ASK A SILLY QUESTION AND GET A SILLY ANSWER: PRACTICAL ADVICE FOR POSING QUESTIONS TO JURIES

NIGEL G. GILBY[1]
LERNERS LLP

French novelist, Albert Camus, wrote that charm is a way of getting the answer "yes" without having asked a clear question. Unfortunately, most of us are not charming enough to avoid the hard work that comes with thoroughly preparing our cases in advance of trial. Careful planning of the questions to be submitted to a jury prior to trial will go a long way in putting together an effective case for your client.

In his seminal text, *The Trial of An Action*, the late John Sopinka observed that questions posed to a jury at the conclusion of a trial work as a safeguard against a jury's power to disregard the law in favour of an entirely emotional verdict.[2] Properly prepared questions provide focus to a jury in its deliberations and directs it to provide focussed answers, which in turn permits judges to scrutinize the soundness of its findings.[3]

OVERVIEW OF RELEVANT LEGAL PRINCIPLES

The legal principles that apply when dealing with jury questions may be concisely stated. They include the following:

1. Questions of fact submitted to a jury may relate to both liability and damages;[4]

---

1 The author wishes to thank his associates, William A. G. Simpson and Marinus L. Lamers, for their capable assistance in the preparation of this paper. He is also indebted to Rebecca A. Dervaitis, student-at-law, for her research efforts.

2 John Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1981).

3 *Ibid*. at p. 153.

4 *Maliewski v. Pastushok* (No. 2) (1996), 54. D.L.R. (2d) 482 (Ont. C.A.).

2. Where counsel submits questions to be asked of a jury, it is improper for the trial judge to identify the questions by their source;[5]

3. A trial judge does not need the consent of counsel before putting questions to a jury. A trial judge has the authority to put questions to a jury that counsel may not want included or exclude questions counsel may want included;[6]

4. By accepting and adopting the questions proposed by the trial judge, and not asking for a "re-charge" on the point, counsel for all parties are deemed to accept that the questions posed by the trial judge are the appropriate way for the jury to decide the issues in the case;[7]

5. Failing to formally object to the questions put to the jury may impact the success of any appeal concerning the appropriateness of the jury questions or the charge concerning the questions;[8]

6. A trial judge may not tell jurors that they may decline to answer certain questions posed to them, nor may counsel suggest to jurors that they are at liberty to act as they please;[9]

---

5 *Ross v. Scottish Union & National Insurance Co.* (1917), 39 D.L.R. 528 (Ont. C.A.), aff'd (1918), 58 S.C.R. 169.

6 *Guthrie v. W.F. Hunting Lumber Co.* (1910), 15 B.C.R. 471 (C.A.); *Fuller v. Stoltze*, [1938] W.W.R. 241 (Sask. C.A.), affirmed on other grounds [1939] S.C.R. 235; *DeGuise v. Henry* (1984), 47 O.R. (2d) 172 (H.C.J.).

7 *Kennedy v. Mandarin Enterprises Ltd.* (1993), 84 B.C.L.R. (2d) 335 (C.A.).

8 *Saunders v. Randolph Hotel Company, Limited and Pidutti*, [1945] O.R. 600 (C.A.).

9 *McElmon v. British Columbia Electric Railway* (1913), 4 W.W.R. 1317 (B.C.C.A.).

7. Where questions are submitted to a jury concerning several findings of fact in respect of one cause of action, the jurors must agree on the findings in relation to each question. Where a jury gives contradictory answers to one or more questions, a judgment based upon the verdict will be set aside;[10]

8. It is sufficient if five of the six jurors agree on the verdict or answer to a question. Where more than one question is submitted to a jury, it is not necessary that the same five jurors agree to every answer; [11]

9. Where a juror dies or is discharged, the trial judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous;[12]

10. Where a jury answers any question in a vague or contradictory manner, objection should be taken at once in order that the jury may have opportunity for clarification;[13]

11. Where the jury fails to make a finding on a crucial question of fact, it may be sent back to do so;[14]

12. An unreasonable or perverse verdict is an issue for the appellate court, not an issue to be dealt with by a trial judge;[15]

---

10 *Risk v. Canadian Pacific Railway*, [1917] 1 W.W.R. 652 (Man. K.B.); *Byrne v. Prudential Insurance Co. of America*, [1937] 4 D.L.R. 416 (N.B.C.A.).

11 *Courts of Justice Act*, R.S.O. 1990. c. C.43, s. 108(6).

12 *Ibid*., s. 108(7).

13 *Cowper v. Studer*, [1950] 1 W.W.R. 780 (Sask Q.B.), aff'd [1951] S.C.R. 450.

14 *Judd v. Frost*, [1957] O.W.N. 539 (C.A.).

15 *Lang v. McKenna*, [2000] O.J. No. 2983 (C.A.)(QL).

13. A trial judge may refuse to accept the verdict of a jury if he or she concludes that there is no evidence to support the finding, or where the jury gives an answer to a question that cannot in law provide a foundation for judgment. Intervention by a trial judge is limited to verdicts with no basis in law or devoid of evidentiary support[16]; and

14. A new trial should be ordered if a jury answers the question(s) in a manner that is not reasonable on the evidence and where it is not possible for a trial judge to re-charge the jury.[17]

It is sometimes the case that, when answering questions put to it, a jury will return inconsistent findings. When this occurs, the trial judge has a number of available options. In this regard, counsel should be familiar with the provisions of Rule 52.08(1) of the *Rules of Civil Procedure*, which states:

> 52.08(1) Where the jury,
>
> (a) 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 finds,

16 *Teskey v. Toronto Transit Commission*, [2003] O.J. No. 4546 (S.C.J.); *Le Blan v. Corporation of the City of Penticton* (1981), 28 B.C.L.R. 179 (C.A.); *Hill v. Church of Scientology*, (1992) 7 O.R. (3d) 489 (Gen. Div.).

17 *Royal Bank v. Pleasant Valley (Rural Municipality)* (1991), 3 C.P.C. (3d) 273 (Sask. Q.B.); *Smith. v. Foussias* (January 31, 1996), Doc. Toronto 89-CU-356998 (Ont. Gen. Div.)

> the trial judge may direct that the action be retried with another jury at the same time or any subsequent sitting, 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.
>
> 52.08(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.

Rule 52.08 contemplates that where judgment can be given, it should be done. If there is a basis for granting judgment notwithstanding the conflicting answers from a jury, it should also be done. It is only where judgment cannot be given that the trial judge has other options. As contemplated by Rule 52.08, those options are to order a new trial or to dismiss the action.

Counsel should be cognizant of the fact that there is no authority under Rule 52.08 of the *Rules of Civil Procedure* for the trial judge to substitute his or her own findings for conflicting jury findings.

As a practical matter, it has become commonplace for trial judges to ask counsel to draft questions to be put to a jury and, in most cases, counsel will agree on a set of appropriate questions. If counsel cannot agree, the trial judge will then determine the appropriate questions to be answered by a jury.

PRACTICAL TIPS WHEN PREPARING JURY QUESTIONS

As a rule, plaintiffs' counsel should begin drafting the questions to be posed to a jury before the trial begins. Identifying the key questions for a jury is an effective way of organizing and calling the evidence in your case. Counsel will obviously need to amend their questions based upon the evidence that is presented during the course of the trial. Thinking ahead, however, about the questions a jury will need to answer in order for your client to succeed forces counsel to prepare thoroughly and strategically.

The relatively recent decision of the Court of Appeal for Ontario in *Pilon v. Janveaux* is a case in point.[18] In this tavern liability case, the defendants admitted liability for causing the accident but not for causing the plaintiff's injuries. At trial, the questions posed to the jury failed to include the apportionment of fault among the individual defendants. The questions also failed to quantify the tavern's responsibility for over-serving the plaintiff and for failing to take appropriate steps to ensure that the plaintiff got home safely. The appeal court noted that apportioning liability among all parties is required under the *Negligence Act*. In the result, the appeal court took the position that it had jurisdiction to apportion fault in an "extraordinary case".

Arguably, *Pilon* is an example of the kind of case where, given the facts and issues involved, careful planning in advance of trial of the questions likely to be submitted to a jury may have prevented the errors that gave rise to the appeal.

---

18 *Pilon v. Janveaux*, [2005] O.J. No. 4672 (C.A.)(QL).

Plaintiffs' counsel should always seize the opportunity to draft the questions to be put to a jury for defence counsel's review. Doing so may provide the chance to use subtle language to the plaintiff's advantage. Counsel should be vigilant about the way a non-legally trained trier of the fact may interpret the question. Consider the subtle difference in the following two questions:

1. What liability do you apportion to the plaintiff?

2. What liability, **if any**, do you apportion to the plaintiff?

A juror may read the first question and assume that it is necessary to assign some degree of responsibility to a plaintiff, even if he or she does not feel that it is appropriate to do so. Thus, the first question may cause confusion in the minds of jurors. Contrast this with the second question, which clearly indicates that it is not necessary for a juror to assign any liability to assigned to a plaintiff.

Consider this further example in a pedestrian case:

1. Has the defendant satisfied you on the whole evidence that the loss or damage sustained by the plaintiff did not arise through the negligence or improper conduct of the defendant, the owner (or driver) of the motor vehicle?

2. Has the defendant satisfied you on the whole evidence that the loss or damage sustained by the plaintiff did not arise, **in whole or in part**, through the negligence or improper conduct of the defendant, the owner (or driver) of the motor vehicle?

Again, plaintiffs' counsel will instinctively prefer the phraseology of the second question because it is more expansive with respect to the manner in which a defendant may be found to be negligent. The more specific wording of the second question may prevent a juror from incorrectly assuming that a defendant can only be found to be negligent if he or she is determined to be wholly at-fault for causing damage to the plaintiff.

Plain language should be used as much as possible when preparing questions for a jury. Most jurors will be unfamiliar with legal terms and concepts. Jurors inevitably have varying degrees of education and life experience. Keeping the questions simple and concise will minimize any risk of confusion in the jury room during deliberations.

Once the questions to be submitted to the jury have been agreed upon, in their closing arguments to a jury, counsel should refer to the questions in detail. There is nothing improper about counsel giving each juror a copy of the questions during his or her closing and advocating with respect to the specific answers should be given to each question.

CONCLUSION

Requiring a jury to answer specific questions can be of assistance to both the trial judge and counsel. As such, jury questions should not be prepared at the end of the case, under the constraints of a tight time-line. The questions should be drafted before the trial starts to provide a road map for counsel to follow when tendering evidence and can then be modified easily based on the actual evidence presented to the jury. Counsel should also use precision and plain language when preparing the questions.