

# **JURY QUESTIONS IN COMPLEX CASES**

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L. Craig Brown  
Partner  
Thomson, Rogers

Stacey L. Stevens  
Associate  
Thomson, Rogers

## Jury questions in complex cases

Drafting jury questions can be one of the most challenging exercises faced by counsel and the bench. Properly formulated questions are the foundation upon which a jury delivers its verdict on factual issues to which the trial judge will apply the appropriate law. Accordingly, the ability to identify the key issues in each case and design questions that effectively respond to these issues is critical. The challenge lies in creating jury questions that recognize the existence of competing legal principles, that are not too general or too specific and that guide the jury to reach findings of fact that are unambiguous. The purpose of this paper is to provide an overview of formulating proper jury questions in complex cases with the goal of eliciting a jury verdict to which the court can give full weight and effect.

Statutory authority for the use of jury questions is found in section 108(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C 43:

- 108(5) Where a proceeding is tried with jury,
- (a) the judge may require the jury to give a general verdict or to answer specific questions, subject to section 15 of the *Libel and Slander Act*,
  - (b) judgment may be entered in accordance with the verdict or the answers to the jury questions.

Although subsection 108(5)(b) implies that a trial judge may, through the exercise of judicial discretion, decide not to enter a judgment in accordance with a jury's answers, the Supreme Court of Canada has severely limited the scope of such discretion. It is a well established principle of law that a jury's verdict must be given all deference and full weight and effect<sup>1</sup>. Having said that, a trial judge may replace a jury's verdict with his/her own factual findings where there is no

evidence to support the jury's findings or where the jury has given an answer which in law cannot provide a foundation for the judgment<sup>2</sup>. In cases where the jury's verdict is obscure and fails to provide the requisite causal connection between fault and damages, the trial judge is compelled to order a new trial<sup>3</sup>.

### **Basic negligence questions**

In a basic negligence action jury questions must be formulated to address three fundamental issues:

- *Was there a duty of care?*
- *Was it breached?*
- *Was damage caused as a result?*

In some cases, this will be a straightforward exercise. Attached at Appendix "A" are standard questions in a negligence case.

### **Multiple or alternative causes of action**

A trial judge is often met with factual situations that shift his/her focus away from ordinary principles of negligence and into areas of law that are complex and give rise to competing legal principles. While the basic requirements of establishing a breach and causation must be met, the initial step of balancing the appropriate legal principles can be challenging. Formulating jury questions based on the wrong legal principle will result in findings of fact that do not respond to a fundamental cause of action. This opens the door to a review of the decision on appeal with a possible outcome of having the decision overturned or dismissed.

In *Wade v. Canadian National Railway*<sup>4</sup>, the jury was presented with questions framed around the ordinary principles of negligence rather than occupier's liability action. The jury verdict found the defendant liable for the plaintiff's injuries. On

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<sup>1</sup> *McCannell v. McLean* [1937] S.C.R. 341 at 343

<sup>2</sup> *Hill v. Church of Scientology of Toronto* (1992) 7 O.R. (3d) 489 (Ont. Gen. Div.)

<sup>3</sup> *Canadian National Steamships Company Ltd. v. Watson* [1939] S.C.R. 11.

<sup>4</sup> *Wade v. Canadian National Railway* 14 N.S.R. (2d) 541 (1976) (NSCA)

appeal, the court concluded that the trial judge erred in formulating questions based on a general negligence standard. The court of appeal reformulated the questions based on the standard of care in an occupier's liability case.

The Plaintiff was an 8 year old boy who was injured when he jumped off of a pile of crushed stone and onto a moving freight train. The pile of crushed stone was beside the railway tracks and in an area where children were known to play. The trial judge framed the Railway's liability within the general law of negligence and put the following question to the jury<sup>5</sup>:

*Question 1.*

*(a) Was there fault or negligence on the part of the Defendant Railway, its servants or agents which caused injury, loss or damage to the Plaintiffs?*

*Answer: Yes.*

*Question 1.*

*(b) If so, in what did such fault or negligence consist?*

*Answer:*

*(1) lack of fence & proper signs.*

*(2) lack of removal of sand or gravel from CN property.*

*(3) the making up of run.*

*(4) CN being aware of condition of property and aware of children playing in this area.*

On appeal, the court distinguished the facts in this case from one involving trains and vehicles where the issue was whether one of the parties breached a general duty of care. The court, in keeping with the jury's finding that the plaintiff was a licensee who had been enticed to the property by the presence of the stone piles rather than a trespasser, formulated the jury questions from the perspective of an occupier's liability matter:

*Did the Railway know or should it have known that children would likely*

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<sup>5</sup> Ibid at para 71.

come to the area? A. - Yes.

*If so, did it know or should it have known that the train was a thing which some of the children would not fully realize was dangerous to touch or jump upon? A. - Yes.*

*Did it fail to take reasonable steps to warn or guard such children against the moving train? A.-Yes.*

*If so, what are the particulars of that failure?*

A. - (1) *The lack of fence and proper signs.*

(2) *Failure of the train crew to watch for children and, if children came too close, failure to stop the train or warn the children away.*

In reviewing the questions put to the jury by the trial judge, Chief Justice MacKeigan found the questions to be too general and did not help solve the essential problem in the case. Chief Justice MacKeigan defined the starting point for formulating jury questions as follows:

*Questions to a jury should take a specific form where facts have to be determined to permit the judge to perform his function of deciding if in law a duty exists, as well as facts determining whether the duty has been breached<sup>6</sup>.*

An example of how competing legal principles can impact the formulation of jury questions on the issue of causation can be found in *Craven v. Strand Holidays (Can) Ltd.*<sup>7</sup> In *Craven*, the Plaintiffs were injured in South America when a tour bus they were riding on blew a tire and crashed. The tour bus service was included in a vacation package sold by the Defendant Strand Holidays to the Cravens. The contract between the parties limited Strand's liability with respect to the negligent acts and omissions of their suppliers. At the conclusion of the trial, the judge put the following questions to the jury:

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<sup>6</sup> Ibid at para 72.

<sup>7</sup> *Craven v. Strand Holidays (Can) Ltd.* (1982) 40 O.R. (2d) 186 (Ont C.A.)

1. *Was there any negligence on the part of either defendant in their selection of a bus company?*

A. YES

2. *If the answer to question 1 is "yes", in what did that negligence consist?*

A. (1) *From the evidence we have heard and studied we, the jury, have come to the conclusion that the Vice-President of Strand, Mr. Lewis, just assumed that there had been an inspection carried out on Expresso Brasilia buses that were to transport Strand Tour passengers to various destinations without having the actual proof of inspection records.*

(2) *Mr. Lewis was assuming that an inspection had been done. He never asked for the records of safety inspection so he has no physical proof of inspection.*

(3) *Miss Robinson said she was sure an inspection had been done but we, the jury, feel there was not any confirmation that a thorough safety inspection had been carried out.*

The trial judge interpreted the jury's answers to question 2 as a finding that an implied condition of the contract existed in that reasonable care would be exercised in the transportation of the tour participants<sup>8</sup>. As a result, Strand was held liable for the plaintiffs' injuries.

The court of appeal rejected the trial judge's interpretation of the jury's verdict. It determined that the appropriate legal principle was grounded in contract and not a general duty of care. Based on the principle that a person is not liable for the negligence of an independent contractor unless he has a primary obligation to carry out a non-delegable duty imposed by law or by contract, the court

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<sup>8</sup> Ibid at para 34.

concluded that Strand's duty did not extend past making reasonable efforts to ensure that a competent carrier was selected for road transportation<sup>9</sup>.

As a result, Lacourciere, J.A. ruled that the jury questions were not worded in a way that would elicit particulars of Strand's negligence in choosing the bus company<sup>10</sup>. In particular, Mr. Justice Lacourciere concluded that it "*was not framed in a way which would require a nexus or causal connection between the negligence and the respondent's damages*"<sup>11</sup>. Accordingly, the court of appeal held that the jury's answers did not form a legal basis for a finding of liability. A new trial was ordered.

Multiple causes of action may give rise to a set of jury questions that are complex and prevent the jury from being able to fulfil its duty. In *Cowles v. Balac and the African Lion Safari*<sup>12</sup>, the court of appeal addressed the issue of whether the trial judge erred in her finding that the matter was sufficiently complex and that justice was better served if the case was tried without a jury. Mr. Justice Borins in his minority reasons, disagreed with Madame Justice MacFarland's ruling, in part, based on a trial judge's inherent responsibility to resolve questions of law and to explain the law to the jury in a way that it can find the facts and apply them to the law<sup>13</sup>. Although, Mr. Justice D. O'Conner, on behalf of the majority, did not dispute the existence of this responsibility, he recognized the manner in which complex facts and evidence affect the jury's role in the trial process. In upholding Madame Justice MacFarland's ruling, Mr. Justice O'Conner stated as follows:

*"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*

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<sup>9</sup> Ibid at paras 19 and 36.

<sup>10</sup> Ibid at para 36.

<sup>11</sup> Ibid at para 39.

<sup>12</sup> *Cowles v. Balac* (2006), 42 C.C.L.T. (3d) 161 (Ont C.A.) affirming (2005), 29 C.C.L.T. (3d) 284 (Ont. S.C.J.).

<sup>13</sup> Ibid at para 176.

*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.*

*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 (emphasis added).***<sup>14</sup>

If the exercise of drafting questions to appropriately address all of the factual and legal issues in a complex case seems difficult and even impossible for counsel and the trial judge, it might be a strong indicator that the case is one which should not be tried by a jury.

### **Particulars**

It is not enough for a jury to answer “yes” or no” or rely on self-evident facts in support of its conclusion with respect to negligence<sup>15</sup>. The decision of the Ontario Court of Appeal in *St. Amour v. Ottawa Transportation*<sup>16</sup> makes it clear that the jury must be asked questions that require judicial deliberation and result in the identification of the specific acts or omissions it relied upon in reaching its finding. In *St. Amour*, the jury's answer with respect to the particulars of the defendant's negligence was as follows:

*“The defendant Stroat failed to stop his tram in time to avoid the collision. Non sufficient evidence.”*<sup>17</sup>

Mr. Justice Laidlaw interpreted this answer to be no more than a restatement of an obvious fact. The jury's failure to provide particulars was a deficiency that could not be remedied by the evidence and allegations contained in the

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<sup>14</sup> Ibid at paras 49 and 50

<sup>15</sup> *St. Amour v. Ottawa Transportation Commission*, [1957] O.J. No. 532 online: QL (Ont C.A.) and *Dhaliwal v. Robertson*, (1999)

<sup>16</sup> *St. Amour v. Ottawa Transportation Commission*, [1957] O.J. No. 532 online: QL (Ont C.A.)

<sup>17</sup> Supra at note 15 at para 4

pleadings. The decision below was overturned. The plaintiff's action was dismissed<sup>18</sup>.

### **Capacity**

In *Wade*, one of the critical issues was whether the plaintiff had the capacity to appreciate the risk involved in trying to jump on a moving train. The court of appeal held that although the trial judge directed the jury's mind to the appropriate legal test, that being whether the minor plaintiff was of an age to be accountable for his own actions<sup>19</sup>, the question put to the jury was not formulated in a way that would alert the jury to the existence of varying levels of a child's appreciation for danger. The question asked of the jury at trial was as follows:

*Question 4. Was Peter Wade, at the time he was injured, a child of such an age, intelligence and experience as to understand and appreciate the risk of injury in attempting to board the Defendant's train?*

*Answer: No.*

The court found this question to be ambiguous. Chief Justice MacKeigan identified the following flaws in the wording of the question:

*"The question answered fails, in my opinion, to tell us whether the Wade boy had any appreciation that it is dangerous to jump on a train. We do not know whether the jury thought he had no appreciation of such danger, which would mean he was legally incapable of negligence with respect to that danger, or whether they merely thought that he did not have full appreciation of the danger.*

*To determine that issue, the trier of fact must ask three questions:*

*(1) Did the child have no appreciation and knowledge of the particular risk, viz., that a train was dangerous to jump upon?*

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<sup>18</sup> Supra at note 13 at para 4.

<sup>19</sup> Supra at note 5, para 67, quoting from *McEllistrum v. Etches* [1956] S.C.R. 793

*(2) Did the child have some appreciation and knowledge of the risk?*

*(3) Did the child have full appreciation and knowledge of the risk?"*

To illustrate his point, MacKeigan J., emphasized the impact of an ambiguous question and simple answer on the trial judge's ability to give full effect to the jury's verdict:

*"In the present case, the jury's answer to the question asked was probably intended as a finding that the boy was not capable of negligence. If so, I must conclude that its verdict was not one that a jury of reasonable men acting judicially could find, one altogether against the evidence.*

*I find nothing in the evidence which shows that the boy had no realization that it was dangerous to jump on a train. On the contrary, he admitted that he "kind of" knew that "it was dangerous to jump on" the train<sup>20</sup>.*

### **Contributory Negligence**

The recent decision of the Ontario Court of Appeal in *Snushall v; Fulsang*<sup>21</sup> makes a clear distinction between negligence which contributes to the accident giving rise to the plaintiff's injuries, and negligence which contributes to the severity of the injuries suffered in the accident.

The plaintiff was injured in a motor vehicle accident. At the time of the collision she was wearing a lap belt but not the separate shoulder belt. The trial judge instructed the jury on assessing the degree of contributory negligence as follows:

*"the percentage blame for the omission to wear a shoulder belt will depend on the extent you are satisfied this failure caused or contributed to her [the plaintiff's] injuries<sup>22</sup>"*

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<sup>20</sup> Ibid at para 84.

<sup>21</sup> *Snushall v. Fulsang* (2005) 258 D.L.R. (4<sup>th</sup>) 425

<sup>22</sup> Ibid at para 51.

The Court of Appeal concluded that the words “caused or contributed to” in the context of assessing the degree of the plaintiff’s negligence would be misleading:

*“... it would be better to instruct the jury that the defendant’s negligence, if such negligence is found, is the sole cause of all the injuries, but the law allows some reduction of the plaintiff’s damages if the plaintiff has failed to take reasonable precautions to protect himself or herself from the consequences of the defendant’s negligence. The jury’s task is to decide on the amount of the reduction considering as one factor, the extent by which damages might have been prevented, but keeping mind that the defendant’s negligence caused the accident and was the prime cause of all the damage<sup>23</sup>,”*

This approach suggests that the negligence of the plaintiff and the defendant are not to be directly compared but rather considered separately in the context of the consequence of the negligence. As a result, the traditional questions for the jury on the comparative negligence of the parties may no longer be sufficient to assist the jury with this rather subtle issue.

In *Resch v. Canadian Tire Corporation et al*<sup>24</sup>, a case tried recently with a jury before Madame Justice Spies in the Ontario Superior Court, the issue of the wording of jury questions in the light of the *Snushall* decision was argued at some length during the trial. In *Resch*, the plaintiff, a 16 year old boy, was severely injured when the front forks of his bicycle suddenly collapsed while he was riding it. One of the issues was whether a helmet would have prevented some or all of the injuries to his face and head.

There was also an issue as to whether the manner in which the plaintiff was riding the bicycle (too fast) contributed to the severity of his injuries.

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<sup>23</sup> Ibid at para 52.

<sup>24</sup> *Resch v. Canadian Tire Corporation Limited et al* (2006) 17 B.L.R. (4<sup>th</sup>) 301 (Ont. S.C.J.)

A separate and distinct question of contributory negligence arose as the result of the defendant's position that the plaintiff had been warned of the danger of riding the bicycle and had ignored the warning.

After reviewing written submissions from the parties on the appropriate structure and wording of the questions addressing these issues, Justice Spies decided to deal with these two aspects of negligence into two entirely separate questions. The first had conventional wording to deal with the issue of the plaintiff's contribution to the accident (whether he had negligently ignored a warning):

*“Have the Procycle defendants satisfied you on the balance of probabilities that there was negligence on the part of the Plaintiff Nathan Resch, which **caused or contributed to the accident?** Answer Yes or No.” (emphasis added)”*

The second question, which followed questions addressed at the quantification of the Plaintiff's damages, was worded as follows:

*“Have the Procycle defendants satisfied you, on the balance of probabilities, that the plaintiff Nathan Resch failed to take reasonable precautions for his own safety in failing to wear a helmet and/or in riding his bicycle too fast and that he thereby **contributed to his own injuries?** Answer Yes or No. (emphasis added)”*

Justice Spies, by separating the two aspects of the plaintiff's potential contributory negligence with separate questions, provided the clearest possible guidance to the jury on the legal consequences of different aspects of the plaintiff's conduct. In doing so she also provided two separate opportunities for the jury to discount the plaintiff's claim – a result that may initially seem to be unfair to the plaintiff. It goes without saying that in her charge the trial judge had to very carefully explain the purpose of providing two questions on the issue of the plaintiff's potential contributory negligence in order to deal with the problem identified in the following paragraphs by the Court of Appeal in *Snushall*:

*“It is understandable that a jury should have difficulty quantifying the relative responsibility for injuries suffered in a motor vehicle accident between the people or persons whose negligence led to the accident and the injured plaintiff who failed to wear a seatbelt. Both the negligence and the contributory negligence are commonly described as having a causal relationship with the injuries. However, the relationship of the defendant’s negligence to the plaintiff’s injuries is quite different than that of the plaintiff’s contributory negligence to his or her own injuries.”*

*“The legal significance of this distinction is that the defendant whose negligence results in the accident has breached the general tort duty to take care to avoid endangering others, whereas by not wearing a seatbelt a person does not commit a tort but fails to protect himself or herself from the torts of others<sup>25</sup>.”*

That distinction is even more important where, as in the Resch case, the plaintiff is alleged to have contributed to the accident (committed a tort) and also to have failed to protect himself from the negligence of the defendant. The wording and placement of questions for the jury can provide considerable clarity and direction on this critical issue.

### **Negligence and Causation**

In some cases both the defendant’s breach of duty (negligence) and the relationship of that breach to the plaintiff’s damages (causation) are issues to be decided by the jury. This is often the case in medical malpractice trials. In the past it was rare for this type of case to be tried by a jury however in recent years juries are routinely being called upon to decide complex questions of professional negligence.

Questions for the jury which separate and distinguish these two aspects of the case are a critical step in achieving a reasonable and just verdict. Sometimes each of these issues will require multiple questions. Where, for example, there is more than one defendant who may have breached a duty of care there will be a question addressed to each defendant. There may also be a need for multiple

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<sup>25</sup> Supra at note 20 at paras 24 and 27

questions on the breach of duty issue canvassing several “what if” scenarios. A good example of that situation arises where a physician may have failed to diagnose the plaintiff’s cancer. It may be appropriate to ask the jury at what stage the diagnosis should have been made. The answer to that question may then lead to several alternative questions on causation assessing the damages that would flow if the cancer had been diagnosed at each of various different stages of its evolution.

The need to craft questions to address the unique negligence and causation issues in each case is emphasised by the Court of Appeal in the *Wade v. CNR* case. Justice MacKeigan commented at paragraph 74 of that decision:

*“The jury’s verdict on the Railway’s negligence was amply supported by the evidence. I should not leave the questions which the jury was actually asked without pointing out that they may have been confused on the issues of causation and contributory negligence, which I shall further discuss.”*

Care taken to ensure that the questions for the jury reflect and clarify the issues to be decided in the case will reduce the likelihood that a reviewing court will have to guess at whether the jury understood the issues it was being asked to decide.

### **Damages: Where the evidence is complex and contradictory**

It has long been the practice in Ontario for juries to be asked to separately assess Pecuniary and Non-pecuniary General Damages. In *Stante v. Boudreau*<sup>26</sup>, Justice Zuber observed:

*“A secondary issue that arises flows from the fact that the jury was asked simply to assess the plaintiff’s general damages. It is apparent in this case that the assessment of general damages includes a substantial amount for pecuniary general damages (diminished earning capacity) and an amount for non-pecuniary general damages (pain and suffering, loss of the amenities of life, etc.). Counsel for the appellant tells us that the trial judge was*

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<sup>26</sup> *Stante v. Boudreau*, (1980) 29 O.R.(2d) 1 (Ont. C.A.)

*asked to put separate questions to the jury dealing with pecuniary and non-pecuniary general damages but declined to do so. He should have acceded to this request. ...*

*In this case, one question for non-pecuniary damages and another for pecuniary general damages would have been sufficient. **In other cases involving substantial claims the nature of the claim may require more questions.**<sup>27</sup> (emphasis added)*

Another issue in the *Stante* case was the deductibility of certain no-fault disability benefits. The jury was asked a question with respect to the plaintiff's capacity to return to work which was intended to assist the trial judge in the determination of the no-fault accident benefit issues. Justice Zuber was critical of the wording of the question but approved the general practice of having the trial judge deal with no-fault issues based on the jury's findings.

In the nearly three decades since the *Stante v. Boudreau* decision there has been a significant increase in the complexity of pecuniary damages claims as well as in the complexity and value of the no-fault accident benefits to which victims of motor vehicle accidents are entitled. As a result, the invitation given by Justice Zuber to pose multiple questions with respect to pecuniary damages claim is even more compelling and useful.

The evidence called in trials of serious personal injury claims often includes complex accounting and actuarial opinion on multiple potential future scenarios for the plaintiff's income earning potential. In addition there will usually be complex evidence on cost of future medical expense, attendant care and rehabilitation. Again, there may be several potential scenarios explored in the plaintiff's evidence and yet others in evidence called from experts for the defence. In these cases the jury may be faced with literally dozens of sub-heads of pecuniary damages with conflicting evidence from the parties. The traditional omnibus questions with respect to past and future pecuniary damages provide

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<sup>27</sup> Ibid at para 5.

little assistance to modern juries in their difficult task of navigating the complex and conflicting evidence they have heard.

In addition, the answers to very general questions on pecuniary damages may be of little or no assistance to the trial judge in the task of determining the no-fault accident benefit issues that must frequently be decided following the jury's verdict.

In the *Resch* case, referred to earlier in this paper, counsel agreed to a format of damages questions designed to consolidate, in the form of a chart (created with a spreadsheet program), the complex evidence on future care which was presented by each side. The chart was prepared by counsel after careful review of the transcript of the evidence given by the care cost experts at trial. The chart set out the plaintiff expert's evidence in one column, the defence expert's evidence in a second column and created a third column for the jury's finding on each care cost item. Multipliers were provided to permit the jury to calculate correct present values for each annual and future cost found.

The questions put to the jury in the *Resch* case, both with respect to liability and damages, are attached as Appendix B. The two page future care cost chart forms Schedule A to the questions.

The approach taken in *Resch* with respect to the quantification of damages by the jury represents one of the most ambitious attempts in Ontario to use jury questions to guide the jury through its complex task. Counsel and the trial judge were in agreement that the nature of the case required that extraordinary effort be made to clarify issues for the jury where it was reasonably possible to do so. An added advantage of this approach was obvious when Counsel gave their closing arguments and the trial judge her charge to the jury. The detailed questions set out the issues logically and sequentially making the tasks of all of the participants in the trial easier.

## **Process Issues**

### **a) Who should draft the Questions?**

It is the usual practice for counsel to try to come to an agreement between themselves on the form of the questions to be submitted for approval by the trial judge. This process is often the subject of meetings of counsel with the trial judge before and during the trial. If no agreement can be reached it is the prerogative of the trial judge, pursuant to Section 108 (5) of the Courts of Justice Act, to draft the questions for the jury to answer.

### **b) Timing**

It stands to reason that it will take longer to create appropriate jury questions in complex cases. This fact argues for an earlier start to the process. Certain judges have made it a practice to ask counsel to submit draft jury questions at the case management conference which is usually held weeks in advance of the commencement of the trial. This approach has the advantage of focussing counsel on the issues that the jury will be asked to decide before they make their opening statements. It also allows time prior to the start of the trial for counsel to try to come to an agreement on the number and wording of the questions thereby potentially avoiding the consumption of valuable court time during the trial.

In other cases the trial judge will ask counsel, at the start of the trial, to submit draft questions as soon as possible. This can sometimes cause difficulties for counsel if they have not anticipated the judge's request. Plaintiffs counsel, in particular, are usually fully occupied with the task of calling their first witnesses and may have little time to spare for careful reflection on appropriate questions for the jury and for discussions with opposing counsel.

Finally, there may be developments during the course of the trial that significantly alter the nature and number of issues to be decided by the jury. For example,

there may be partial settlements which render unnecessary some questions or, in rare cases, rulings on legal issues that change the nature of the claims in dispute. The *Resch* case provided an example of such a situation when Justice Spies made a ruling during the trial, at the request of the parties, on whether the plaintiff was a purchaser for the purpose of the application of the *Sale of Goods Act*. By finding that he was not a purchaser the trial judge rendered unnecessary a number of questions directed at the *Sale of Goods Act* claim by the plaintiff against the retail vendor of the bicycle<sup>28</sup>.

Certainly the process of drafting jury questions should not be left until the end of the trial when time to devote to this critical task may be in short supply.

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<sup>28</sup> Attached at Appendix "C" are the jury questions relating to the claim under the *Sale of Goods Act*.

**“Appendix A”  
Standard negligence questions**

- 1) Was there any negligence on the part of the plaintiff, RM, which caused or contributed to the cause of the accident?

**Answer: Yes” or No”**

- 2) If the answer to Question 1 is “Yes”, then state carefully and clearly the particulars of what such negligence consisted.

**Answer fully**

- 3) Was there any negligence on the part of the Defendant, BG, which caused or contributed to the cause of the accident?

**Answer: Yes” or No”**

- 4) If your answer to Question 3 is “Yes”, then state fully and clearly the particulars of what such negligence consisted.

**Answer fully**

- 5) If your answer to Question 1 is “Yes” and if your answer to Question 3 is “Yes”, do you find it practicable to determine the respective degrees of fault or negligence on the part of the plaintiff, RM and the defendant, BG?

**Answer Yes” or No”**

6) If your answer to question five is "yes", then state in percentages the degrees of fault or negligence on the part of the plaintiff, RM and the defendant, BG:

The Defendant \_\_\_\_\_%

The Plaintiff \_\_\_\_\_%

Total 100 %

7) In any event and irrespective of your answers to the foregoing Questions, at which amount do you assess the Total Damages sustained by the Plaintiff in the following categories:

a) Non-Pecuniary Loss: Damages for pain, injury, suffering and loss of enjoyment of life from the date of loss.

Total Non-Pecuniary Loss \$ \_\_\_\_\_

b) Past Loss of Income \$ \_\_\_\_\_

c) Future Losses

i) Future Loss of Income \$ \_\_\_\_\_

ii) Future Cost of Care \$ \_\_\_\_\_

TOTAL DAMAGES \$ \_\_\_\_\_

**“Appendix B”**

**Questions for the Jury**

**PART I - LIABILITY**

1) Re the Defendant Procycle Group Inc:

a) Have the plaintiffs and Mills-Roy Enterprises Limited satisfied you on a balance of probabilities that there was negligence on the part of the Defendant Procycle Group Inc. which caused or contributed to the Plaintiff Nathan Resch's bicycle accident on May 18, 1998 ("the accident")? Answer "Yes" or "No"

ANSWER: \_\_\_\_\_

b) If your answer to 1(a) is "yes", in what way(s) was the Defendant Procycle Group Inc. negligent? Please state fully the particulars of the negligence:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

2) Re the Defendant Canadian Tire Corporation Limited:

a) Have the plaintiffs and Mills-Roy Enterprises Limited satisfied you on a balance of probabilities that there was negligence on the part of the Defendant Canadian Tire Corporation Limited, which caused or contributed to the accident? Answer "Yes" or "No".

ANSWER: \_\_\_\_\_

b) If your answer to 2(a) is “yes”, in what way(s) was the Defendant Canadian Tire Corporation Limited negligent? Please state fully the particulars of the negligence:

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3) Re the Defendant Mills-Roy Enterprises Limited:

a) Have the Defendants Canadian Tire Corporation Limited and Procycle Group Inc. (“the Procycle Defendants”) satisfied you on a balance of probabilities that there was negligence on the part of the Defendant Mills-Roy Enterprises Limited, which caused or contributed to the accident? Answer “Yes” or “No”.

ANSWER: \_\_\_\_\_

b) If your answer to 3 (a) is “yes”, in what way(s) was the Defendant Mills-Roy Enterprises Limited negligent? Please state fully the particulars of the negligence:

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4) Re the Plaintiff Nathan Resch:

a) Have the Procycle Defendants satisfied you on a balance of probabilities that there was negligence on the part of the Plaintiff Nathan Resch, which caused or contributed to the accident? Answer “Yes” or “No”.

ANSWER: \_\_\_\_\_

b) If your answer to 4(a) is “yes”, in what way(s) was the Plaintiff Nathan Resch negligent? Please state fully the particulars of the negligence:

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5) Only if you answered “yes” to more than one of questions 1(a), 2(a), 3(a) and 4(a) answer the questions below (note that the total of your answers in (a), (b), (c) and (d) below must equal 100%):

a) Only if you answered “yes” to question 1(a), state in percentage the degree of negligence attributable to the Defendant Procycle Group Inc.:

= \_\_\_\_\_ %

b) Only if you answered “yes” to question 2(a), state in percentage the degree of negligence attributable to the Defendant Canadian Tire Corporation Limited:

= \_\_\_\_\_ %

c) Only if you answered “yes” to question 3(a), state in percentage the degree of negligence attributable to the Defendant Mills-Roy Enterprises Limited:

= \_\_\_\_\_ %

d) Only if you answered “yes” to question 4(a), state in percentage the degree of negligence attributable to the Plaintiff Nathan Resch:

= \_\_\_\_\_ %

**PART II – DAMAGES**

**A) Compensatory Damages**

6) **Disregarding the apportionment of negligence you made in response to the questions above in Part I**, at what amount, if any, do you assess the damages sustained by the Plaintiffs under the following heads of damages?

a) For Nathan Resch’s pain, suffering and loss of enjoyment of life from the date of the accident to date and in the future?

\$ \_\_\_\_\_

b) For Nathan Resch’s loss of income from the date of the accident until today?

\$ \_\_\_\_\_

c) For Nathan Resch’s loss of prospective earning, loss of opportunity or loss of earning capacity from this date forward, including a management fee, if any?

\$ \_\_\_\_\_

d) For Nathan Resch’s future surgical procedures, treatment, rehabilitation and care (a chart to assist you in this calculation is attached as Schedule A), including a management fee, if any?

\$ \_\_\_\_\_

e) For the care provided by Annette Crayden from the date of the accident to date?

\$ \_\_\_\_\_

f) For loss of care, guidance and companionship under the Ontario Family Law Act (note these have been agreed as follows):

|                     |                    |
|---------------------|--------------------|
| i) Annette Crayden  | \$30,000.00        |
| ii) Mark Crayden    | \$20,000.00        |
| iii) Bobby Higham   | \$ 5,000.00        |
| iv) Ashley Higham   | \$ 5,000.00        |
| v) Ashley Crayden   | \$ 5,000.00        |
| vi) Shannon Crayden | \$ 5,000.00        |
| vii) Joan Crayden   | \$ 2,500.00        |
| viii) John Crayden  | <u>\$ 2,500.00</u> |
|                     | \$75,000.00        |

g) For special damages (note these have been agreed as follows):

|  |                    |
|--|--------------------|
| i) Annette Crayden's loss of income      | \$ 2,400.00        |
| ii) Child Care services by Joan Crayden  | \$ 1,062.00        |
| iii) Hospital for Sick Children expenses | \$19,939.27        |
| iv) OHIP's subrogated interest           | \$54,828.71        |
| v) Great West Life's subrogated interest | \$ 3,504.90        |
| vi) Parking and Mileage costs            | <u>\$ 3,028.00</u> |
|  | \$84,762.88        |

**B) Should the Plaintiff Nathan Resch’s damages be reduced?**

- 7) a) Have the Procycle Defendants satisfied you on a balance of probabilities that the plaintiff Nathan Resch failed to take reasonable precautions for his own safety in failing to wear a helmet and/or in riding his bicycle too fast and that he thereby contributed to his own injuries? Answer "Yes" or "No".

ANSWER: \_\_\_\_\_

- b) If your answer to 7(a) is "yes", in what way(s) did the Plaintiff Nathan Resch fail to take reasonable precautions? Please state fully the particulars:

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- c) If the answer to question 7(a) is "yes", by what percentage should his damages be reduced by reason of such failure?

= \_\_\_\_\_%

**C) Punitive and Exemplary Damages**

- 8) Re the Defendant Procycle Group Inc.:
  - a) Was there conduct by the Defendant Procycle Group Inc. for which it ought to be punished by an award of punitive and/or exemplary damages? Answer "Yes" or "No".

ANSWER: \_\_\_\_\_

b) If your answer to question 8(a) is “yes”, of what did such conduct consist? Please state fully the particulars of the conduct:

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c) If your answer to question 8(a) is “yes”, at what amount do you award punitive and/or exemplary damages against the Defendant Procycle Group Inc.?

\$ \_\_\_\_\_

9) Re the Defendant Canadian Tire Corporation Limited:

a) Was there conduct by the Defendant Canadian Tire Corporation Limited for which it ought to be punished by an award of punitive and/or exemplary damages? Answer “Yes” or “No”.

ANSWER: \_\_\_\_\_

b) If your answer to question 9(a) is “yes”, of what did such conduct consist? Please state the particulars of the conduct:

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c) If your answer to question 9(a) is “yes”, at what amount do you award punitive and/or exemplary damages against the Defendant Canadian Tire Corporation Limited?

\$ \_\_\_\_\_

## Schedule A to Jury Questions (re: Question 6(d))

### Future Care Cost Analysis

| Needs  | Plaintiffs' Position (based on Martha Binstock's evidence) |  |  | Defendants' Position (based on Luana Troiani's evidence) |   |  | Jury's Findings<br><br>Insert Present Value Totals |
|--|--|--|--|--|---|--|--|
|  | One Time Cost  | Annual Cost                                  | Professor Carr's Present Values (as of Jan 31, 2006) | One Time Cost  | Annual Cost                               | Calculated Present Values (as of Jan 31, 2006) |  |
| <b>Surgical Procedures</b>                   |  |  |  |  |   |  |  |
| Rhinoplasty                                  | \$6,000.00   |  |  | \$6,000.00   |   |  |  |
| Scar Revisions                               | \$20,300.00  | Estimated 7 surgeries                        |  | \$29,000.00  | Estimated 10 surgeries                    |  |  |
| Orthodontic Treatment                        | \$2,740.00   |  |  | \$2,740.00   |   |  |  |
| Prosthetic Treatment                         |  | \$200.00                                     |  |  | \$200.00                                  |  |  |
| Bridge Replacement                           | \$10,500.00  | \$1,050.00                                   |  | \$10,500.00  | \$1,050.00                                |  |  |
| Contingency for Failed Implants              | \$15,500.00  | Believes failure more likely                 |  | \$7,750.00   | Believes failure less likely              |  |  |
| Tissue Filler Procedure-Surgical             | \$11,000.00  | \$2,200.00                                   |  | \$11,000.00  | \$2,200.00                                |  |  |
| Tissue Filler Procedure-Injections           |  | \$3,919.50                                   |  |  | \$3,919.50                                |  |  |
| <b>Totals</b>                                | <b>\$66,040.00</b>   | <b>\$7,369.50</b>                            | <b>\$314,933.87</b>                                  | <b>\$66,990.00</b>                                       | <b>\$7,369.50</b>                         | <b>\$315,833.15</b>                            |  |
| <b>Transitional Living Program</b>           |  |  |  |  |   |  |  |
|  |  | <b>Based on 2 Years Residential Living</b>   |  |  | <b>Based on 1 Year Residential Living</b> |  |  |
| Case Manager                                 | \$7,200.00   |  |  | \$7,200.00   |   |  |  |
| One month assessment in residential facility | \$24,000.00  |  |  | \$24,000.00  |   |  |  |
| One month treatment at residential facility  | \$16,500.00  |  |  | \$16,500.00  |   |  |  |
| Months of high supervision                   | \$105,000.00   | Based on 10 months                           |  | \$52,500.00  | Based on 5 months                         |  |  |
| Months of low supervision                    | \$91,250.00  | Based on 12 months                           |  | \$45,625.00  | Based on 6 months                         |  |  |
| Psychology                                   | \$8,580.00   | 1 hr/wk for 1/2 year then monthly for 1 year |  | \$5,136.00   | 1 hr/wk for 1/4 yr then 1/mn for 1/2 yr   |  |  |
| Family Counseling                            | \$7,410.00   | 1 every 2 wks for 1 yr then monthly for 1 yr |  | \$3,852.00   | 1/2 wks for 1/2 yr then 1/mn for 1/2 yr   |  |  |
| Occupational Therapy                         | \$9,120.00   | Believes cost is additional                  |  | \$0.00   | Believes cost included in living cost     |  |  |
| Tutor  | \$27,445.50  | 3 times/wk for 90 wks                        |  | \$8,132.00   | 1 time/wk for 80 wks                      |  |  |
| Psychoeducational/Vocational Assessment      | \$3,000.00   | One assessment                               |  | \$4,250.00   | Two separate assessments                  |  |  |
| <b>Totals</b>                                | <b>\$299,505.50</b>  |  | <b>\$294,474.90</b>                                  | <b>\$167,195.00</b>                                      |   | <b>\$164,430.42</b>                            |  |

Note to calculate the present value of a benefit over Nathan Resch's lifetime, multiply the annual amount by 34.252007

| Needs  | Plaintiffs' Position (based on Martha Binstock's evidence) |  |  | Defendants' Position (based on Luana Troiani's evidence) |                                     |  | Jury's Findings<br>Insert Present Value Totals |
|--|--|--|--|--|-------------------------------------|--|--|
|  | One Time Cost  | Annual Cost                                | Professor Carr's Present Values (as of Jan 31, 2006) | One Time Cost  | Annual Cost                         | Calculated Present Values (as of Jan 31, 2006) |  |
| <b>Medical/Rehabilitation Services--Ongoing</b>      | <b>Commencing 2008 (after residential living)</b>          |  |  | <b>Commencing 2007 (after residential living)</b>        |                                     |  |  |
| Case Manager   | 40 hrs/yr  | \$4,800.00                                 |  | \$8,356.00   | For 2 years only                    |  |  |
| Occupational Therapy                                 | 30 hrs/yr  | \$3,600.00                                 |  | \$2,354.00   | One time cost                       |  |  |
| Psychologist—Initially                               | \$14,040.00  | 24 sessions/yr for 3 years                 |  | \$0.00   |                                     |  |  |
| Psychologist--Long term                              | 5 session/yr   | \$975.00                                   |  | \$51,360.00  |                                     |  |  |
| Employment/Job Coach                                 | \$56,160.00  | 8 hrs/wk for 6 months, 3 times in lifetime |  | \$6,750.00   | Cost over lifetime                  |  |  |
| Speech Language Pathology                            | \$0.00   | Didn't comment                             |  | \$3,081.60   |                                     |  |  |
| Therapy Support Worker                               | Addressed through community support worker                 |  |  | \$10,682.88  | Instead of community support worker |  |  |
| Community Support Worker - Best Case                 | 12 hrs wk  | \$32,048.64                                |  |  |                                     |  |  |
| Community Support Worker - Worst Case                | Up to \$200 day  | \$73,000.00                                |  | \$0.00   |                                     |  |  |
| <b>Totals</b>  | \$70,200.00  | \$41,423.64                                | <b>\$1,476,219.00</b>                                | \$82,584.48  |                                     | <b>\$79,257.40</b>                             |  |
| <b>Totals - Worst Case</b>                           | <b>\$70,200.00</b>   | <b>\$82,375.00</b>                         | <b>\$2,878,885.27</b>                                |  |                                     |  |  |
| <b>Attendant Care: Recuperation from Surgery</b>     | 8 hrs/day for 2 weeks then 2 hrs/day for 1 wk              |  |  | For 2 wks after each of 10 surgeries                     |                                     |  |  |
| Reserve for care following surgery                   | \$24,783.22  |  | <b>\$23,459.87</b>                                   | \$19,773.60  |                                     | <b>\$18,717.76</b>                             |  |
| <b>Equipment</b>                                     |  |  |  |  |                                     |  |  |
| Computer and hand held organizer                     | \$3,335.00   | \$667.00                                   |  | \$2,100.00   | \$420.00                            |  |  |
| Computer Software                                    | \$1,436.29   |  |  | \$500.00   |                                     |  |  |
| Computer related furniture                           | \$5,571.29   | \$80.00                                    |  | \$2,000.00   |                                     |  |  |
| <b>Totals</b>  | \$10,342.58  | \$747.00                                   | <b>\$31,157.54</b>                                   | \$4,600.00   | \$420.00                            | <b>\$18,985.84</b>                             |  |
| <b>Medication--Acetaminophen &amp; antibiotics</b>   |  | \$100.00                                   | <b>\$3,425.20</b>                                    |  | \$100.00                            | <b>\$3,425.20</b>                              |  |
| <b>Transportation--Driving Assessment</b>            | \$2,435.00   |  | <b>\$2,435.00</b>                                    | \$1,405.00   |                                     | <b>\$1,405.00</b>                              |  |
| <b>Homemaking--Homemaking service</b>                |  | \$735.68                                   | <b>\$25,198.52</b>                                   |  | \$735.68                            | <b>\$25,198.52</b>                             |  |
| <b>Home Maintenance--Snow Removal</b>                |  | \$750.00                                   | <b>\$25,689.01</b>                                   |  | \$750.00                            | <b>\$25,689.01</b>                             |  |
| <b>GRAND TOTAL (without management fee)</b>          |  |  | <b>\$2,196,992.91</b>                                |  |                                     | <b>\$652,942.30</b>                            |  |
| <b>GRAND TOTAL--WORST CASE</b>                       |  |  | <b>\$3,599,659.18</b>                                | Does not account for travel time by service providers    |                                     |  |  |
| <b>Management Fee (@ 5%)</b>                         |  |  | <b>\$109,849.65</b>                                  | Did not comment  |                                     |  |  |
| <b>Management Fee (@ 5%)</b>                         |  |  | <b>\$179,982.96</b>                                  |  |                                     |  |  |
| <b>GRAND TOTAL (with management fee)</b>             |  |  | <b>\$2,306,842.56</b>                                |  |                                     |  |  |
| <b>Grand Total--Worst Case (with management fee)</b> |  |  | <b>\$3,779,642.14</b>                                |  |                                     |  |  |

## “Appendix C”

### Liability pursuant to the Ontario Sale of Goods Act

1. The defendants admit that Nathan’s bicycle was defective and in particular that the bicycle was not of “merchantable quality fit for the purpose for which it was intended” within the meaning of the Ontario Sale of Goods Act. Accordingly the Defendant Mills-Roy Enterprises Limited and in turn the Defendant Canadian Tire Corporation Limited are liable for the resulting bicycle accident. This is subject to any “fault” you may find on the part of Nathan and/or Mills-Roy that you find caused or contributed to the accident. Please remember that the term “fault” has the same meaning as the term “negligence”. With this in mind please answer the following questions:

- a) Have the Procycle Defendants satisfied you on a balance of probabilities that there was fault on the part of the Plaintiff Nathan Resch, which caused or contributed to the accident? Answer “Yes” or “No”.

ANSWER: \_\_\_\_\_

- b) If your answer to 6(a) is “no” that means that Mills-Roy is 100% liable for the damages and will seek to recover those damages from the Defendant Canadian Tire Corporation Limited. If your answer to 6 (a) is “yes”, in what way(s) was the Plaintiff Nathan Resch at fault? Please state fully the particulars of the fault:

\_\_\_\_\_  
\_\_\_\_\_

- c) If you answered “yes” to question 6(a) state in percentage the degree of fault attributable to Nathan Resch, bearing in mind that subject to the degree of fault attributable to Nathan Resch, Mills-Roy Enterprises is 100% liable for the damages and will seek to recover those damages from the Defendant Canadian Tire Corporation Limited:

= \_\_\_\_\_%

- 2) a) Have the Procycle Defendants satisfied you on a balance of probabilities that there was fault on the part of the Defendant Mills-Roy Enterprises, which caused or contributed to the accident? Answer "Yes" or "No".

ANSWER: \_\_\_\_\_

- b) If your answer to 7(a) is "no" that means that Canadian Tire Corporation Limited is 100% liable for the damages payable by Mills-Roy to the plaintiffs. If your answer to 7 (a) is "yes", in what way(s) was the Defendant Mills-Roy Enterprises at fault? Please state fully the particulars of the fault:

\_\_\_\_\_  
\_\_\_\_\_

- c) If you answered "yes" to question 7(a) state in percentage the degree of fault attributable to Mills-Roy Enterprises, bearing in mind that subject to the degree of fault attributable to the Defendant Mills-Roy Enterprises and any degree of fault that you may have attributed to the Plaintiff Nathan Resch, the defendant Canadian Tire Corporation Limited is 100% liable for the accident and the plaintiffs' damages:

= \_\_\_\_\_%