# Soldwisch v. Toronto Western Hospital et al.

[1983] O.J. No. 3188

43 O.R. (2d) 449

1 D.L.R. (4th) 446

38 C.P.C. 309

22 A.C.W.S. (2d) 135

**Ontario**
**High Court of Justice**
**Divisional Court**
**Galligan, Van Camp**

**and Smith JJ.**

October 12, 1983.

R. J. **Sommers,** Q.C., for appellant.

R. A. Stradiotto, Q.C., for respondent, Toronto Western Hospital.

D. K. Laidlaw, Q.C., and G. A. Smith, for respondent, John Taylor Miles.

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**1** BY THE COURT:-- This appeal raises for the first time at an appellate level the question of whether a rule, practice or tradition exists in our jurisprudence that absolutely precludes trial by jury of medical malpractice cases and if so whether it should be re-examined with a view to its disappearance.

**2** An order of Trainor J. is before us by leave of Montgomery J. Similar orders were made by countless individual members of the High Court over the years sitting in chambers, and more recently, in motions court.

**3** The reasons of Trainor J. in disposing of the application to strike the jury notice were succinct:

> I would have dismissed this application and left the issue to the trial judge but I am bound by a long line of authority dealing with jury notices in malpractice cases.
>
> ... This order is without prejudice to the jury notice being reinstated by the trial judge should the issue of liability be settled.

**4** Labrosse J. in Demeter v. Occidental Life Ins. Co. of California and two other actions (1979), 23 O.R. (2d) 31 at p. 35, 94 D.L.R. (3d) 465 at p. 469, 9 C.P.C. 322 (affirmed 26 O.R. (2d) 391, 102 D.L.R. (3d) 454, 12 C.P.C. 125), pointed out that the power of a trial judge to reinstate a jury notice stricken out under Rule 400 was practically non-existent. Counsel agreed before us that the relief given to the plaintiff by the second sentence of the reasons of Trainor J. was illusory.

**5** It is a well-known fact that for years in Ontario it has been accepted that medical malpractice cases could not be tried with a jury. It was accepted that a judge hearing an application to strike out a jury notice under Rule 400 was left with virtually no discretion to refuse to do so. It is unnecessary to review any of the countless cases in which jury notices in medical malpractice cases have been stricken out because the practice was chronicled by the obiter dictum of Morden J.A. in Such v. Dominion Stores Ltd., [1961] O.R. 190 at p. 195, 26 D.L.R. (2d) 696 at p. 701:

> There are certain classes of cases which by long established practice are not tried by juries in this Province. I mention, merely by way of example, actions for malpractice, actions involving scientific investigations and highly technical evidence and accounting actions. When these issues appear in the pleadings, a Chambers Judge would almost as a matter of course, strike out a jury notice; in fact in such cases his order, in view of the well-settled practice, would hardly merit the epithet of discretionary.

(Emphasis added.)

**6** There was some discussion before us about whether the established practice referred to by Morden J.A. was a rule, a practice or a tradition. Various expressions have been used but it does not seem necessary to decide which is the most appropriate. For clarity's sake we will adopt the term "practice" which was used by Morden J.A.

**7** The real question at issue is not whether the practice exists or has heretofore existed. It has and does exist. Trainor J. was obviously correct when he followed it. What is at issue is whether the practice should continue to be applied to deprive the motions court judge of the discretion to decide an individual application under Rule 400(1) upon its individual merits.

**8** High authority frequently has reminded us that the right to jury trial in a civil case is an important, substantive right that may not be lightly taken away. It may be taken only for a cogent reason: King v. Colonial Homes Ltd. et al., [1956] S.C.R. 528, 4 D.L.R. (2d) 561; Neelands et al. v. Haig, [1957] O.W.N. 337, 9 D.L.R. (2d) 165. However, the right to jury trial is not absolute. The Legislature has by statute taken it away in certain types of cases. Rule 400(1) gives a motions court judge broad power to deprive a party of a jury trial if it appears to him that the action is one that ought to be tried without a jury.

**9** That rule explicitly confers a discretion upon the motions court judge. It is clear from such cases as Demeter v. Occidental Life Ins. Co. of California and two other actions (1979), 26 O.R. (2d) 391, 102 D.L.R. (3d) 454, 12 C.P.C. 125, and Martin v. Deutch et al., [1943] O.R. 683, [1943] 4 D.L.R. 600, that the judge must exercise that discretion every time an application is made under the rule. In the latter case, Robertson C.J.O. said at p. 691 O.R., pp. 601-2 D.L.R.:

> It is plain from the terms of Rule 398 [now Rule 400], that the judge in chambers is intended to exercise his discretion. He is to direct that the issues shall be tried and the damages assessed without a jury when "it appears to him that the action is one which ought to be tried without a jury".

In the same case Laidlaw J.A. said at p. 698 O.R., p. 608 D.L.R.:

> I think the Rule puts on a judge in chambers a duty to decide each and every application made to him, and if he decides that the action is one that ought to be tried without a jury, he is bound to give the direction as provided ...

**10** If a judge must decide a particular application in a certain way, it is difficult to understand how the judge can be said to have a discretion. It seems to us, therefore, that the Ontario practice which requires a motions court judge automatically to strike out a jury in a medical malpractice case deprives the motions court judge of a discretion explicitly conferred by the rules and of the opportunity to exercise that discretion in a particular type of case. A practice which in a particular class of case denies a discretion which the Rules of Practice explicitly confer, and which the Court of Appeal and this court said must be exercised, does not seem to us to be legally supportable.

**11** The provisions contained in Rule 400(1) have existed since 1911. We think a practice which continued or developed since that time, and which purported to prevent a judge from exercising the discretion conferred by the rule in a particular class of case in the light of the decisions of the Court of Appeal in Martin v. Deutch, and of this court in Demeter v. Occidental, must be held to be wrong in principle and must no longer be followed, no matter its antiquity, no matter the stature of those who developed and followed it.

**12** We heard eloquent attacks upon, and arguments in defence of, this ancient Ontario practice but in the view we take of this appeal it is not necessary to comment upon the various justifications advanced for the practice. Perhaps the many, many cases that have followed it can best be

rationalized by the thought that by their very nature medical malpractice cases generally are so technically complex that it may be unrealistic to expect that a jury could reasonably be expected to follow, comprehend, analyze and weigh the conflicting and often confusing testimony of experts in a highly scientific area of activity. But the fact that many of those cases may more appropriately be tried without a jury, cannot remove from the motions court judge the discretion to decide whether a particular case ought or ought not to be tried with a jury.

**13** It is not for this court to lay down particular rules by which motions court judges will exercise their discretion when applications are made under Rule 400(1) in medical malpractice cases, nor to review the myriad of decisions where orders under it were made or refused in other kinds of cases. The general rules which apply to applications under Rule 400(1), in our opinion, ought to apply to applications in medical malpractice cases.

**14** It is perhaps useful to recall what some eminent judges have said about how the discretion is to be exercised. In Martin v. Deutch, supra, Robertson C.J.O. said at p. 691 O.R., p. 602 D.L.R.:

> Doubtless, the discretion is to be exercised juridically. The judge is not to dispense with a jury because he does not believe in juries. Neither is he to disregard substantial grounds for dispensing with a jury for no other reason than his high regard for the right of a litigant to have his case tried by a jury. The Rule plainly contemplates that it may be applied, and that a jury may be dispensed with, in an action of a class that is ordinarily tried with a jury, if there are special circumstances that make it appear that it will be in the interest of justice to try the case without a jury. Whether there are, in the particular case, special circumstances that warrant a judge in chambers directing a trial without a jury, is a matter upon which that judge must exercise his discretion.

And Laidlaw J.A. said at p. 698 O.R., p. 608 D.L.R.:

> There are no hard and fast rules to guide a judge in reaching a decision of this kind. He must exercise a judicial discretion. That means he may use his personal wisdom and experience to find what is fair and equitable in the peculiar circumstances of the case before him. He is allowed a liberty and privilege to act in accordance with what he believes to be right and proper; he is to be guided by the spirit of justice, and his decision is not compelled by fixed principles and precedents in law. The decision to be made, as stated in the Rule, depends on what "appears to him"; but, of course, it ought to be deliberate and judicial and must not be an arbitrary, vague or capricious use of power.

**15** More recently, in Majcenic v. Natale, [1968] 1 O.R. 189 at pp. 201-2, 66 D.L.R. (2d) 50 at pp. 62-3, Evans J.A. (as he then was), although he was discussing the discretion of a trial judge to dispense with a jury, made comments that a motions court judge might find helpful when hearing applications under Rule 400(1):

> The order of the trial Judge to strike out the jury notice must be based on a juridical discretion. The trial Judge's doubts as to the efficiency and efficacy of the jury system are not judicial grounds for dispensing with a jury nor is his personal high regard for the litigant's right to a jury sufficient to reject a motion to discharge when the grounds in support of the motion are substantial. The sole question for determination on this issue is: Will justice to the litigants in the particular case be better served by retention or discharge of the jury? The various factors relevant to the issue must be considered in a judicial manner and the decision must be responsive to the question enunciated.

(Emphasis added.)

**16** It is not for this court to predict or direct how judges will exercise their discretion in individual applications made under Rule 400(1) in medical malpractice cases. But we do think that there should no longer be a judge-made practice that says that if in a particular application it does not appear to the judge that the case ought to be tried without a jury he is without discretion to dismiss the application.

**17** Because Trainor J. did not make an order in the exercise of discretion this court may exercise its discretion as to whether or not this case is one that ought to be tried without a jury. A very brief review of the circumstances as described in the material put before the court is necessary.

**18** Before doing that, we keep in mind that the essential question to be resolved is that posed by Evans J.A. in Majcenic v. Natale, supra, namely, will justice to the litigants in this case be better served by retention or discharge of the jury? We think that an important element in any answer to that question is which forum is more likely going to be able to comprehend, recollect, analyze and eventually weigh expert testimony on complex and highly technical scientific matters. It is essential to just determination of issues that the tribunal of fact be able to understand the case that the litigants are putting forward.

**19** It is in no sense a disparagement of the jury system or of the important role it plays in the administration of justice in this province that in many highly complex or technical cases other than malpractice ones many judges have held that a judge alone is the more appropriate tribunal.

**20** A review of only a few of the many cases in which jury notices have been stricken out shows that the courts have long recognized that a factor, and oftentimes a very important factor, to be taken into account when deciding whether or not a case ought to be tried without a jury is the complexity of the issues and the technicality of the evidence.

**21** In A.-G. Ont. v. Cuttell et al., [1955] O.R. 8 at p. 13, [1955] 2 D.L.R. 583 at p. 587, Spence J. approved the statement by a judge in an earlier case that when the issues were many and complicated the case could more conveniently be tried without a jury. Wells J. (as he then was) decided in Rintoul v. Dominion Stores Ltd., [1955] O.W.N. 114, that where there was medical

evidence of "some complexity and difficulty" in a damages action the case was one which ought to be tried without a jury [p. 115]. In Arrow Transit Lines Ltd. et al. v. Tank Truck Transport Ltd. et al., [1968] 1 O.R. 154 at p. 155, 65 D.L.R. (2d) 683 at p. 684, Wilson J. concisely put the proposition in these words:

> I always approach an application such as this with great care because ... the party serving the jury notice has a prima facie right to have the action disposed of by a jury. However, in circumstances where the evidence is likely to be of a technical nature which a jury is likely to have difficulty in comprehending, it is dispensed with.

**22** Complexity of issues together with complicated medical evidence led Gale C.J.H.C. (as he then was) to dispense with a jury in Kovacs v. Skelton, [1966] 1 O.R. 6. That was an action for damages for personal injuries arising out of a motor vehicle accident.

**23** There are many practical difficulties and problems which arise in any trial, whether it be by a judge alone or with a jury. We think it is important in considering a motion such as this to keep very much in mind those practical problems. If during a trial a judge has difficulty understanding technical evidence he is in a position to ask questions to obtain the necessary explanation. On the other hand, it is not always easy to know whether the jury as a whole is understanding the evidence, much less to know whether one or more jurors are experiencing difficulty. It is frequently difficult enough for an expert to explain a technical matter so that one person can understand it. It is substantially more difficult to explain it in a way that a number of different persons, each with different educational and occupational backgrounds, can do so. There are practical constraints upon the amount of time that can be taken in the education of the tribunal so that it can comprehend the complexities of someone else's field of expertise. Often one person can be educated more quickly than can a group. It is, we think, more probable that within some reasonable time constraints one person -- the judge -- can be educated than can a group of people -- the jury.

**24** On May 7, 1979, at the Toronto Western Hospital the defendant Dr. Miles performed an aortal-bifemoral bypass upon the plaintiff. Following the operation it became obvious that either during the surgery or closely coincident with it in time damage was caused to the plaintiff 's left peroneal nerve which has resulted in serious residual problems for the plaintiff. Before a court can begin to consider whether or not Dr. Miles or the hospital were negligent, it must consider the question of causation because one of the possible causes of the particular type of damage could be embolic, i.e., a piece of debris in the vascular system could have broken loose and blocked an artery serving the peroneal nerve. Some of the medical opinions suggest that the nerve damage is located in the vicinity of the knee which is a substantial distance from the site of the surgery.

**25** It will be necessary for the tribunal of fact to make a careful review, not only of the plaintiff 's pre-operative state of health, but also the operation itself, in an attempt to resolve the issue of causation as well as the issue of negligence. The usual time for the performance of an aortal-

bifemoral bypass averages from two to four hours. A very short note of this operation was prepared by one of the surgeons who assisted Dr. Miles. It reads as follows:

Diagnosis
AORTOILIAC OCCLUSIVE DISEASE PLUS BILATERAL SUPERFICIAL F

. . . . .

NOTE:

This man in his 50s has had intermittent claudication of his calves and thighs with decreased femoral pulses. Arteriography demonstrated fairly severe aortoiliac occlusive disease with some minor dilation of the distal aorta. There were also bilateral superficial femoral occlusions. Profundas were well developed with good collateralization. Popliteal opened up just above the knee which was fairly diseased and had a reasonable outflow tract.

PROCEDURE:

With the patient under general endotracheal anaesthetic in supine position, the abdomen and groins were prepared and draped in sterile fashion. Both groins were opened through longitudinal incisions, the common temoral artery identified, the profunda system dissected out as was the superficial femoral. The anatomy was somewhat bizarre.

The abdomen was then opened from xiphoid almost to pubis. Laparotomy unremarkable. Bowels retracted. Retroperitoneum divided over the aorta, avoiding damage to the duodenum on the inferior mesenteric vein. Dissection was carried up as far as the left renal vein and down as far as the inferior mesenteric artery.

Aorta was then cleaned away and the area for anastomosis picked about an inch below the renal vein. Blood was then drawn to pre-clot an 18 mm. Cooley double velour Dacron graft.

The patient was thus systemically heparinized and aortic clamp placed just below the renal vein and another clamp placed just above the inferior mesenteric artery.

The aorta was then divided. Lumbar vessels were clipped. Distal end was then oversewn with two layers of 2-0 Prolene and a good field was made. Then the graft was sutured on the aorta using 2-0 Prolene continuous Kuyper technique. Good anastomosis was fashioned and then the limbs were passed down to retroperitoneal tunnels to the groins bilaterally.

Common femorals were seriously diseased on both sides. Arteriotomy was made in the common femoral extending down a good distance into the profunda on each side. Graft was then cut to size, and sutured into position using 4-0 Prolene continuous Kuyper technique. One or two extra sutures were placed to control hemorrhage and the graft was flushed prior to closing each anastomosis. There was a fair amount of plaque-like material returned from the flush.

When there was good hemostasis obtained both groins closed with two layers of subcutaneous Vicryl, skin closed with Prolene and both were washed out with Becitracin.

There was good flow through the graft and there was good hemostasis. Retroperitoneum was then closed over the aorta using continuous vicryl sutures. Bowels were then placed back in the abdominal cavity and the abdomen closed with heavy Vicryl in the peritoneum and the linea alba closed with continuous Ethibond sutures. Skin closed with Prolene. Sterile dressings were applied and the patient was taken to the ICU in satisfactory condition, although rather hypertensive. The legs were warm although appeared somewhat mottled, probably due to embolic phenomenon.

**26** Sponge and instrument counts were reported as correct.

**27** The diagnosis of nerve damage and the efforts to isolate its location are assisted by electromyographic studies. The summary of one of those studies reads as follows:

SUMMARY:

The electromyographic findings show a marked loss of motor unit potential activity from extensor digitorum brevis. There is evidence of reinervation and enlarged motor unit potentials from the left tibialis anterior, while the left quadriceps showed no abnormality. Motor nerve conduction of the left peroneal nerve is intact to tibialis anterior, but could not be recorded to extensor digitorum brevis on the foot.

That is but a small portion of the technical evidence that will be led in this case. The tribunal of fact will have to be taught a substantial amount of medicine.

**28** We recognize that Dr. Meloff 's opinion is that the medical issues in this case do not pose any unusual difficulty and may be readily explained to and be understood by laymen. However, from our point of view as trial judges, in the light of the many and complex issues in this case we think his opinion is somewhat optimistic. It is not always easy for a trial judge to assimilate and weigh medical evidence. It seems to us that it will be more difficult for a group of lay people to do so in as complicated a case as this one. While there is always the risk that a trial judge may fail to assimilate enough medical knowledge to decide this case fairly, it seems to us that the chance of such failure by a judge alone is less than the chance of that failure by a jury.

**29** There are in this case, as well as the complex medical problems, difficult legal issues such as vicarious liability and informed consent.

**30** We feel in all of the circumstances of this particular case that it is more likely that justice to the litigants will be better served by having it tried without a jury.

**31** We considered the course followed by Osler J. in Law et al. v. Woolford et al. (1976), 2 C.P.C. 197, and O'Brien J. in Placido v. Shore et al., [1982] O.J. No. 877, July 23, 1982 [summarized 15 A.C.W.S. (2d) 537] of leaving the issues of damages for trial by jury while directing that liability be tried by judge alone. However it is our opinion that the medical evidence respecting damages in this case will be so inextricably interwoven with that respecting liability that it is not practicable to have the issue of damages separated from that of liability.

**32** It follows therefore that we are of the opinion that this particular case ought to be tried without a jury. The appeal from the order of Trainor J. is therefore dismissed.

**33** Before leaving this case a comment should be made in relation to the suggestion that if a motions court judge is in doubt upon a motion pursuant to Rule 400, the matter be left for the trial judge to resolve. It is clear from Martin v. Deutch, supra, and Demeter v. Occidental, supra, that there is an obligation upon the motions court to exercise the discretion conferred by Rule 400 on each and every application pursuant to that rule. If after a consideration of all of the material the judge is in doubt about whether or not the action is one that ought to be tried without jury, then the applicant must fail for want of satisfying the onus which rests upon him.

**34** A decision by the motions court judge not to dispense with a jury of course does not remove from the trial judge the ultimate responsibility to strike out a jury if it appears either at the beginning of the trial or as it proceeds that justice would be better served by discharge of the jury. The discretion of the motions court judge under Rule 400 is a separate and distinct discretion from that of the trial judge. Each must exercise his or her discretion separately. The fact that the ultimate discretion rests with the trial judge does not relieve the motions court judge of exercising the discretion conferred by Rule 400.

**35** We do not feel that we ought to interfere with the disposition which Trainor J. made of the costs of the application before him. However, in all of the circumstances of the case, we feel that the appropriate disposition of costs of the application for leave to appeal and in this court ought to be in the cause.

**36** In the result the appeal is dismissed. Costs here and before Montgomery J. in the cause.

Appeal dismissed.