

**TRIALS**  
**RULE 52**  
**TRIAL PROCEDURE**

**FAILURE TO ATTEND AT TRIAL**

- 52.01** (1) Where an action is called for trial and all parties fail to attend, the trial judge may strike the action off the trial list.
- (2) Where an action is called for trial and a party fails to attend, the trial judge may,
- (a) proceed with the trial in the absence of the party;
  - (b) where the plaintiff attends and the defendant fails to attend, dismiss the counterclaim, if any, and allow the plaintiff to prove the claim;
  - (c) where the defendant attends and the plaintiff fails to attend, dismiss the action and allow the defendant to prove the counterclaim, if any; or
  - (d) make such other order as is just.
- (3) A judge may set aside or vary, on such terms as are just, a judgment obtained against a party who failed to attend at the trial.

**ADJOURNMENT OF TRIAL**

- 52.02** A judge may adjourn or postpone a trial to such time and place, and on such terms, as are just.

**COURT APPOINTED EXPERTS**

**Appointment by Judge**

- 52.03** (1) On motion by a party, or on his own initiative, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.
- (2) The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties.

**Contents of Order Appointing Expert**

- (3) The order shall contain the instructions to be given to the expert and the judge may make such further orders as he or she considers necessary to enable the expert to carry out the instructions, including, on motion by a party, an order for,

- (a) inspection of property under Rule 32; or
- (b) the physical or mental examination of a party.

**Remuneration of Expert**

- (4) The remuneration of an expert shall be fixed by the judge who appoints the expert, and shall include a fee for the expert's report and an appropriate sum for each day that attendance at the trial is required.
- (5) The responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge.
- (6) Where a motion by a party for the appointment of an expert is opposed, the judge may, as a condition of making the appointment, require the party seeking the appointment to give such security for the remuneration of the expert as is just.

**Report**

- (7) The expert shall prepare a report and send it to the Registrar and the Registrar shall send a copy of the report to every party.
- (8) The report shall be filed as evidence at the trial of the action unless the trial judge orders otherwise.
- (9) The judge may direct the expert to make a further or supplementary report, and subrules (7) and (8) apply to that report.

**Cross-examination of Expert**

- (10) Any party may cross-examine the expert at the trial.

**Liability of Parties for Remuneration of Expert**

- (11) The liability of the parties for payment of the remuneration of the expert shall be determined by the trial judge at the end of the trial, and a party who has paid the expert in accordance with a determination under subrule (5) if not the party determined to be liable for payment under this subrule, shall be indemnified by the party determined to be liable.

**EXHIBITS**

**Marking and Numbering**

- 52.04** (1) Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was

put in evidence and, where the person who produced it is not a party or his solicitor, the name of that person.

### **Return of Exhibits**

- (2) At any time following the trial judgment, on requisition by the solicitor or party who put an exhibit in evidence or the person who produced it and on the filing of the consent of all parties represented at the trial, the registrar may return the exhibit to the person making the requisition.
- (3) Subject to subrule (2), the exhibits shall remain in the possession of the registrar,
  - (a) until the time for an appeal has expired; or
  - (b) where an appeal has been taken, until it has been disposed of.
- (4) On the expiration of the time for appeal or on the disposition of the appeal, the registrar on his or her own initiative, shall return the exhibits to the respective solicitors or parties who put the exhibits in evidence at the trial.

### **VIEW BY JUDGE OR JURY**

**52.05** The judge or judge and jury by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their counsel, inspect any property concerning which any question arises in the action, or the place where the cause of action arose.

### **EXCLUSION OF WITNESSES**

#### **Order for Exclusion**

**52.06** (1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).

#### **Order not to Apply to Party or Witness Instructing Counsel**

(2) An order under subrule (1) may not be made in respect, of a party to the action or a witness whose presence is essential to instruct counsel for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.

#### **No Communication with Excluded Witnesses**

- (3) Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, except with leave of the trial judge, until after the witness has been called and has given evidence.

**Exclusion of Persons Interfering with Trial**

- (4) Nothing in this rule prevents the trial judge from excluding from the courtroom any person who is interfering with the proper conduct of the trial.

**ORDER OF PRESENTATION IN JURY TRIALS**

- 52.07** (1) On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:
- (a) The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence;
  - (b) A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence;
  - (c) When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so and shall then adduce evidence;
  - (d) When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make a closing address, followed by the closing address of the plaintiff;
  - (e) Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make a closing address, followed by the closing address of the defendant.
- (2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.
  - (3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.
  - (4) Where a party is represented by counsel, the right to address the jury shall be exercised by counsel.

**DISAGREEMENT OF THE JURY**

- 52.08** (1) Where the jury,
- (a) subject to the provisions of s. 24 of the *Jury Act* disagrees;
  - (b) makes no finding on which judgment can be granted; or
  - (c) answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings,

the trial judge may direct that the action be retried with another jury, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, the judge shall dismiss the action.

- (2) Where the answers given by a jury are sufficient to entitle a party to judgment on some but not all of the claims in the action, the judge may grant judgment on the claims in respect of which the answers are sufficient, and subrule (1) applies to the remaining claims.

### **RECORDING JURY VERDICT**

**52.09** The verdict of a jury shall be endorsed on the trial record.

### **FAILURE TO PROVE A FACT OR DOCUMENT**

**52.10** Where, through accident, mistake or other cause, a party fails to prove some fact or document material to his case,

- (a) the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs; or
- (b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on proof of the fact or document afterwards as directed, and, if it is not so proved, judgment shall be granted to the opposite party, unless the judge directs otherwise; or
- (c) adjourn the trial and require the attendance of the jury upon a date to be fixed by him.

### **RIGHT OF DEFENDANT TO MOVE FOR DISMISSAL**

**52.11** At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out. (*Editor's Note: This Rule does not appear in*

*the Ontario Rules of Civil Procedure. It was adopted from the 1976 Rules of Civil Procedure - Rule 30.08 - previously applicable in this Province.)*

*P.P. v. D.C.W. (P.E.I.)* 2006 PESCAD 12

The rule does not contemplate the order in which multiple defendants present their cases. The court provided an interpretation as to the application of Rule 52.06(1) and (2).

*Bryant v. Fenton* (1997), 152 Nfld. & P.E.I.R. 306 (P.E.I.S.C.-T.D.), affirmed on appeal, (1998) 166 Nfld. & P.E.I.R. 109

Plaintiff commenced action against defendant doctor based exclusively on lack of informed consent. At conclusion of plaintiff's case, in which plaintiff offered evidence relating to such matters as pre-surgery condition, elective nature of procedure, defendant's advice, post-operative condition, injury, damages, and plaintiff's alleged choice if disclosure adequate, the defendant moved for non-suit on ground that no case was made out on facts and law. Motion granted. On such a motion the court is to determine whether facts established from which liability might be inferred; whether any evidence, if left uncontradicted would permit a reasonable trier of fact to find in plaintiff's favour. The plaintiff failed to offer expert medical evidence which was essential to establish a known risk had materialized to cause injury and that such a risk was within the scope of risks the defendant had a duty to disclose, both of these criteria being essential elements of a claim founded on lack of informed consent.

*Director of Child Welfare (P.E.I.) v. N.W. and L.M.* (1994), 124 Nfld. & P.E.I.R. 180 (P.E.I.S.C.-A.D.)

The exclusion of witnesses is a discretionary matter for the trial judge.

*Wakelin v. Superior Sanitation Services Ltd. & Town of Parkdale*, [1993] 2 P.E.I.R. 241 (P.E.I.S.C.T.D.)

The Court allowed the motion for non-suit brought by the Town finding that the plaintiff had not adduced sufficient evidence which, if left uncontradicted, would allow a reasonable man to infer the liability of the town.

*MacDougall v. St. Peters Bay (Community)* (1992), 100 Nfld. & P.E.I.R. 45 (P.E.I.S.C.-T.D.)

A motion for dismissal may be granted when, upon the facts and the law, no case has been made out by the plaintiff. The motion will only be granted if there is no evidence upon which a jury properly instructed could find for the

plaintiff. The judge must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point.

If the plaintiff fails to prove a *prima facie* case in its evidence in chief and the defendant brings a successful non suit motion, then the plaintiff's action will be dismissed.

*McKenna's Express Ltd. v. Air Canada* [1992] 1 P.E.I.R. 24 (P.E.I.S.C.-T.D.).

On a motion for non-suit it is the function of the trial judge to determine whether any facts have been established by the plaintiff from which liability may be inferred.

The following cases were decided under Rule 30.08 of the 1977 Rules:

*Ward v. Harris Projects Ltd.* (1989), 73 Nfld. & P.E.I.R. 11 (P.E.I.S.C.-T.D.);

*Hyndman v. Jenkins* (1981), 18 C.P.C. 303 (P.E.I.S.C.-T.D.)