COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***de Araujo v. Read,***
2004 BCCA 267

Date: 20040513
Docket: CA29268

Between:

Estela de Araujo

Respondent
(Plaintiff)

And

Kenneth C. Read

Appellant
(Defendant)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

S.B. Stewart
M. Wilhelmson — Counsel for the Appellant

W.S. Berardino, Q.C.
A.N. MacKay — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
12 December 2003

Place and Date of Judgment: Vancouver, British Columbia
13 May 2004

Written Reasons by:
The Honourable Mr. Justice Thackray

Concurred in by:
The Honourable Mr. Justice Low

Dissenting Reasons by:
The Honourable Mr. Justice Smith (p. 34, paragraph 74)

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] On 22 August 1997, Mr. Read's motor vehicle rear-ended a vehicle being driven by the respondent Ms. de Araujo. Ms. de Araujo suffered neck, back and shoulder injuries. The trial of her action was heard by Mr. Justice Clancy sitting with a jury. On 29 November 2001 the jury returned with a verdict in the amount of $162,000 divided as follows:

a)	Non-pecuniary damages	$100,000
b)	Past income loss	$ 16,000
c)	Loss of income earning capacity	$ 40,000
d)	Special damages	$ 4,000
e)	Cost of future care	$ 2,000

[2] The appellant, Mr. Read, asks this Court to order a new trial on the basis that the trial judge erred in failing to order a mistrial. The appellant asserts in his factum that the plaintiff put the Insurance Corporation of British Columbia ("I.C.B.C."), defence counsel and a defence expert on trial, "causing prejudice to the defendant that no direction in the charge could have removed."

[3] In an "opening statement" at the oral hearing of this appeal the appellant submitted that the trial judge erred in allowing "the systematic use of inflammatory language by plaintiff's counsel at trial." This is in keeping with the

oral arguments presented on the appeal by counsel for the appellant.

[4] A full review of the transcript satisfies me that, to use the words of counsel for the appellant, "there were cumulative improprieties rampant throughout" the trial by counsel for the plaintiff. Many of the improprieties were not corrected by the trial judge and I am not satisfied that the efforts that he did make were either appropriate or effective. I would order a new trial.

[5] The appellant also alleges that the award is unreasonable and unjust and that no reasonable jury acting judicially could have reached it. That is, that the award was excessive.

[6] Counsel for the appellant submitted that the main issue is the impropriety of the remarks made by counsel for the respondent. His position reflects what was said in ***Brophy v. Hutchinson*** (2003), 9 B.C.L.R. (4th) 46, 27 C.P.C. (5th) 14, 2003 BCCA 21. A new trial was ordered in that "real prejudice was caused by what defence counsel said in his opening." The Chief Justice, with whom his colleagues agreed, said:

> [24] The opening's purpose is to outline the case the party bearing the onus of proof (usually the plaintiff) intends to present. Counsel's goal in opening is, or should be, to assist the jury in understanding what his or her witnesses will say, and to present a sort of "overview" of the case so

> that the jury will be able to relate various parts of the evidence to be presented to the whole picture counsel will attempt to present.
>
> . . .
>
> [41] In an opening statement, counsel may not give his own personal opinion of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors' emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible: see *Halsbury*, supra, at para. 103; Williston and Rolls, *The Conduct of An Action* (Vancouver: Butterworths, 1982); Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 1990) at 8-8; Lubet, Block and Tape, *Modern Trial Advocacy*: Canada, 2nd ed. (Notre Dame: National Institute for Trial Advocacy, 2000).

[7] The Chief Justice added that in an opening statement counsel may not suggest that the jurors place themselves in a party's position. He concluded, on this issue, as follows:

> [48] It is, of course, impossible to say what effect these improper statements had upon the jury's consideration of the evidence in this case. It seems, however, inevitable to me that collectively they could only have had a very damaging effect on the way the jury listened to and understood the evidence presented on the plaintiff's behalf.

OPENING COMMENTS BY COUNSEL FOR THE PLAINTIFF AT TRIAL

[8] After introducing himself, counsel at trial, who was not counsel on this appeal, said:

> Imagine that you are 22 years of age. You've put in four hard years of university. You've gotten a Bachelor of Arts degree. You've got one more year to go to get your Bachelor of Education degree and your teacher certificate so that you can do what you've always dreamed of doing: being a teacher. You're just ready to start school again. School starts in about 10 days at UBC. It's a beautiful August day. You're driving your car to pick up some supplies at a shopping centre. As you drive forward on that day you think everything is going perfectly well, I'm in control of my life, I'm ready to tackle the world.
>
> And yet in the next instant that all changes. Because you have been paying attention to your driving, because you have been waiting for vehicles ahead of you to turn left, you came to a stop. But the driver behind you, who is not paying attention, doing who knows what but certainly not paying attention to the road ahead, crashes into you.

[9] Counsel for the plaintiff then painted a word picture: "you hear ... the screech of rubber"; "you feel and hear an explosion"; "your car is struck, sending you rocketing forward into the car ahead of you". He continued:

> The driver who hit you clearly had a choice to make: pay attention to the road and do what you should do when you're driving or do other things that end up causing who knows what degree of damage to people like Estela de Araujo. That choice was made by the defendant. That choice has cost Estela de Araujo dearly, and that's why we're here. Although you're not aware of it at that moment that your life has changed forever, because that driver that crashed

> into you was doing something more important than keeping his eye on the road. ...

[10] The condemnation of a negligent driver for doing "who knows what degree of damage to people like" the plaintiff, was improper. These comments suggested that Mr. Read was, as a driver, a general threat to other drivers. There had to be an anticipation of such evidence before this type of comment became appropriate. As it was, it had no purpose other than to prejudice the jury against the named defendant.

[11] Plaintiff's counsel, while inappropriately referring to the plaintiff as "Estela", then said, "we are here today to ask for your help. We are in this together... Estela would much rather have had the defendant accept responsibility" and allow her to have her life as it was before the accident. "We are here because he has not done that." The fact is that the defendant admitted liability. The defendant was negligent and his negligence caused injuries to the plaintiff. He admitted to this and nothing more was required of him.

[12] Consequently, this comment could do nothing other than arouse hostility. Plaintiff's counsel continued:

> You may be asking yourself why do you need to know about Estela's past anyway? She isn't on trial here. You may be asking yourself and thinking to yourself: Why is this past important? If Estela fully

> recovered many months before this accident, the subject of this lawsuit, what has this got to do with the fact that Estela had her life changed by the negligence of the defendant, Read, and deserves to be compensated for what she has suffered and for what her losses are and will be?
>
> These are good questions. But I know how these cases are sometimes defended. Perhaps this case will be different and the defendant's lawyer will take the high road. But sometimes lawyers for defendants try to distract juries from the real issues. Sometimes defence lawyers hope that by bringing up past injuries or by asking hundreds of questions on side issues they can uncover some inconsistency, lack of memory or forgetfulness to make a plaintiff look like they are perhaps unreliable, thus fooling a jury into thinking that she is not deserving or to be trusted. I hope that won't happen here because Estela does not deserve that. If the defendant's doctors or lawyers harp on any of this, you are entitled to ask yourselves: why are they doing this? And you're entitled to ask: is it fair to an innocent woman who has already been through so much?

The first paragraph is argument, not suitable for an opening. The second paragraph is not only argument but attacks the moral tenor of the defence. The suggestion that defence counsel in some cases do not always "take the high road" is not proper comment in an opening, or in a closing for that matter.

[13] Counsel for the plaintiff told the jury that the "defence" hired "investigators to spy on Estela." This never surfaced as evidence. He said:

> ... I should also be fair and warn you that the defence hired investigators to spy on Estela. When you understand the nature and seriousness of her injuries you may ask yourself: what was the point?
>
> These investigators videotaped Estela going about her normal life. If and when you see these videotapes you may ask yourself: what could these videotapes possibly have to do with this case? But again, I know how these cases are sometimes defended. Sometimes the videotapes are used to create an impression that an innocent victim is exaggerating her problems when it is quite obvious that real and lasting injuries have been suffered. Sometimes the defence will try to persuade a jury that the plaintiff is someone who cannot be trusted or believed and will argue that since there are no signs of disability on this small snippet of tape that the plaintiff shouldn't be trusted.

[14] Counsel for the plaintiff acknowledged to the jury that he did not know if the videotaped film would be shown to the jury. No such film became evidence. As said in ***Halsbury's Laws of England,*** 3rd ed., an opening statement is to be "a general notion of what will be given in evidence." The only purpose of saying that "the defence hired investigators to spy on Estela" was, to paraphrase from ***Brophy***, *supra*, to arouse hostility and to prejudice the jury.

[15] Plaintiff's counsel then said that if the defence took the approach which he outlined:

> ... you will soon realize that it is misguided, that Estela has endured years -- four now and going on five -- of constant limitation, of pain, of restricted activity. You will see and hear her and

> realize that Estela would not be before you letting you know about her life and what it has been like for the last four years, exposing every medical record of her life for eight strangers to review, if her problems were not legitimate and serious.

[16] Plaintiff's counsel informed the jury as to his version of the body movements to which Ms. de Araujo was subjected during the collision and the extent of her injuries. He told the jury that connective tissues supporting the spine were damaged, and that muscles, ligaments, tendons, cartilage, blood vessels and nerves surrounding the spine were damaged. He added:

> The structural integrity of the spine, meaning the tightness with which it is held together by these ligaments and muscles and tendons is now destroyed.

[17] None of this became evidence before the jury. As was said in ***Brophy***, *supra*, at ¶24, counsel may not mention matters that require proof. Counsel's "opening is, or should be, to assist the jury in understanding what his or her witnesses will say." It must not go beyond the evidence.

[18] Plaintiff's counsel then informed the jury that the defence had referred Ms. de Araujo to an orthopaedic surgeon for an assessment. He made suggestions as to what the doctor would say in evidence and added: "I am not sure what else he will say or what arguments the defence will try to raise to

deny Estela fair compensation." This was an unacceptable and unfounded impugning of an officer of the court. There is no place, ever, for such a remark.

[19] Plaintiff's counsel then turned to the medical expert witness for the defence. He said, "Is he trying to help Estela get justice or is he merely trying to assist the defence that hired him?" This inappropriate remark reflected badly upon both the doctor and defence counsel. The objectivity of the doctor might have been open to challenge after he had testified, but not at the stage of an opening.

[20] Plaintiff's counsel then unilaterally entered into a pact with the jury to keep his end of a bargain. He said that at the end of the trial:

> ... I sincerely hope that I will have kept my promise to you to present the evidence in a complete, fair, and courteous way. I also promise you that at the end of the trial I will only ask you to do one thing for Estela and that is to be fair. I am confident that in being fair you will give her the justice that she deserves.

APPLICATION FOR A MISTRIAL

[21] Defence counsel made no objection to the opening when it was being delivered nor immediately thereafter. The first witness for the plaintiff was the plaintiff herself. At the

conclusion of her examination-in-chief counsel for the defendant applied to strike out the jury and asked for an order for a mistrial.

[22] The motion was based upon testimony from the plaintiff that I.C.B.C. had refused to pay for certain treatments combined with comments made by plaintiff's counsel in his opening. Defence counsel submitted that the case was not about the contract between the plaintiff and I.C.B.C. and that the opening of counsel for the plaintiff "painted the defendant as the bad guy." She said that prejudice had been created by putting I.C.B.C. on trial.

[23] In ***Triebwasser v. Strelley*** (1998), 60 B.C.L.R. (3d) 213,115 B.C.C.A. 301, counsel for the respondent made derogatory remarks about I.C.B.C. in the context of its refusal to pay certain no-fault benefits and some medical expenses. The trial judge instructed counsel not to put I.C.B.C. on trial. On the appeal this Court said, at ¶ 25, as follows:

> I do not wish to imply that comments similar to those by the respondent and his counsel with respect to the insurer in this case should be condoned. In my view, they went well beyond the proper limits. The insurer of a defendant is not on trial and references to the insurer should be limited to those necessary to explain a course of treatment or be otherwise relevant to the issues between the parties. If a plaintiff asserts that he has not

> undergone a treatment or has otherwise suffered hardship from lack of funds, it is normally sufficient to limit the references in the evidence to a lack of funds, without getting into the question of potential sources of funds from insurers.

[24] In the case at bar defence counsel said that she had no concern over revealing to the jury that the defendant was insured with I.C.B.C. This does not require comment other than, as conceded by defence counsel, this alone will seldom, today, result in a mistrial. What she objected to was the contractual issue being introduced and to the "high road" submission of plaintiff's counsel. Counsel for the plaintiff conceded that I.C.B.C. was not on trial and added: "Whether ICBC paid or not has got nothing to do with the issue and she [defence counsel] was right on that."

[25] Defence counsel submitted that the identification of I.C.B.C. as the party allegedly refusing to pay certain expenses combined with counsel's opening comment that the defence had hired "private investigators to spy on her ... were intended to both personalize and demonize I.C.B.C."

[26] There are two separate aspects to this issue. The first is payment for certain treatments. This was not relevant and should not have been raised in front of the jury. That is a matter to be worked out by the trial judge after a jury

verdict. The trial judge, in giving his reasons for dismissing a mistrial motion, explicitly found that the matter of payment for treatments "was not necessary to explain a course of treatment, and I do not accept that they [questions to the plaintiff] were necessary to rebut a defence of mitigation."

[27] Consequently, there was no need for the fact of insurance to be raised in the opening nor expanded upon in the examination-in-chief of the plaintiff. Nevertheless, the trial judge, while acknowledging that the contractual issue between the plaintiff and I.C.B.C. was not an issue in the trial, suggested to defence counsel that she could cross-examine the plaintiff on this matter. Defence counsel, properly in my opinion, submitted that she should not have to cross-examine on an issue that should not be before the jury.

[28] The comments by plaintiff's counsel in his opening comprise the second aspect of this matter. Plaintiff's counsel defended his comments, noting that he did not name I.C.B.C. The trial judge agreed but said "the inference was there ... I thought it was a bit much. I have to say that. Who else could you have been talking about?"

[29] Plaintiff's counsel then read his words in opening regarding the hiring of "investigators to spy on Estela" and said:

> And that's all there was to that and I don't see anything, with respect, My Lord, that was the least bit derogatory about ICBC or anybody. I have the right to characterize my case without - even if I was to demonize somebody, the defence - the defendant in this case was the negligent party.
>
> THE COURT: And as long as you demonize the defendant, I see nothing wrong with that.

[30] I do not know what definition counsel and the trial judge were putting on the word "demonize". However, even putting it at its mildest, it has no role to play in an opening before a jury. There was no pleading suggesting any form of conduct on the part of the defendant that could be so categorized. It was an error to approve the demonizing of Mr. Read.

[31] Plaintiff's counsel acknowledged that the comments were designed to influence the jury: "... my friend obviously doesn't like the impact of my opening. Obviously it had an impact on her, and I was hoping it would have the same impact on the jury." It might well have had an impact on the jury and prejudiced it against Mr. Read.

[32] Plaintiff's counsel defended his opening on the basis that he had chosen his words carefully and "took them, in

part, from a lot of research from a lot of other cases." I expect that those cases were from some other jurisdiction. In this jurisdiction it is an unacceptable form of opening.

[33] Plaintiff's counsel concluded his submission by saying that in his opinion, "this whole application, I think, stems from my opening" rather than from the issue over payment of medical expenses. In his reasons the trial judge said it was a "combination" and said, in part, as follows:

> [3] I disagree with counsel for the plaintiff that his reference to I.C.B.C. does not, when related to his opening, amount to criticism of I.C.B.C. as opposed to the defendant. The jury would logically make that connection and now they would be certain that it was I.C.B.C. who hired private investigators, who have refused fair compensation, and it is I.C.B.C. that counsel wishes to have take the high road.
>
> . . .
>
> [6] I am not satisfied that the questions were limited, in the sense that they were necessary to explain a course of treatment, and I do not accept that they are relevant or were necessary to rebut a defence of mitigation.
>
> [7] As I said earlier, I am satisfied that the remarks are not prejudicial. I.C.B.C. has not, to quote counsel for it, "been demonized." It has, however, been criticized and the criticism, the jury now knows, is directed to the insurer.
>
> [8] I conclude that it is necessary for me to instruct the jury as to how they should deal with the evidence elicited, and to make some comment on the opening of Mr. Jarvis.

INSTRUCTIONS TO THE JURY BY THE TRIAL JUDGE

[34] The trial judge reminded the jurors of the remarks of plaintiff's counsel that expenses had been submitted to I.C.B.C. and not paid. He told the jury there was no prejudice in them being informed of the fact that I.C.B.C. "is involved as the insurer of all drivers." He said:

> ... But what it means is that Mr. Jarvis was very critical of the defendants in his opening remarks to you. He said things like they had hired - they, meaning the defendants, had hired private investigators and he was critical of that. He said that they had refused to give fair compensation; he hoped they would take the high road and then the logical inference, I suppose, or a logical inference from the examination of Ms. de Araujo that ICBC had refused to pay certain expenses is highly critical of ICBC as well.
>
> What I have to tell you now is that all of that information is completely irrelevant to your deliberations. Please do not pay any attention to it. ICBC is not on trial. They are not a party to these proceedings. The defendant is Mr. Read. The fact that he may be insured by ICBC is not something that need concern you.
>
> ICBC may have had very good reasons for hiring private investigators. They may have had very good reasons for refusing to pay the expenses and so on. So please don't speculate on ICBC's conduct and don't take it into account. It's just simply not a matter that you're going to deal with. Your task, as I told you at the opening, is to assess the damages, if any, to which Ms. de Araujo is entitled and that doesn't have anything to do with ICBC. They are not a party.
>
> I don't mean to be critical of Mr. Jarvis when I talk about his opening, because he is perfectly entitled to criticize the defendant, the person who injured his client. But by tying it back into ICBC

> and the criticism then becomes a criticism of ICBC, that then introduces irrelevancies into the mix and I don't want you to go down that road.
>
> Ms. Jones may or may not be able to call evidence that would explain all of these things, but she doesn't have to do that. ICBC isn't on trial, so it would just be a complete waste of your time and the court's time if I were to force her to embark on defending ICBC. She doesn't have to defend ICBC.
>
> So I hope that's clear. Please simply ignore that kind of evidence, but take into account Mr. Jarvis' remarks about the defendant and if he thinks the defendant is being unfair or has been unfair and can prove it to your satisfaction, then your job is to assess damages in a fair way. So that's all that's all about. All right.

[35] The trial judge told the jury that it was "not to pay any attention" to plaintiff's counsel's remarks regarding spying and refusing to give fair compensation. That, as he said, was "completely irrelevant" to the jury and "ICBC might have had very good reasons for hiring private investigators" and "for refusing to pay the expenses."

[36] But there was no evidence at trial on the point about hiring investigators and there should have been no reference to I.C.B.C. in the opening nor evidence from the plaintiff regarding the expenses allegedly unpaid by I.C.B.C. What the trial judge did was confirm the hiring of investigators and a failure to pay expenses.

[37] Then the trial judge said that plaintiff's counsel was "perfectly entitled to criticize the defendant." He told the jury to ignore evidence about I.C.B.C. "but take into account Mr. Jarvis' remarks about the defendant." None of plaintiff's counsel's remarks about the defendant were appropriate other than that he was negligent and admitted it.

CLOSING REMARKS OF COUNSEL FOR THE PLAINTIFF

[38] Plaintiff's counsel commenced by referring to his own conduct:

> Ladies and gentlemen, Stela has asked me to begin by thanking you for your care and attention. She understands the sacrifice that each of you have made to take two weeks basically out of your lives to be here.
>
> I sincerely hope that in the course of this trial I have done my part, by keeping the promise that I made at the beginning to bring the evidence carefully, fully, and courteously. Your attention has made it a pleasure for me to keep that promise. I assure you it isn't always that way.
>
> I also promised you that all I'd ask at this time would be fairness and justice for Stela and I intend to keep that promise, too.

[39] Having improperly inserted his own conduct into the case and having sealed his pact with the jury, plaintiff's counsel turned to his cross-examination of Dr. Fenton:

> ... I know I got upset when I was cross-examining Dr. Fenton yesterday. I asked myself why I got so angry at Dr. Fenton. It is because Stela is driving

> on 12th Avenue on a beautiful summer day in August. She's rammed by a driver who is not paying attention. She has to wait over four years to ask a jury for justice. And what happens? The driver of that vehicle doesn't even have to testify. All he has to do is instruct his lawyer to admit that he was at fault and he becomes a safe spectator while the defence puts Stela de Araujo on trial. While the woman who is suffering is forced to justify every move she made or didn't make in her life, the defendant is defended by a doctor who is a professional disgrace, a doctor who cared nothing for the woman who could be hurt even more by his testimony, a man whose bias, whose arrogance and whose neglect were an insult to this courtroom.

[40] I can find nothing in this that could be defended as comments properly included in a closing address to a jury. It is not for counsel to tell a jury why he got upset over an accident. It was improper to criticize Mr. Read, or the system, for the fact that Mr. Read did not testify. It was incorrect to say that the defence put Ms. de Araujo on trial or that Mr. Read "becomes a safe spectator".

[41] It was not only incorrect to say that Mr. Read was "defended by a doctor" but it was also a sarcastic comment designed to characterize the defendant in the light that counsel had cast upon Dr. Fenton.

[42] To then tell the jury that Dr. Fenton is a professional disgrace was an unfounded attack upon professional integrity. Plaintiff's counsel had cross-examined Dr. Fenton as to the

source of his income and about not reading certain reports. This line of inquiry gave a foundation for addressing the jury as to bias and the quality of his report. However, the evidence gave no foundation for characterizing Dr. Fenton as a professional disgrace.

[43] Plaintiff's counsel further said as follows:

> Do you believe that the April 1996 accident, and all the time that the defence took to question Stela about various doctors and witnesses about it, were anything other than distraction? The defence hoped that by repeating this theme to you on innumerable occasions that you might be fooled into thinking that there was some merit to it.

[44] This was an attack on defence counsel. It did, as submitted in this appeal, put defence counsel on trial.

SUBMISSION TO THE TRIAL JUDGE BY DEFENCE COUNSEL

[45] Defence counsel made the following submission to the trial judge:

> I think it might be appropriate for the court to make some comment on the suggestion by my friend that Dr. Fenton had a - was a professional disgrace and an insult to the court and that he had been negligent.
>
> I appreciate that my friend can undermine his credibility and can undermine his report, but I don't want the jury to be left with the impression that the court condones suggesting that the doctor was a professional disgrace or that he was somehow negligent. That does concern me in light of the other comments that have been made to date about

> other matters we've discussed, and particularly when the only attack I saw against him was that he got a date wrong, or that he hadn't read the reports, or that he was parachuted in two weeks before trial, which of course was our doing, not his.
>
> THE COURT: Yes, I was concerned about that. I hadn't decided whether to say anything or not. Mr. Jarvis?
>
> MR. JARVIS: My Lord, with respect, I can characterize any witness as I have the right to.

[46] There was a short submission by Mr. Jarvis. The trial judge raised the matter of inflammatory language and then said:

> I'm not going to say anything [to the jury], Ms. Jones. I understand your concern, but that is critical evidence. Certainly that is going to be an issue for the jury to grapple with. I think the language was a bit over the top, but I'm not going to say anything.

[47] Presumably the trial judge was referring to the evidence of Dr. Fenton as being "critical." When the trial judge said "the language was a bit over the top" he probably meant that it was "excessive." As such, it had to be dealt with.

DISCUSSION

[48] Counsel for the respondent submitted that the opening remarks of counsel for the appellant did not fall within the inappropriate conduct detailed by the Chief Justice in ***Brophy***, supra. That amounts to a submission that the impugned

comments were not sarcastic, rhetorical, derisive, irrelevant or inflammatory and that they did not contain information that was subject to proof for which no proof would be forthcoming.

[49] I cannot accept that position. In my opinion the comments were inappropriate in nearly every way detailed in ***Brophy*** and were inflammatory.

[50] Counsel for the respondent submitted that even if the comments (particularly those in the closing address) were inappropriate, they were either supported by the evidence or would not be prejudicial in the minds of intelligent persons. He referred to ***Dale v. Toronto R.W. Co.*** (1915), 34 O.L.R. 104 (C.A.) at 107-108:

> ... counsel has the right to make an impassioned address on behalf of his client – nay, in no few cases it may be a duty to make an impassioned address – mere earnestness, fervour or even passion, is not in itself objectionable – so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects – and Courts do and must give considerable latitude even to extravagant declamation.

However, the learned judge qualified this statement by saying that the practice of some counsel "of employing inflammatory language in addressing juries, should be checked – it is an abuse of the privileges of counsel ... ."

[51] In commenting upon the appellant's contention that there is a "strong case for a new trial", Mr. Berardino cited ***Kralz v. Murray*** (1953), [1954] 1 D.L.R. 781 at 784, [1954] O.W.N. 58 (C.A.):

> I am of the opinion that while in certain circumstances a new trial should be ordered, nevertheless the principles set out on behalf of this Court by Meredith J.A., in *Caswell* v. *Toronto R.W. Co.* (1911), 24 O.L.R. 339 at pp. 350–1, are here applicable, namely:
>
> > A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary. ...
> >
> > A strong case must, therefore, be presented before a new trial can properly be directed ...

[52] I am in agreement that "a strong case must ... be presented before a new trial can properly be directed." In the case at bar a strong case for a new trial was presented. The remarks of plaintiff's counsel, both in his opening and closing addresses, transgressed the decorum which must be

observed. They far surpassed, to refer to ***Dale***, mere earnestness or fervour. Latitude has its limits.

[53] In arguing against a new trial, counsel for the respondent cited ***R. v. Emkeit*** (1972), [1974] S.C.R. 133 at 139, 24 D.L.R. (3d) 170, 6 C.C.C. (2d) 1:

> In my opinion the administration of justice in our courts would be gravely hampered if it were not recognized that a trial judge has a wide discretion as to the manner in which a trial is to be conducted, and it has long been accepted that a trial judge's ruling on the question of whether or not to discharge the jury is one which a court of appeal should approach with great caution.

This is apt to the case at bar. I recognize the discretion that rests in trial judges as to the conduct of a trial: see ***Hamstra v. B.C. Rugby Union***, [1997] 1 S.C.R. 1092, 145 D.L.R. (4th) 193, 9 C.P.C. (4th) 1. In the case at bar I cannot conclude that the trial judge properly exercised his discretion. The trial judge found "over the top" language but gave little or no consideration to the question of prejudice and how to remove it.

[54] The trial judge erred in his conclusion as to what can properly be said in opening and closing addresses. When he did instruct the jury that they were to disregard certain submissions, he erred in directing them as to what they could

accept. The cumulative effect of the transgressions in this case is such that there cannot be any assurance that the defendant received a fair trial. As in ***Hamstra***, the prejudice "might [have led] to an improper verdict."

[55] If the trial judge had discharged the jury, as in my opinion he should have, it would then have been open to him to invoke the provisions of Rule 41(7):

> Where, by reason of the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury.

There is nothing new about this procedure, designed as it is to expedite the trial process after it has been damaged by the conduct of counsel. In ***Sims v. Grand Trunk R.W. Co.*** (1906), 12 O.L.R. 39 at 41-42(C.A.), the court noted:

> For myself I must add that I cannot divest myself of the opinion that the introduction into the case of improper remarks and appeals contrary to the warning and rebuke of the learned trial Judge has had its effect upon the jury, and that if anything of that kind should be attempted at a future trial, the jury ought at once to be dispensed with and the trial had without a jury.

[56] In ***Dale*** the Court noted that "[M]ore than one Judge" in circumstances wherein there were inappropriate comments has "discharged the jury and dealt with the case alone." That

comment was cited with approval in ***Stewart v. Speer***, [1953] O.R. 502, [1953] 3 D.L.R. 722 (C.A.). This procedure was followed in both ***James v. White***, [1999] B.C.J. No. 2058 (S.C.) (QL) and ***Lawson v. McGill*** (2003), 14 B.C.L.R. (4th) 385, 2003 BCSC 883 (reversed on other grounds, 2004 BCCA 68).

[57] It will be apparent that I have not dealt with the second ground of appeal, that being that the awards were unreasonable and unjust. That is because, in my opinion, in the circumstances of this case, a new trial should be ordered on the first ground of appeal. However, in the event that an argument could be mounted that the two issues are not mutually exclusive, I will explain my position in that regard.

[58] The issue of whether a mistrial should have been ordered by the trial judge might occur at any time during the trial, either on a motion from counsel or on the judge's own initiative. In the case at bar the appellant's contention is that "there were cumulative improprieties throughout" the trial. Counsel for the defendant applied for a mistrial after the examination-in-chief of the first trial witness.

[59] However, it might now be argued that if the award is within the range that can be supported, the misconduct or judicial error should not be found to be relevant and the appeal should be dismissed. I do not agree. In my opinion,

there are cases where the conduct of counsel is so egregious that a continuation of the trial would be inappropriate. In my opinion this was such a case. I find support for this view in the cases discussed below.

[60] In ***Kellum v. Roberts*** (1914), 19 D.L.R. 152 (Ont. S.C., App. Div.) during the course of the trial, the plaintiff encountered several jurors in a restaurant and discussed his case with the jurors at that encounter. Mulock, C.J.Ex. delivered the judgment of the court, holding that the verdict should be set aside. He said:

> To set aside the verdict of a jury because of any improper interference with it in the trial of a case, it is not necessary to shew that such interference had the effect of influencing the jury. It may be difficult or impossible to shew the actual effect; but, in my opinion, it should be and is sufficient ground for setting aside a verdict if such interference might be reasonably supposed to have deprived the innocent party of a fair trial. No verdict should be allowed to stand where the course of justice has been or may possibly have been interfered with by any improper conduct.... [Emphasis added]
>
> ...
>
> I think that where, as here, the conduct of a party has been so improper as to cast discredit on the fairness of the trial, public policy demands that the guilty party should not be allowed to retain the verdict obtained under such circumstances.

[61] In ***Pianosi et al v. Canadian National Railway Co.*** (1943), [1944] 1 D.L.R. 161, [1943] C.C.S. 779, [1943] O.W.N. 766 (C.A.), counsel for the plaintiff read to the jury a number of decided cases with similar facts and results favourable to the plaintiff. Robertson C.J.O., for the majority, held as follows (p. 167, 168-169, D.L.R.):

> To have their attention drawn, in these circumstances, to statements made by other Judges upon the facts and circumstances of other cases, having, perhaps, some resemblance, or at least put to them as having some resemblance, to the case they are to decide, does not make for a fair trial or a true verdict upon the evidence.
>
> . . .
>
> If there were no other ground for saying that there was not a fair trial, this one ground alone would, in my opinion, be a sufficient ground for setting aside the verdict of the jury, the more especially as it would appear from the statement of appellant's counsel upon the record, and apparently not challenged, that respondents' counsel continued in the course objected to after the trial Judge had ruled against it.

[62] Neither ***Kellum*** nor ***Pianosi*** dealt with setting an award of damages. However, in ***Pender v. Hamilton Street R.W. Co.*** (1917), 12 O.W.N. 262 (S.C., App. Div.), the Court held that improper language would be enough, on its own, to order a new trial. The jury awarded $1,500 for injuries sustained. Plaintiff's counsel said during the trial that the defendant corporation "think they can kill a man for $1,000 [...] I want

you to startle the company by your verdict in this case."

Lennox J., with whom the other three justices agreed, is reported as saying :

> The language was improper, and was likely to prejudice the jury - that was enough. It would have been competent and quite proper for the trial Judge to have discharged the jury and have forthwith determined the issues himself or have called another jury. [citations omitted]
>
> It was to be regretted that the verdict of the jury must be set aside and a new trial ordered, but in this case it was necessary in the interest of justice.

[63] Hall J.A., dissenting in ***Didluck v. Evans*** (1968), 67 D.L.R. (2d) 411 at 419-420, 63 W.W.R. 555 (Sask. C.A.), said:

> The evidence was therefore misrepresented to the jury. In my opinion, the misrepresentation was a serious one. If the jury accepted this incorrect statement they must of necessity have been influenced in determining the amount of their award.
>
> . . .
>
> In my opinion the question to be determined, whether or not the learned trial Judge or counsel noticed or reacted to the improper remarks, is did the remarks, individually or collectively, influence the jury to the disadvantage of the appellant.
>
> . . .
>
> The amounts awarded are, however, sufficiently high to prevent me from reaching the conclusion that they demonstrate that the jury could not have been influenced by the remarks of counsel above referred to. Under these circumstances, in my opinion, the appeal should be allowed and a reassessment ordered.

The majority held that the comments by counsel were not objectionable but they did not disagree with Hall J.A.'s proposition that a new trial could be warranted where objectionable conduct by counsel appears to have influenced the jury.

[64] In his concurring reasons in ***Ross v. Lamport***, [1956] S.C.R. 366 at 375, 2 D.L.R. (2d) 225 at 233, Rand J. said:

> An inflammatory address, in the proper understanding of that expression, is sufficient in itself to call for a re-assessment unless, among other things, it can be said that the amount awarded demonstrates that the jury could not have been influenced by it.

[65] In ***Brophy*** a new trial was ordered. The Court said:

> It is, of course, impossible to say what effect these improper statements had upon the jury's consideration of the evidence in this case. It seems, however, inevitable to me that collectively they could only have had a very damaging effect on the way the jury listened and understood the evidence presented on the plaintiff's behalf.

[66] If prejudice needs to be shown in the verdict to justify a new trial this case makes the point that prejudice arises by "the way the jury listened and understood the evidence."

[67] Chief Justice Kerwin, for the majority in ***Leslie v. Canadian Press***, [1956] S.C.R. 871 at 874, 5 D.L.R. (2d) 384 at 387, said as follows:

> Bearing in mind the right of the plaintiff in such an action as this to have the issues passed upon by the jury, I am of opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show that a misdirection may have affected a verdict and not that it actually did so; and that, if an appellate Court is in doubt as to whether it did or not, it is then for the opposite party to show that the misdirection did not in fact affect the verdict.
>
> [Emphasis added]

SUMMARY

[68] I am of the opinion that a new trial may be ordered where trial irregularities may have influenced the verdict or award of the jury, even though the jury verdict or award on its own may not be subject to review as being perverse, excessive, or inordinately high or low.

[69] There is no particular utility in basing the order of a new trial on whether the outcome of the trial resulted in an "injustice", "prejudice", or "miscarriage of justice". The labels do not disclose applicable standards. A verdict or award that is excessive, perverse, or inordinately high or low can, of course, be characterized as constituting an injustice, prejudice, or miscarriage of justice, but there does not appear to me to be a principled basis for excluding from the definition of injustice, prejudice, or miscarriage of justice, situations where the jury may have been influenced by trial irregularities.

[70] Specific to the case at bar, the impugned awards were high. It must be recognized that even if they fall within a range not otherwise subject to variation, they might not have been that high but for the inappropriate conduct of counsel for the plaintiff.

[71] There is, therefore, a factual component to my conclusion, but essentially it is based upon the principle put forth by Rand J., in ***Ross***, *supra*. That is, the misconduct was sufficient in itself to call for a re-assessment because it cannot be said that the jury was not influenced by the inappropriate remarks of counsel.

[72] I agree with the submission of counsel for the respondent, based as it was upon the remarks of Mr. Justice Meredith in ***Caswell v. Toronto R.W. Co.*** (1911), 24 O.L.R. 339 at 351, that "a strong case must be presented before a new trial can properly be directed...". However, as further said by Meredith J.A., "new trials are, of course, occasionally necessary in order that justice may be done between the parties." As I said earlier in these reasons, the appellant's case at bar is strong and, unfortunate as it always is to have

to retry a case, such is necessary in this case in order that justice may be done between the parties.

[73] I would order a new trial.

"The Honourable Mr. Justice Thackray"

I agree:

"The Honourable Mr. Justice Low"

Reasons for Judgment of the Honourable Mr. Justice Smith

[74] I have had the privilege of reading, in draft form, the reasons for judgment of Mr. Justice Thackray. Although for the most part I join in his condemnation of counsel's misconduct at trial, I cannot agree that a new trial should be ordered. In my view, counsel's misconduct did not cause any substantial wrong or miscarriage of justice such as would warrant a new trial.

[75] The appellant asserts two grounds of appeal which, in my view, are inextricably linked and must be considered together. The first ground alleged is that the trial judge erred in failing to declare a mistrial after the misconduct of plaintiff's counsel "caus[ed] prejudice to the defendant that no direction in the charge could have removed." The second is that the jury's award of damages is "so plainly unreasonable and unjust that no reasonable jury reviewing the evidence as a whole and acting judicially could have reached it." In the words of the appellant's factum, the allegedly excessive damages are "an indication of impropriety and a manifestation of the prejudice to the defence caused by Plaintiff's counsel's abuse of privilege at trial, such that the jury's deliberations were tainted and a new trial ought to be ordered." Thus, whether the award of damages was excessive

must be considered as an element of the first ground of appeal.

[76] Before discussing these issues, I wish to comment on the improprieties that, in the appellant's submission, irremediably prejudiced his defence at trial.

[77] On certain points, my colleague and I diverge as to the propriety of counsel's conduct and, on others, I prefer to express my views separately.

Was the conduct of plaintiff's counsel improper?

[78] I agree that the opening statement of counsel for the plaintiff was excessively argumentative and that it contained personal opinions and improper references to evidence and to what he anticipated the defence would be. I must also agree, however, with the trial judge's statement to defence counsel during submissions on the mistrial application:

> It may well be that I will agree with you that I should tell the jury something about Mr. Jarvis' opening, because I thought that it was excessive, but to say that the jury can't possibly render a fair verdict seems to me to be equally over the top.

Nothing that I have seen or heard on this appeal persuades me that, at that stage of the trial, this characterization of the application was inaccurate.

[79] The mistrial application brought on the third day of trial was in any event misconceived as it was based on the incorrect premise, which the trial judge accepted, that plaintiff's counsel introduced the appellant's liability insurer into the trial in his opening statement and in his direct examination of the respondent. It was in fact the trial judge, not counsel for the plaintiff, who, at the urging of defence counsel, advised the jury that I.C.B.C. was the appellant's third-party liability insurer in his remarks to the jury set out in para. 34 of my colleague's reasons.

[80] When plaintiff's counsel referred in his opening statement to videotaping of the respondent by "the defence," he said nothing about a liability insurer. The trial judge viewed the comment as identifying I.C.B.C., but I think it more likely that the jury understood "the defence" to be a reference to the appellant and his lawyers. Further, counsel's questioning of the respondent related to I.C.B.C. in its capacity as her accident benefits insurer; that is, as the carrier of her Part 7 coverage pursuant to her owner's or driver's certificate: ***Revised Regulation Under the Insurance (Motor Vehicle) Act***, B.C. Reg. 447/83, Part 7. These benefits had nothing to do with the appellant's third-party liability insurance.

[81] I disagree with the trial judge's suggestion that evidence of the respondent's expenses was irrelevant. She could recover them from the appellant only as special damages in her tort action against him. Since the statement of defence traversed the respondent's claim for special damages and pleaded a failure to mitigate, it was necessary and proper for her counsel to elicit evidence that, as a result of her injuries, she had incurred the expenses that comprised the claim and that, in doing so, she had acted reasonably in her efforts to rehabilitate herself.

[82] Counsel's references to I.C.B.C. in its capacity as the respondent's insurer and to the fact that it had not reimbursed her for these expenses were unnecessary and irrelevant to this line of questioning, but irrelevance was not the basis of the objection or of the trial judge's ruling.

[83] I would note, as an aside, that care must be taken by counsel that s-s. 25(4) of the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1996, c. 236 is not transgressed by mention in the tort trial before damages are assessed of the amount of accident benefits paid to the plaintiff, or to which the plaintiff is entitled, under his or her no-fault policy. Plaintiff's counsel did not commit that error.

[84] Jurors in British Columbia know that I.C.B.C. provides basic third-party liability and no-fault accident benefits insurance for the vast majority of persons involved in automobile accidents in this province. In light of its monopoly on these coverages and its ubiquity in litigation arising out of personal injuries sustained in automobile accidents, it is hardly surprising that some of the witnesses mentioned I.C.B.C. during the testimonial phase of the trial. As well, since I.C.B.C exerts control under the no-fault coverage over medical and rehabilitative treatment of injured plaintiffs and will not reimburse for certain expenses, such as the pain management training that was recommended for the respondent, unless it has authorized the treatment in advance, the documentary medical evidence at trial, including some of the evidence filed by the appellant, was replete with references to I.C.B.C.

[85] Accordingly, the disclosure to jurors that I.C.B.C. provides third-party liability coverage should not result in a mistrial, at least in ordinary cases. As Major J. noted in ***Hamstra v. B.C. Rugby Union***, *supra*, at paras. 13-19, 25, the existence of compulsory automobile insurance is now common knowledge and disclosure that a defendant is insured is unlikely to cloud the judgment of modern juries.

[86] Next, I cannot agree with the appellant's submission that it was improper for plaintiff's counsel to cross-examine Dr. Fenton as to partiality or bias arising out of the substantial income he has received from I.C.B.C. for providing medical-legal reports.

[87] The appellant's position in this regard has changed on appeal. When defence counsel asked the trial judge for a special direction to the jury regarding Dr. Fenton's evidence, she accepted that plaintiff's counsel was entitled to cross-examine on his credibility and to "characterize" his evidence for the jury. She objected only to his description of the doctor as a "professional disgrace" and of his conduct as "negligent," saying:

> I think it might be appropriate for the court to make some comment on the suggestion by my friend that [Dr. Fenton] had a -- was a professional disgrace and an insult to the court and that he had been negligent. I appreciate my friend can undermine his credibility and can undermine his report, but I don't want the jury to be left with the impression that the court condones suggesting that the doctor was a professional disgrace or that he was somehow negligent.
>
> [Emphasis added]

[88] After further discussion, she said:

> I appreciate my friend can characterize the evidence any way he wants, but this doctor did appear here as a professional, with standing in the community, and

> I just -- I'm concerned that it went beyond characterizing his evidence to making inflammatory remarks about him as a professional, which I don't believe have any basis particularly when jurors are present.

[89] On this appeal, however, the appellant contends that the cross-examination of Dr. Fenton as to potential bias was improper.

[90] In my view, it was quite proper for respondent's counsel to ask the impugned questions and to submit to the jury that the answers should lead them to accord the doctor's opinions little or no weight. Cross-examination of a witness for possible bias cannot be foreclosed. With respect, the trial judge should not have interfered during the cross-examination.

[91] In remarks set out at para. 46 of my colleague's reasons, the trial judge refused defence counsel's request that he give the jury a special direction, and properly, in my view, characterized Dr. Fenton's evidence as "critical." In Dr. Fenton's opinion, the respondent had made "substantial functional and symptomatic recovery," was able to do "any work-related activity of her choice," and would not likely suffer any long-term complications. This view of the nature and extent of the respondent's injuries was dramatically different from the opinions expressed by the doctors who

testified in the respondent's case. Thus, Dr. Fenton's credibility and the reliability of his evidence were central to the jury's deliberations.

[92] On the other hand, counsel's remarks that the doctor was a professional disgrace and was guilty of arrogance and neglect were immaterial, gratuitously rude, and insulting. That they were improper hardly needs to be said. However, these remarks would have reflected more unfavourably on the professionalism of counsel who made them than on that of the doctor in the minds of any eight reasonable citizens.

[93] I agree with my colleague's remarks, at paras. 8-11, 20 above, about counsel's personalization of the trial. In particular, I would emphasize that jurors are judges of the facts. It is highly improper to ask them to put themselves in the position of a litigant. They are to judge the evidence objectively, without passion or favour. That no reasonably competent counsel would consider making such suggestions to a judge underscores the impropriety of the approach plaintiff's counsel took in this case. Further, I agree that many of counsel's comments in his closing address were an "abuse of the privilege of counsel."

[94] Although my colleague and I differ on the extent of the misconduct, I accept the premise that there was serious

impropriety in the conduct of plaintiff's counsel at trial. I turn now to consider whether this finding necessarily leads to the conclusion that a new trial is warranted.

What is the test for ordering a new trial?

[95] As I noted at the outset of these reasons, it is the appellant's position that the trial judge erred in failing to declare a mistrial of his own motion following final submissions to the jury.

[96] Although the appellant applied for a mistrial after the close of the direct examination of the respondent on the third day of the ten-day trial, the circumstances of which Mr. Justice Thackray has recounted at paras. 21-33 of his reasons, he does not appeal from the dismissal of that application. Rather, it is his position that the trial judge erred in failing, of his own motion, to declare a mistrial after counsel for the plaintiff had addressed the jury following the conclusion of the evidence.

[97] This submission is based on allegations that plaintiff's counsel acted improperly not only in his opening address and in his direct examination of the respondent, but throughout the trial and, in particular, in his cross-examination of Dr. Fenton and in his closing submission to the jury. It is the

"cumulative effect" of these alleged improprieties that underpins the appellant's argument.

[98] That a trial judge may declare a mistrial *proprio motu* in appropriate circumstances cannot be disputed. However, it will be an exceptional case where an appellate court will interfere with an exercise of discretion by a trial judge to discharge the jury or to continue with the trial. As Major J. said in ***Hamstra v. B.C. Rugby Union***, *supra*, at para. 26:

> It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. This applies with equal force to a decision to retain or discharge the jury. It cannot be overstated that the trial judge is in the best position to determine how to exercise this discretion.

[99] The trial judge "sees the jury, sees and hears the counsel, is fully cognizant of the whole atmosphere of the case" and is in a position to assess the effect upon the jury, if any, of counsel's improper remarks – advantages that an appellate court does not enjoy: ***Dale v. Toronto R.W. Co.,*** *supra* at 108 and ***Birkan v. Barnes*** (1992), 69 B.C.L.R. (2d) 132 at para. 16 (C.A.) *per* Gibbs J.A.

[100] The hardship and expense, both public and private, that a new trial inevitably occasions afford a further policy

reason for such deference. The comments of Meredith J.A. in ***Caswell v. Toronto R.W. Co.*** (1911), 24 O.L.R. 339 at 350-51 (C.A.), which are set out at para. 55 of my colleague's reasons and which I will repeat for emphasis, express this point:

> A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary...
>
> A strong case must, therefore, be presented before a new trial can properly be directed...

[101] The circumstances in which a new civil jury trial should be ordered were considered by this Court in ***Christie v. Westcom Radio Group Ltd.*** (1990), 75 D.L.R. (4th) 546 (B.C.C.A.), leave to appeal to the Supreme Court of Canada refused 79 D.L.R. (4th) vii, a defamation case in which there was both non-direction and misdirection of the jury on the issue of malice. Macfarlane J.A., speaking for the Court, said, at 555:

> The factors to be considered are those set forth in *Arland v. Taylor*, [1955] 3 D.L.R. 358,

[1955] O.R. 131 (C.A.), a case which was referred to with approval by Hutcheon J.A., speaking for this court, in *Hayes v. Thompson* (1985), 17 D.L.R. (4th) 751, 18 C.C.C. (3d) 254, 60 B.C.L.R. 252, at pp. 761-2. In *Arland*, at pp. 364-5, Laidlaw J.A. set forth these general propositions:

> (1) A new trial is contrary to the interest of the public and should not be ordered unless the interests of justice plainly require that to be done.
>
> (2) An appellant cannot ask for a new trial as a matter of right on a ground of misdirection or other error in the course of the trail when no objection was made in respect of the matter at trial.
>
> (3) A new trial cannot be granted because of misdirection or other error in the course of the trial "unless some substantial wrong or miscarriage has been thereby occasioned".
>
> (4) A party should not be granted a new trial on the ground of non-direction in the Judge's charge to the jury where, having opportunity to do so, he did not ask the Judge to give the direction the omission of which he complains of.

Arland was referred to by the Supreme Court of Canada in *Leslie v. Canadian Press* (1956), 5 D.L.R. (2d) 384 at pp. 386-7, [1956] S.C.R. 871. Kerwin C.J.C. made this statement about the onus of proof:

> Bearing in mind the right of the plaintiff in such an action as this to have the issues passed upon by the jury, I am of the opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show that a misdirection may have affected a verdict and not that it actually did so; and that, if an Appeal Court is in doubt as to whether it did or not, it is then for the opposite party to

> show that the misdirection did not in fact affect the verdict.

[102] When the error is the exclusion of relevant evidence or the admission of inadmissible evidence, the test of whether there has been a substantial wrong or miscarriage of justice is whether it can be said with certainty that a properly-instructed jury acting reasonably would necessarily have reached the same result had the error not been made: ***Anderson v. Maple Ridge (District)*** (1992), 71 B.C.L.R. (2d) 68 (C.A.); ***Jennings Estate v. Gibson*** (1994), 96 B.C.L.R. (2d) 242 (C.A.); ***Tsoukas v. Segura*** (2001), 96 B.C.L.R. (3d) 344, 2001 BCCA 664.

[103] As I understand my colleague's reasons, in order to obtain a new trial, the appellant need show only that counsel's misconduct "might have led to an improper verdict." With respect, I cannot agree. That approach fails to address the essential question whether the respondent has shown that the misconduct did not in fact affect the verdict: ***Leslie v. Canadian Press***, *supra*. Accordingly, we must consider whether the misconduct in this case actually caused a substantial wrong or a miscarriage of justice.

[104] Impropriety in the conduct of trial counsel cannot constitute prejudice in some abstract sense sufficient to produce a substantial wrong or miscarriage. A new trial

cannot be ordered simply for the purpose of disciplining counsel. Absent prejudice in the result, it would be contrary to the public interest and to the interests of justice to deprive the respondent of her judgment and to subject her "to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome": ***Caswell v. Toronto R.W. Co.***, *supra*, at 350-51.

[105] In this regard, the task of an appellate court differs subtly from that of a trial judge. A trial judge can only assess, in the midst of a trial, whether counsel's misconduct might result in prejudice such that continuation of the trial would be inappropriate. As Major J. stated in ***Hamstra v. B.C. Rugby Union***, *supra* at para. 20, a case in which the trial judge took the case from the jury because of the possibility of prejudice arising from improper references to the defendant's liability insurance:

> In exercising this discretion [whether to discharge the jury], the trial judge should consider whether in the circumstances, the reference to insurance would likely result in real prejudice to the defendant. That is, the trial judge should consider whether the reference has caused a substantial wrong or miscarriage of justice, so that it would be unfair to continue with the present jury.

[106] On appeal from a trial that has proceeded to completion, an appellate court, on the other hand, has the benefit of hindsight and must consider not simply the likelihood of prejudice at the time of the trial judge's decision, but whether there was ultimately real prejudice to the appellant.

[107] The appellant referred to a number of authorities in his factum and in his oral submissions. In those cases in which an appellate court interfered with the trial judgment on the ground of opposing counsel's misconduct, there was clear prejudice to the appellant. In ***Brophy v. Hutchinson,*** *supra*, the improper remarks of defence counsel destroyed the effect of the plaintiff's opening statement, which contributed to the jury's dismissal of his action; in ***Hallren v. Holden*** (1913), 4 W.W.R. 1330 (B.C.C.A.), ***Stewart v. Speer***, [1953] O.R. 502 (C.A.), ***Sims v. Grand Trunk R.W. Co.*** (1906), 12 O.L.R. 39 (C.A.), and ***Ross v. Lamport***, [1955] O.R. 542 (C.A.), varied [1956] S.C.R. 366, the jury awarded excessive damages; and in ***Kosturos v. Giusti*** (1998), 48 B.C.L.R. (3d) 352 (C.A.), inadmissible evidence, the effect of which the trial judge amplified in his charge to the jury, may have led the jury to reject the claim that the defendant's conduct caused the plaintiff injury.

[108] On the other hand, in several cases upon which the appellant relied, the court denounced counsel's conduct without interfering with the judgment. In those cases, no real prejudice resulted. I would note, in particular, ***Triebwasser v. Strelley***, *supra*, where this Court was critical of comments made by counsel that were, in some respects, similar to the comments impugned here, but dismissed the appeal on the ground that the damages were not inordinately high and that there had been no misdirection of the jury.

[109] In this case, liability was not contested at trial and the prejudice the appellant alleges is in the form of a *quantitatively* adverse result: an inflated award of damages. As I have noted above, the appellant contends that the allegedly excessive award is the manifestation of the prejudice caused by counsel's improper remarks.

[110] My colleague has alluded (at para. 70 above) to the possibility of the prejudice component being satisfied although the award is *within* the range of reasonable awards. Although I do not deny that it is possible that the improprieties here led to a higher assessment of damages than would otherwise have been the case, I take the view that it is sufficient to discharge the respondent's burden of persuasion

on this appeal that the award is within or at least very close to the relevant reasonable range.

[111] Adapting the test for substantial wrong or miscarriage of justice announced in ***Anderson v. Maple Ridge (District)***, *supra*, one would ask whether the jury's verdict would necessarily have been the same absent counsel's misconduct. Expressed in that way, the test does not lend itself to reasoned application when the prejudice is said to lie in an excessive award of damages. Absent any misconduct, it could not reasonably be said that any two properly-instructed juries, considering the same evidence and acting reasonably, would necessarily arrive at the same dollar-amount of damages.

[112] Thus, to require the respondent in this case to establish that the award of non-pecuniary damages, although not so excessive as to warrant appellate interference, was less than it would have been had her counsel not misconducted himself before the jury, would be to place an impossible burden on her and on this Court. It is difficult enough for an appellate court to identify excessive deviations by juries from normative awards, let alone to identify increments within the reasonable range and to assign a cause to them: see ***Boyd v. Harris***, 2004 BCCA 146 at para. 12, where it is observed that the quasi-objective comparative approach to the review of

damages awards remains, at its heart, inescapably subjective and that judges may reasonably disagree in a specific case. Such a requirement would mean that, in all but clearly unarguable cases, the respondent would be unable to discharge the burden of persuasion. In that event, cases in which the aggrieved party suffered no substantial prejudice would be retried, which would be inimical to the proper administration of justice and contrary to the interests of justice as between the parties.

[113] I find support for this view in ***Schwartz v. De Pauw*** (1985), 16 O.A.C. 66. There, the appellant argued for a new trial on the ground that the trial judge had erred in directing the jury on the upper limit of the respondent's claim and that the misdirection had produced an inflationary effect on the jury's award of damages. The court noted that the onus of proof was on the respondent to show that the misdirection had not affected the verdict (for which it cited ***Leslie v. The Canadian Press***, *supra*), but concluded that the reasonableness of the jury's award satisfied this burden: because the award of damages was not inordinately high, "it [was] unreasonable to suppose that the assessment [of damages], depending as it did on the view of the evidence taken by the jury, would have been different without any

mention of the upper limit." No substantial wrong or miscarriage was found to have occurred and the appeal was dismissed.

[114] Thus, in my view, the critical issue on this appeal is whether the jury's award of damages is so excessive that it manifests a substantial wrong or miscarriage of justice resulting from counsel's misconduct. I turn now to consider this question.

Was the award of damages excessive?

[115] In reviewing a jury's award of damages, we must assume that the jury made all findings of underlying fact capable of supporting the award and reasonably open to it.

[116] The jury had before it the following evidence.

[117] The respondent was injured in a rear-end collision of such violence that it propelled her vehicle into the vehicle in front and knocked the transmission out of the former onto the roadway.

[118] For the first few months after her injury, the respondent sought relief from her symptoms through massage therapy administered by a naturopath, who was a friend and her superior at work. She testified that she thought her pain

would be temporary and that relaxation and massage would, in time, overcome her symptoms.

[119] From four or five months after the accident until the trial, her treatment was managed by Dr. Cherkezoff, a general physician who had been her family doctor since 1987. Because her neck and back pain persisted, Dr. Cherkezoff referred her to Dr. Wade, a rheumatologist, who saw her on three occasions between January 1999 and December 2000. Dr. Wade diagnosed "mechanical neck and mechanical back pain subsequent to a ligamentous injury" and "more diffuse symptoms of soft tissue rheumatism." She remained symptomatic on her last visit. He recommended that she slowly undertake a progressive strengthening program for the neck and spine.

[120] Dr. Cherkezoff also referred the respondent to Dr. van Rijn, a specialist in physical medicine and rehabilitation. Dr. van Rijn's comprehensive medical-legal reports of April 30, 1999 and August 30, 2001 were filed as exhibits. In 1999, Dr. van Rijn opined that the respondent had likely suffered "an extension and then forward flexion axial strain on her spine resulting in 'mechanical' spinal axis symptoms." He said that the consequent pain interfered with her sleep and caused her to become fatigued at work. In his last report, Dr. van Rijn noted that she continued to suffer from pain in

her neck and associated headaches, pain in her mid-back and low back, and anxiety when driving. He opined:

> ...a certain percentage of persons do not fully recover following an accident of this nature and Ms. De Araujo is, unfortunately, likely such a person. Her symptoms have persisted for over 4 years. She has been involved in active and passive treatment ventures without significant improvement. A more recent incident of increasing shoulder pain would be unusual even in a young person who is hypermobile and may be a reflection of the neck/shoulder musculoskeletal imbalances that have arisen due to accident related complaints. She still has residual aching in her shoulder girdle and within the shoulder joint (which was not present when I saw her two years ago).
>
> Ms. De Araujo's chronic symptoms have been difficult for her to manage. She is not as functional as she was before the accident and mundane activities of daily living have to be undertaken more cautiously or sometimes not at all. Before her more recent shoulder injury, she still had restrictions in her ability to lift, carry, and reach, as well as with activities involving prolonged positioning of her upper limbs. When I saw her last she had made some changes in her method of teaching so as to better accommodate to her complaints but even then had ongoing difficulties. She is a primary school teacher and enjoys active involvement with her students in class; work activities might include kneeling, bending, squatting, reaching and helping with activities – many of which have proven extremely difficult for her to manage. She has now taken a part time position in order to accommodate to her complaints. I believe this was reasonable decision but it may influence her ability to secure full time employment in the future. She may have to teach 'higher' grades in order to work around whatever limitations she has more easily. This more pessimistic opinion regarding her work capacity is slightly at variance than that which I previously expressed and is based on the fact that her symptoms have persisted for so long without resolution and

continue to affect her even in the mundane activities of daily living.

Ms. De Araujo is involved in a gym based reconditioning program. I believe her current exercise program is reasonable. She will probably require an exercise trainer for another 4-6 months or so to supervise her exercise regime. She should be able to do a lot of the exercises on her own.

Ms. De Araujo would probably require some help with heavier and seasonal cleaning, if she were responsible for such in her home environment.

Ms. De Araujo's complaints will be difficult for her to manage if and when she becomes a parent in the future and additional care needs are anticipated as a result of lingering accident related complaints above and beyond those which I would normally expect from an able-bodied mother.

These changes in functional capacity would not be anticipated, even with the underlying hypermobility, and especially given her age. She had no other risk factors from what I could determine. The accident has caused significant changes in her physical and psychological well-being which are seemingly now permanent and resolution, if any, will likely take a long period of time. Her ability to enjoy many leisure and recreational activities have been affected, as well as her vocational potential for many jobs she might have considered, had she been able-bodied.

As she continues to experience emotional difficulties associated with her accident, I believe she would benefit from treatment with a psychologist experienced in chronic pain management, to help her better understand and learn to cope with her chronic pain.

A visit from an occupational therapist would probably be of some benefit to teach her ways of pacing herself and to evaluate which aids, if any, might make things easier for her at home and at work.

[Emphasis added]

[121] Dr. Robinson, a neurologist with a primary focus on headache disorders, saw the respondent in March 2001. In his thorough medical-legal report, he concluded:

> Most patients do recover in a short period of time following neck injury. However, many may have persistent difficulty for years after the accident. This young lady was injured over three years ago, and continues to have constant symptoms that reduce her quality of life. Her major complaint is that of mid-back pain, although head and neck pain are also present. I believe that all of these complaints are related to soft tissue injury as a direct result of the motor vehicle accident.
>
> It is clear that the stress of her job, both psychologically and physically, is a major aggravator to her condition. She works long hours despite her discomfort and has little capacity for social or recreational activities. Sleep is disrupted due to her physical discomfort, which further compounds her disability. Mood disorder does not appear to be a significant aggravator of her condition.
>
> She is considering having time off over the next 6 months. In the past this has resulted in a marked improvement in her condition, and this will most probably occur again. I would suggest taking advantage of this period of relative rest to engage her in an active rehabilitation program. The services of a personal trainer, directing her into an appropriate physical strengthening program, may be useful in allowing her to begin to recover.
>
> I believe it probable that she will continue to have head, neck and mid-back discomfort over the next 3-5 years. I believe it possible that there will be improvement during this time, particularly if she is able to undertake an active rehabilitation programme as outlined. I believe it possible that she will continue to have her level of disability on an indefinite basis. This would have ongoing impact on her quality of life.
>
> [Emphasis added]

[122] Dr. Robinson referred the respondent to a personal trainer, who testified that the respondent had worked at the exercises she prescribed to strengthen her musculature but that, to date, she had made little progress.

[123] Dr. Cherkezoff described the respondent as "stoic." He recounted her visits to his office and her reports of pain and functional disabilities. In his view, she had suffered an acute flexion extension injury of her cervical, thoracic, and lumbar spine. By early 2000, he had concluded that her pain was chronic. When he examined her in August 2001, about two months before the trial, he found no significant change in her condition.

[124] All of these doctors, save Dr. Wade, were called as witnesses for the respondent and testified before the jury.

[125] The respondent told the jury about the effects of her injuries. She testified, in part, as follows:

> Q All right. Ms. De Araujo, it's now four years later. You are here today. Tell us in a nutshell what this crash has done to your life?
>
> A My life has not been the same since the car accident. I used to be very active. I would go out a lot. I never questioned much any actions that I would do. I was free to do most of the things that I wanted to do. I would go out with my friends: dinners, movies, dancing. Since the accident I've had to question almost every action or outing that I participate in.

I'm no longer able to participate in the amount of activity that I used to prior to the accident. I feel pain every day. Not a day goes by that there's not some kind of aching, soreness, cracking sound in my neck or back.

Q How old are you today?

A Twenty-six.

Q Looking back on those four years, what do you say about your enjoyment of them?

A Sorry. Can you repeat the question?

Q You're now 26. Looking back over the last four years what do you say about how you enjoyed those four years?

A I didn't. I think -- I was 21 at the time of the accident, and I think I've lost most of the last four years to the enjoyment that I did before.

Q Are there any days that go by now when you still aren't aware of those injuries?

A No. I'm aware of them every day.

Q Do you think that you've improved significantly over the last four years?

A Not at all. I think I've worsened.

[Emphasis added]

[126] Later, she testified:

Q All right. Next topic, Ms. De Araujo. I want the Court to know what your injuries have been from this crash in August 1997. I want you to start with whatever part of your body you wish but give us a complete rundown of all of the injuries and problems, symptoms that you can recall at this stage that you've had as a result of that accident over these four years and three months?

A Right after the accident I was feeling a lot of pain in my lower back right underneath the waistline, right where the tailbone is. It was very difficult for me to sit. The pain radiated up my spine to my mid-back. On both sides I would feel pulls. Always felt bruised as if someone was stepping or pressing against the mid-part of my back. That pain radiated up into my neck, into my shoulder blades, and up the back of my neck into my head. I was feeling dizzy at times. I was having headaches. The headaches started at the beginning but they would come and go. Later on in the year -- sorry. Later on in this past year, 2000/2001, is when the headaches have been increasingly worse. I've had difficulty stretching and bending and reaching. Sleeping is a very big problem for me. I need to sleep with pillows under my legs or in between my legs, which is very difficult for me because I've always been used to sleeping on my stomach, which I can no longer do or I'm advised not to do. I wake up two to three times a night every night. In the morning I'm very stiff and aching. I need to stretch. Sometimes I need to lie on the floor or a hard surface to adjust or crack something into place to make me feel better.

Q Of the various parts of your body that were injured, which has been the most problematic or can you say one's more than the other?

A It varies from time to time, but I always feel pain in my mid-back.

Q Okay. You said that the headaches have been something that are worse at times and not so bad at others; is that correct?

A Yes.

Q And is there any particular reason or activity that creates the worsening, that you can think of?

A I think the worsening started when I was working full-time. And in the last year or my last

> contract, the year 2000 and 2001 up until last March of that contract is when they were extremely regular. The intensity was much different and they were constant, regular, two to three a week.
>
> Q Okay. Lasting how long?
>
> A Anywhere from an hour to the next day, till I woke up.
>
> Q Has this sleeping problem that you've described been something you've ever experienced before in your life?
>
> A Not before the accident, no.
>
> Q I noted that one of the problems before the accident in that entry was that you had trouble waking in the morning. Do you have that problem now?
>
> A No. I'm usually awake two or three times throughout the morning. I have problems sleeping.
>
> Q All right. Describe the types of headaches you get when you get a headache. Where is it located, where does it start, and how does it feel?
>
> A It usually starts right above the eyes. It's usually -- at the beginning it was just a lot of pressure. It was more annoying than anything. As they got increasingly worse it was more of a throbbing, thumping pain across my eyes and on top of my head.
>
> [Emphasis added]

[127] The respondent led testimonial evidence, as well, from a teaching colleague, two close friends, and her brother. Their evidence supported her claim. The jury could reasonably have concluded, from their testimony, that the respondent's

pain and suffering were severe and that the interference with her amenities and enjoyment of life was substantial. As well, the jury could reasonably have found from this evidence that her injuries interfered with her ability to teach and her potential to advance in her teaching career. The jury had before it documentary economic opinion evidence, as well, to assist it in assessing the respondent's pecuniary loss.

[128] Thus, there was evidence before the jury that would reasonably support the conclusion that the respondent had suffered through four years of severe pain and serious disability; that her loss of amenities and of enjoyment of life were substantial; that she had suffered loss of income and income-earning capacity; that she had incurred, and would likely continue to incur in the future, expenses for treatment; and that the prognosis for her improvement and recovery was poor.

[129] The appellant identified evidence from which the jury might have come to a less pessimistic conclusion about the respondent's injuries and their consequences. However, having seen and heard the respondent, the medical doctors, and the other witnesses testify, the jury was in the best position to weigh the evidence and to form a collective view of the severity of the respondent's injuries. It appears that they

accepted the evidence that I have set out above and it cannot be said that in doing so they were clearly wrong. The appellant submitted that we should conclude that the respondent suffered only "mild to moderate whiplash." That submission amounts to an invitation to substitute our view of the evidence for that of the jury, which we cannot do.

[130] There remains the question of whether, accepting the evidence that I have described, the jury's assessment of damages demonstrates a palpable and overriding error in their deliberations and conclusions or, to put it another way, that to arrive at an award in that amount, they must have been influenced by improper considerations. Although the appellant alleged in his factum that the awards under all heads were excessive, he wisely focused his submission on the non-pecuniary award of $100,000. Indeed, the awards under the other heads are not excessive on the evidence.

[131] The appellant referred to the range of reasonable awards of non-pecuniary damages for "mild to moderate whiplash," but I do not find the cases he cited as establishing this range to be helpful since the jury apparently concluded that the respondent's injuries were more severe than that description implies.

[132] The respondent cited one trial decision and four appellate decisions that were broadly similar to her own case: ***Laramie-Bartman v. Eager***, 2002 BCSC 1175 ($90,000); ***Leighton v. Simpson*** (1998), 86 B.C.A.C. 298, 29 B.C.L.R. (3d) 232 ($50,000, adjusted to $54,000 to account for inflation to 2001); ***Strazza v. Stupich*** (2000), 138 B.C.A.C. 161, 2000 BCCA 108 ($75,000, adjusted to $76,500); ***Unger v. Singh*** (2000), 133 B.C.A.C. 265, 72 B.C.L.R. (3d) 353, 2000 BCCA 94 ($90,000, adjusted to $92,000); and ***Deglow v. Uffelman*** (2001), 160 B.C.A.C. 114, 96 B.C.L.R. (3d) 130, 2001 BCCA 652 ($75,000).

[133] I find ***Unger v. Singh*** to be the most useful comparator. First, this Court assessed the non-pecuniary damages in that case as if it were the court of first instance, awarding $90,000 as a "fair award." Thus, the assessment has direct relevance for present purposes; it does not represent an award that is "high" but not "inordinate": see ***Blackwater v. Plint*** (2003), 235 D.L.R. (4th) 60, 2003 BCCA 671 at paras. 180-181. Further, it is the most similar in terms of the relevant factors: the age and sex of the plaintiff; the nature of the injuries and their consequences in respect of their interference with the plaintiff's professional career; and the severity and duration of pain, suffering, and loss or

impairment of enjoyment of life: see ***Boyd v. Harris***, *supra*, at para. 42.

[134] Ms. Unger was a 36-year-old mother and retail store manager. She suffered soft tissue injuries to her neck, shoulders, lower back, and left knee in an automobile collision in 1996. Within six or seven months of the accident, her neck, shoulder, and back pain had substantially resolved and she had returned to most of her former activities. She suffered, as well, from mild depression and psychological injury that resolved by mid-1997. At that time, she was involved in a second accident that resulted in minor aggravation of her previous injuries but not to the extent that they began to interfere with her employment or with the majority of her activities. A jury assessed non-pecuniary damages at $187,000. As I have said, this Court substituted what it characterized as a "fair award" of $90,000 (which would have had a value of $92,000 at the date of the verdict in this case).

[135] The respondent is a young school teacher. Her injuries are of a similar nature. However, on the most favourable view of the evidence from the respondent's point of view, her injuries and their *sequelae* are somewhat more severe than those of Ms. Unger. Having regard to the relative severity of

the injuries and to the award in ***Unger v. Singh*** and to those in the other cases cited by the respondent, I am not persuaded that the jury's award of $100,000 in this case can be said to be outside the range of reasonable awards, let alone substantially so, which is the standard required to justify interference by this Court: ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.). Accordingly, I would not accede to the submission that the jury's award of non-pecuniary damages is so excessive that it must be taken to be the result of a fundamental error or to have been influenced by improper considerations. It follows, in my view, that the award does not manifest a miscarriage of justice.

Should a new trial be ordered?

[136] Since the respondent has met the burden of showing that no substantial wrong or miscarriage resulted from the misconduct of her counsel, the appellant cannot succeed on this appeal.

[137] Moreover, and in any event, the appellant cannot ask for a new trial as of right, since he did not apply to the trial judge for a mistrial declaration at the critical time. Accordingly, we are asked to make a discretionary order and, in my view, the overriding consideration in the exercise of

our discretion must be the interests of justice. I would exercise my discretion against ordering a new trial.

[138] As Hinds J.A. observed, in ***Atherton v. Maurice*** (1998), 55 B.C.L.R. (3d) 182 (C.A.), at para. 21, "[n]ew civil jury trials are to be avoided wherever reasonably possible." He drew support for that statement from a passage in ***Kralj v. Murray***, [1954] O.W.N. 58 at 60, [1954] 1 D.L.R. 781 (C.A.) that sets out the same remarks of Meredith J.A. in ***Caswell v. Toronto R.W. Co.***, *supra*, at 350-51, which I have reproduced above at para. 100. Hinds J.A. continued, at para. 23:

> The duty of an appellate court to endeavour to sustain the verdict of a civil jury was referred to by Estey J. in ***Dube v. Labar***, [1986] 1 S.C.R. 649, (1986) 27 D.L.R. (4th) 653. At 663-664 (S.C.R.) Estey J. said this:
>
> > The paramount principle here operating is the duty residing in the court to sustain, so long as it be reasonable to do so, the jury's disposition of the issues without judicial intervention. The court is concerned, of course, at all times, with providing ultimate justice consistent with the principles of law. Here, two routes lie open to a reviewing tribunal but in the selection of the appropriate route the paramount principle of support of a jury verdict governs.

[139] Here, the award of non-pecuniary damages was not inordinately high. If the appellant suffered any prejudice in the award, it is modest and indeterminate.

[140] As well, the appellant had an opportunity before the trial judge to seek a mistrial or to have the jury discharged following counsel's final submissions and failed to take it. That factor weighs heavily against the appellant in my view. This Court has held that, in deciding whether to order a new trial, the failure of counsel to object at trial to irregular or improper proceedings is a significant consideration that must be weighed against the nature and character of the impropriety complained of: ***Morton v. McCracken*** (1995), 7 B.C.L.R. (3d) 220 at para. 13 and ***Brophy v. Hutchinson***, *supra* at paras. 49-56.

[141] Further, to deprive the plaintiff of the judgment and to force her to go through the expense, anxiety, delay, and uncertainty of a new trial would be to punish an innocent client for the misconduct of her counsel.

[142] Finally, a new trial would involve considerable public expense.

[143] Considering all of the circumstances, I am not "fully satisfied that [a new trial] is necessary in the interests of justice" in this case: see ***Arland v. Taylor***, *supra*, at 361.

[144] It has been said, correctly, that jury trials are not tea parties. Counsel are entitled to make impassioned

submissions on behalf of their clients. That has long been a tradition in our common law system of trials. However, there are limits, which, in this case, respondent's counsel transgressed by a substantial margin. Fortunately for the respondent, it appears that the jurors recognized his misconduct for what it was and that they were not swayed from their duty to judge the facts impartially and dispassionately.

[145] In the end, I would adopt as applicable the remarks of Finch C.J.B.C. in ***Tsoukas v. Segura***, *supra*, at para. 76, "In the civil context, I would say that both parties are entitled to a trial that is fair, not one that is free from all imperfections. I am not persuaded that this trial was unfair."

[146] For those reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Smith"