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The Ontario Court of Appeal's Decision on Trial Fairness and Self-Represented Litigants

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On April 21, 2020, the Ontario Court of Appeal in *Girao v. Cunningham*, 2020 ONCA 260, held that Ms. Girao's trial was one of the rare cases in which a substantial wrong or miscarriage of justice had occurred, and in the interests of that justice, her appeal was allowed with costs and a new trial ordered.

Several principles are highlighted in the *Girao* decision involving the admission of opinion evidence, accident benefits settlements and dealing with self-represented litigants in order to ensure a fair and just judicial process.

By way of background, Ms. Girao represented herself at trial with the assistance of a Spanish interpreter due to her difficulty with the English language. The defendants, Lynn Cunningham and Allstate Insurance Company of Canada, were represented by experienced lawyers.

On the eve of trial, the defendants served a "joint" document brief without obtaining Ms. Girao's input. Opinion evidence contained in the document brief that was favourable to Ms. Girao was redacted by the defendants. The Court of Appeal determined that the failure of the trial judge and the parties to properly deal with the admissibility and use of the evidence in the document brief prior to its admission as evidence, led to a cascade of evidentiary pitfalls and prejudiced Ms. Girao. It was further held that this failure ultimately resulted in the overturning of the trial judge's threshold decision and the ordering of a new trial by the Court of Appeal.

(1) The Admission of Opinion Evidence

One year prior to Ms. Girao's motor vehicle accident, she attended with Dr. Sanchez, psychiatrist, who authored a two-page letter with the impression that Ms. Girao had a major depressive disorder with psychotic features in partial remission.

The opinion letter was contained in the "joint" document brief and entered into evidence under s. 35 of the *Evidence Act*, which pertains to the admission of business records. On cross-examination, Ms. Girao's objection to the opinion letter being tendered without the ability to cross-examine Dr. Sanchez went unheard. The Court of Appeal clarified that the applicable section with respect to the admission of a medical report is s. 52 of the *Evidence Act*, not s. 35. The Court of Appeal further held that once Ms. Girao objected to the truth and contents of Dr. Sanchez's report, the trial judge was required to refuse to admit the report unless Dr. Sanchez was presented for cross-examination. On this omission alone, the Court of Appeal determined that the hearsay content of Dr. Sanchez's opinion was not admissible for any

purpose, yet the trial judge allowed the defence to continue the cross-examination and rely on Dr. Sanchez's opinion letter throughout the trial to substantiate its theory that there was no exacerbation to Ms. Girao's psychological impairments as a result of the accident.

A separate issue arose in relation to a report prepared by Dr. Harold Becker, which had summarized the reports of other doctors who had examined Ms. Girao in connection with her accident benefits claim. One of those doctors was Dr. Rosenblat, a psychiatrist, who had reached a diagnosis which supported Ms. Girao's case on causation. Ms. Girao had served a Notice of Intent to rely on Dr. Becker's report pursuant to s. 52 of the *Evidence Act* and Dr. Becker was called as a witness at trial. The defence successfully challenged the admission of Dr. Becker's report and the tendering of his oral evidence on the substance of his report, which resulted in the exclusion of Dr. Rosenblat's diagnoses being put into evidence. On appeal, it was found that the trial judge should have allowed the admission of the report as evidence under s. 52 of the *Evidence Act*, and Dr. Becker should have been able to testify to the substance of his report, with the defence being able to cross-examine him or any of the doctors whose opinion Dr. Becker would have referred to in his oral testimony.

Because of these evidentiary rulings at trial, the Court of Appeal determined that the jury heard a one-sided defence-oriented story. These errors of law were held to be procedurally and substantively unfair to Ms. Girao and were enough, on their own, to allow her appeal and order a new trial.

(2) <u>The Admission of Accident Benefits Settlement Amounts and Details</u>

Ms. Girao's accident benefits settlement documents were included in a volume of the trial brief, which the Court of Appeal determined was "slipped in" as the first trial exhibit on the first day of the trial. Ms. Girao did not object to its admissibility, likely because she did not know she could have done so. The trial judge allowed the defence to rely on the settlement documents and to cross-examine Ms. Girao about the content.

On appeal, the Court confirmed the two factors to be considered before admitting such evidence at trial: One, relevance; and two, whether the probative value of the evidence would exceed its prejudicial value.

In reaching the Court of Appeal's decision, the Court recited Justice Leach's comments in *Ismail v. Fleming*, 2018 ONSC 5979 on three occasions. That is, that defence counsel should not use "collateral entitlements premised on *disability* to support arguments of *ability*". In *obiter*, the Court of Appeal made clear that an accident benefits settlement would *rarely* (emphasis added) be relevant to the claim and would usually be more prejudicial than probative.

In Ms. Girao's case, the cross-examination pertaining to her accident benefits settlement and motivation not to return to work was found by the Court of Appeal to be irrelevant and belittling, in a way that prejudiced her. The Court of Appeal asserted that it was up to the trial judge to stop the line of questioning in this instance, and this did not occur.

While the panel did not make a binding finding that accident benefits settlements pertaining to the same accident are inadmissible at trial, the Court of Appeal articulated the view that any evidence surrounding the accident benefits settlement would only be relevant and admissible if the allegation is made that the Plaintiff's abuse of a benefit will have an impact on the calculation of the tort damages. The example given by the panel in *Girao* was that if the defence pleads that the Plaintiff failed to use the settlement proceeds to mitigate certain related future losses, then the evidence should be admissible.

(3) On Dealing with Self-Represented Litigants

Several principles pertaining to a trial judge's obligations to a self-represented litigant are highlighted in *Girao*. At trial, the defence advanced problematic evidentiary positions on complex legal topics, such as the admission of medical opinion evidence and settlement details of Ms. Girao's accident benefits claim. Ms. Girao needed the active assistance of the trial judge to deal with those positions, the absence of which left the Court of Appeal with the impression that the trial judge was led by trial counsel's arguments. Ms. Girao, the self-represented, legally unsophisticated plaintiff who struggled with the English language, was left to her own devices when the principle of fairness required more.

(4) Ensuring Trial Fairness

At paragraph 33 of the decision, the Court of Appeal lists six questions that counsel and the Court should have addressed in considering how the documents were to be treated for trial purposes. Had the issues pertaining to the "joint" document brief's admission into evidence been dealt with prior to the commencement of trial, perhaps the cascade of evidentiary pitfalls that led to Ms. Girao's success on appeal could have been avoided.