.[10] Therefore, al-

termining which of two negligent acts, both of which caused the collision, was the *sole* cause of the collision is presented at all. The inference is therefore (almost) irresistible that the trial judge found the Richmond car negligently operated and exempted Richmond from liability on the ground that English's negligence was subsequent and severable.

[8] *Supra*, footnote 5. [9] *Potter* v. *Swain*, [1945] 4 D.L.R. 4.

[10] Two of the majority judges, Chief Justice Kerwin and Mr. Justice Taschereau, describe the evidence given by English and counsel who prosecuted English, setting forth the circumstances under which the plea of guilty was bargained for and obtained as "certain alleged explanations". These judges also described what the trial judge did as admitting the evidence subject to objection. Becoming confused by failing to distinguish between admitting evidence subject to objection and reserving a question of admissibility may offer an easy way out of a difficulty for a trial judge who wishes to avoid making a ruling on admissibility. The case is not reported below and we learn what the trial judge said from the members of the Supreme Court of Canada. (Mr. Justice Locke, and Mr. Justice Cartwright who quote from the record below.) This is what the trial judge said: "I think it is obvious that the question of the admissibility of the statement made by Mr. English on the occasion of his prosecution on the charge of dangerous driving is one which presents some difficulties. If the evidence is admitted the plaintiffs fear they may be adversely affected. On the other hand, the importance of such an admission to the defendant is not to be overlooked. I think the proper course in this case is to admit the evidence but I shall discharge the jury, which will mean that in the event of either side being dissatisfied with the judgment the Court of Appeal will be able to pronounce a final judgment without the necessity of sending this action back for another trial, which undoubtedly would be the case if it did not agree with the ruling which I should make concerning admissibility.

As to the admissibility itself, I have still an open mind but I propose to take the evidence subject to objection and of course, I shall have to reserve judgment." [1956] S.C.R. 383 at p. 389; 3 D.L.R. (2d) at p. 390.

He then said to the Jury: "Members of the jury, while you have been out I have been listening to some evidence and an argument on a difficult question of law. In the exercise of my discretion and *because* the ruling *which I shall have to give* on an important point of law is one which I shall have to *reserve* for further consideration, I have come to the conclusion

though argued, the question of admissibility was not really before the Supreme Court for decision and none of the opinions expressed by the members of the court should be regarded as anything more than an essay by the judge on a problem he has not yet had presented to him for decision. The majority judges offer no show of reason for admitting the plea of guilty but the dissenting judges, particularly Mr. Justice Abbott, offer strong reasons for excluding it:

(a) The plea of guilty was not sufficiently reliable evidence because it was entered simply to buy peace and not as a confession of wrong-doing.

(b) in any event, an admission made by counsel for the purpose of a criminal trial is neither made nor authorized for any purpose beyond the necessities of that trial.

It is straining at the gnat of relative reliability to reject a conviction in a defended action and swallowing the camel of relative unreliability to admit a plea of guilty which comes normally from hope of a lighter, or fear of a heavier, sentence, if the matter is unsuccessfully defended. Such a plea is also entered frequently because it is much cheaper to pay a nominal fine than to pay for a defense, however successful. In a subsequent civil action the

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that I should finish this case without a jury being present. *It is not possible to adjourn the trial until I should make up my mind with regard to what should be done with the matter I have been concerned with in your absence.* The most practical and in the long run I think the best interest of the litigants will be served by discharging you now and finishing this case myself." [1956] S.C.R. 383 at p. 393; 3 D.L.R. (2d) 385 at pp. 393-4.

These passages, particularly the portions I have underlined, are my reason for believing that the trial judge *reserved* the question of admissibility which is, in my opinion, very different from admitting evidence subject to objection. My reason for saying that the trial judge never *did* decide the question of admissibility is my interpretation of the following passage in his judgment: "In arriving at my conclusion I have disregarded evidence of English's conviction on a charge of driving without due care and attention which was admitted subject to objection because counsel for English admitted in the course of his argument that his client had been guilty of some negligence."

This passage is inexact. Notice that it speaks of *conviction,* not plea of guilty. It uses the phrase "admitted subject to objection" but, as the first of these passages shows, the judge uses that phrase to mean: evidence on which he has reserved the question of admissibility because this evidence was objected to when tendered.

This I interpret as still refusing to decide the question of admissibility but, by finding *other* evidence to lead to the same conclusion, making it difficult for English to make anything of that issue on appeal. Notice also that the substitute for the disregarded evidence which the judge finds to justify his conclusion that English was negligent is, as I have explained elsewhere, no substitute at all but merely the statement of hypothetical assumption upon which to base an argument for apportionment of amount of damages under the contributory negligence legislation. No mention of anything that could be called improper driving appears in the only report of the case that I have found.

importunities of the party who wants to benefit by the prejudicial overtones of plea of guilty should not be permitted to outweigh the risk of unfair prejudice. The party wishing to introduce a plea of guilty either has or has not other evidence. If he has, he does not need, and if he has not, he normally should not have, the benefit of this peculiar and highly prejudicial type of admission. As I have said above, the Supreme Court did not decide the question, but unfortunately a recent case in the New Brunswick Court of Appeal did,[11] although that court likewise offered no reason for its conclusion but merely quoted dicta from *Hollington* v. *Hewthorn.*

(2) Did the trial judge err in discharging the jury in order that he might reserve the question of admissibility? The three-judge majority said that this was a proper exercise of judicial discretion to determine whether the case should be tried by a judge and jury or by a judge alone.

I cannot agree. In the first place the trial judge did not purport to decide that this was not a proper case for a jury trial. He had, by hypothesis, ruled that this was a proper case for a jury trial. His only reason for changing this opinion was that he did not know what to do about a problem of admissibility. Surely the question of whether a case is or is not a proper case for a jury trial must turn on the jury's capacity to weigh the evidence likely to be admitted, not on the judge's uncertainty concerning the law of evidence.

Can a judge *ever* reserve a pure question of admissibility? Evidence is sometimes admitted conditionally on the understanding that subsequent evidence will establish its relevancy. But no such situation presented itself in this case. As Mr. Justice Cartwright points out, unnecessary confusion is inescapable if a judge fails to rule on admissibility when evidence is tendered and objected to even when no jury is involved. Nobody knows whether the evidence is in or not. Counsel who offered it must wonder whether to paint the lily by offering alternative evidence to establish the same fact. Opposing counsel must wonder whether he need bother to offer contradictory evidence. Both counsel are handicapped in making a clear analysis of the probable facts for argument. Frequently this would mean that each counsel must submit alternative arguments based on the possibility that the evidence is admitted and the possibility that the evidence is excluded. Both facts and law are normally uncertain enough without

[11] *Ferris* v. *Monahan* (1956), 4 D.L.R. (2d) 539.

introducing these additional elements of unpredictability to waste time and multiply confusion. For these and other reasons it would be bad enough for a judge trying a case alone to shelve for later consideration a question of admissibility. It is, however, except to people who think that *any* excuse for getting rid of a jury is a good one, disquieting if a judge in a case which has been solemnly determined to be a proper case for trial by jury may suddenly decide that it is not a proper case for a jury trial simply because he wants to reserve a question of admissibility. This is what the majority in the Supreme Court say that a trial judge may do. The majority offers no reasons for its conclusion and it is difficult to imagine any reasons that it could have offered.

(3) Assuming that the trial judge erred in discharging the jury, does the failure of English to object then preclude a court of appeal from ordering a new trial? What the majority judges *said* concerning the admissibility of the evidence and the propriety of the trial judge's discharge of the jury could be relatively harmless because none of the opinions expressed was at all necessary to their decision. Much clutter and confusion would therefore have been avoided had the majority judges relied on their third reason alone. This third reason was that counsel for English had made no objection to the trial judge's announcement that he was going to discharge the jury. The trial judge should have invited argument on that problem, but the majority judges are probably right when they say that judicial errors in the conduct of a trial not objected to at the time cannot (normally) be taken advantage of on appeal. The majority took the position that the plaintiff cannot be permitted to take his chance of winning and then when he has lost, raise for the first time the cry that he has been deprived of his trial by jury. In order to give the trial judge a reasonable chance to avoid making incautious and casual errors and in order to clarify issues and have fewer new trials, our rules must require that the judge's attention be called to the fact that counsel regards a proposed ruling as erroneous; and if the judge insists on making it, counsel must insist that his objection be recorded for purposes of appeal. I do not see much difference (from the point of view of having objections clarified and recorded) between what the judge did in this case and what a judge does when he admits or rejects evidence over the casual complaint of counsel who fails to insist on getting a ruling. Indeed, in *English* v. *Richmond,* so far as the report shows, the trial counsel made no objection at all. The minority judges (Mr. Justice Cartwright and Mr. Justice Abbott)

were so shocked by what the trial judge did in discharging the jury that they were willing to order a new trial nowithstanding the failure of counsel for English to object.

From the report, one cannot tell whether English lost because Richmond was not negligent at all or because, although Richmond was negligent, the negligence of English was, on vestigial last chance reasoning (which still clutters Canadian opinions),[12] found to be subsequent to and severable from that of Richmond. If Richmond was free from fault, the negligence of English is irrelevant because Richmond is liable to no one. If, however, Richmond was negligent, but escaped on the argument that English's negligence was the *sole* cause of the accident which was caused by the negligence of both of them, Mrs. Laing's action should not have been dismissed just because English's action failed.

It is true that section 2(2) of the Ontario Negligence Act, reads as follows:[13]

> In any action brought for any loss or damage resulting from bodily injury to, or the death of, any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle not operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle which the injured or deceased person was being carried in, or upon, or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

This legislative command that the court ascertain the portion of the damage caused by the fault of the driver of the gratuitous passenger, is a piece of dangerous nonsense. The only thing the legislature could mean was that the court determine how negligent the driver of the gratuitous passenger was as compared with the driver of the other car. Putting that confusion of fault with cause on one side for the moment (although not forgetting that it is that very confusion which makes the court fail to see the serious injustice it does to Mrs. Laing) the section does for most practical purposes, exhume *Thorogood* v. *Bryan*[14] to the extent of identifying the gratuitous passenger with his negligent host. But it does this as a matter of substantive law only. What the court in dis-

[12] See MacIntyre, Last Clear Chance after Thirty Years under the Apportionment Statutes (1955), 33 Can. Bar Rev. 257.

[13] R.S.O., 1950, c. 252.

[14] (1849), 8 C.B. 115; 137 E.R. 452, overruled by the *The Bernina* (1888), 13 App. Cas. 1.

cussing the admissibility problem did in this case by letting its dismissal of English's action carry Mrs. Laing's action with it was to endow English with power to make hearsay admissions against her when, (for reasons of his own) he elected to plead guilty to the charge of driving without due care and attention. Nothing in the legislation suggests that the host is the agent for the passenger authorized to make hearsay admissions by pleas of guilty or otherwise.

The case if not read carefully may appear to have decided that a plea of guilty is admissible in subsequent civil proceedings. It may also appear, if not read carefully, to have decided that a judge may properly discharge the jury when he is reluctant to make a ruling on the admissibility of evidence. I have taken pains to point out that neither of these problems is really involved, and also to point out that that aspect of the decision which appears to give the driver of a gratuitous passenger power to make hearsay admissions admissible against his guest is not to be taken seriously because (a) that was no more decided than was the question of admissibility and (b) there is no indication that the court considered that problem notwithstanding the fact that everybody who thinks that alternative reasons should be treated by lower courts as grounds of decision would assume that the court had decided *per incuria* the question of admissibility against the gratuitous passenger.

Because the trial judge reserved the question of the admissibility of the plea of guilty (so far as one can tell from the report there was no other evidence of negligence on the part of English) counsel was (even if he had not otherwise been) by that very error forced to argue apportionment in case the trial judge should admit the plea and on the basis of it find English guilty of negligence. The inescapable inference one draws from the case as reported is that it was from this argument that the trial judge decided that he need not decide whether the plea of guilty was admissible or not, because counsel for English (thereby) admitted that English was guilty of some negligence. Curiously enough this aspect of the case did not appear to disturb anybody in the Supreme Court, but remained throughout buried in the general murk through which some good healthy mistakes are nevertheless apparent.