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COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., BORINS and ROULEAU JJ.A.

B E T W E E N :	)	
	)	
JENNIFER-ANNE COWLES, JESSE COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles, QUINTO COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles and ANNE KELLY	)	**Earl A. Cherniak, Q.C., Kirk F. Stevens and Christine Snow for the appellant**
Plaintiffs (Respondents)	)	**Alan A. Farrer and Craig Brown for the respondents**
- and -	)	**Jennifer-Anne Cowles, Jesse Cowles, Quinton Cowles and Anne Kelly**
DAVID BALAC, RANKO BALAC and THE AFRICAN LION SAFARI & GAME FARM LTD.	)	**R. Donald Rollo for the respondent Jennifer-Anne Cowles**
Defendant (Appellant)	)	**Bruce Haines, Q.C. and Douglas Christie for the respondents**
A N D B E T W E E N :	)	**David Balac, Ranko Balac, Slavka Balac and Sandra Balac**
DAVID BALAC, RANKO BALAC, SLAVKA BALAC and SANDRA BALAC	)	
Plaintiffs (Respondents)	)	**Heard: June 12, 2006**
- and -	)	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	)	
Defendant (Appellant)		

On appeal from the judgment of Justice Jean L. MacFarland of the Superior Court of Justice dated January 27, 2005, reported at [2005] O.J. No. 229.

O'CONNOR A.C.J.O.:

[1] The African Lion Safari & Game Farm Ltd. ("ALS") appeals from two related judgments of MacFarland J. dated January 27, 2005 holding it liable to the plaintiffs, David Balac and Jennifer-Anne Cowles, for injuries resulting from an attack by Bengal tigers at ALS's drive through safari zoo. The trial judge awarded damages in the approximate amounts of $1.7 million to Balac and $800,000 to Cowles.

[2] These appeals are with respect to liability only. ALS seeks a new trial and raises four grounds of appeal. It argues that the trial judge erred in:

i. striking its jury notice;
ii. refusing to admit the evidence of its private investigator;
iii. holding that the defence of contributory negligence does not apply to a finding of strict liability; and
iv. misapprehending or ignoring certain evidence.

[3] I do not accept ALS's submissions with respect to grounds one and four. While I agree with ALS that the trial judge erred with respect to ground two, I do not think that error affected the outcome of the cases. As to ground three, the trial judge did not find it necessary on the facts as she found them to decide whether the defence of contributory negligence applies to a finding of strict liability. In the result, I would dismiss the appeals.

Facts

[4] ALS operates a drive through safari zoo in Cambridge, Ontario. The zoo is a popular tourist attraction which hosts thousands of visitors each year. It provides its visitors with opportunities to view its animals, including lions and tigers, from the visitors' own vehicles or from buses operated by ALS in an open environment. In order to ensure a safe environment for its visitors and the animals, ALS requires that visitors keep the windows of their vehicles closed at all times and not feed the animals.

[5] On the afternoon of April 19, 1996, Balac and Cowles who were twenty-three and twenty years old, respectively, visited ALS's zoo in Balac's father's 1988 Honda Prelude. The car was equipped with two power windows, both of which could be operated by buttons on the driver's side. When Balac drove into the Carnivore Section of the zoo where the attack occurred, both windows were fully closed.

[6] Shortly afterwards, a Bengal tiger named PACA got into the Balac car through the passenger-side window, which was lowered before or during the time that PACA came into physical contact with the car. Around the same time, the driver's side window was also lowered enabling two other tigers to gain partial access to the interior of the car.

[7] The tigers mauled Balac and Cowles, inflicting serious injuries. Eventually, an ALS employee drove the animals away from the car by circling it in an ALS truck.

The Trial Judge's Reasons

[8] The trial judge found ALS liable to Balac and Cowles on two bases.

[9] First, the trial judge found that ALS, as the keeper of wild and vicious animals, was strictly liable for damages caused by those animals, regardless of fault.

[10] ALS does not argue that the trial judge erred in concluding that the doctrine of strict liability applied to the facts of these cases. It argues only that the trial judge erred in holding that the defence of contributory negligence did not apply to a finding of strict liability. I discuss that issue under ground three below.

[11] As an alternative, the trial judge also found that ALS was liable to Balac and Cowles in negligence.

[12] In particular, the trial judge found that ALS owed Balac and Cowles a duty of care and that it breached that duty in three ways. First, an ALS employee had removed a tiger cub from the Carnivore Section of the zoo shortly before PACA attacked the Balac car. In doing so, the employee drove in the vicinity of adult tigers with the cub in her vehicle. This would likely have excited or upset the adult tigers and may have provoked the attack, as the ALS truck and the Balac car were similar in colour. An expert called by the plaintiffs suggested, "[N]othing could be more calculated to excite attention and/or attack in a drive through facility than having another animal in one's vehicle."

[13] Second, the trial judge found that another ALS employee was negligent in failing to pay sufficient attention to the Balac car and PACA after the car entered the Carnivore Section. In particular, the employee failed to keep the passenger side of the car and PACA within her sight. The employee's actions breached an ALS guideline requiring her to monitor a collection of big cats in a manner that permitted the public to safely view them and to "keep cats away from visitors' vehicles". The plaintiffs' expert described the employee's actions as "a monumental and fundamental error of judgment". The trial judge characterized it as negligence in the extreme. As events turned out, the employee

was not immediately aware of the attack and did not respond to drive the tigers away from the car as soon as she could have. The trial judge concluded that, had the employee been more vigilant, Balac and Cowles might not have suffered injury.

[14] Finally, the trial judge found fault with the way ALS had designed the zoo and trained its employees. She found that ALS's actions fell below the reasonable standards of care to be expected of exhibitors of dangerous animals such as those at the ALS zoo, and thus constituted negligence.

[15] On this appeal, ALS does not challenge the trial judge's findings of negligence. Indeed, there was ample expert evidence to support each of the trial judge's conclusions.

[16] One of the central factual issues at trial was how the windows of the Balac car were lowered, permitting the tigers entry. ALS took the position that Cowles had lowered the passenger window intentionally in order to take a picture of PACA with her camera or possibly to feed a tiger. In fact, Cowles did take a picture of PACA shortly before the attack. However, it could not be determined from the developed photograph whether it was taken through the car window or not.

[17] Balac and Cowles both testified that they did not know how the windows came down. They said that they did not intentionally lower the windows and Cowles specifically said that she did not open the passenger window to take a picture or to feed a tiger. Cowles testified that she took the picture of PACA through her closed passenger-side window.

[18] The trial judge accepted the evidence of Balac and Cowles. She said at para. 16 of her judgment:

> I was impressed by both Jennifer and David as they gave their evidence, they were excellent witnesses in my experience. They were both on the stand for a number of days and were both closely and vigorously cross-examined – neither wavered. I thought they were both forthright and did not see any tendency to overstate or exaggerate.

[19] Later in her reasons, at para. 53, the trial judge said:

> David and Jennifer have, I find, been consistent from the day of the attack and repeated over and over that they do not know how the window came down and they deny that

> Jennifer's window was opened so she could take photographs and I accept their evidence.

[20] These were strong findings of credibility. Significantly, ALS, on this appeal, does not challenge the trial judge's findings in this respect.

[21] Having found that Balac and Cowles did not intentionally lower the windows, the trial judge went on to consider how the windows could have come down. The parties put forward a number of explanations.

[22] The trial judge concluded that the only reasonable explanation on the facts was that when PACA made her initial attack on the passenger side of the vehicle, the window was closed. PACA attacked the car, causing it to rock. Balac's foot then slipped off the clutch, stalling the car. Probably, at the same time, Balac's arm or some other part of his body inadvertently came into contact with the automatic window switches on the driver's side, lowering the windows on both sides of the vehicle and allowing the tigers access to the passengers. The trial judge said at para. 21 that this was "the most reasonable explanation for what occurred and it accord[ed] with the evidence which [she] accept[ed]".

[23] In reaching this conclusion, the trial judge relied on expert evidence concerning the damage done to the car and the operation of the car's automatic windows. On this appeal, ALS argues that, in considering the evidence about how the windows could have been lowered, the trial judge misapprehended or ignored certain evidence. I disagree with this submission and I deal with this argument under ground number four below. I note here, however, that this is the only basis upon which ALS attacks the findings of fact made by the trial judge.

[24] Finally, in her reasons, the trial judge rejected the evidence of five witnesses who testified about statements allegedly made by Balac or Cowles about how the attacks occurred. The alleged statements suggested that Cowles had intentionally lowered the passenger window in order to take a photograph of or to feed a tiger.

[25] The trial judge carefully analyzed the circumstances surrounding each of these alleged statements and found that there were significant problems with each. The statements were not consistent with one another and, in some instances, were inconsistent with the undisputed factual evidence about what in fact happened or with what the witness had said on other occasions.

[26] ALS does not argue on this appeal that the trial judge erred in rejecting the evidence relating to the alleged statements.

Ground #One – Striking the Jury Notice

[27] The appellant argues that the trial judge erred in striking the jury notice that it had served in accordance with the rules and in proceeding with the trial without a jury.

[28] In her ruling of November 4, 2004, reported at *Cowles v. Balac*, [2004] O.J. No. 4534 at para. 29 (S.C.J.), the trial judge began her reasons for striking the jury notice by quoting from this court's decision in *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 625 (C.A.):

> If a litigant is entitled to trial by jury, that right is a substantive one which should not be interfered with without just cause: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, 4 D.L.R. (2d) 561, at p. 533 S.C.R. When a trial judge is asked to discharge a jury, she or he must decide whether justice to the parties will be better served by the discharge or retention of the jury. The moving party bears the burden of persuasion and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of a jury. *Majcenic v. Natale*, [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.), at pp. 201-02 O.R. A trial judge faced with a motion to discharge a jury must exercise a judicial discretion [emphasis added].

[29] The trial judge continued at paras. 30 to 34 as follows:

> [30] In my view the complexities which arise in these cases and which I have detailed above cause me to conclude that *justice to the parties will be better served if the jury notice is struck out* and these matters proceed before me alone.
>
> [31] The legal liability arguments are complex, whether the doctrine of strict liability applies on the facts of this case is at best a question of mixed fact and law. Further there is disagreement about whether strict liability admits of any defence. The alternative ground of negligence advanced here clearly admits the defence of contributory negligence. It may be difficult for a lay jury to keep the concepts separate. There

is disputed expert evidence on the liability aspects outlined earlier in these reasons and the medical evidence will be detailed, lengthy and complex and may even be disputed in some respects, I am told that ALS has delivered two defence medical reports – but even absent any dispute – the evidence remains detailed and complex. The actuarial evidence, which is never easy, is even more difficult where a plaintiff is at a stage in life where he/she has not moved yet into a permanent vocation where there is some reliable indicator of income potential. Of necessity streams of income from a number of scenarios are usually considered when these sorts of claims are made.

[32] These and the other complexities outlined cause me to believe that justice requires these matters be tried without a jury. While each of the factors I have outlined may – alone – not be sufficient, when considered cumulatively together with the fact that counsel conservatively estimate that the trial will take six weeks there really in my view is little choice.

[33] Mr. Wright suggests we take a wait and see attitude. He says that perhaps as the evidence unfolds the issues may become less complex. I must respectfully disagree with his submission. All of the evidentiary complexities I have outlined to this point in time are the reality now. They are not merely possibilities which may arise in the future; they arise by reason of the very nature of the actions themselves. While I appreciate there are times where it is preferable to take a wait and see approach in my view, this is not one of those cases.

[34] In addition to these complexities, when I consider the number of counsel involved on behalf of the primary plaintiffs in their various capacities and the difficulty of explaining that to a jury let alone having them comprehend it, I am more convinced that it is appropriate here to strike the jury notices and I so order [underline in original, italics added].

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[30] Pursuant to s. 108(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a party in a civil action may require that the issues of fact be tried and the damages assessed, or both, by a jury, except when the relief sought falls within the enumerated exceptions in s. 108(2). The claims underlying this appeal do not come within any of those exceptions.

[31] A party may require a jury trial by serving a jury notice pursuant to rule 47.01 of the *Rules of Civil Procedure.*

[32] A party's entitlement to a jury trial is, however, subject to the power of the court to order that the action proceed without a jury. Section 108(3) of the *Courts of Justice Act* provides, "On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury."

[33] Rule 47.02 provides further direction with respect to a motion that a trial be conducted without a jury. Rules 47.02(2) and (3) read as follows:

> (2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.
>
> (3) Where an order striking a jury notice is refused, the refusal does not affect the *discretion of the trial judge, in a proper case*, to try the action without a jury [emphasis added].

[34] The French version of rule 47.02(3) provides that a trial judge may dispense with a jury "s'il l'estime opportun" suggesting an even broader discretion.

[35] It is worth noting that the *Courts of Justice Act* and the rules provide very little guidance with respect to the manner in which judges should exercise their discretions to dispense with a jury. As I discuss below, over time courts in Ontario have developed a test for what is considered to be "a proper case" to try an action without a jury.

[36] It is settled law that the right to trial by jury in a civil case is a substantive right and should not be interfered with without just cause or cogent reasons: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528.

[37] A party moving to strike a jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial which merit the discharge of the jury. In the end, a court must decide whether the

moving party has shown that justice to the parties will be better served by the discharge of the jury: *Graham*, *supra*.

[38] While that test confers a rather broad discretion on a court confronted with such a motion, it is nonetheless a sensible test. After all, the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.

[39] The application of this test should not diminish the important role that juries play in the administration of civil justice. Experience shows that juries are able to deal with a wide variety of cases and to render fair and just results. The test, however, recognizes that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible.

[40] Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited. In *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 at 69-70 (C.A.), Robins J.A. set out the well accepted standard for appellate review as follows:

> I think it manifest from the authorities that before an appellate court may properly intervene it must be shown that the discretion was exercised arbitrarily or capriciously or was based upon a wrong or inapplicable principle of law. The question to be addressed in this case is whether the trial judge committed an error of such a nature. If not, this Court is not entitled to interfere with his exercise of the discretionary power conferred by s. 60(3) [of the *Judicature Act*].

[41] Appellate deference for the exercise of discretion by lower courts is justified on several bases: it serves to recognize the expertise of the lower court; it promotes the integrity and autonomy of the proceedings in the lower court; it limits the number, length and costs of appeals; and, in some cases (not this one), it recognizes the advantage that the lower courts have from firsthand observation of the evidence. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; see also Roger P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994).

[42] An appeal court should not interfere with the exercise of a trial court's discretion simply because it disagrees with the conclusion reached. That means an appeal court should not merely pay lip service to the concept of deference and then proceed to

substitute its own view as to what the proper result should be for that of the lower court. Interference is only justified when the lower court is shown to have committed the type of error referred to in *Kostopoulos*.

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[43] This ground of appeal, in my view, turns on the proper application of the principle of appellate deference to the way in which the trial judge exercised her discretion in striking the jury notice.

[44] It is not argued, nor could it be, that the trial judge acted arbitrarily or capriciously. She heard the motion to strike the jury notice on November 1, 2004. The parties presented a substantial amount of evidence by way of affidavits with several exhibits attached, including copies of some of the expert reports upon which they intended to rely at trial. The parties made detailed submissions. The trial judge took the matter under consideration and delivered her decision, providing reasons three days later. It is apparent from her reasons that she had reviewed the evidence that had been filed on the motion and that she had considered the submissions of the parties.

[45] Thus, the only issue is whether the trial judge based her decision to strike the jury notice upon a wrong or inapplicable principle of law.

[46] Before turning to the specific errors the appellant alleges that the trial judge made, it is important to note that the trial judge correctly set out the principles of law applicable to a motion to strike a jury notice.[1] She started her reasons by specifically quoting the test set out in *Graham*, *supra* – whether justice to the parties would be better served by striking the jury notice. The appellant does not argue that this was not the correct legal test for a motion of this kind.

[47] Having set out the proper test, the trial judge went on to conclude that this test had been satisfied because of the complexities, legal, factual, and evidentiary of the two cases.

[48] Clearly, the complexity of a case is a proper consideration in determining whether a jury notice should be struck. Indeed, a review of the case law indicates that the complexity of a case is by far the most common reason why courts dispense with juries in civil cases, the rationale being that a judge, because of his or her legal training and experience, may be better able to render justice in a case that is complex. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science.

[1] The test for striking a jury notice is essentially the same as the test for discharging a jury after it has been selected.

[49] A consideration of the complexity of a case relates not only to the facts and the evidence, but also to the legal principles that apply to the case. While it is the trial judge who is responsible for determining questions of law and instructing a jury on the appropriate legal principles, it is the jurors who must decide whether and how those principles apply to the facts as they find them on the evidence.

[50] The jury's task in applying the law to the facts may be more or less complex depending on the issues in a particular case. The point is, however, that in looking at the complexity of the case insofar as it may affect a jury, it is proper for a judge to consider the complexity of the factual as well as the legal issues, bearing in mind the jury's particular role with regard to the latter.

[51] The trial judge in this case quite properly looked to issues of complexity, legal, factual and evidentiary, in approaching the question of whether she should strike the jury notice.

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[52] The fact that a trial judge considers that the complexity of a case warrants dispensing with a jury is not, in itself, sufficient to insulate the exercise of that discretion from appellate interference. The test is whether there were cogent reasons for the exercise of the discretion, *King*, *supra*, or, as I would word it, was there a reasonable basis for the trial judge's exercise of discretion? If the circumstances are such that there was no reasonable basis for the conclusion reached, then the trial judge will have made a reversible error.

[53] In her reasons, the trial judge pointed out that her conclusion was based on the cumulative effect of a number of factors. She considered the legal, factual and evidentiary complexities of the cases. While she did not appear to attach great weight to the legal complexity of the cases, she pointed out that there were two alternative causes of action, strict liability and negligence, and that there were potentially a number of defences available.

[54] The trial judge attached considerable importance to the factual and evidentiary complexities of the cases. There was going to be disputed expert evidence with respect to liability on two issues, the standards pertaining to a drive through safari zoo and the mechanics of automobile power windows.

[55] Moreover, she indicated that the damages issues were going to be very complex. The plaintiffs had suffered serious personal injuries and, during the argument of the motion, the parties indicated that there would be eighteen to twenty medical witnesses

called. The trial judge had before her lengthy and complicated medical reports, including reports from plastic surgeons, orthopaedic surgeons, psychiatrists, psychologists and rehabilitation and clinical neuro-psychologists.

[56] In addition, it was anticipated that the actuarial evidence relating to the income potential for both plaintiffs would be more difficult than in many cases. Because the plaintiffs had not yet embarked upon permanent occupations, it would be necessary to consider potential income streams from a number of different scenarios. Finally, the trial judge observed that the trial would be lengthy, as counsel conservatively estimated it would last six weeks.

[57] Looking at all of the factors considered by the trial judge, I am satisfied that there was sufficient complexity to form a basis for her to conclude that justice to the parties would be better served if she tried the case without a jury. I must say that I find this case to fall at the low end of the complexity scale that would permit a judge to dispense with a jury. It is likely that some judges confronted with the same factors would exercise their discretion differently. That said, I do not think that it can be said that there was no reasonable basis for the trial judge's conclusion that the complexity of the cases warranted striking the jury notice.

[58] It has been suggested that, when weighing the issue of complexity, regard should be had to the fact that over the years juries in criminal trials have decided some very complex and lengthy trials, some exceeding a year in length. The suggestion is that if juries are able to manage lengthy and complex criminal trials, then the same should hold true for civil cases. I do not think that the comparison to criminal cases is particularly helpful. As Reid J. pointed out in *Rahmaty v. Kentner*, [1982] O.J. No. 2284 (H.C.J.), the problem with this suggestion is that it ignores the fact that in criminal cases there is no room for the exercise of a judge's discretion with respect to whether a case would be better tried with or without a jury. Factors that are absent in disputes between private litigants come into play in criminal trials. Accused persons have an absolute right to be tried by a jury when charged with specified offences. As such, juries must deal with some criminal trials no matter how complex and no matter what a judge may consider to be the best way to achieve justice in the particular case. The same is not true for civil cases. While parties in civil cases have a substantive right to a jury trial if they choose, courts are given a discretion to try a case without a jury "in a proper case".

[59] I turn now to the specific errors that the appellant alleges that the trial judge made. I group them into four categories.

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[60] First, the appellant argues that the trial judge erred in the way she approached the legal complexity of the case. For convenience, I repeat what the trial judge said in her November 4, 2004 ruling at para. 31 about legal complexity:

> The legal liability arguments are complex, whether the doctrine of strict liability applies on the facts of this case is at best a question of mixed fact and law. Further, there is disagreement about whether strict liability admits of any defence. The alternative ground of negligence advanced here clearly admits the defence of contributory negligence. *It may be difficult for a lay jury to keep the concepts separate* [emphasis added].

[61] To start, I reject any suggestion that the trial judge was operating under the misapprehension that a jury would be required to decide legal issues or to determine the legal principles that would be applied to the case. Had she made that error, there would, of course, be a basis for this court to interfere: see *Cosford v. Cornwall* (1992), 9 O.R. (3d) 37 (C.A.). While the trial judge expressed a concern about the complexity of the legal issues in her reasons, I read her comments in this regard as suggesting that the jury may have difficulty in applying the legal concepts as instructed by her, not in deciding what those concepts were. This, it seems to me, is apparent from her last comment – "It may be difficult for a lay jury to keep the concepts separate".

[62] There is nothing in the trial judge's reasons to suggest that she did not understand that she was responsible for deciding questions of law and, on the basis of her decisions, instructing the jurors who would then be required to apply the law to the facts as they found them. Indeed, it seems most unlikely to me that this experienced trial judge, who no doubt had conducted many dozens of jury trials over the years, would have misunderstood the respective roles of a trial judge and a jury.

[63] I also do not accept the suggestion that the trial judge was motivated to strike the jury notice, even in part, on the basis that it would be difficult for her to explain the law to the jury. Again, it would be reversible error to strike a jury notice on this basis, as trial judges are presumed to know the law and to be able to explain it to a jury: *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.); *Neelands and Neelands v. Haig* (1957), 9 D.L.R. (2d) 165 (Ont. C.A.); *Cosford*, *supra*.

[64] In her reasons, the trial judge referred to the differing positions of the parties as to whether any defences were available when the doctrine of strict liability applies. However, she did not relate that observation to any difficulty she might have in

explaining the law as she would determine it. Rather, I interpret her reasons, somewhat brief in this regard, as saying that, depending on her decision, it may be necessary for her to instruct the jury on defences for strict liability with the result that there would be more issues for the jury to address.

[65] The appellant argues that the trial judge erred in characterizing the legal liability issues as complex and, in particular, in indicating that the issue of whether the doctrine of strict liability applied to the facts was "at best a question of mixed fact and law". The appellant points out that this court, in *Hunt*, *supra*, emphasized that an issue that is one of mixed fact and law is not necessarily complex.

[66] However, the court in *Hunt* did not say that issues of mixed fact and law may never be complex. Obviously, in some cases they can be very complex. The court said only that they are not necessarily so. Moreover, the court in *Hunt* did not reverse the trial judge's decision to dismiss the jury on the basis that the trial judge had referred to questions of mixed fact and law as being complex. The court interfered because the trial judge had erred in considering the length of time it would take to prepare a charge to the jury, in failing to consider splitting the trial between liability and damages as he had been asked to do, and in giving weight to the difficulty he would have in instructing the jury as to the law. None of those errors are present here.

[67] In exercising her discretion to strike the jury notice in these cases, the trial judge considered the legal complexity of the cases as one of those complexities that would affect the task of the jury. She was entitled to do so.

[68] Having looked at the legal complexities of the cases insofar as they might affect the jury, the trial judge concluded only that the jury may have difficulty keeping the legal concepts separate. She did not appear to attach a great deal of weight to the legal complexity aspect of the cases. In any event, even if this court were to disagree with the trial judge's assessment that, from a legal issue standpoint, the cases may be difficult for a jury, that disagreement in the context of the trial judge's overall reasons would not, in my view, constitute the type of legal error that warrants appellate intervention.

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[69] The appellant's second argument is that the trial judge erred in failing to take a "wait and see" approach to the motion to strike the jury notice. In its submissions to the trial judge, the appellant urged her to reserve her decision until after the evidence had been completed, or at least a portion of it had been completed, arguing that the issues may become less complex as the evidence unfolded. The trial judge declined to take such an approach and set out her reasons at para. 33 of her ruling:

> All of the evidentiary complexities I have outlined to this point in time are the reality now. They are not merely possibilities which may arise in the future; they arise by reason of the very nature of the actions themselves. While I appreciate there are times where it is preferable to take a wait and see approach in my view, this is not one of those cases [emphasis in original].

[70] Over the years, courts have said that, in some cases, when confronted with a motion to strike a jury notice or discharge a jury, it is preferable to proceed with the trial and wait until the evidence or a substantial portion of it has been heard before deciding whether the discharge of the jury is warranted. Experience has shown that in many instances the anticipated complexities of a case or other concerns giving rise to a motion to dismiss a jury do not materialize or at least not to the extent originally asserted. By "waiting and seeing", courts are better able to protect the substantive right of the party who wants a jury trial and to only dismiss the jury when it becomes necessary to do so: see e.g. *Martin v. St. Lawrence Cement Co. et al.*, [1968] 1 O.R. 94 (C.A.); *Ryan v. Whitton*, [1964] 1 O.R. 111 (C.A.).

[71] Obviously, there is merit to taking a "wait and see" approach in some cases, and perhaps in most. However, taking such an approach is not a rule of law. The *Courts of Justice Act* and the rules contemplate that a judge may strike a jury notice even before a trial has begun and that a trial judge may dismiss a jury before beginning to hear the evidence.

[72] A trial judge has a discretion whether or not to take a wait and see approach. In many cases it is the most prudent course to follow. In some cases, however, trial judges will consider that there is no advantage to beginning the trial with the jury because the situation as presented at the outset makes it apparent that the case should not be tried with a jury. There is thus no point to waiting and seeing.

[73] The trial judge in this case was well aware that taking a wait and see approach was a preferable course in some cases, but in exercising her discretion she considered that the case before her was not one of those cases. As she saw it, the evidentiary complexities were the reality at the time of the motion and those complexities arose because of the nature of the actions.

[74] In support of its argument that the trial judge should have adopted a wait and see approach, the appellant points to the fact that at the trial, as events turned out, only five doctors were called with respect to damages, not the eighteen to twenty that had been

forecasted at the time of the motion. Had the trial judge waited before striking the jury notice, she would have been aware of this change of circumstance and it may have affected the way in which she exercised her discretion.

[75] That is possible. However, it is important to look at what happened after the trial was underway. During the course of the trial, both plaintiffs, Cowles and Balac, settled their non-pecuniary damages claims. Those settlements, no doubt, made it possible to proceed with considerably fewer medical witnesses than would have otherwise been the case.

[76] It is always possible that a case or some issues in a case will settle during the course of a trial. When that happens, the complexity of the proceedings may well be reduced. While a trial judge may wish to consider the possibility of settlement as one of the factors in determining whether to dispense with the jury at the outset of the trial, I do not think that a trial judge who strikes a jury notice or discharges a jury makes an error in law because of a failure to "wait and see" if the case might be simplified by settlement during the course of the trial. Were it otherwise, trial judges would never dispense with a jury before a case was completed because only then would it be known for sure whether the case or some issues in the case would be settled. The *Courts of Justice Act*, the rules and the case law do not restrict a trial court's discretion to dispense with a jury in this manner. Courts have the authority to dispense with a jury even before a trial begins.

[77] Moreover, the fact that fewer medical witnesses were called at the trial than were anticipated at the time of the motion likely related, at least in part, to the fact that when a trial proceeds before a judge alone, the parties are often able to abbreviate the evidence and limit the number of witnesses to be called. It is well recognized that the conduct of a jury trial is significantly different and typically takes longer than the same trial before a judge sitting without a jury.

[78] In my view, there is little to be gained in this case in reviewing the trial judge's decision to strike the jury notice by using hindsight and looking back on what actually happened at the trial after it proceeded without a jury. The trial judge assessed the case as being complex when it was put to her by the parties at the time of the motion. She considered the wait and see approach, determined that the complexities as she saw them at that time were the reality, and exercised her discretion against adopting that approach. She considered the appropriate factors and, even if one were to disagree with the approach she adopted, it was reasonable and properly fell within her discretion to proceed as she did. I see no error that would constitute the use of a wrong or inapplicable principle of law and thus no basis to interfere with the trial judge's decision not to take a "wait and see" approach.

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[79] The third error alleged by the appellant is that, in reaching her decision, the trial judge took into account two irrelevant factors, the anticipated length of the trial, six weeks, and the fact that each plaintiff was represented by two sets of counsel who each had a different role to play.

[80] At the time of the motion, counsel estimated that the trial would last six weeks. The trial judge characterized this estimate as conservative, correctly, I suggest. The actual trial lasted twenty-six days. However, the circumstances as they existed at the time of the motion pointed to a much longer trial. As indicated above, the plaintiffs' non-pecuniary damages claims were settled during the trial. Had the trial proceeded before a jury as anticipated at the time of the motion, it likely would have taken much longer than six weeks.

[81] The fact that a jury trial might last for a lengthy period of time is not, in itself, a reason to strike a jury notice or dismiss a jury. However, the length of a trial may be one indicator of the complexity of a case. It seems logical that a longer trial with more witnesses and probably more issues will, in many cases, be more complex.

[82] Importantly, the trial judge's comment about the anticipated length of the trial was linked to her conclusions about the complexity of the cases. Her point, as I understand it, was that these were complex and difficult cases which were going to last for a considerable period of time.

[83] I see no error in the way the trial judge considered the anticipated length of the trial as part of her decision-making process.

[84] The appellant also argues that the trial judge erred in taking into consideration the fact that Balac and Cowles were represented by two sets of counsel in different capacities. As events turned out, counsel who were acting for the plaintiffs in responding to claims from the other plaintiffs played virtually no role in the development of the evidence.

[85] It strikes me that in some instances, the fact that a party is represented by more than one set of counsel could be a minor factor to be taken into account by a judge in deciding whether or not to dispense with a jury. Be that as it may, the trial judge's comment about this anticipated difficulty was not integral to her decision to strike the jury notice. She based her decision on the other factors that I have mentioned above and only referred to the issue of multiple counsel as lending weight to the decision she had already made, in effect as an afterthought.

[86] I see no error in this regard and certainly no error in the application of a legal principle that would warrant appellate interference.

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[87] Finally, the appellant argues that the trial judge erred in that she did not consider splitting the case, pursuant to s. 108(3) of the *Courts of Justice Act*, to let the jury decide liability only if she deemed the damages issues to be too complex for a jury.

[88] The appellant relies on this court's decision in *Hunt*, *supra*, in which the trial judge's failure to consider splitting the case was one of the factors on which this court relied to set aside the trial judge's decision to discharge the jury. In *Hunt*, however, defence counsel had expressly asked the trial judge to consider that option and, significantly, the trial judge made no mention whatsoever of the defendant's request or arguments in this respect. The trial judge appeared not to address the argument at all. Austin J.A., for this court, held that the trial judge erred in failing "to consider" splitting the trial.

[89] In our case, the appellant did not ask the trial judge to consider splitting the case. The appellant was represented by experienced counsel who would have been aware of the option of a split trial. I have no way of knowing if there were tactical reasons involved in the appellant's decision not to make that request.

[90] The trial judge did not address the possibility of a split trial in her reasons, likely because she was not asked to. She may have considered it, I do not know. In any event, I see no error on the trial judge's part in failing to consider an approach that was not put forward by counsel.

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[91] In summary, I am satisfied that the trial judge acted within the ambit of her discretion in striking the jury notice. Although some judges might have exercised that discretion differently, that does not constitute a basis for appellate intervention. Cases such as these come down to weighing the right of the litigant to a jury trial against a determination that justice to the parties will be better served by striking the jury notice. In cases where a party seeks to strike a jury notice on the basis of complexity, the question will generally become one of degree. A judge hearing a motion must consider whether the degree of complication or difficulty is such that the notice should be struck. The answer to the question of whether justice to the parties will be better served by striking a jury notice is not always clear. As Doherty J.A. said in *Graham*, *supra*, at 625:

> A trial judge faced with a motion to discharge a jury, must exercise judicial discretion. In many situations that discretion

> may, with equal propriety, be exercised for or against discharging the jury.

[92] Finally, I note that in *King*, *supra*, the Supreme Court of Canada held that one element of the test for appellate interference in a trial court's decision to dispense with a jury is that the appeal court must determine that the result of the trial would not necessarily have been the same had there been a trial with a jury. A consideration of the merits of the case arises, however, only if the appeal court determines that the trial court's discretion was exercised capriciously, arbitrarily, or was based on a wrong or inapplicable principle of law. Given that I do not find that the trial judge made such an error in this case, it is not necessary to consider the merits of the cases in relation to this ground of appeal.

[93] In the result, I would not interfere with the trial judge's decision to strike the jury notice and would not give effect to this ground of appeal.

Ground #2 – Refusing to Admit the Reports of the Appellant's Investigator

[94] I have had the advantage of reading the reasons of my colleague, Borins J.A. I agree with him that the trial judge erred in excluding the evidence of the appellant's investigator.

[95] However, in my view, the trial judge's error does not warrant interference by this court. The appellant has not established that the admission of the investigator's evidence at trial could have had any effect on the outcome of the case.

[96] On the motion to exclude the evidence, counsel for the respondent Cowles filed an affidavit indicating that a letter received October 22, 2004 from the solicitors for the appellant provided a summary of the investigator's surveillance of Cowles on various dates between September 3, 1996 and August 11, 2000.

[97] In her November 4, 2004 ruling, in which she excluded the evidence, the trial judge observed at para. 37:

> Mr. Wright [counsel for the appellant at the time] tells me that he instructed his investigator only to go out and see if she (the plaintiff Ms. Cowles) is working at Hanrahan's and how often. He says the evidence from the investigator actually confirms what Ms. Cowles told him at discovery.

[98] In its factum on this appeal, the appellant suggests that the investigator's evidence was "highly relevant to the issue of Cowles' credibility". However, the appellant has neither in its factum nor in oral argument attempted to show how the investigator's evidence, if admitted, would have impugned or been inconsistent with Cowles' evidence at trial. Nor has the appellant argued that Mr. Wright's statement to the trial judge that the evidence of the investigator actually confirms what Cowles told him on discovery was incorrect.

[99] In the circumstances, I do not see how the trial judge's failure to admit the investigator's evidence could have had any effect on the outcome of the trial.

Ground #Three – Holding that the Defence of Contributory Negligence Does Not Apply to a Finding of Strict Liability

[100] The appellant argues that the trial judge erred in holding that the defence of contributory negligence did not apply to a finding of strict liability. In her reasons for judgment, the trial judge discussed this issue at some length and seemed to conclude that the defence was not available.

[101] However, in the end, the trial judge did not find it necessary, on the facts as she found them, to decide the legal issue. At para. 140 of her reasons for judgment, she said:

> In any event, I have found that the injuries to and the damages suffered by both plaintiffs resulted from the unprovoked attack on their vehicle by the tiger PACA. That forceful assault on the vehicle caused Mr. Balac's body to inadvertently come into contact with the window switch resulting in the lowering of the windows on the vehicle which admitted the tiger into the vehicle. There was no conduct, in my view, on the part of either David or Jennifer which would constitute contributory negligence on their part even if such defence were available. Their windows were up when they entered the Carnivore Section and were not deliberately put down for any purpose while in that Section before the attack, by either of them.

[102] Thus, I do not think that it is necessary to address this ground of appeal.

Ground #Four – Misapprehending and Ignoring Evidence

[103] The appellant argues that the trial judge misapprehended or ignored certain evidence in reaching the conclusions that the windows of the car were up when PACA first attacked and that the attack caused Balac's arm or some other part of his body to inadvertently come into contact with the window switches, thereby lowering both windows.

[104] It is important to position the appellant's challenge to the trial judge's findings of fact in the context of her overall reasons. The trial judge found that the appellant was strictly liable and was also liable in negligence to Balac and Cowles for the injuries they suffered. The appellant does not challenge those findings.

[105] Thus, the factual issues of when and how the windows were lowered are only relevant to the possible defence of contributory negligence to the findings of liability.

[106] The trial judge began her analysis of these issues by considering the only direct evidence available – the testimony of Balac and Cowles. They testified that they did not intentionally lower the windows. Cowles specifically testified that she did not lower the passenger-side window to take a picture of PACA. Although Balac and Cowles could not say when and how the windows were lowered, the most logical inference from their evidence was that the windows were up when the tiger attacked. The trial judge found Balac and Cowles to be credible witnesses and accepted their evidence. The appellant does not challenge the trial judge's findings in this regard.

[107] After the trial judge concluded that Balac and Cowles did not intentionally lower the windows, she went on to consider what explanation or explanations there could be as to how the windows were lowered that would be consistent with the evidence that she had accepted. It was in the course of this analysis that the appellant submits that the trial judge made reversible errors in her fact-finding process.

[108] Significantly, the appellant accepts that the trial judge's conclusion that Balac inadvertently pressed the down on the window buttons was not a physical impossibility. In other words, the appellant concedes that the events could have happened in the way that the trial judge found to be a reasonable explanation of what did in fact occur.

[109] However, the appellant argues that the trial judge erred in relying on evidence of the plaintiffs' expert, Mr. Leier, who testified that the damage to the passenger-side door indicated there had been a repeated vigorous striking of the vehicle by a large animal trying to gain entry when the passenger window was up. The appellant argues that the

trial judge erred in relying on this evidence because Balac and Cowles had not testified that the tiger "repeatedly" struck the car. Balac's evidence was that when PACA attacked, the car rocked violently and his foot slipped off the clutch. However, he said that there was only one rocking. Cowles testified about hearing a "bang-like noise". The appellant also argues that the tiger could have damaged the door while the window was partially opened, the latter fact being conceded by Mr. Leier.

[110] As I understand it, the appellant's purpose in making these submissions is to make the point that the physical damage to the car was consistent not only with the explanation that the passenger-side window was fully up at the start of the attack, but also with an explanation that it could have been partially open.

[111] Accepting that both explanations are possible, I fail to see how that helps the appellant on this appeal. The explanation that the window was up when the tiger first attacked is still consistent with the evidence of Balac and Cowles.

[112] Moreover, the evidence is clear that the car rocked violently at least once, that Balac's foot slipped, and the car stalled. That evidence provides the basis for the explanation as to how Balac inadvertently came into contact with the window buttons. It seems to me that once the trial judge accepted the evidence of Balac and Cowles, her finding of how the windows came down was, as she put it, "the most reasonable explanation" for what had occurred. The fact that there could be another explanation does not undermine the trial judge's conclusion.

[113] The appellant also argues that the trial judge erred in ignoring the evidence that the window could only be lowered by the application of four seconds of pressure to the switch unless the tiger accelerated the movement, a fact the trial judge did not expressly find to be the case.

[114] I do not accept this submission. Balac testified that the window came down in milliseconds and, at para. 11 of her reasons for judgment, the trial judge referred to Balac's evidence as follows:

> [A]s he faced forward, out of the corner of his eye he noticed a paw and at about the same time the window moved down quickly with the paw.

[115] A fair reading of the trial judge's reasons indicates that she found that when Balac inadvertently hit the window switches, the tiger's paw was almost immediately put on the window, which accelerated the downward movement of the window. The trial judge did

not ignore the evidence with respect to the time required to lower the window, absent pressure. I see no error in this regard.

[116] Finally, the appellant argues that the trial judge in her reasons failed to address the evidence that, although there was mud on the passenger-side door, there was no mud on the window – the suggestion being that if the window was up when the tiger attacked there would have been mud on it.

[117] A trial judge's failure to refer to a specific piece of evidence does not *per se* constitute palpable and overriding error. It is only when an omission gives rise to a reasonable belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected her conclusion that an appellate court is entitled is intervene: *Housen*, *supra*, at para. 72.

[118] It is not argued nor could it be that the lack of mud on the passenger-side window necessarily leads to a conclusion that the window was down when the tiger first attacked. While that is one possibility, there are other explanations about the lack of mud on the window that are consistent with the window being up. The fact is that no one knows for sure exactly what happened. However, none of the physical evidence, including the lack of mud on the passenger-side window, is inconsistent with the evidence that the trial judge accepted.

[119] In my view, the trial judge's conclusion as to how the attack most likely occurred is entirely consistent with the physical evidence. I do not accept that she misapprehended evidence or ignored relevant evidence in reaching that conclusion. Thus, I would not give effect to this ground of appeal.

Disposition

[120] In the result, I would dismiss the appeals. The parties have filed bills of costs relating to these appeals. However, given the results, I would ask the parties to make written submissions within fourteen days as to the appropriate costs orders.

"Dennis O'Connor A.C.J.O."
"I agree Paul Rouleau J.A."

BORINS J.A. (Dissenting in part):

I

[121] This is an appeal by the defendant, African Lion Safari & Game Farm Ltd. ("ALS") from a judgment holding it strictly liable to the plaintiffs, Jennifer-Anne Cowles and David Balac, and related *Family Law Act* claimants for bodily injuries sustained by Cowles and Balac caused by tigers owned by ALS at the premises of ALS. The trial judge awarded damages of approximately $1,700,000 to Balac and $800,000 to Cowles. Although ALS had delivered a jury notice, the trial judge struck out the jury before the opening of trial. In its principal ground of appeal, ALS contends that the trial judge erred in doing so, and seeks a new trial on the issues of liability and contributory negligence. For the reasons that follow, I would allow the appeal on this ground and order a new trial on these issues.

[122] In addition, ALS contends that the trial judge erred in excluding the evidence of an investigator retained by it and in finding that in a case where a defendant is strictly liable the amount of the plaintiffs' damages cannot be reduced by contributory negligence on the part of the plaintiff. As I will explain, I would agree with these contentions. ALS further submits, in the alternative, that if it is found that the trial judge did not err in striking out the jury, she erred in finding it liable for the plaintiffs' injuries. In the view that I hold of this appeal, it is unnecessary to deal with the appellant's alternative ground.

II

[123] As the facts are set out fully in the trial judge's reasons reported at (2005), 29 C.C.L.T. (2d) 284, I need only refer to the facts that are relevant to the appeal.

[124] ALS operates a drive-through "safari" zoo in Cambridge, Ontario, where it permits various wild animals to run free. Unlike a conventional zoo, the animals are not caged. The visitors to the zoo are able to view the animals, including lions and tigers, in an open environment. They can do so while driving through the zoo in their own motor vehicles, or while riding buses operated by ALS. To ensure a safe environment for its visitors and the animals, ALS requires that its visitors keep their motor vehicle windows closed at all times and not feed the animals. Large signs to this effect are posted throughout the park.

[125] Balac and Cowles, who were dating each other, visited the zoo in Balac's father's 1988 two-door, standard-shift Honda Prelude, that was equipped with two front-seat power windows. Balac was driving the car. Cowles was sitting in the passenger seat

taking pictures of the tigers. It was the contention of ALS that at, or shortly after, the time that Cowles was taking a picture of a tiger called Paca, the tiger entered the car through the passenger's window that was lowered before, or during, the time that Paca came into physical contact with the car. During the chaos that followed, the driver's window was somehow lowered, enabling two other tigers to gain partial access to the interior of the car. The plaintiffs' contention was that the windows were always closed and that they were opened accidentally. Balac and Cowles were mauled by the tigers, causing them serious injuries.

[126] In one action, Cowles, her two sons and her mother, sued Balac, Balac's father as the owner of the Honda, and ALS (the "Cowles action"). This action, as against ALS, is based on allegations of strict liability for damages caused by dangerous animals, negligence and breach of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. The action against the Balacs is based on negligence, it being alleged that Balac opened the passenger's window enabling the tiger to gain access to the car. In his statement of defence and counterclaim against Cowles, Balac alleged that Cowles opened the passenger's window and was "enticing" and attempting to feed the animals.

[127] In a second action (the "Balac action"), Balac and his family members sued ALS on the basis of strict liability and negligence, and also sued the Liberty Mutual Insurance Company, the insurer of the Honda, for statutory accident benefits. In this action, ALS brought a third party claim for contribution and indemnity against Cowles for the injuries sustained by Balac. The Balac action against Liberty Mutual was settled before trial.

[128] By way of defence in both the Cowles action and the Balac action, ALS alleged contributory negligence and voluntary assumption of risk. An order was made that both actions be tried together. ALS served a jury notice in respect to both actions.

III

[129] Although I will return to this subject, it is important to note that in this case there was only one significant factual issue. It was how the car's windows came to be open, permitting the tigers to enter the car. The plaintiffs and the defendant each submitted expert evidence on the operation of the Honda's power windows. Cowles testified that she had not opened the passenger's window to take pictures of the tigers. It was common ground that for the tigers to enter the car, its windows on the driver's side and the passenger's side had to have been open. However, there was considerable evidence that contradicted Cowles' testimony. An ALS employee testified that when he approached the car Balac was scolding Cowles for opening the window and feeding the tigers after the tigers had attacked them. Another ALS employee and two emergency rescue workers

testified that Cowles admitted to them that she had lowered the passenger window to take a picture. The hospital records prepared by Dr. Wong, the admitting emergency room physician, indicated that Cowles stated that she had opened the window to take a photograph. Cowles's aunt, in a statement given to an insurance adjuster, said that Cowles had told her that she had the window down while taking a picture of the tiger. The trial judge rejected the evidence of each of these six witnesses.

IV

[130] At the opening of the trial, the trial judge dealt with motions to strike out ALS's jury notice and to exclude the evidence of an investigator retained by ALS who had conducted surveillance on Cowles and had interviewed her. In reasons reported at [2004] O.J. No. 4534, she granted both motions.

[131] In respect to the motion to strike out the jury, after reviewing the nature of the plaintiffs' claims and noting there would be medical experts, liability experts in respect to the standard of care expected by keepers of wild animals and engineering experts in respect to the operation of power windows, the trial judge observed at para. 15: "The causes of action pleaded and relied on by the plaintiffs in both actions raise a number of legal issues."

[132] In considering whether to strike out the jury notice, she referred to the test discussed by Doherty J.A. in *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 625 (C.A.). She continued at paras. 30-34:

> [30] In my view the complexities which arise in these cases and which I have detailed above cause me to conclude that justice to the parties will be better served if the jury notice is struck out and these matters proceed before me alone.
>
> [31] *The legal liability arguments are complex, whether the doctrine of strict liability applies on the facts of this case is at best a question of mixed fact and law. Further there is disagreement about whether strict liability admits of any defence.* The alternative ground of negligence advanced here clearly admits the defence of contributory negligence. It may be difficult for a lay jury to keep the concepts separate. *There is disputed expert evidence on the liability aspects outlined earlier in these reasons and the medical evidence will be detailed, lengthy and complex and may even be disputed in some respects,* I am told that ALS has delivered two defence

> medical reports – but even absent any dispute – the evidence remains detailed and complex. The actuarial evidence, which is never easy, is even more difficult where a plaintiff is at a stage in life where he/she has not moved yet into a permanent vocation where there is some reliable indicator of income potential. Of necessity streams of income from a number of scenarios are usually considered when these sorts of claims are made.
>
> [32] These and the other complexities outlined cause me to believe that justice requires these matters be tried without a jury. While each of the factors I have outlined may – alone – not be sufficient, when considered cumulatively together with the fact that counsel conservatively estimate that the trial will take six weeks there really in my view is little choice.
>
> [33] *Mr. Wright suggests we take a wait and see attitude. He says that perhaps as the evidence unfolds the issues may become less complex.* I must respectfully disagree with his submission. All of the evidentiary complexities I have outlined to this point in time are the reality now. They are not merely possibilities which may arise in the future; they arise by reason of the very nature of the actions themselves. While I appreciate there are times where it is preferable to take a wait and see approach in my view, this is not one of those cases.
>
> [34] In addition to these complexities, when I consider the number of counsel involved on behalf of the primary plaintiffs in their various capacities and the difficulty of explaining that to a jury let alone having them comprehend it, I am more convinced that it is appropriate here to strike the jury notices and I so order [emphasis added].

[133] In respect to the motion to exclude the investigator's evidence, the trial judge noted that on the instructions of counsel for ALS, an investigator conducted surveillance of Cowles and had conversations with her at the place of her employment. At the time, Cowles was represented by counsel who had no knowledge of what the investigator saw and heard until disclosure took place at a pre-trial conference shortly before trial. The trial judge excluded the investigator's testimony on the ground that he had violated

rule 4.03(2) of the *Rules of Professional Conduct of the Law Society of Upper Canada*. At paras. 39-42, she said:

> [39] The Rules of Professional Conduct provide:
>
> > 4.03(2) A lawyer shall not approach or deal with a person who is represented by another lawyer, save through or with the consent of that party's lawyer.
>
> [40] Whether the approach is by the lawyer him or himself [*sic*] or an investigator retained by the lawyer it is equally improper and the lawyer bears the responsibility for those to whom he delegates tasks.
>
> [41] It is the lawyer's responsibility to insure that those to whom tasks are delegated are aware of the rules and to educate them when they are not.
>
> [42] The approach was improper. Any evidence obtained by the investigator and any other evidence obtained as the result or consequence of such information will be excluded from the trial proceeding.

V

[134] In her reasons for judgment, the trial judge dealt first with the factual issue that was central to liability. In doing so, she reviewed the evidence of Balac and Cowles in respect to what had occurred. She accepted the evidence of both plaintiffs, although it appears that neither testified about whether the passenger's window was up or down when Paca entered the car and attacked Cowles. In para. 18, she made her only reference to the evidence about the operation of the power windows given by the two engineering experts, Leier and Raftery.

[135] At para. 21, the trial judge decided the critical factual issue as follows:

> [21] In my view the only reasonable explanation on the facts, is that when the tiger, PACA, made its initial attack on the passenger side of the vehicle, the window was closed. Had it been open then the tiger would have entered the car. It

did not and this fact is evidenced by the physical damage on the passenger door described by Mr. Leier in his evidence. There were four primary dents at the sill level, three smaller ones toward the centre of the panel and two similar vertical creases at the bottom of the door. David Balac's evidence was that this damage was *not* present on the door before the incident and was present when the vehicle was returned to him after the attack. His father's evidence is to the same effect. Ranko Balac, David's father, attended the ALS premises in the morning after the attack to retrieve the car. He noted the presence of a number of dents on the passenger door that had not been present the day before. Mr. Balac Sr. is a photographer on weekends; he often carries a camera with him and did so on this occasion. Exhibit 1, Tab 11 contains the photos taken by Mr. Balac Sr. Photos "A" and "B" in particular show the damage to the passenger door. Their evidence is corroborated in this respect by that of Steve Ashbee, head game warden of ALS then and now, who after the attack noted the presence of "lots of smears, scratches, and dents" on the passenger-side door. Mr. Leier's opinion, which I accept, is that this damage was *NOT* consistent with the type of damage that might be sustained with regular and usual usage and further that the multiple locations of the damage suggest repeated incidents or impacts. Mr. Leier concluded, quite reasonably in my view, that there had been repeated vigorous striking of the vehicle by the large animal trying to gain entry into the vehicle when the windows were up. This would coincide with David's evidence about the sudden rocking of the vehicle and Jennifer's evidence about the sudden "bang" and movement of the vehicle. The motion caused David's foot to slip from the clutch and in my view probably at the same time, although David was unaware of it, caused his arm or some part of his body to come into contact with the window switches inadvertently, and thereby lower the windows on both sides of the vehicle which allowed the tigers access to the passengers. In my view this is the most reasonable explanation for what occurred and it accords with the evidence which I accept [emphasis in the original].

The trial judge then explained why she rejected the evidence of the six witnesses who testified that either Balac or Cowles had stated that the passenger's window was open when the first tiger attacked Cowles.

[136] Turning to damages, the trial judge indicated that the parties were agreed on non-pecuniary general damages for Balac and Cowles and on the *Family Law Act* claims of Cowles' family members. Then she assessed the claims of Balac's family members. Next, she assessed Balac' and Cowles' claims for past and future loss of income. In addition, the trial judge awarded out-of-pocket expenses incurred by the plaintiffs.

[137] Finally, the trial judge considered the liability of ALS for the plaintiffs' injuries caused by the tigers. Following a lengthy liability analysis in which the issue was whether liability should rest on common law negligence principles or on strict liability regardless of fault, she found ALS strictly liable for the plaintiffs' damages. In the course of her analysis, the trial judge referred to academic discussions about whether a plaintiffs' "contributory negligence" could reduce his or her damages in a case of strict liability. Although the trial judge expressed doubts that it could, she concluded that she did not have to decide the issue. In this regard, she stated at para. 140:

> In any event, I have found that the injuries to and the damages suffered by both plaintiffs resulted from the unprovoked attack on their vehicle by the tiger PACA. That forceful assault on the vehicle caused Mr. Balac's body to inadvertently come into contact with the window switch resulting in the lowering of the windows on the vehicle which admitted the tiger into the vehicle. There was no conduct, in my view on the part of either David or Jennifer which would constitute contributory negligence on their part even if such defence were available. Their windows were up when they entered the Carnivore Section and were not deliberately put down for any purpose while in that Section before the attack, by either of them.

[138] The trial judge concluded her liability analysis by finding that the defence of voluntary assumption of risk did not apply on the facts. At para. 151, she indicated that although she had found ALS strictly liable, had she not come to that conclusion she would have found ALS liable in negligence. In that situation, from what the trial judge said earlier, she would have reduced the plaintiffs' damages had she found them to be contributorally negligent.

VI

[139] ALS submits that the trial judge erred (a) in striking the jury, (b) in excluding the investigator's evidence and (c) in suggesting that contributory negligence and, by inference, the defence of "plaintiffs' own act", have no application to a finding of strict liability for damages caused by dangerous animals. In the alternative, ALS contends that the trial judge overlooked and misapprehended certain evidence, thereby committing a palpable and overriding error, by concluding that Balac must have inadvertently opened the car windows.

VII

[140] I turn first to whether the trial judge erred in striking the jury.

[141] Section 108(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43l, as amended ("*CJA*"), provides that a party to an action in the Superior Court of Justice "may require that the issues of fact be tried or the damages assessed, or both, by a jury" with the exception of claims for the kinds of relief specified in s. 108(2). A party may obtain a jury trial by serving a jury notice pursuant to rule 47.01 of the *Rules of Civil Procedure*. Section 108(3) empowers the court to strike out a jury, and reads as follows:

> On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

Rule 47.02 complements s. 108(3) and speaks to the circumstances where the court may strike out a jury notice. Rule 47.02(1) applies to situations where the service of a jury notice does not comply with procedural requirements. Rules 47.02(2) and 47.02(3) read as follows:

> (2) A motion to strike out a jury notice on the *ground that the action ought to be tried without a jury* shall be made to a judge.
>
> (3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, *in a proper case*, to try the action without a jury [emphasis added].

[142] Subrule 47.02(2) contemplates a pre-trial motion before a judge in motion court, who may strike out a jury notice on "the ground that the action ought to be tried without a

jury". In my view, this would permit the court to strike out the jury if the plaintiff's claim falls within the claims precluded by s. 108(2) of the *CJA*, as well as where, in the opinion of the judge, the case "ought to be tried" without a jury. In this case, there was no pre-trial motion to strike out the jury as the motion was made to the trial judge at the opening of trial. Arguably, this invoked discretion to strike out a jury notice "in a proper case" pursuant to rule 47.02(3). To determine the circumstances in which a case ought to be tried without a jury, or what constitutes a proper case for trial without a jury, it is necessary to review the case law. The only interpretation of a "proper case" appears to be that of this court in *Cosford v. Cornwall* (1992), 9 O.R. (3d) 37 (C.A.).

[143] Historically, a judge presiding at trial had an absolute and unfettered discretion to decide the mode of trial, despite the giving of a jury notice.[2] This discretion could not be reviewed on appeal.[3] Older jurisprudence also indicated that a judge sitting in chambers before the commencement of trial did not enjoy the same absolute discretion in striking a jury notice.[4] More deference was given to a trial judge's decision to strike a jury presumably because he or she was better acquainted with the nuances of the factual and legal issues surfacing at trial.

[144] The Ontario Court of Appeal in *Burton v. Harding and Marks*, [1952] 3 D.L.R. 302 (Ont. C.A.), however, departed from the well-established principle that a trial judge's discretionary exercise of striking a jury is not a reviewable matter. In *Burton*, a personal injury action initially proceeded before a judge and jury. On motion by the defendant, the trial judge dismissed the jury after the trial commenced and remained seized of the trial. The trial judge made numerous findings of fact unfavourable to the plaintiff and ultimately concluded that the plaintiff was negligent in crossing a street intersection. He apportioned responsibility for the accident accordingly. In ordering a new trial with a jury, the *Burton* court held that a trial judge's discretion in striking a jury must be exercised judicially, *i.e.*, the discretion cannot be exercised arbitrarily or capriciously, and must be based on sound principles. As I will illustrate, this has remained the governing principle in this province for more than sixty years.

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[2] Section 60(3) of the *Judicature Act*, R.S.O. 1980, c. 223 provided: "Notwithstanding the giving of the [jury] notice, the issues of fact may be tried or the damages may be assessed without the intervention of a jury if a judge presiding at the sittings so directs or if it is so ordered by a judge." This provision was also contained in s. 62(3) of the *Judicature Act*, R.S.O. 1970, c. 228, s. 58(3) of the *Judicature Act*, R.S.O. 1960, c. 197, s. 57(3) of the *Judicature Act*, R.S.O. 1950, c. 190, and s. 55(3) of the *Judicature Act*, R.S.O. 1937, c. 100.

[3] *Wilson v. Kinnear* (1925), 57 O.L.R. 679 at paras. 6 & 7 (C.A.); *Telford v. Secord*, [1947] S.C.R. 277; *Mizinski v. Robaillard*, [1957] S.C.R. 351; Holmested and Gale, *Ontario Judicature Act and Rules of Practice*, Vol. 1 (Toronto: Thomson Carswell, 2005) at p. 504; and *Holmested and Langton on the Judicature Act of Ontario* 5th ed., (Toronto: Carswell, 1940) at p. 263.

[4] *Brown v. Wood*, [1887] O.J. No. 333 (H.C.J. – Ch. Div.) at para. 9 and *Wilson v. Kinnear*, *supra* note 2 at para. 9.

[145] A few years later, the Supreme Court of Canada in *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 considered whether a trial judge erred in dispensing with a jury in an action arising out of a motor vehicle accident. In holding that the trial judge made no error, Cartwright J. underscored the significance of the right to a jury trial and articulated a slightly different standard of review:

> *This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons;*[5] but I cannot think that a new trial should be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appellate court was satisfied that the course followed by the trial judge was wrong in law, *if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge* [emphasis added].

Although frequent reference to the important substantive right to a trial by jury is found in the cases, this slightly modified standard of review has since been cited only a few times in Ontario, *i.e.*, *Martin v. St. Lawrence Cement Co.*, [1968] 1 O.R. 94 (C.A.), *Markovski v. Allstate Insurance Co. of Canada* (1983), 42 O.R. (2d) 689 (Div. Ct.), *Neelands and Neelands v. Haig* (1957), 9 D.L.R. (2d) 165 (Ont. C.A.) and *Cosford v. Cornwall*, *supra*. Significantly, however, it does not appear that the Supreme Court of Canada has departed from, or modified, the standard of review articulated in *King*.

[146] *Martin* was a simple occupier's liability case that involved uncomplicated issues. Nevertheless, the trial judge struck the jury on the basis of complexity and found in favour of the plaintiff. In sending the matter back for a new trial with a jury, at p. 96 this court held that the preferred approach would have been for the trial judge to first hear evidence before determining whether it was inappropriate for a case to proceed before a jury:

> In the present case the decision to discharge the jury was made by the learned Judge before any evidence had been

[5] A similar opinion has been expressed by the Supreme Court of the United States where the 7th Amendment to the Constitution preserves the right to jury trial in civil actions in a federal court. In *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) the court stated: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." More than a century earlier, in *Parsons v. Bedford*, 3 Pet. 443, 445 (1830), Justice Story stressed: "The trial by a jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealously." See, also, *Teamsters v. Terry*, 494 U.S. 558, 581 (1990).

> adduced and *he therefore enjoyed no greater advantage than a Judge sitting in Chambers*. With deference, *I am bound to say that the more desirable course would have been for the learned Judge to have proceeded with the trial by jury until the evidence or a substantial portion of it had been heard and only then to have exercised his discretion in the light of the testimony and after hearing counsel's submissions thereon*.
>
> *It is by no means certain that a jury acting reasonably must inevitably have acquitted the plaintiff of contributory negligence* and while it is regrettable that there should be a new trial of this action, the defendants were prima facie entitled to have the issues of fact, at least, determined by a jury, a right of which they have been deprived for no cogent reasons [emphasis added].

[147] Earlier in its reasons, after noting at p. 95 that "juries over the centuries have determined the issues of fact and the occupier's liability under the Court's instruction as to the law", the court went on to state at p. 96:

> The right to trial by jury in an action of this character is a substantive right as our Courts have declared on many occasions. In *Fillion v. O'Neil*, [1934] O.R. 716 at pp. 727-8, [1934] 4 D.L.R. 598, Davis, J.A., stated:
>
> > But it seems to me in this case (essentially a case to be tried by a jury so long as the jury system prevails) that the plaintiff was entitled to be given her election and that its denial was not an exercise of discretion by the trial Judge but a deprivation of a substantial right that the plaintiff in the circumstances of this case has.
>
> The right to trial by a jury in occupier cases was also discussed in this Court in *Such v. Dominion Stores Ltd*., [1961] O.R. 190, 26 D.L.R. (2d) 696.

The court went on to quote and apply the passage from the reasons of Cartwright J. in *King v. Colonial Homes Ltd.* that I have reproduced in para. 25.

[148] Although this court does not appear to have considered or relied upon *Martin*, this case, along with *Ryan v. Whitton*, [1964] 1 O.R. 111 (C.A.) lend authority for the proposition that the trial judge in this case should have adopted the "wait and see" approach as urged by the appellant's counsel on the argument of the motion. In *Ryan*, the comments of Roach J.A. at p. 112 are apt:

> With very great respect it is our view that in that situation the learned trial judge should have first heard the evidence in the presence of a jury and at the conclusion of all the evidence decided whether or not in the light of that evidence the case should be decided by the jury or by him alone. As it turned out the learned trial judge at the conclusion of the evidence given on behalf of the plaintiff Ryan in his action held that there was quite independently of any evidence that might be given in the Whitton action by the plaintiffs in that action, some corroboration of Ryan's story so that the difficulty that the learned trial judge had anticipated might arise did not in fact arise.

[149] The modified *King* standard of review was also relied upon in *Neelands.* In that case, the trial judge proceeded without a jury and awarded damages to the plaintiff arising out of an automobile accident. The trial judge reasoned that the jury had to be dispensed with due to difficult questions of law that were involved in the case. As was the case in *Martin*, the Court of Appeal in *Neelands* ordered a new trial with a jury. At p. 167 Laidlaw J.A. stated:

> This court is not satisfied that there were questions of law of such difficulty or character that the learned judge could not have made the issues plain for consideration and findings of the jury. I need not indicate what the precise form of questions to the jury should have been; that was a matter for the learned trial judge, notwithstanding the difficulty of settling the questions in a form satisfactory to the parties. *The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to be deprived of his right to have the trial proceed in that way.* A trial judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. *It must be exercised in a judicial manner and*

> *there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him.* The court is not satisfied that there was any sufficient reason for the learned trial judge taking this case from the jury. *The court is not satisfied that a jury would inevitably have made the same finding of facts as were made by the trial judge.* There was a distinct, clear-cut issue between the parties as to whether or not there was an unidentified vehicle present immediately before the collision resulting in the damages suffered by the respondents. *That issue was one of fact and of the very kind and character which a jury could decide in the exercise of their functions* [emphasis added]**.**

[150] *Cosford* was a claim for damages arising out of a motor vehicle accident in which the main issue was a claim by the corporate plaintiff for damages for loss of income sustained as the result of the loss of the personal plaintiffs' services. Although none of the parties wished to dispense with the jury, at the conclusion of the evidence the trial judge discharged the jury on his own motion on the ground of the complexity of the legal issues surrounding the corporate plaintiffs' claim for loss of income. In doing so, it appears that the trial judge was of the view that the jury would be required to decide which of three legal alternatives would entitle the corporate plaintiff to recover damages. In discharging the jury, he said that "the matter [had] become more complex than anticipated by either the parties or myself at the outset". On appeal, the plaintiff contended that even if the trial judge had jurisdiction to discharge the jury on his own motion, he could not do so on the ground of complexity where the complexity related only to an issue of law that was for the trial judge to resolve.

[151] Justice Goodman began his analysis of whether the trial judge erred in striking out the jury by emphasizing that the right to a trial by jury is a fundamental one that should not be interfered with lightly, quoting the passage from *King v. Colonial Homes Ltd.*, which is set out in para. 25. He then considered the meaning of "a proper case" in subrule 47.02(3), stating at pp. 44-45:

> In my view, a proper case is one where one of the parties moves [to strike out the jury notice] at a later date before the trial judge and the circumstances are such as would justify the exercise of his discretion to try the case without a jury.

[152] In finding that the trial judge exercised his discretion to strike out the jury by the application of incorrect principles, at pp. 47-48, Goodman J.A. held:

> The trial judge did not exercise his discretion in dispensing with the jury on the ground that the nature of the evidence was too complex or technical for a jury to make a proper assessment. On the contrary, as indicated in the excerpt from his reasons set forth above, he dispensed with the jury on the basis that the law to be applied to the facts as found by them was too difficult to explain to them.
>
> *In my opinion, he erred in this regard. It was his duty to determine the legal principles to be applied in the case and to instruct the jury with respect to those principles.* It seems clear that the present case was, indeed, one in which the corporate veil should be lifted or pierced. See *Kummen v. Alfonso*, [1953] 1 D.L.R. 637, (Man. C.A.). The trial judge was correct in so holding. *It was a matter of law which he had to decide before he himself could assess the respondent's damages and it would have been no more onerous or difficult for him to make the decision for the purpose of instructing the jury as to the appropriate legal principles to be applied to guide it in giving its verdict on the basis of the findings of fact made by it in answer to proper questions left to it, than it was for his own purposes in assessing damages.*
>
> . . .
>
> It is my view that the trial judge erred in law in exercising his discretion to dispense with the jury on the ground that "I'm doing that because in my judgment, there are issues now involved that aren't properly put to a jury to be decided". *The issues to which he referred were issues of law which it was his duty to decide and the difficulty in deciding such issues did not form a basis for dispensing with jury. Questions of law are never matters for the jury to decide* [emphasis added].

[153] In allowing the appeal and ordering a new trial with a jury, the court applied the test in *King v. Colonial Homes Ltd.* stating that it was not satisfied that a "jury acting reasonably must inevitably have reached substantially the same result" as that reached by the trial judge.

[154] In sum, *King*, *Martin*, *Neelands* and *Cosford* indicate that 1) the right to a jury trial is a substantive right that cannot be lightly interfered with unless there exist cogent reasons to do so; 2) if a trial judge errs by relying on incorrect or inapplicable principles in exercising his or her discretion under s. 108(3) of the *Courts of Justice Act*, an appellate court may interfere if it is not satisfied that a jury acting reasonably must inevitably have reached the same result as did the trial judge; and 3) in certain situations, the preferred procedure for a trial judge is to first entertain evidence before ruling on a motion under Rule 47.02(2) of the *Rules of Civil Procedure* to strike out the jury.

[155] I find it helpful to refer to three judgments of trial judges which span a period of forty years that reflect, in my view, the preferable approach for a trial judge to follow when asked at the outset of a trial to strike out a jury notice on the ground of complexity.

[156] *Wood (Litigation Guardian of) v. Audia*, [2004] O.J. No. 1478 (S.C.J.) is a case that involved similar issues to this appeal. In *Wood*, the plaintiffs moved to strike out a jury notice delivered by the defendants. The plaintiffs' action arose from a motor vehicle accident in which the minor plaintiff sustained severe injuries when the moped he was operating collided with another vehicle. The plaintiffs made numerous submissions to advance the argument that the trial would be unduly complex for a jury, including 1) the difficulties the trial judge would face in instructing the jury on the standard of care of a parent and how to apportion liability, 2) the difficulty in explaining the presence of counsel representing the insurer, 3) the potential difficulty a jury may have in assessing the minor plaintiffs' damages, 4) evidence would be given by twenty witnesses, including eleven medical and damages-related experts, and 5) conflicting evidence would be presented on the nature and extent of the plaintiffs' injury. In the plaintiffs' submission, these complexities in combination required a bench trial.

[157] Justice Lane considered these arguments, but ultimately dismissed the plaintiffs' Rule 47 motion to strike the jury. He noted at paragraphs 21-23:

> [21] I have already noted the views of the Court of Appeal that the trial judge is the person best situated to make this decision. Motion judges have frequently been reversed on such decisions and the matter referred to the trial judge. *At the opening of trial, the trial judge is not really in a better position than a motion judge to make the decision. It is only as the trial progresses and the evidence goes in, that the trial judge's advantage over the motion judge develops. For this reason, the best course is often the course proposed by [counsel for the defendants]: wait and see.*

> [22] In the present case, I am not persuaded that there is sufficient factual complexity to take it out of the class of cases frequently tried by juries. The liability evidence will include accident reconstruction and mathematical analysis to determine the position of the vehicles on the road at critical moments. I do not think that the jury needs to understand the mathematics in order to understand the significance of this evidence; nor do I think that a good expert witness will leave them uneducated….
>
> [23] No doubt the medical evidence will be complex, but it will be up to the trial judge to gauge the understanding of the jury as the evidence goes in, not now when one can only speculate [emphasis added].

[158] The *Wood* case is germane because it indicates that though medical evidence will be complex at trial, a trial judge will be in a better position to gauge the jury's comprehension and appreciation of the evidence *after the evidence goes in.* Turning to this appeal, the trial judge acknowledged that the medical evidence would be detailed, lengthy, complex, and conflicting. She refused, however, to follow a "wait and see approach" because in her view, the evidentiary complexities "arise by reason of the very nature of the actions themselves." In effect, she prematurely speculated that the jury would be overwhelmed by the medical evidence adduced at trial when, in fact, the many doctors that counsel said would testify did not because the parties were successful in resolving the amount of the general damages subsequent to the determination of the motion to strike out the jury and before the plaintiffs' opened their case.

[159] Furthermore, the *Wood* case illustrates that the factual matrix of the present appeal was not so complex as to be in a different category from cases that are typically tried by juries. Similar to the circumstances in *Wood,* the liability evidence included the testimony of various witnesses, including the plaintiffs, to determine whether the car's windows had been rolled down before the plaintiffs entered the game park's carnivore section.

[160] In *Strojny v. Chan* (1988), 26 C.P.C. (2d) 38 (Ont. H.C.J.), the plaintiff brought a medical malpractice action against the defendant. The defendant doctor moved prior to trial to strike the jury on the basis that the case was complex. In dismissing the defendant's rule 47.02(2) motion, Barr J. noted, at p. 40 and p. 42:

> My experience has been that the complexities that are raised before judges on applications such as this frequently fail to materialize at trial after the jury notice has been struck out.
>
> . . .
>
> This is not the place to explore the virtues of trial by jury but, in spite of its shortcomings, there are many who feel that the jury is a better tribunal for determining credibility and for finding facts generally and that jurors are more closely in touch with community standards and better able to apply them where they are relevant.
>
> . . .
>
> The action in question is a common law action, as opposed to an action invoking the equitable jurisdiction of the court. As a common law action it is prima facie to be tried by a jury.

[161] *Strojny* also lends support for the proposition that where a party raises complexities during a Rule 47.02(2) motion before trial, a "wait and see" method is preferable, especially because many of the "complexities" that are raised do not materialize at trial, as was the case in this appeal.

[162] A "wait and see" approach was also adopted in *Cole v. Trans-Canada Air Lines*, [1966] 2 O.R. 188 (H.C.J.). The court in *Cole* dismissed a motion to strike out a jury notice before trial in a fatal plane crash accident on the grounds that the actuarial evidence and other evidence pertaining to the future value of money, the appropriate discounts for the cash value of the verdict, and the effect of income tax and old age security pensions would be too complex for a jury to understand. Justice Haines pointed out that such evidence is routinely considered by juries in fatal accident claims, and, as Barr J. did in *Strojny*, noted that the complexities of issues raised by counsel seldom materialize as the trial progresses.[6]

[6] In criminal cases, the rule is that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on a motion for a stay until after all the evidence has been heard: *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.); *R. v. La* (1997), 116 C.C.C. (3d) 97 (S.C.C.).

VIII

[163] This court held in *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 at para. 52 that an appellate court may not interfere with the exercise of a trial judge's discretion to discharge a jury unless it has been carried out arbitrarily, capriciously or on wrong or inapplicable principles, thus reiterating the standard of review applied fifty years earlier in *Burton v. Harding and Marks*. Although

the standard of appellate review that applies to a trial judge's discharge of a civil jury is well settled, *Hunt* provides a helpful guide to the analysis of the factors that could properly inform a trial judge's discretion to strike a jury under s. 108(3) of the *C.J.A.* For the most part, the cases speak in general terms of a trial being too complex for a jury to adjudicate.

[164] I find the reasons of Austin J.A. in *Hunt* instructive. The substantive issue before this court was the liability of a host to a guest who provided alcohol to the guest that was injured in an automobile accident as a result of her impairment. The procedural issue was the trial judge's discharge of the jury on the principle ground that the case presented issues that were too complex for the jury to decide. This court granted a new trial to the defendant host, which had been found partly at fault for the plaintiff's injuries, because the trial judge improperly exercised his discretion in discharging the jury, thereby depriving the defendant of its right to a jury trial.

[165] Although it was unclear at what stage of the proceedings the plaintiff moved to discharge the jury, it is reasonable to infer from Austin J.A.'s reasons that the motion was made during the course of the trial. The plaintiff relied on the sixteen grounds listed in para. 56 of Austin J.A.'s reasons in her submission that the case presented issues that were too complex for a jury to decide. I note that many of these grounds are generically similar to those relied on by the plaintiffs in their motion to strike the jury in this case, in particular, the determination of questions of law and questions of mixed law and facts, and issues surrounding the calculation of future income loss.

[166] The trial judge concluded his reasons for discharging the jury in this way:

> Because of the aforementioned complexities submitted by the plaintiff and reproduced above, I have come to the conclusion that it would be inappropriate in this instance for this court to continue to proceed with the jury, and in the circumstances, I have discharged same.

He also commented that:

> The plaintiff admits that taken individually, each and every one of these complexities could likely be dealt with by a jury, properly instructed. He rather relies on the quantity of those complexities to render this action so complex so as to make it inappropriate to continue with the jury.

[167] In submitting that the trial judge relied on erroneous principles in discharging the jury, the appellant argued that many of the factors that the trial judge relied on in finding that the case was too complex for a jury to decide were matters of law and, as such, were the concern of the trial judge and not the jury. Justice Austin accepted this argument. Thus, as the resolution or determination of questions of law are for trial judge, this was not a proper factor to be considered by him in his complexity analysis. Justice Austin, after observing that the trial judge erred in striking out the jury on the ground that it would be too difficult to explain the law to the jury, stated at para. 72: "It was his duty to determine the legal principles to be applied in the case and to instruct the jury with respect to those principles." With respect to the trial judge, this was also her duty in this case.

[168] Justice Austin considered each of the grounds relied on by the trial judge in discharging the jury. Of particular relevance to this appeal is Austin J.A.'s conclusion in respect to questions of mixed fact and law at paras. 62-64:

> [62] On the motion to discharge the jury, the plaintiffs' particular concern was "questions of mixed law and fact" and the trial judge addressed the matter on that basis. This does not strike me as a helpful approach. The determination of the standard of care in any given case is always a question of "mixed fact and law"….
>
> Just because an issue is one of "mixed fact and law" does not mean it is especially complex.
>
> [63] With respect to the "complex" questions respecting damages, it is argued that some of these were legal questions, to be dealt with by the trial judge, and that the others are dealt with by juries every day.
>
> [64] In a jury case, the judge resolves the legal questions and provides the answers to the jurors who first find the facts and then determine whether those facts comply with or satisfy the requirements of the law. *There is therefore nothing inherently complex in the fact that it may be a question of mixed fact and law* [emphasis added].

[169] As for the assessment of damages, at para. 63 Austin J.A. observed that they are "dealt with by juries every day". At para. 65 he stated that the toxicological evidence

was typical, but not unusual, noting that the jury was only required to understand the result of the evidence "as juries do in criminal cases on a regular basis".

[170] With respect to other reasons given by the trial judge for discharging the jury, Austin J.A. was particularly critical of the difficulty that the trial judge felt he would have in preparing jury instructions in the short time "usually available" to do so and "for the jury to comprehend and remember the different shades of standards to apply in attributing negligence between the respective parties". At para. 68, Austin J.A. held that this was not a proper consideration, adding at para. 70:

> …To the extent that his difficulty lay in explaining the law to the jury, as appears to have been the case, that was an error of law. It is an error of law to rely upon a trial judge's inability to explain the law to the jury as a basis for discharging the jury.

[171] At para. 73, Austin J.A. concluded:

> Finally, it bears repeating that the right to trial by jury is a substantial right and one which is not to be taken away lightly. The onus is upon a party moving to discharge a jury and that onus must also be substantial. The arguments of counsel on the motion are fully recorded, as are the reasons of the trial judge. With respect, none of these reflect any substantial reason for discharging the jury.

[172] *Hunt* was applied in the recent decision of this court in *Brady v. Lamb* (2005), 78 O.R. (3d) 680 (C.A.) where a new trial was ordered when, in the course of the trial, the trial judge erred in the exercise of his discretion in discharging the jury. *Hunt* and *Brady* are representative of a consistent line of decisions from this court over the past sixty years illustrating that this court has not hesitated to order a new trial when it has found that a trial judge has relied on improper principles in removing a case from the jury. In doing so, while recognizing the deference to be accorded to trial judges, the court has repeatedly emphasized the importance of preserving the statutory right to a jury trial, and further emphasized that a party is not to be deprived of that right except for substantial and significant reasons.

[173] Of particular significance to this appeal are the earlier decisions of this court that applied the standard of review articulated by the Supreme Court of Canada in *King v. Colonial Homes Ltd.*, *supra*, and which in my view strike the proper balance between

deference to the trial judge and fairness to the parties. I refer, in particular, to the cases that I have cited in para. 25 that stand for the proposition that deference should be accorded to the decision of a trial judge to discharge a judge even if an appellate court is satisfied that the course followed was wrong in law, but only when the appellate court is also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge. As I will explain, in this case I find it impossible to be satisfied that a jury would have reached the same result as that reached by the trial judge.

IX

[174] While the trial judge's reasons do not reflect an arbitrary or capricious exercise of judicial discretion, her decision was grounded on incorrect or inapplicable principles. I say this for the following reasons.

[175] This court held at para. 70 of *Hunt* that it is an error of law to discharge a jury based on an inability to explain the applicable law to it. In this case, at para. 31 of her reasons the trial judge expressed uncertainty with respect to whether any defences are available where liability is based on strict liability. This, of course, was a question of law. As the appellant emphasizes at para. 43 of its factum, "[t]rial judges are presumed to know the law and to be able to explain it to juries." If the trial judge was motivated to discharge the jury on the basis that it would be too difficult to explain the law of strict liability to the jury, together with any defence that applied, this is reversible error according to *Hunt*. Although the trial judge discussed in some detail whether contributory negligence could reduce a plaintiff's damages in a case of strict liability, because of her findings of fact, she did not ultimately have to decide this issue. Had she retained the jury, it would have been necessary to decide the issue. Having done so, it would have been a simple point on which to instruct the jury.

[176] The *Hunt* court emphasized at para. 62 that an issue that is one of "mixed fact and law" is not necessarily complex. At para. 31 of her reasons, the trial judge characterizes the liability issues as complex, especially because the issue of whether the doctrine of strict liability applied to the facts was "at best a question of mixed fact and law." As *Hunt* explains, it is incumbent on a trial judge to resolve questions of law and to explain the law to the jury who first finds facts and then determines how those facts apply to the law as outlined by the trial judge. In her reasons for judgment, the trial judge held that this was a case of strict liability – a proposition that could easily have been explained to the jury had it been retained.

[177] In my view, the estimated length of the trial was an irrelevant factor on which the trial judge relied in striking the jury and, therefore, constituted an error of law. The trial

judge took into consideration a six-week estimate for completion of the trial. This was not a relevant consideration and had no bearing on the complexity of facts or the predominance of legal issues at trial. In any event, in the contemporary litigation world, many civil and criminal trials exceed six weeks. In *Demeter v. Occidental Life Insurance Co. of California* (1979), 23 O.R. (2d) 31 (H.C.J.), aff'd 26 O.R. (2d) 391 (Div. Ct.) Labrosse J. (as he then was) suggested that the anticipated length of trial did not warrant striking out the jury in the circumstances. In *Demeter*, the plaintiff was involved in related criminal proceedings that attracted extensive media coverage. Labrosse J. noted in his reasons at p. 34 that the issues arising in the civil context would be no more complex that those arising in the associated criminal arena:

> It cannot be disputed that the facts and issues of law will be complicated but there is nothing strange or exceptional about that. Jurors often try very long and complicated murder or conspiracy trials. A jury is presently on a very long trial involving some nine accused persons together with eleven companies charged with serious and complicated offences.
>
> In the present actions, the defences are substantially identical. Numerous issues referred to in the material relate to the admissibility of evidence. They will be decided by the trial Judge and not by a jury. *I fail to see how the issues could be any more difficult than at the criminal trial of the plaintiff and they were decided by a jury*. If they do become so complex, the trial Judge can exercise his discretion [emphasis added].

[178] In my experience as a trial judge, I presided over several very lengthy criminal jury trials involving difficult concepts, such as complicated conspiracy trials that involved the co-conspirator's exception to the hearsay rule, and trials where self-defence had to be explained to the jury. Based on that experience, I have a high regard for the intelligence and common sense of juries. If a jury can deal with similar issues in the criminal context, logically a jury should be able to deal with them in a civil context notwithstanding that in criminal trials the trial judge has no discretion to strike the jury. Based on my experience on this court, I have a high regard for the ability of trial judges to explain difficult and complicated concepts of law and factual issues to a jury. Moreover, if the jury experiences difficulty in understanding the trial judge's instructions, clarification can be requested from the trial judge. I would refer to the following observation of Dickson C.J. in *R. v. Corbett*, [1988] 1 S.C.R. 670 at 692:

> In my view, it would be quite wrong to make too much of the risk that the jury *might* use the evidence for an improper

> purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law [emphasis in original].

For a similar observation by Dickson C.J., see *R. v. Hill*, [1986] 1 S.C.R. 313 at 334. Although the observations of the Chief Justice were made in the context of criminal trials, logically, they apply to civil trials. See, also, *Hamstra (Guardian ad Litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092 at para. 15.

[179] In being of the view that the case involved complex liability issues, in particular whether this was a case of strict liability or one of negligence, and whether damages awarded on the basis of strict liability could be reduced by the plaintiffs' contributory negligence, the trial judge properly identified legal issues that she was required to resolve. In my view, however, this did not provide a "cogent" reason, to use the language of *King v. Colonial Homes Ltd.*, or a sound principled reason, to use the language of *Burton v. Harding and Marks*, to strike out the jury, thereby depriving ALS of its important substantive right to a jury trial. In virtually every jury trial the trial judge is called upon to resolve legal issues and to provide appropriate instructions to the jury. To say that doing so provides a cogent or principled reason for striking a jury, in my respectful view, would seriously diminish a party's right to a jury trial.

[180] In my view, this was a case in which it was preferable for the trial judge to have reserved her decision on the motion to strike out the jury until after the evidence had been completed as counsel for ALS had urged her to do, or, perhaps, until a discrete problem arose. As the cases emphasize, where, as in this case, a motion to strike out the jury on the ground of complexity is made at the outset of the trial before any testimony has been heard, the trial judge is in no better position to decide the motion than a motion judge who is asked to strike out a jury notice on the same ground. The authorities which counsel a "wait and see" approach are informed by the important principle that the right to a jury trial is a fundamental substantive right that should not be interfered with except for very cogent reasons. In my view, this approach is also informed by the fact that juries have tried multitudes of cases involving personal injuries sustained in circumstances where there is conflicting evidence about the cause of the injuries, the extent of the

injuries, pecuniary and non-pecuniary damages, and they have been able to resolve these issues with the guidance received from trial judges.

[181] What subsequently occurred in this case shows that it would have been preferable for the trial judge to take a "wait and see" approach before ruling on the plaintiffs' motion to strike the jury. She rejected the suggestion of the appellant's counsel to follow this approach because she considered that the "evidentiary complexities" were already a "reality", stating at para. 33 that they were "not merely possibilities which may arise in the future; they arise by reason of the very nature of the actions themselves". However, the wisdom of waiting until the evidence unfolded was illustrated soon after the jury was struck out, as the parties agreed on the amount of the plaintiffs' general damages, thereby removing this issue from the case and greatly reducing the medical evidence tendered at trial which the trial judge had considered a "reality". As the authorities to which I have referred indicate, this is the preferable approach. In yet an additional case, where the trial judge allowed a motion to strike out the jury at the commencement of the trial, this court had the following to say in *Sloane v. Toronto Stock Exchange* (1991), 5 O.R. (3d) 412:

> As this court has frequently stated, the right to trial by a jury is an important substantive right: see *Isaacs v. MHG International Ltd.* (1984), 45 O.R. (2d) 693, 7 D.L.R. (4th) 570 (C.A.) and *Such v. Dominion Stores Ltd.*, [1961] O.R. 190, 26 D.L.R. (2d) 696 (C.A.). *That right should not be denied prematurely*. In our view, it was inappropriate to strike the jury notice in this case. All of the evidence going to the question of whether or not there was just cause for the appellant's dismissal was eminently suited to assessment by a jury. *Had the unfolding of the evidence made it appropriate to do so, specific issues, such as those relating to the assessment of damages, could have been withdrawn from the jury. We consider this an appropriate case in which to order a new trial before a jury* [emphasis added].

In this case, had the assessment of future loss of income, which was of concern to the trial judge, taken on a dimension that indicated it was not appropriate to leave to the jury, it could have been withdrawn from the jury and decided by the trial judge.

[182] Although a small point, another factor relied on by the trial judge in striking the jury was her view that it would be difficult to explain the various roles of counsel. In my view, this was irrelevant to whether the jury would be able to carry out its function, and, thus, constitutes an error in law.

[183] When asked to strike the jury, the general approach taken by the court is to ask what it is about the case that makes it inappropriate to be decided by a jury. No doubt this is because the onus rests on the party moving to strike the jury to satisfy the court that it is appropriate to do so. As I have observed, almost invariably when a motion succeeds it is because the case is seen as too complex to be tried by a jury. In my view, there is an important factor in this analysis that is usually overlooked. The court should also ask whether the essential character of the plaintiff's claim and its underlying facts make the case suitable for a jury trial. Approached from this perspective, at the time the plaintiffs' motion was argued the essential character of their claims was damages for injuries sustained as a result of the defendant's negligence, with only one factual issue to be decided, and general damages and past and future income loss to be assessed. For decades, if not centuries, juries have decided these issues. Indeed, as the factual issue concerning the car windows engaged credibility considerations, it was eminently suited to be decided by the jury.

X

[184] As I am of the opinion that the trial judge erred in the exercise of her discretion in discharging the jury, the issue becomes whether I should order a new trial. This calls for the application of the test articulated by the Supreme Court of Canada in *King v. Colonial Homes Ltd*. Applying this test, in my view it is far from clear that a properly instructed jury acting reasonably must inevitably have reached the same result as did the trial judge. The central factual issue in the case was whether the passenger's window was left open by Cowles for the purpose of taking a picture, or whether this window and the driver's window were opened by Balac through inadvertence. In making her finding that the windows were opened through inadvertence, the trial judge rejected the evidence of six witnesses who testified that Cowles or Balac had told them that Cowles had opened the passenger's window to take a picture. The remarkable feature of the evidence of the six witnesses was that it was identical in attributing to Cowles an admission that she had opened the window. A jury could well have taken a different view of the reliability of these witnesses and of Balac and Cowles than did the trial judge. Although the trial judge was entitled to reject the evidence of the six witnesses, a jury might not have done so.

[185] Notwithstanding a simple fact situation, the plaintiffs contend that this is a very complex case. As I have endeavoured to illustrate in my review of the factors that the trial judge relied on to strike the jury, I am not satisfied that there were issues of such difficulty that the experienced trial judge could not have made them plain for the consideration and findings of the jury, aided as it would be by the questions drafted by counsel and approved by the trial judge. In my view, the comments of Laidlaw J.A. in *Neelands* which are quoted in para. 29 of my reasons apply to the circumstances of this

case in which, to adopt the language of Laidlaw J.A., the "distinct, clear-cut issue between the parties" is how the car's windows came to be open permitting the tigers to maul the plaintiffs. In addition, Goodman J.A.'s analysis of the circumstances in *Cosford* which is quoted in para. 32 also apply to the facts of this case.

XI

[186] In reviewing the cases in which the court has considered whether to strike a jury on the ground of complexity, I was struck by the absence of any attempt to define what constitutes a case that is too complex to be trusted to a jury. In addition, I was struck by the absence of any analysis as to why some cases should not be tried by a jury and others should be, and by a similar absence of any analysis as to why a judge is presumed to be able to do a better job than a jury. Although juries have rendered fair and rational verdicts for centuries in very complicated criminal trials (see, for example, *R. v. McNamara, No. 1* (1981), 566 C.C.C. (2d) 193 (Ont. C.A.) which was a fifteen month trial followed by an eleven day jury charge), why is it assumed that they are not capable of doing so when the same circumstances become the subject of a civil action? In reading the judicial opinions, it is difficult to escape the conclusion that decisions about the right to a jury trial in particular cases are informed more by intuition and assumptions about the relative abilities of juries and judges than by empirical knowledge. Stated somewhat differently, without the benefit of supporting empirical data, the hypothesis used to support striking a jury is that jurors, but not judges, are incompetent to deal rationally with complex civil cases. To this I would add, as it is accepted that a jury trial presents more management issues for a trial judge than a bench trial and requires the trial judge to prepare and deliver instructions to the jury, in my view judges must be careful to avoid subconscious bias in favour of a bench trial when confronted by a motion to strike the jury.

[187] There is a significant difference in Canada and the United States in the jurisprudence on the subject of striking juries. In the United States, the Seventh Amendment to the Constitution of the United States of America guarantees a right to trial by jury in civil cases brought in a federal court. This has given rise to a considerable volume of case law and academic literature on whether there is, or should be, a "complexity exception" to a litigant's constitutional right to a civil jury trial.[7] What is

[7] There is a substantial volume of American academic literature that discusses the constitutional right of a civil jury in the federal courts. See, *e.g.*, Patrick E. Higginbotham, "Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power" (1977-1978) 56 Tex. L. Rev. 47; Constance S. Huttner, "Unfit for Jury Determination: Complex Civil Litigation and The Seventh Amendment Right of Trial by Jury" (1978-1979) 20 B.C. L. Rev. 511; Note: "The Right to a Jury Trial in Complex Civil Litigation" (1978-1979) 92 Harv. L. Rev. 898; Note: "The Case for Special Juries in Complex Civil Litigation" (1979-1980) 89 Yale L. J. 1155; Richard O. Lempert, "Civil Juries and Complex Cases: Let's Not Rush to Judgment" (1981-1982) 80 Mich. L. Rev. 68; Peter W. Sperlich, "The Case for Preserving Trial by Jury in Complex Civil Litigation" (1982) 65 Judicature 394; Lisa S. Meyer, "Taking the 'Complexity' Out

instructive about the American experience is the nature of the cases that are commonly characterized as complex and form the foundation for motions to strike the jury. In the United States, "complexity exception" arguments are to be found typically in antitrust, securities, patent, fraud and mass tort cases in which it is contended that there are issues which are too complicated for a jury to understand and render a rational verdict. In Canada, of course, few, if any such cases are tried by a jury. However, among the very few American cases where a court has been asked to strike a jury in a personal injury case, the court has never done so.

[188] While the issue as to whether a complexity exception to the constitutional right to a civil jury trial should be recognized has not been resolved in the United States[8], in my view it can be said that a "complexity exception" to a litigant's right to a jury trial contained in s. 108(1) of the *CJA* has been recognized in this province. The contrast between what is characterized as a complex case in the American and Canadian jurisprudence is stark. There is nothing in s. 108(1) or s. 108(2) of the *CJA* that creates a complexity exception in the legislature's iteration of the claims that can and cannot be tried by a jury. The exception has been created by the exercise of judicial discretion. The result is that a litigant stands to be deprived of his or her statutory right to a jury trial if his or her claim is found to be complex. It is troubling that two classes of cases have been created resulting in a double standard – simple cases that a jury can be trusted to decide, and complex cases that only a judge is deemed competent to decide.[9]

[189] A very through and helpful discussion of whether jurors are competent to decide complex cases is that of Mark T. Cowie, "Juries and Complex Trials", in Vol. 3 *Jury Service in Victoria: Final Report*, ch. 2 (Melbourne, Victoria: Parliament of Victoria, Victorian Law Reform Committee, 1997). The author wrote a research paper that was commissioned by the Victorian Law Reform Committee to assist it in carrying out a reference from the Victorian Governor in Council in relation to the jury system in Victoria. At pp. 56-57 he concluded that there was not a "good historical foundation for

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of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial" (1993-1994) 28 Val. U. L. Rev. 337; Douglas King, "Complex Civil Litigation and The Seventh Amendment Right to a Jury Trial" (1984) 51 U. Chi. L. Rev. 581; Joe S. Cecil et al, "Comprehension of Difficult Issues: Lessons from Civil Jury Trials" (1991) 40 Am. U. L. Rev. 727; Neil Vidmar, "The Performance of the American Civil Jury: An Emperical Perspective" (1998) 40 Ariz. L. Rev. 849; Robert D. Myers et al "Complex Scientific Evidence and the Jury (1999-2000) 83 Judicature 150.

[8] The Supreme Court of the United States has not ruled on whether there should be a complexity exception to the 7th Amendment, while Circuit Appeals Courts are split on the issue.

[9] This autumn the British government intends to introduce legislation to permit a single judge to preside over complex criminal fraud trials on the application of the prosecution. A judge will be able to grant an application if "the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury". See *The Independent*, Online ed., September 19, 2006.

the argument that plaintiffs may be denied the right to a jury trial because their cases are complex", having found on the evidence available "that the case of jury incompetence in complex litigation has not been made out". However, at p. 57 he added:

> This, however, is not to suggest that the involvement of juries in complex litigation is without its difficulties. In fact, many of the alleged weaknesses and difficulties have arisen because the practices and procedures employed in the trial process have not been designed with the needs and capacities of jurors in mind. It would seem that if we are to preserve trial by jury in complex cases we must be willing to take measures which will assist juries in performing their difficult task. Simple changes such as appropriate breaks, the provision of facilities to encourage note taking, improved juror comfort, providing jurors with the opportunity to ask questions of witnesses, and the provision of transcripts would go a long way towards eradicating or lessening the problems. Also, there can be little argument with the notion that the jury system works at a more optimum level when the issues are clearly defined, evidence is presented in manageable proportions, and the case is conducted in a manner which is coherent and well structured.

[190] Earlier, Mr. Cowie attempted to define a "complex" case. Although noting that cases involving issues calling for scientific, technical, or other specialized knowledge, with conflicting and contradictory opinions from experts, are frequently found to be complex, he was unable to present a compendious definition. However, at p. 10 he observed that the "term *complexity* has multiple, ambiguous meaning and carries evaluative connations in addition to its apparent descriptive meaning". He added at p. 11 that "any attempt to isolate what makes a trial complex is a subjective venture".

[191] If I were to venture a description of a case that it is so complex as to be problematic for a jury, I would use as a model one that is so lengthy that it encompasses volumes of oral and documentary evidence, a multitude of issues, numerous parties, technical evidence, and, perhaps, difficult questions of law. In my view, none of these characteristics feature in this case which, in essence, is a simple personal injury case arising from the negligence of the defendant or, possibly, the plaintiffs. Juries are well-suited to resolve credibility issues and to quantify damages. With appropriate instructions by the trial judge in the law and careful articulation of the issues, in this case a jury should have no difficulty in resolving the essential factual issues and in assessing the past and future loss of income sustained by the plaintiffs. At risk of repetition, in

considering whether to strike a jury, the court must keep in mind the paramountcy of a litigant's right to a jury trial and avoid limiting this right to short, simple cases, while denying it in those cases which appear to require lengthier trials and involve less simple issues. To this end, the focus must remain on the statutory right to a jury trial, and should not be on the perceived difficulty that the trial judge may have in crafting jury instructions. This, of course, is part of the traditional role of a trial judge.

[192] Finally, I turn to a consideration that is virtually overlooked or ignored in Canadian jurisprudence. I refer to the failure of courts to consider measures that are available to preserve a litigant's right to a jury trial by resort to techniques designed to assist juries in their roles. As I have mentioned, one device that is always used is the submission of questions for the jury to answer, which no doubt aid a jury considerably in its deliberations. But more can be done.

[193] In cases involving multiple parties and issues, to preserve the right to a jury trial judges and lawyers have a role to play in structuring the trial in such a way as to provide jurors with the most possible assistance. In my view, early, active involvement by the judiciary is critical in managing complex litigation. Rule 50, providing for pre-trial conferences, gives the court broad powers in scheduling, management and the defining of issues. If effectively used, in a complex case a succession of pre-trial conferences should enable the judge and counsel to develop a trial management plan that includes schedules and other procedures for identifying and resolving disputed issues of law, and by clarifying and narrowing disputed issues of fact. If the plans are followed, the issues at trial will be clearly defined and should be more easily understood by the jury. Counsel should be required to take advantage of rule 51.02 by serving a request to admit facts, and should be prepared to stipulate to matters not in genuine dispute. To facilitate the litigating of issues in dispute, with respect to each issue the parties should present a detailed outline of their contentions, with supporting facts and evidence. Thus, the judge must take an active role in determining how a trial will be best structured to assist the jury in fulfilling its role. In addition, consideration should be given to permitting jurors to take notes and to ask written questions, and trial judges should be able to provide each juror preliminary and final written instructions.

XII

[194] I come now to consider ALS's two remaining grounds of appeal. Although it is not necessary to deal with them given my conclusion that a new trial is required, it will be helpful to do so for the guidance of the judge presiding at the new trial.

[195] In para. 13 of my reasons I have reproduced the trial judge's reasons for excluding the evidence of an investigator retained by counsel for ALS to conduct surveillance of Cowles in the course of which he had conversations with her at a time when Cowles was represented by counsel. The trial judge excluded his evidence on the ground that the investigator had violated rule 4.03(2) of the *Rules of Professional Conduct of the Law Society of Upper Canada* which precludes a lawyer from approaching or dealing with a person who is represented by another lawyer, except with the consent of the party's lawyer. She held that whether the approach is by a lawyer or by an investigator retained by the lawyer, rule 4.03(2) applied and its violation required the exclusion of evidence thereby obtained.

[196] Counsel for ALS contends that the trial judge misconstrued the purpose of the rule. It is submitted that the purpose of the rule is to govern the professional conduct of lawyers, and not to govern the admissibility of evidence that may have been obtained consequent to a breach of the rule. I am in agreement with this submission.

[197] Rule 4.03 is entitled "Interviewing Witnesses". The Law Society's commentary to rule 4.03(2) provides, in relevant part, as follows:

> This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. A lawyer may communicate with a represented person or an employee or agent of such a person, concerning matters outside the representation. Also parties to a matter may communicate directly with each other.
>
> The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise whether there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In my view, it is clear from the language of the rule and the commentary that the purpose of the rule is to prevent lawyers from circumventing other lawyers by dealing directly with their clients. There is no evidence that counsel for ALS intended or instructed the investigator to approach Cowles with the intent of "dealing" with her. Had there been evidence that this is what had occurred, counsel might have been in breach of rule 4.03(2). However, this would then be a matter for the Law Society to consider as the court seldom, if ever, becomes involved in such matters.

[198] The Law Society passed *The Rules of Professional Conduct* to ensure that its members maintain the highest standards of professional conduct. Where a member's contravention of a rule is brought to the attention of the Law Society, it may result in the commencement of a disciplinary proceeding against the member. However, the *Rules of Professional Conduct* do not, and could not, affect the admissibility of relevant evidence in civil or criminal proceedings. Thus, even if it could be said that counsel for ALS contravened rule 4.03(2), this would not affect the admissibility of relevant evidence acquired by the investigator.

[199] The record before us does not contain the investigator's complete report of his surveillance of Cowles and what she said to him. What is known from the affidavit of a law clerk in support of Cowles's motion to exclude the investigator's testimony is that the surveillance of Cowles occurred at a "strip club" where she was employed as an exotic dancer before and after the incident with the tigers. Considering the excerpts from the report contained in the affidavit, what the investigator saw and heard would be capable of adversely affecting Cowles's credibility, which is likely why she attacked this admissibility of this evidence. Unfortunately, the trial judge did not consider whether this evidence was relevant but focused only on how it was obtained. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the court. This is essential if justice is to be done between the parties.

[200] By commencing this action against ALS, the plaintiff Cowles has placed in issue the cause and extent of her injuries. In my view, having placed these factors in issue, it would be reasonable for Cowles to assume that ALS would investigate her claim, in the course of which it might hire an investigator to make observations of her activity and, if possible, to converse with her if she agreed to do so. Having put in issue her medical condition and the cause of her injuries, Cowles cannot complain where ALS seeks to introduce evidence that its investigator acquired relevant to these issues. *Cf.*, *Cook v. Ip et al* (1985), 52 O.R. (2d) 289 (C.A.), leave to appeal to S.C.C. refused 55 O.R. (2d) 288n.

[201] The established test for the admission of evidence at trial rests on relevancy. Under this test, where evidence is tendered for impeachment purposes, as in this case, the

admission of the evidence requires a showing of relevance to the credibility of a witness on a material matter and a demonstration that the potential value of the evidence for this purpose outweighs its potential prejudicial effect. The trial judge, unfortunately, failed to address these factors. Although the record concerning the surveillance evidence is incomplete, in my view it is reasonable to infer that it was relevant to Cowles's credibility in respect to the circumstances surrounding the attack by the tigers. In addition, if she were to be disbelieved on this matter, the reliability of the evidence of her expert might also suffer to the extent that it was based on her description of what took place. See *Landofi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.).

[202] Accordingly, the trial judge erred in excluding the investigator's testimony. Therefore, I would give effect to this ground of appeal.

XIII

[203] As for the next ground of appeal, ALS contends that notwithstanding that it may be strictly liable to the plaintiffs for causing their injuries, the damages recoverable by them can, as a matter of law, be reduced by the degree of their fault in causing the injuries and their damages could be negated if they came about by the "plaintiff's own act". In argument before us, this was referred to as the contributory negligence defence. Although at paras. 126-141 of her reasons the trial judge discussed whether contributory negligence is available to a defendant found to be strictly liable, in the final analysis she concluded that it was unnecessary to decide this issue given her finding that Balac inadvertently opened the car windows enabling the tigers to enter the car and attack the plaintiffs. However, the trial judge doubted that contributory negligence could apply, stating at para. 139: "It seems to me contradictory to hold a defendant strictly liable – *i.e.* whether negligent or not – and then to consider a plaintiff's 'contributory' negligence."

[204] In her analysis of whether ALS was strictly liable for the damages caused by its tigers, the trial judge made extensive reference to passages from J.G. Fleming, *The Law Torts*, 9th ed. (North Ryde: LBC Information Services, 1998) and G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002), that discuss liability for damages caused by different categories of animals. These passages also contain discussions of whether there is any defence available where a defendant is found to be strictly liable for a plaintiff's damages.

[205] For the purpose of this analysis, I proceed on the common understanding of strict liability as liability that does not depend on actual negligence or an intent to cause harm, but that is based on the breach of a duty to make something safe. However, it is important to note that strict liability is not absolute and that in the appropriate

circumstances may give rise to a defence arising from the plaintiff's conduct. In the case of wild animals such as tigers, the underlying rationale for anchoring liability on the doctrine of strict liability is that anyone who maintains an animal that is known to be dangerous to humans does so at his or her peril. While strict liability removes the burden of having to prove breach of a standard of care, it does not relieve the plaintiff from having to prove causation.

[206] Fleming is uncertain whether contributory negligence constitutes a defence to strict liability. At p. 405 he states:

> The range of defences is exceedingly limited. Indeed, no excuse seems to be admitted *except the plaintiff's own responsibility in exposing himself to injury*.
>
> It is well settled, for example, *that the defendant may take advantage of the victim having brought the injury upon himself through his own fault*, as by stroking a zebra that is improperly secured or actually teasing an animal, though not by merely walking close to it unless in unreasonable disregard of obvious danger. *Authority is unclear on whether contributory negligence ever constituted a defence such as would now reduce damages* [footnotes omitted; emphasis added].

[207] Fridman, however, takes a different view. At p. 26r he states:

> (A) *Contributory negligence* If the circumstances justify such a conclusion, *a court may find that the injured plaintiff has brought about his injury, in part at least, by his own neglect for his safety. Indeed, the plaintiff may be totally responsible*, as in *Dowler v. Bravender*, where the owner of a horse which kicked the plaintiff did not discharge the onus of proving that he lacked knowledge of the horse's dangerous propensity, yet the defendant was not liable *because the plaintiff brought the injury on herself by shouting at and frightening the horse*. Whether a plaintiff is guilty of contributory negligence is a question of fact. Once such conduct is established, its effect in law depends upon the application of common law or statutory principles relating to the apportionment of liability in consequence of contributory negligence [emphasis added].

[208] And at p. 255 Fridman states:

> Sometimes it has been suggested that liability is absolute, where the animal is wild or a domestic animal known to be dangerous. *This cannot be accurate, because it is clear that there are limits upon the liability of the defendant, for example, contributory negligence on the part of the plaintiff, voluntary assumption of risk or consent, the act of a stranger, or an act of God. Hence, liability, although strict in the sense of without proof of negligence, is not absolute, which could mean that it would be imposed whatsoever the circumstances, as long as the animal caused harm* [emphasis added].

[209] In F.V. Harper, F. James Jr. and O.S. Gray, *The Law of Torts*, 2nd ed., Vol. 4 (Boston: Little, Brown and Company, 1986), at pp. 304-318, there is a thorough discussion about the effect of a plaintiff's misconduct as a contributory factor in respect to his or her damages in circumstances where a defendant is strictly liable. It is apparent from the discussion that there are two concepts in play. The first is the plaintiff's contributory negligence as a defence, while the second is apportionment of liability.

[210] As the discussion of a plaintiff's contributory negligence is in the context of jurisdictions in which it constitutes a complete defence, although not strictly relevant to this case, it is instructive. The authors point to the difficulty of calling a plaintiff's negligence "contributory" when because of the defendant's strict liability there is no negligence of the defendant to which it can contribute. However, at p. 304 they characterize the difficulty "as no more than a play on words" and suggest that the difficulty can be avoided by noting that a plaintiff's negligence may be called "contributory" if it contributes to his injury. If it does, for policy reasons this should be taken into account in the reduction of damages and should not constitute a complete defence. However, even where liability is strict, the substantial weight of authority barred a plaintiff's recovery where he or she assents to or assumes the risk. As the authors state in pp. 307-308:

> If plaintiff actually knows of the risk and appreciates it, yet unreasonably encounters it, he will probably be barred even where the relationship between the parties is not one of voluntary association that either one is free to take or leave as he will. Such conduct is often called "assumption of risk", but it does not constitute assumption of risk in the primary sense. It is a case where plaintiff is barred because his conduct is unreasonable and involves fault of a graver kind

> than mere inadvertence or carelessness. "Assumption of risk" here means willful and unreasonable self-exposure to risk [footnotes omitted].

[211] At p. 310 *et seq.* the authors point out that the judicial approach to a plaintiff's misconduct as a contributing factor to his or her damages where a defendant is strictly liable changed with the widespread acceptance of comparative negligence. More courts were willing to recognize a comparative negligence "defence" based on a plaintiff's misconduct than had been willing to recognize a contributory negligence defence. And they included unreasonable conduct other than that which involved the encountering of a known risk. Applying comparative negligence theory tended to reduce the amount of a plaintiff's damages, rather than to prevent a plaintiff's recovery.

[212] The authors of two leading Canadian treatises on the law of torts have little to contribute to this issue. In A.M. Linden, *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001), at p. 509 the author, citing Prosser, comments that "some courts have been reluctant to use contributory negligence as a defence in strict liability cases". Professor Klar, citing the above passage from Fleming, writes: "There appear to be few defences to the strict liability action brought against keepers of dangerous animals." See L.N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Carswell, 2003) at p. 576.

[213] In addition, I would refer to P. Perell, "A Bit About Bites: Liability for Damages Caused by a Dog" (2006) 31 Advocates' Q. 347 at 348 and P.H. Osborne, *The Law of Torts*, 2nd Ed (Toronto: Irwin Law, 2003) pp. 321-322. In discussing strict liability for damages caused by dangerous animals, each author points out that liability is not absolute. At p. 348 Justice Perell states:

> Under common law, liability, however, was not absolute and could be rebutted by showing that the person harmed by the dog was the author of his own misfortune in that he meddled with or provoked the dog.

At p. 322-324 Professor Osborne writes:

> There are a number of defences to the scienter action. To a large extent, they mirror the defences in the rule in *Rylands v. Fletcher*. Four of the defences – default of the plaintiff, consent, trespass of the plaintiff, and illegality – address common concerns and often overlap. They withhold the advantage of strict liability from the plaintiff where he is, for

> one reason or another, undeserving or to some degree blameworthy.
>
> **a) Default of the Plaintiff**
>
> There is no liability if the injury is the result of the plaintiff's fault. This mirrors the nineteenth-century common law rule in negligence where contributory negligence was a complete bar to an action. It has been applied most frequently where the plaintiff entered an animal's cage, came too close to the animal, or attempted to feed or pet the animal. Some of these situations may now be similarly resolved on the ground that there has been no loss of control of the animal by the keeper. This position is out of step with current policies that do not favour the allocation of all personal injury losses to a careless plaintiff, and it seems a particularly harsh result in the scienter action, based as it is on the defendant's knowledge of the danger of his animal. Apportionment is a much fairer result but the provincial apportionment legislation was not written with strict liability torts in mind.
>
> **b) Consent**
>
> Consent is established where the plaintiff has voluntarily exposed herself to the risk of injury by the animal. Placing oneself in harm's way with knowledge of the danger posed by the animal is probably sufficient. This, too, reflects the defence of voluntary assumption of risk as it was interpreted in nineteenth-century negligence law and is closely related to the defence of default of the plaintiff.

[214] In the United Kingdom liability for damages caused by dangerous animals is governed by the *Animals Act 1971* which incorporates the common law principle of strict liability. The Act provides a strict liability regime that covers a range of circumstances in which damage might be caused by both dangerous and non-dangerous animals. However, s. 5(1) of the Act provides that there is no liability for damage caused by a dangerous animal that is due wholly to the fault of the person suffering it. If the damage is due partly, as distinct from wholly, to the fault of the plaintiff, then ss. 10 and 11 enable the provisions of the *Law Reform (Contributory Negligence) Act 1945* providing for the apportionment of fault to be applied.

[215] In Ontario, the only legislation dealing with liability for damages caused by animals is the *Dog Owners' Liability Act*, R.S.O. 1990, c. D. 16. Section 2(1) provides that the "owner of a dog is liable for damages resulting from a bite or attack by the dog on another person". However, as in the United Kingdom, s. 2(3) provides for apportionment of damages and reads as follows:

> The liability of the owner does not depend upon knowledge of the propensity of the dog or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

[216] In *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 35 Iacobucci J. said that "it seems as a matter of principle that contributory negligence would not be available in the context of a strict liability tort". In this case, the plaintiff successfully sued for damages for conversion its bookkeeper, who had drawn 155 cheques on the plaintiff's bank accounts, and the bookkeeper's bank, where she negotiated the cheques. The bank, which agreed that it was *prima facie* liable to the plaintiff for conversion focused on possible defences, including that the plaintiff was "contributorily negligent" in failing to properly supervise its bookkeeper. Iacobucci J. responded as follows:

> If the contributory negligence approach is to be introduced *into this area of the law*, I would leave that innovation to Parliament because such a change would be more appropriate for the legislative branch to make. As I see it, the strict liability feature of conversion is well engrained in the jurisprudence concerning bills of exchange [emphasis added].

In my respectful view, in stating contributory negligence is not available in the context of a strict liability tort, Iacobucci J. was not intending to state a general principle. Rather, he was referring to the law of bills of exchange in respect to which Parliament has legislated in the *Bills of Exchange Act*, R.S.C. 1985, c. B-4.

[217] The trial judge considered it to be "contradictory" to reduce a plaintiff's damages arising from a defendant's strict liability. While recognizing that the authority on the question is not uniform, with respect, I do not agree. In the case of dangerous animals, society condones the keeping of them on condition that the owner or keeper of the animal pay its way when the animal causes injury, regardless of whether the keeper has been careless or negligent in its keeping of the animal. Although the principle of strict liability

removes the burden of a plaintiff having to prove breach of a standard of care, it does not relieve a plaintiff from having to prove causation. In my view, the application of a principle akin to comparative negligence to strict liability would not defeat or frustrate the rationale that led to the development of the principle of strict liability. Plaintiffs will continue to be relieved of proof of a defendant's negligence. The defendant's liability for keeping a dangerous animal will remain strict. A plaintiff's recovery will be reduced only to the extent that his or her lack of reasonable care contributed to the cause of his or her injuries. In a case where the evidence demonstrates that the plaintiffs' "own act" was the sole cause of his or her damages, although the defendant remains strictly liable for the damages, the plaintiff will obtain no recovery.

[218] Although it may appear to be doctrinally counterintuitive to apply comparative negligence principles where a defendant's liability is strict and not dependant on negligence, in my view functional and fairness considerations strongly suggest that comparative negligence principles are appropriate where a plaintiff's misconduct or want of care is a contributing factor to his or her damages. Of course, each case will depend on its own facts. While it may be said that a defendant's liability should not be diluted when a loss occurs that strict liability is intended to prevent, there will be cases where a plaintiff's misconduct is so clearly a contributory factor, or the contributory factor, that it will seem, to many, to be more unfair to ignore it than to consider it. This would favour the application of comparative negligence principles for a plaintiff's failure to exercise reasonable care in relation to dangerous animals, and to reduce the plaintiff's damages accordingly. As I have indicated, comparative negligence principles have been incorporated into the English *Animals Act 1971* and the Ontario *Dog Owners' Liability Act*.

[219] Thus, in cases of strict liability, a plaintiff's conduct in respect to the cause of his or her damages will not escape unexamined. In my view, there can be do doubt that in the presence of a wild animal, such as a tiger, a person is required to take reasonable care for her own safety. This is a common sense proposition arising from the existence of circumstances that reasonably require that care be taken, and which ALS brought to the attention of park visitors by posting several warning signs. As to that share or portion of his or her damages that flow from his or her fault, there is no policy reason why it should be borne by others. Where a plaintiff's own act is the sole cause of his injury, this will completely bar any recovery notwithstanding the defendant's strict liability. With respect, the trial judge's insistence on a fixed and precise doctrinal approach to legal concepts led her to doubt the application of principles of contributory negligence in cases of strict liability. In my view, some conceptual overlapping and interweaving is required to attain substantial justice for the parties in circumstances where, doctrinally, a defendant is strictly liable and, factually, the plaintiff's behaviour was a contributing cause of his or her damages.

XIV

[220] Relying on several grounds, the trial judge found that this case was too complex to be decided by a jury. As I understand her reasons, she placed particular emphasis on the difficult issues of law and mixed law and fact that the case presented, specifically the legal basis for the defendant's liability and whether contributory negligence could reduce damages arising from a defendant's strict liability. As I have explained, these grounds did not constitute a cogent, or a sound principled reason, for discharging the jury. As I have also explained, I am not satisfied that a jury acting reasonably would inevitably have come to the same decision as did the trial judge. While it is regrettable that there must be a new trial, the defendant was *prima facie* entitled to have the issues of fact determined by a jury, a right of which it was deprived in the absence of a cogent or sound principled reason. There is no doubt that the cases on this subject indicate a tension between deference to the trial judge and ensuring that justice to the parties is properly served by intervening to protect a party's important substantive right to a jury trial where he or she has been deprived of that right except for cogent and sound principled reasons. In my view, the right to trial by jury should supercede deference in the absence any cogent or principled reason for striking out the jury where it is clear that a jury might not have come to the same result as did the trial judge.

[221] For all the above reasons I would allow the appeal with costs, set aside the judgement and order that there be a new trial limited to liability. The costs of the first trial will be in the discretion of the judge conducting the new trial.

RELEASED: "DOC" "OCT 19 2006"

"S. Borins J.A."