COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Giang v. Clayton, Liang and Zheng,***
2005 BCCA 54

Date: 20050202
Docket: CA31152

Between:

Alice Nu Giang

Respondent
(Plaintiff)

And

Wayne Harry Clayton and Financialinx Corporation

Appellants
(Defendants)

– and –

Between:

Alice Nu Giang

Respondent
(Plaintiff)

And

Liang Ye Liang and Mi Xin Zheng

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Southin
The Honourable Mr. Justice Thackray

P.M.E. Abrioux
S.M. Katalinic — Counsel for the Appellants

T.R. Berger, Q.C.
E.F. Berger — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
October 27, 2004

Place and Date of Judgment: Vancouver, British Columbia
February 2, 2005

Dissenting Reasons by:
The Honourable Chief Justice Finch

Written Reasons by:
The Honourable Madam Justice Southin (P. 10, para. 22)

Reasons Concurring in the Result by:
The Honourable Mr Justice Thackray (P. 32, para. 78)

Reasons for Judgment of the Honourable Chief Justice Finch:

[1] I have had the advantage of reading in draft form the reasons of my colleagues. I regret to say that I am unable to agree with either. I would dismiss the appeal.

[2] The defendants appeal the jury's award of damages for personal injuries and financial losses suffered as a result of the second of two motor vehicle accidents. The second accident occurred on 28 April 2001. The jury awarded $216,000 for non-pecuniary damages. It awarded $217,680 for future loss of income, and $24,971 for cost of future care. There is no appeal against the award for past loss of income of $4,079.

[3] The jury apportioned 10% of fault for the second accident to the plaintiff, so judgment was entered for her in the net sum of $416,457, being 90% of the total damages assessed.

[4] The defendants have two grounds of appeal. The first is that the conduct of the plaintiff's trial counsel was so improper and inflammatory that, although the defendants' counsel did not move for a mistrial, the trial judge of his own motion should have declared one.

[5] The second ground of appeal is that the awards for non-pecuniary damages, future loss of income and cost of future care are inordinately high and unsupported by the evidence.

PLAINTIFF'S TRIAL COUNSEL'S CONDUCT

[6] As to the first ground of appeal, there is no doubt that Mr. Lauk misconducted himself by addressing the jury in an inflammatory and potentially prejudicial way. Mr. Justice Thackray has set out the substance of the improper remarks made in Mr. Lauk's closing address to the jury, and there is no need to repeat them here. I agree that what Mr. Lauk said was well outside the standard to be expected of counsel, particularly counsel with Mr. Lauk's ability and experience.

[7] However, counsel for the defendants did not move for a mistrial at any point in this ten day trial. In my opinion, that is a complete answer to this ground of appeal in this case. After the judge's charge to the jury, counsel for the defendants asked the learned trial judge to recharge the jury on only two matters: Mr. Lauk's misstatement that defence counsel did not dispute the evidence of the plaintiff's expert witnesses; and the fact that the plaintiff made an erroneous statement on an application for Workers' Compensation benefits. The trial judge recharged the jury on the second point, but declined to do so on the first. I see no reversible error in that decision.

[8] In ***Randall v. Ewart*** (1989), 38 B.C.L.R. (2d) 1 (C.A.), this Court held that the appellant's failure to object to a

charge is "a powerful circumstance militating against treating the alleged defect as a ground to set aside the jury's verdict." See also ***Basra v. Gill*** (1994), 99 B.C.L.R. (2d) 9 (C.A.) at para.15.

[9] In my opinion, this case is distinguishable on its facts from ***Brophy v. Hutchinson,*** [2003] B.C.J. No. 47 (Q.L.), 2003 BCCA 21. Here the substance of Mr. Lauk's misconduct was in his closing address. In ***Brophy***, the misconduct occurred at the outset of the trial and was calculated to colour everything that occurred thereafter. In addition, the procedure followed in ***Brophy*** did not conform to the Rules of Court.

[10] Here, after Mr. Lauk's improper closing address, defence counsel was invited to move for a mistrial. He declined the invitation and asked the judge to address the improper remarks in his charge. The judge did so and, except for the one matter mentioned above, did so to the defendants' apparent satisfaction. In any event, there was no further objection taken and, most importantly, no motion for a mistrial.

[11] This is not the exceptional case that ***Brophy*** presented. It would be quite wrong in my view to permit defence trial counsel to remain silent, and rest his clients' fortunes on a

possible favourable verdict, and then to complain in this court that the trial process was unfair.

[12] I would not give effect to the first ground of appeal.

THE QUANTUM OF DAMAGES

[13] As to the second ground of appeal, I am unable to adopt the reasoning of Madam Justice Southin which rejects the well settled practice of separating awards for non-pecuniary damages from other future losses, and treating damages attributable to pain, suffering, loss of amenities (non-pecuniary damages), future loss of income earning capacity and cost of future care all as falling within one global assessment of "general damages" (Southin J.A.'s reasons at para.77). Such a departure from well established practice should not be made without some compelling reason to do so, a direction from the Supreme Court of Canada, or legislative enactment. The proposed disposition would lead to much confusion in the trial court, and uncertainty in the practice.

[14] The issues are therefore whether the awards of $216,000 for non-pecuniary damages, $217,680 for future loss of income earning capacity and $24,971 for cost of future care are inordinately high.

[15] There is no doubt that the award of $216,000 for soft tissue injuries is a high award. But the evidence, the substance of which is summarized in the reasons of Southin J.A., show that this was a significant neck injury resulting in chronic pain. Obviously the jury accepted that the injury had serious and permanent consequences for the plaintiff. In ***Boyd v. Harris,*** 2004 BCCA 146, this Court affirmed the jury award of $225,000 for non-pecuniary damages for somewhat similar injuries, and in ***Alden v. Spooner,*** 2002 BCCA 592, this Court affirmed a jury award of $200,000 for non-pecuniary damages for soft tissue injuries, commenting that the award was high, but not inordinate.

[16] I am unable to say that the award of $216,000 for non-pecuniary damages in this case is a wholly erroneous estimate of the plaintiff's loss. I would not interfere with that award.

[17] As to the award for future loss of income earning capacity, there was medical evidence that the plaintiff, 50 years old at the time of trial, had a 50% probability that she would be unable to continue her present employment within the next five years. Her income for the three years preceding trial was, in round figures, $30,000 per annum.

[18] On this evidence, the jury might well have reasoned that the plaintiff could become disabled from her then employment at any time following trial, and that for a woman of her age, physical disabilities, training and experience, the chance of finding alternate employment was remote at best. There was therefore, on the view of the evidence most favourable to the plaintiff — a view which we are bound to accept — a 50% chance that the plaintiff would suffer a future loss of income earning capacity approaching $450,000, before discounting to present value. There was actuarial evidence that would enable the jury to do the discounting.

[19] In my view therefore, the award of $217,680 under this head while generous, cannot be said to be a wholly erroneous estimate of the loss.

[20] Finally, I have not been persuaded that the award for cost of future care is unsupported by the evidence. There was evidence from Lila Quastel upon which the jury could have found the plaintiff's cost of future care for gardening, housework and gym fees to be as great as $49,255. The award of $24,971 cannot be said to be inordinately high in light of that evidence.

[21] In the result, I would dismiss the appeal.

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Madam Justice Southin:

[22] I have had the privilege of reading in draft the reasons for judgment of Thackray J.A., who has set out much of the sorry course of this trial.

[23] The first ground of appeal is narrow in its focus — the closing address. I agree with my colleague that the closing address did not accord with the standard of conduct required of counsel.

[24] The reply of the respondent was to that focus.

[25] The respondent does not respond with a contemporary application of the ecclesiastical doctrine of recrimination. See, for an explanation, ***Proctor v. Proctor*** (1819), 2 Hag. Con. 292, 161 E.R. 747. In other words, she does not say, "If my counsel behaved badly during this trial, so did yours and no remedy should be given to you."

[26] That being so, I shall say only that counsel for the appellants was not during this trial without sin. Before the closing addresses, the honours (or dishonours) were about even.

[27] The critical question is whether the failure of counsel for the appellants to move for a mistrial after the address of

counsel for the respondent disentitles the appellants to an order for a new trial from this Court.

[28] In approaching this question, I have in mind these matters:

1. The principal accident occurred on the 28th April, 2001.

2. The complained of misconduct occurred on the eighth day of trial.

3. It was open to the learned trial judge, if the appellants had been willing, to continue the trial without a jury pursuant to Supreme Court Rule 41(7):

> (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.

4. If the appellants were not willing, the case would have had to be reheard with a new jury. I am reasonably certain that a new trial would have taken place substantially before this appeal was heard.

5. It is now 2005, almost four years since the second accident.

6. From what I know of the present press of business in the court below, if we order a new trial it will be at least another year before it is heard.

[29] The relevance of these matters is found in Bacon's aphorism, "The law's delays turn justice sour."

[30] They lead me to the conclusion that the appellants, having had a remedy below which they chose not to seek, ought not to be granted it now.

[31] In so concluding, I am not unmindful of my colleague's opinion that this trial was rendered unfair by the impugned conduct.

[32] But the fairness of a trial is often in the eyes of the participants. A transcript does not give a complete sense of events in a courtroom. Counsel for the appellants, by not moving for a mistrial, obviously did not consider the trial "unfair" and I am not prepared to say that he was in error.

[33] Therefore, much as I deplore what happened below, I would not give effect to the first ground of appeal.

[34] I turn then to the second ground of appeal.

[35] The jury's awards for non-pecuniary damages and "future loss of income" are, in total, $433,680.00, even though the

respondent, who was born the 17th September, 1953, had continued from shortly after the accident to the time of trial to follow her pre-accident occupation of a kitchen worker.

[36] Her income tax returns for the years 1997 to 2002 inclusive disclose income from employment thus:

2002	$32,386.86
2001	$27,514.73
2000	$27,648.20
1999	$29,087.49
1998	$25,293.72
1997	$26,430.27
1996	$24,536.99

[37] Her pay stubs for 2003, the last of which is for the pay period ended 15th June, 2003, show total earnings of $14,933.20, less taxable benefits of $770.77, for a "gross" amount of $14,162.43.

[38] I make these comments on these figures:

1. If one divides the sum of $433,680.00 by 15 (the years between the date of trial and her attaining the age of 65), the result is $28,912.00, which is just about the average of her income for the years 1999-2002 ($29,159.32).

2. If one assumes a person of her age, earning $32,386.86 per year, who would have been able to work from the date of trial to age 65, became, in consequence of a tortious act, no longer employable, and one then applies to that income the net present value per thousand of $12,333.00 (see the report of Associate Economic Consultants Ltd.), one arrives at a "loss" of $399,427.00.

Why I have said "who would have been able to work ... to age 65" will become apparent presently when I address the evidence of Dr. Yu.

[39] In considering whether a jury's award of damages is inordinate, it is correct to assume the jury accepted the evidence adduced by the plaintiff where it conflicts with the evidence, if any, adduced by the defendant. Here the evidence of the respondent's medical witnesses was not contradicted.

[40] Her family physician's evidence was encompassed in two reports filed pursuant to the ***Evidence Act***. I need not refer to that of the 13th November, 2000, which relates only to matters in connection with the first accident.

[41] As to the accident here in question, Dr. Ping Tan said in his report of 4th April, 2003:

In summary, Mrs. Alice Giang was involved in two separate MVA's, namely on September 2, 1999 and on April 28, 2001. As a result of the MVA of September 2, 1999, Mrs. Alice Giang sustained sprain of her neck muscles, right trapezius and right interscapular muscles, sprain right shoulder, sprain lumbar muscles and post-traumatic headache as outlined in my medical report dated November 13, 2000. She had been treated with Physiotherapy, analgesic and anti-inflammatory medications. She has had x-rays done of her cervical and lumbar spine and x-ray of her skull as described in my medical report of November 13, 2000. She had also been seen by Dr. William Yu, an orthopaedic surgeon.

Prior to the MVA of September 2, 1999, Mrs. Alice Giang was working in a food catering company supplying food to aeroplanes. She was also working as a waitress in a restaurant. After the MVA of September 2, 1999, Mrs. Giang was totally unable to continue to work. She finally returned to work again on September 17, 1999.

In spite of having returned to work, Mrs. Alice Giang continued to experience residual ache and pain in her neck and upper back and headache although there was no objective evidence of muscle spasm and there was normal range of movement of her neck muscles.

Her MVA of April 28, 2001 undoubtedly aggravated the pain in her neck and upper back muscles and she was totally unable to work after this second MVA. She finally returned to work again on June 11, 2003. As a result of the MVA of April 28, 2001, Mrs. Giang sustained a moderate sprain of her neck, trapezius, scapular and interscapular muscles. The word "moderate" is used here not just to denote the total disability, but also used here to denote her continuous residual pain in her neck and upper back. Mrs. Alice Giang is also having on and off post-traumatic headache.

After the MVA of April 28, 2001, Mrs. Alice Giang was treated with analgesic and anti-inflammatory medications as outlined in my present medical report. She was also treated with physiotherapy and was also referred to see Dr.

> William Yu, the orthopedic surgeon who saw her after her first MVA of September 2, 1999. On July 16, 2001, I wrote a letter to Mr. Gary Mayede of ICBC requesting him to enroll Alice in a muscle strengthening and work conditioning program (see enclosed).
>
> In spite of the residual pain in her neck and upper back, Mrs. Alice Giang continues to work while taking medications to relieve her pain whenever necessary. I have been the family doctor of Mrs. Alice Giang since December 29, 1988. I have known Alice as a person of integrity and a hard working individual. She hardly took time off from work unless she was very sick and that was why she only took two weeks off work after her first MVA of September 2, 1999 and about two months off work after her second MVA of April 28, 2001 and continues to work in spite of the residual pain in her neck and upper back.
>
> I do not think anyone can say for definite as to how long her residual pain will persist. However, it is about 3 1/2 years after her first MVA on September 2, 1999 and almost two years after her second MVA on April 28, 2001 and Mrs. Alice Giang is still having on and off residual pain. My opinion is that Mrs. Alice Giang will continue to experience on and off residual pain in her neck and upper back for a long time. At times, Mrs. Giang may experience exacerbation of her residual pain and under these circumstances a short course of physiotherapy or massage therapy may help to reduce the pain. It is important that she continues to do stretching exercises daily and to increase her activities. If she can swim, swimming will be a good exercise. I suggest you also consult Dr. William Yu for his expert opinion on Mrs. Alice Giang's prognosis with respect to her residual pain and permanent disability if any at all, and on any special future treatments that may help with her residual pain.

[42] His reference to her returning to work in 2003, rather than in 2001, as she did, is obviously a typographical error.

[43] The cross-examination did not diminish the import of this report.

[44] Dr. William Yu, an orthopaedic surgeon, who last saw the respondent on the 7th November, 2002, made a report dated the 8th April, 2003. In it he said, in part:

> I saw Mrs. Giang again on May 31, 2001. She informed me that she had been involved in another motor vehicle accident.
>
> * * *
>
> She had not returned to work since the accident.
>
> She told me her neck pain persisted and she had low back pain. She had trouble sleeping. She was taking Tylenol #3.
>
> Examination on May 31, 2001 showed her general condition was satisfactory. Gait was normal. She did not appear in acute distress.
>
> > Cervical spine: there appeared to be some decrease in the cervical lordosis. She was tender over her neck and trapezius bilaterally. Adson's sign, Phalen's test and tinel sign were all negative. Neurological examination of the upper extremities was normal. She was slightly tender over the lumbosacral spine.
>
> X-ray of the cervical spine was done on May 2, 2001 at Greig Associates. There was a kyphosis at C4/5. This was not observed following the previous accident. There was mild disc degeneration at C5/6 and moderate disc degeneration at C6/7. Compared with previous cervical spine x-rays, it appeared the degree of disc degeneration had not changed much except for the kyphotic shape of her neck at C4/5.
>
> IMPRESSION
>
> It appeared that she sustained ligamentous and muscular injury to her neck. There was some

> kyphotic deformity at C4/5. She was still symptomatic.
>
> I encouraged her to continue exercising and physiotherapy. Treatment should be of an active nature.
>
> She had not returned to work. At the time I informed her that I would see her in a few weeks to assess whether or not she was capable to returning to work, at least on a part time basis.

[45] Then, in a report dated the 6th June, 2003, Dr. Yu said:

> I have reviewed the report completed by Lila N. Quastel, Occupational Therapist Consultant, Northwest Rehabilitation, dated April 28, 2003.
>
> Mrs. Giang was assessed to determine her physical fitness and physical work tolerance. The findings outlined in Ms. Quastel's report were similar to those I found in my examination of her.
>
> * * *
>
> I believe the injuries sustained in the motor vehicle accidents on September 2, 1999 and April 28, 2001 have had a significant negative impact [on] her employment and future employability. There is a 50% probability that she may not be able to continue in her present job within the next five years. With her educational background and vocational skills it is quite doubtful that she will be able to secure alternate employment if she has persistent problems with her neck and back.
>
> After having reviewed the Occupational Therapy report, Dr. McPherson's report and x-rays, my opinion, as expressed in my report dated April 8, 2003 remains unchanged.

[46] Dr. Yu gave evidence at the trial and said, in part:

MR. LAUK:

Q Now, at the bottom of that report at page 2 you state that -- as a totality of the two accidents, September 2nd and April 28th, you state that it would have an impact on her employment?

A Well, what my assessment -- basically I felt that she had a significant ligamentous injury. It is probable her neck has aged a few years. It is impossible to predict, you know, how significant the impact is.

Our society generally give us certain time for our work life. For example, if a logger, they seldom last more than 50 years old. A fireman or sometimes there are policeman that are able to retire quite early, whereas a -- other occupations such as lawyers, judges, politicians, they are allowed to practice for a long time, as long as their mental capacity is okay.

THE COURT: Or even when it isn't.

A That's right. Well, I won't comment on that. I think I have a lot of respect for the law profession.

THE COURT: And we do of the medical profession, Doctor.

A Well, we are allowed to practice up to 65, you know, but some in Vancouver General Hospital and St. Paul's is 70, and MSP cut us off at 75, so there is certain arbitrary -- arbitrary decisions made.

Now, based on my assessment, this lady's work, even though not very physically demanding, she has to stand eight hours a day and that -- a lot of times she has to bend forwards, you know, certain awkward position. She is doing some lifting sometimes, and she has some preexisting degenerative changes in her neck, which is not unexpected, and the degenerative change in the neck, as expressed before. She had some episodes of neck pain at work before, which I don't know.

Now, if her neck is aged for a few years, as a result of this accident, which is probable, because she did have -- from what I can assess on examination and x-ray she did have some ligamentous injury, and over the

years there seems to be an individual -- for example, a young person with a soft-tissue injury and have a significant kyphotic change in their neck, and we -- I have the opportunity to follow some of these along, and the younger people, they develop degenerative changes earlier on. And for example young individuals who have a whiplash injury, which we describe as soft-tissue injury in the past, and if they do MRI, say 18, 20 years old, for a significant car accident like this, their MRI do show degenerative changes in the neck in the disc, which is not expected for some young individual, had it not been for an accident.

So, even though there is no concrete evidence in the literature, it did show that this type of injury do have an aging -- increase the aging of the neck. And she is now about 50 years old, and she has preexisting arthritic changes in the neck, and significant injury, which probably make her neck a few years older. And the type of job she does is fairly mostly standing and reasonable physical activity, so I think it's not unreasonable to -- to predict that there might be some significant negative impact on her employment.

She appears to be a motivated person, and as soon as she can work she returned to work, as shown by her first accident, second accident, and also that her previous compensation injury she didn't take a lot of time off, so she would do the best she could. But basically I think her neck has aged a bit. I don't know how much, probably a few years, so if you feel that, in a situation -- the retirement is 65, perhaps she lose a few years. That would be an educated guess and nobody can tell.

Q And you state within that paragraph that there is a 50-percent probability that she may not be able to continue in her present job within the next five years.

A I think that's what I tried to explain to the Court and to the jury. There is a negative impact but what it is is an educated guess, because a lot of factors affect employment. You know, sometimes they have to work, they

> carry on, and sometimes they try to overcome that, but generally speaking there is a negative impact on her employability, the fact that she has rarely to other opportunity to work apart from what she's doing now. Her education, her language problems, so those are factors to be considered, but I will be honest with you. Nobody has any definite criteria. Why should a fireman stop working at 60 -- at 45, you know? Why a RCMP officer allowed to retire earlier on a -- 40 years old? Those are quite arbitrary decisions, but they are based on I think the job demand, their backgrounds, and all this.
>
> Q But in this case your -- your prediction in the second report is based upon your medical findings and your prognosis, is that correct?
>
> A I think it's based on the -- what I told you. It was not a hundred percent scientific assessment, but it's based on the fact that her job requirement, based on the fact of her education background, and the assessment that I think her neck has aged a few years.

[47] The cross-examination did not, in my opinion, detract from his evidence given in chief.

[48] In this evidence, Dr. Yu is making the point that while those whose work requires mental skill only, for instance judges, may be able to work until they are old, there are many occupations the physical requirements of which are such that the ability to continue may cease before the age of 65. Although he does not mention the occupation of professional athlete, it is notorious that a career on the soccer field or tennis court may be finished before an athlete is of the age of 40.

[49] In the case at bar, there was no evidence whether kitchen workers performing the same sort of work as the respondent generally continue to work full time to the age of 65 or whether many find themselves obliged to give up such work, because of its physical demands, at an earlier age.

[50] Dr. Yu does not say that but for this accident the respondent could have continued to be employed as a kitchen worker to age 65. What I take him to be saying is that from the injuries it is probable, although not certain, that the respondent will lose five of whatever her remaining years of employability were.

[51] Thus, this is a case to which Lord Reid's now famous dictum in ***Davies v. Taylor***, [1972] 3 All E.R. 836 at 838 applies:

> You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent, sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent and a probability of 49 per cent.

[52] That being so, the jury, acting judicially (see ***McLean v. McCannell***, [1937] S.C.R. 341 at 343), could not reasonably

conclude that the respondent, through the tortious act of the appellants, had lost 15 years income earning ability. It was, however, open to the jury to compensate the respondent for the substantial chance, whether one calls it a probability or not, of the loss of five working years of her occupation as a kitchen worker.

[53] It was also open to the jury in considering the question of quantum to give substantial weight to her pain and suffering and loss of amenities of life. An aspect of that pain and suffering is that the respondent was working and might continue to work for many years despite the pain and disruption to her life from continuing to do so and by doing so, in essence, would be conferring a financial benefit upon the appellants.

[54] It is not unusual to encounter a case in which a plaintiff, being more stoical than some injured persons, continues to work despite the difficulties caused by the tort.

[55] In broad terms, a plaintiff who continues to work when it would be reasonable for him or her not to work should not be penalized for his or her grit.

[56] But it was not open on the evidence to compensate her, as is so often with young plaintiffs, for a general impairment of

future earning capacity. See ***Earnshaw v. Despins*** (1990), 45 B.C.L.R. (2d) 380 (C.A.). It was not open because her age, education and language limitations, for which the appellants were not responsible, precluded her from other occupations.

[57] I am quite unable to find any warrant on the evidence in this case for the total award. It was inordinate.

[58] How, then, should the award in this case and others like it be assessed?

[59] By "this case and others like it", I mean cases in which the injuries are not catastrophic or near catastrophic but do leave the victim with some possibility, difficult although it is to assess, of not being able over her lifetime to take some sorts of jobs, or having to retire early, or continuing to work in the same occupation but with pain and discomfort. In "near catastrophic", I include cases in which, for instance, a person embarking on a career as a professional athlete can no longer play his sport.

[60] In cases like the one at bar, it is, in my opinion, artificial in the extreme to divide general damages as is done in catastrophic cases, a practice of only the last 30 years.

[61] Until the 1970's, awards of damages were not broken down as they are now. There were general damages and special

damages. Special damages — and in this Province there was a dispute, largely academic, as to whether past loss of income was "special" damages — were medical or other expenses incurred before trial in consequence of the tortious act in issue. General damages comprised all other elements of loss, past and prospective.

[62] Following a practice which had its origin in the combined effect of the ***Prejudgment Interest Act***, S.B.C. 1974, c. 65, and the judgment of the Supreme Court of Canada in the cases now known as the Trilogy and, particularly, ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, in which the plaintiff had been injured on the 19th May, 1972, the learned judge asked the jury to assess damages under several heads.

[63] Until the ***Act*** of 1974, prejudgment interest was not awarded on damages in any common law action, whether in tort or contract. But, by the Act:

> **1.** (1) Subject to section 2, a court shall add on to a pecuniary judgment an amount of interest calculated on the amount of the judgment at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies in respect of interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of judgment.
>
> * * *

> **2.** The court shall not award interest under section 1
>
> (a) on that part of a judgment that represents pecuniary loss arising after the date of judgment; or
>
> (b) where there is an agreement between the parties respecting interest; or
>
> (c) upon interest; or
>
> (d) where the judgment creditor waives in writing his right to an award of interest; or
>
> (e) upon costs.

[64] Thus, in order to determine the amount of interest payable, it was essential to divide an award into pecuniary loss after judgment and other losses. Special damages were dealt with in a section of the statute which it is not necessary to quote.

[65] In 1993, by S.B.C. 1993, c. 28, the Legislature added to section 2 of what had become the ***Court Order Interest Act***, "(e) on that part of an order that represents non-pecuniary damages arising from personal injury or death."

[66] Thus, the statutory reason for dividing up awards in ordinary personal injury cases no longer exists.

[67] But are the courts of this Province bound by the judgment of the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd.***, *supra*, to continue the practice of dividing up damages in all personal injury cases?

[68] In ***Andrews v. Grand & Toy Alberta Ltd.***, the damages were broken down thus, at 234:

Pecuniary Loss

(a)	Cost of Future Care	Trial	Appellate Division
	- special equipment	$ 14,200	$ 14,200
	- monthly amount	4,135	1,000
	- contingencies	20%	30%
	- capitalization rate	5%	5%
	- life expectancy	45 years	45 years
		$735,594	$164,200

(b)	Loss of Prospective Earnings		
	- level of earnings	$ 830	$ 1,200
	- basic deduction to avoid duplication between the award for future care and that part of the lost earnings that would have been spent on living expenses	440	--
	Net	$ 390	$ 1,200
	- contingencies	20%	20%
	- work span	30.81	30.81
	- capitalization rate	5%	5%
	Total	$ 59,539	$175,000

Non-Pecuniary Loss			
	- Pain and Suffering	$150,000	$100,000
	- Loss of Amenities		
	- Loss of Expectation of Life		
Special Damages		$ 77,344	$ 77,344

[69] I note at this point that the evidence did not suggest that the respondent here had any "loss of expectation of life".

[70] At pages 235-36, Dickson J. said:

> The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible

> on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

[71] In my opinion, Dickson J. was not addressing run-of-the-mill personal injury cases. He was addressing a species of actions which, until the advances of medicine in the years following the Second World War, would only rarely have occurred. Those advances led to those rendered quadriplegic surviving rather than dying of their injuries. Although they survived, they had lost all ability to work and required life long care.

[72] I would not wish to be misunderstood. Cases in which a victim of a tort could no longer work because of his injuries, were not unknown. Indeed, in ***Phillips v. South Western Railway Co.*** (1879), 4 Q.B.D. 406, aff'd (1879), 5 Q.B.D. 78, the plaintiff was a medical man with a large and prosperous practice who suffered injuries which resulted in "no hope that he would ever be able to resume his profession or even recover so far as to have any enjoyment of life..."

[73] In ***Phillips***, Field J. had charged the jury [5 Q.B.D. at 80-82]:

Now with regard to the pecuniary position, it is this, the plaintiff has been making an income of between 6000*l.* and 7000*l.* You will have to consider under the head of damages, first of all, the pain and suffering to him. That of course is a matter which you must take into account, as it is a fair matter for compensation. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness with every enjoyment of life destroyed and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience and loss of enjoyment which he has sustained. ...

Now we come to the most difficult portion of the case and that is the question of the loss of income. There is comparatively no difficulty about it up to the present time, because the plaintiff has undoubtedly already lost a considerable amount of income. But what are the principles on which you are to take the amount of income? You have had furnished to you the gross amount as to which no question at all is raised, except one to which I will draw your attention. He appears to have had a very lucrative practice, and to have received in some cases, very large fees. In one case the sum was 5000 guineas. If that had been sought to be taken into account in ascertaining the average income, it would have been open to objection, because such a thing might happen once in a man's life, and never happen again. Therefore, very reasonably, the accountants who have gone through the figures have agreed that that fee is not to be taken into account at all, and the way they have dealt with the case is this: They have taken from the attendance book the number of times when the patient was visited, or visited the doctor, and have put down a guinea for every attendance. I do not know whether you think there is any very great reason to complain of that. It is entirely a question for you. That I think is the only question as to the amount of income with which you are to start. Now how are you to deal with the loss of future income? I first of all say that I see

> nothing whatever in this case to lead you to give vindictive damages. I say also that you are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. You must take all things into consideration, and endeavour to see if you can what is the proper mode of dealing with them. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for the purpose of seeing what sum is to be given. It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been.

The jury awarded £7000.

[74] On a motion to the Queen's Bench Division (Cockburn C.J. and Lush J.) for a new trial on the ground of insufficiency of damages and misdirection, the order was made on the former ground. That order was upheld in the Court of Appeal. Both the Divisional Court and the Court of Appeal held that there had been no misdirection.

[75] To use the present method is to give an aura of mathematical respectability to that which cannot be so assessed because the future is essentially unknown. The trier

of the issue of damages is assessing chances – gazing into a crystal ball – speculating.

[76] In my opinion, it is wrong in law to approach assessing of damages by a one-size-fits-all method. The questions a trial judge should ask himself or herself, if it is a trial by judge alone, and the questions to be put to the jury, on a trial by jury, should be tailored to the live issues in the particular case.

[77] In the case at bar, taking all the factors into account, I consider a fair and proper award of general damages for the second accident, that is to say in lieu of the awards for "non-pecuniary damages", "future loss of income" and "cost of future care", is $225,000.00 and I would allow the appeal accordingly.

"The Honourable Madam Justice Southin"

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[78] The plaintiff, at trial, Alice Nu Giang, was involved in two motor vehicle accidents. Those accidents occurred on 2 September 1999 ("the first accident") and on 28 April 2001 ("the second accident"). The jury awarded $4,000 for non-pecuniary damages and $3,291 for past loss of income for injuries suffered in the first accident. For injuries in the second accident the jury awarded $216,000 for non-pecuniary damages, $217,680 for future loss of income, $7,370 for past loss of income and $24,971 for cost of future care.

[79] The jury rounded out the totals to $7,300 for the first accident and $462,700 for the second accident but on settling the order of Mr. Justice Parrett, entered on 10 September 2003, this rounding out was ignored. The amounts as they appear in the order are $7,291 plus interest of $250 for the first accident and $462,730 less a 10% reduction for contributory negligence for a total of $416,457 plus $150 interest for the second accident.

[80] The appellants (defendants at trial) do not appeal against the awards arising out of the first accident. They ask for an order that the jury verdict be set aside or alternatively that the award for non-pecuniary damages in the second accident be reduced and that the awards for future loss

of income and future care costs be either overturned or reduced.

[81] The errors in judgment, as framed by the appellants, are as follows:

> The closing address of the solicitor for the plaintiff was so inflammatory, prejudicial and improper that the trial process was unfair and there has been a miscarriage of justice, such that the jury verdict should be overturned and these matters remitted for a new trial.
>
> In the alternative, the awards for non-pecuniary damages, loss of future income and cost of future care are so inordinately high and unsupported by the evidence that they should be set aside or reduced.

[82] I am of the opinion that the appellants have made out a compelling case based upon both grounds of appeal. I would allow the appeal on the basis that the misconduct of counsel for the respondent resulted in an unfair trial, that the conduct possibly affected the awards granted by the jury and that, in any event, the awards for non-pecuniary damages and loss of future income earning capacity were inordinately high and unsupported by the evidence.

PROCEEDINGS AT TRIAL

i) Prior to the addresses of counsel

[83] The trial commenced before Mr. Justice Parrett and a jury on 14 July 2003. Counsel for the plaintiff, Mr. Gary Lauk Q.C., delivered an opening speech that started as follows:

> My Lord, Mr. Justice Parrett, if it please the Court, I am Gary Lauk. I represent Alice Nu Giang. My friends have introduced themselves and they represent the defendants, each and all of them.
>
> Every morning Alice Nu Giang wakes up and for a moment she looks forward to a fine day, but a second or two later she moves her head to get up and remembers, as she has for the last two-and-a-half years, that she has been severely injured in her neck. The aching and stabbing pain is still there and she has only times and moments of relief. She slowly gets up and painstakingly moves her head, first from side to side and then from back to front and this will be the best part of her day.

[84] If objection had been taken right then to this improper rhetoric, the parties might not have been subjected to this expensive appeal. Rather, there was no objection from defence counsel or any intervention by the trial judge. Mr. Lauk continued: "Mrs. Zheng's left front bumper and fender struck Alice's car … with such force that Alice's car … spun towards the west … Alice was stunned." This referencing of the plaintiff by her first name continued throughout the opening which Mr. Lauk ended as follows:

> Alice is — I'm honoured to represent Alice and say on her behalf that we're asking for your help in this case, based on the evidence.

[85] This form of address should have been stopped immediately by the judge. Not only the expression of counsel's personal feelings, but the reference to his client by her first name. I do not know why it has apparently become fashionable and is not always corrected by the presiding judge. Lawyers and judges should take note of what was said by Mr. Justice Berger in *A View from the Bench*, *The Advocate,* 1974, at pages 11-12:

> I think it is a mistake to call a witness by his first name, either when questioning him or in making a speech to the jury. It is all right, of course, to address a child giving evidence by his first name, but it is quite wrong to address anyone else in that way. It may be designed to ingratiate the witness with the court, or to demean the witness. It may be simply bad manners. But it is out of keeping with the dignity and solemnity that the litigants are entitled to expect when their rights are being disposed of.

[86] This Court, adopting the words of Madam Justice Southin in ***Palmer v. Goodall*** (1991), 53 B.C.L.R. (2d) 44, [1991] B.C.J. No. 16 (QL) (S.C.), has tried, seemingly to no avail, to dissuade counsel from this practice. As said by Southin J.A. at page 51:

> … I deplore the practice of some counsel of referring to, or addressing, adult litigants by their Christian names. I am surprised that trial judges permit such inappropriate, often patronizing, informality.

[87] At the end of the evidence of one of the plaintiff's key witnesses, Dr. Yorke, Mr. Lauk expressed "concern" about questions asked by defence counsel that were "misleading or trick or deception, that's not cross-examination." He asked the judge to "correct those impressions." This followed:

> THE COURT: You're not seeking a mistrial?
>
> MR. LAUK: I'm saying that at this stage I don't think there's sufficient grounds because I feel that Your Lordship addressing the jury on these issues would probably resolve the impression that is – that causes us apprehension.

The next day the judge gave the jury a "caution" with regard to some matters and reiterated some of his opening directions.

[88] Mr. Lauk continued to make objections during Mr. McCrimmon's cross-examination of the plaintiff whereupon the judge, on his own initiative, sent the jury out. He said that the reason "the jury is out right now, Mr. Lauk, is over your comment in front of the jury." The judge asked Mr. Lauk if he had "any submission in that regard." Mr. Lauk replied "no" but said that what was being asked of the plaintiff by Mr. McCrimmon was "highly prejudicial and not relevant to the facts in this case." The judge replied "Oh, it's relevant to the facts in this case" and added:

> There's nothing wrong with the question, and with respect, your statement to the jury that it has to be proven is wrong. We'll have the jury in, please.

[89] Before the jury returned to the courtroom, Mr. Lauk submitted that certain Workers' Compensation Board records were inadmissible. This exchange ended as follows:

> MR. LAUK: … the pattern of assault on the plaintiff's case that's been before this jury, based upon this kind of material, is highly prejudicial and ends up, in my respectful submission, in an unfair trial.
>
> THE COURT: Well, I have seen nothing so far I would characterize in that way, nor do I think the cumulative effect is what you suggest, but I will hear from you further in the future on that, no doubt.

[90] Shortly thereafter, during the plaintiff's cross-examination, the following took place before the jury:

> THE COURT: Just a moment. Ms. Giang, would you turn to page 4 of that document, bottom left-hand corner? Is that your signature?
>
> MR. LAUK: My Lord, I object to the bench entering upon cross-examination in these matters. To put it to her as if this is earth shattering, "is that your signature", and she's — as if she's given a wrong answer already —
>
> THE COURT: It's for the —
>
> MR. LAUK: -- I object to the —
>
> THE COURT: -- jury to determine whether she gave a wrong answer and to do so on the basis of the evidence that is here.

> MR. LAUK: But why are you cross-examining the witness?
>
> THE COURT: I am not cross-examining the witness.
>
> MR LAUK: Well —
>
> THE COURT: The witness has just tendered a document which she, through you, I might add, Mr. Lauk — that it purports to be her tax return and now she says she isn't responsible for it or somehow it isn't her document, it's somebody else's.
>
> MR. LAUK: Well, then —
>
> THE COURT: I am perfectly entitled to clarify issues before this jury, Mr. Lauk. Sit down.
>
> MR. LAUK: Well, I object, My Lord.
>
> THE COURT: You already have. Is that your signature Ms. Giang?
>
> A. Yes.

[91] The judge might well have reminded Mr. Lauk of the words of The Honourable J.O. Wilson, O.C., Q.C., LL.D., as they appear in *A Book for Judges* (Minister of Supply and Services Canada, 1990), at page 45:

> As a rule, a general rule, he [a judge] should wait until all counsel have concluded their examinations before himself questioning the witness. But there then can be no question of his right, his duty, to attempt, through questioning, to ascertain the truth about a circumstance germane to the litigation, and left in the air through the failure of counsel to ask proper and necessary questions.

[92] Near the end of the plaintiff's case Mr. Lauk informed the judge that he wanted "to raise the issue of conduct of

defence counsel." He accused Mr. McCrimmon of doing a "slight of hand with the witness." He then said:

> The second thing is the editorial comments on a daily basis. During cross-examination Your Lordship pointed out the one about the x-rays — we might as well make use of the x-rays, everybody wants a part-time job, looking at the jury, I want a part-time job — which belittles and demeans the plaintiff and her case without relying upon the evidence. … The impression wrongly left with the jury that plaintiff's counsel is hiding documents … .
>
> ...
>
> Now, Friday arose some new and even, in my view, more serious problems. The idea of looking at a jury hoping for eye contact, and saying "I want a part-time job," belittles the plaintiff's case without a scintilla of evidence that her desire to reduce her workload to heal herself, or to live a better quality of life is somehow just like Mr. McCrimmon wanting a part-time job, so he can go out and golf. That kind of mean-spiritedness has no place in front of a jury.

[93] After a lengthy recitation of complaints, Mr. Lauk, relying upon what was said by the Chief Justice in ***Brophy v. Hutchison*** (2003), 9 B.C.L.R. (4th) 46, 2003 BCCA 21, which Mr. Lauk defined as "sort of a codification of conduct which ought to be enforced in every jury trial", said:

> I can meet the defence's case, even though ICBC is a huge institution with huge resources, fairly and squarely upon the evidence. I cannot meet antics, side comments. I'm informed by counsel, who I asked to sit in the body of the courtroom on Thursday and Friday that my friend constantly makes eye contact with the jury when my witnesses are giving evidence.

> Now, if he cannot make use of sarcasm and derision in his opening, he certainly cannot do that when we're calling evidence in what is a solemn inquiry of the truth.
>
> I therefore move for a mistrial. I would ask that the jury be discharged.

[94] Mr. McCrimmon responded that he had no notice of the application. The judge said that the application came as no surprise to him and that he was "startled if you suggest to me it comes as a shock to you." The judge ruled on the motion, concluding as follows:

> I certainly remain concerned about a general approach. I have commented on it on a couple of occasions in this trial, and I have commented on it because of my concern about it. It is very difficult to deal with counsel's manner of dealing with things without disrupting their approach to a particular case, but this is a jury trial and it is a jury trial at the election of the defendant. They do not have a right to put a jury in the witness box and put the plaintiff in front of a jury and then seek to take improper advantage of it, and there have been a couple of comments, side comments and editorial comments, more than a couple during the course of this trial that are of real concern to me. I have stopped and commented on at least one of them, and that is the comment with respect to the x-rays. I have had quite enough of it, Mr. McCrimmon and Mr. Lauk, because I have seen some more things from both sides in this case. I have had quite enough.
>
> If you wish to do your jury address during the course of the trial and not get an opportunity to do one to the jury, so be it, or if you prefer to lose the jury, so be it. At this stage I do not believe we are at that point, but I am not going to have any more of this from anybody in this courtroom in the presence of the jury.

> Do you both understand me?

[95] The judge continued, saying, "any more of this and either the jury will be gone, or there will be a mistrial." He reiterated that his criticisms were aimed at both counsel. Mr. Lauk informed the judge that he also served a notice of trial by jury in this case and that he was not "trying to get rid of a jury." He added:

> … I rise because on behalf of my client I don't think she can get a fair trial and by that I mean the jury is going to be asked by you at the end of the case to only decide this case upon the evidence and I fear that the way it's gone, they'll be very confused, even after a very elegant charge, about what is the real evidence and what isn't.

[96] Mr. Justice Parrett said he did not share that concern and was not prepared to grant the motion "at this time." He expressed the opinion that the jury was "more than capable of doing their job at this stage …."

[97] All of this occurred before counsel addressed the jury. That is to say, before the events occurred upon which the appellants say warrant a new trial. However, it is important to the issues at hand to recognize just how close the trial was to either being declared a mistrial or being heard by the judge alone even before the particular conduct that forms the basis for this appeal had occurred.

[98] In view of this fragile state and the admonition of the judge that any more misconduct and there would be a mistrial or the jury would be discharged, it would be expected that the addresses to the jury would be models of decorum.

ii) Address to the jury by counsel for the plaintiff

[99] Some of the passages from plaintiff counsel's closing address to the jury, in chronological order, that are significant to this appeal are as follows:

> Ladies and gentlemen, I get to speak to you directly and address some of the issues in this case on behalf of Alice Giang. I told you when I opened that I was proud to represent her and I am more so as I stand before you now.
>
> Nothing outside of this courtroom should come into your deliberations. I know it's tempting to report that you've gotten special information from a neighbour about how ICBC works …
>
> Another example is you may have heard about ICBC settlements, "friends' and neighbours'" stories. Someone settled for a million dollars or someone settled for $50 or whatever. These are not tested stories; they're merely rumours.
>
> … I'm confident that you can keep an open mind about people and issues. It's not the biases that we have; it's how you deal with them. Can you set them aside when you're deciding this case? And I'm sure you will. Biases such as race. These things happen. Or PR campaigns from some insurers that altogether refer to a particular race or ethnic origin at a time; sometimes that happens. …
>
> … The general public hysteria against insurance claims — and you've seen this before. Constant harping on one case involving a McDonald's coffee

cup has been going on for seven years. You'd think they'd find another case. Eliminate that outside influence; it has no bearing in a courtroom.

Now, the defendants have brought us into this courtroom, not Alice Giang. If they [had] accepted responsibility for their actions and their duty to their neighbour, we wouldn't be here. Please keep that in mind.

Now, friends and neighbours are outside influences. What they tell you they've heard, you know, the kind of rumours about cases, frequently I've had the opportunity to track many of these things down in another capacity, and frequently they're just complete nonsense with no foundation at all.

I want to talk about Alice's case. Collision one, negligence is admitted. … Clayton, the defendant in the first action didn't give evidence. He didn't come in and tell you how much he really spent to repair his car. Where is he? Ask yourself that.

Just try to imagine what kind of a woman [the plaintiff] we're dealing with here. She works five days a week, seven and a half hours a day at CLS, and she works a full shift twice a week at Brock House. Now, there's a person who wants to be a contributor to her family and to this community. She shouldn't be punished for that. She should be rewarded for that. She's off welfare.

[Note: There was no evidence that she was ever on welfare.]

It's interesting when you refer to the medical evidence, which is the only evidence in this case, it's the plaintiff's medical evidence; there's no defence medical evidence. They demur*, and here they are, the only case before you, medically speaking, is the plaintiff's evidence. You will remember that when Drs. Yorke, Yu and Quastell were offered as witnesses my friend said, "No questions and no submissions." What does that mean? It means an unequivocal acceptance of their expertise. Keep that in mind. If they doubt any of their opinions or abilities to come to those opinions, the defence would have made — asked questions and made

submissions.** They accepted the expertise of the plaintiff's witnesses.

[Note: *The defence tendered medical-legal reports by Dr. Duncan MacPherson, orthopaedic surgeon, that the trial judge ruled inadmissible. **The opinions of the noted witnesses were not accepted by the defence and they were cross-examined on their opinions.]

We're not asking for a real substantial award for the first accident. What we're asking you to do is include it in your consideration. Had we not included the first rear-end collision for your consideration, my expectation is that ICBC would try to blame all of Alice's injuries on that first accident and we'd see a different colour of evidence coming into the courtroom.

I'll deal with causation and then some of the highlights of the medical evidence. Now what is causation? Did the accident cause the injuries that the doctors are reporting to you about? Now you can go through the medical record and I — we're dealing with one of the largest, most powerful insurance companies in the world. They know all about you and me, or they can easily find out. They have our medical records and outlines, they know our accident records, they know our criminal records if we have any, they know all about us. They have access to a massive amount of information about each and every citizen in this province and they don't share it readily. So anything, everything, that would be available to weaken causation in this case would be before you.

[Dr. Yu testified that there was a 50% chance that the plaintiff may not be able to continue her job within the next five years.] Now, remember when considering that evidence, it's 50% in the next five years. It goes up. This is a logical conclusion. It goes up beyond 50% after five years, and it could occur much sooner.

[Note: There was no such evidence.]

[Regarding Dr. Yu] And that's why he came to give evidence in the box, to come and tell you that,

because she needs help. He wouldn't lightly – a man like that wouldn't lightly come in and give that kind of evidence. He's here to help Alice get a verdict, because this is what he found.

Whatever was wrong with Mi Zheng driving that car was discussed* between the time that my client got out of the car, got no response and walked back to her car, and the plot* is laid. … There was no evidence of impaired* driving. The window was up. My client couldn't smell* anything. Was that the reasons? I don't know. … This [the changing of lanes] had to be caused by driver impairment of some kind. Alcohol*, drugs*, we don't know. Maybe it was a stroke*.

[Note: *There was no evidence of a discussion, a plot, alcohol, drugs or a stroke.]

When I see citizens like Sharon Leong, I get really proud that people have that kind of responsibility. Liang and Zheng left my client in the street, not providing any information about the real driver* and left the scene of the accident. But here is a responsible woman sitting in her SUV who saw the whole thing. She got out of the car and comforted my client, and, with no advantage to her except great inconvenience, came to this court to tell you the truth. She was more than aggressively cross-examined. This is her reward for coming to tell you the truth, is a full frontal assault on her testimony. But I was even prouder after that cross-examination. You saw that little face in the witness box looking at this big lawyer, having at 'er, and she stuck to her evidence because it was true. And Mr. McCrimmon couldn't break her evidence at all. She's a fine person, fine citizen to make that contribution.

[Note: *As to the "real driver", the defendant, Liang, went to the plaintiff and provided her with his insurance information.]

Do I have to go into the trial version [of the defendants in the second accident?] Very uncomfortable. It's very seldom that I as counsel have seen that kind of evasion and irresponsibility in giving evidence.

> What we're really saying is to create an income stream for her where she can retire soon and not destroy her life trying to make a living with this kind of injury. … Why not give her an opportunity to retire and avoid a tremendous - almost a horror show every day for the rest of her life and uncompensated on welfare or whatever happens.
>
> When I think of this case, at the end of it, I think of Alice, a young woman, starting as a seamstress, having to leave her home country. She came to Canada, married, had a child and was deserted. She was left alone with her child, she raised her child by herself as a single mother, and then in another sense at the accident scene, the defendants left her standing in the street, and she never would have made it this far in court if it was her word against them. She was deserted once again, but somebody came to her rescue. I don't want her to be deserted again. I would like you to, and I know you will, apply yourself very, very dispassionately but responsibly to Alice Giang. Don't walk away from her. When I think of this case a few years from now — it may be that you will think of this case when you see somebody in a similar line of work, somebody that looks like Alice, some single mother with a child or something like that, and you'll remember this case. You'll say to yourself, I remember Alice Giang. I remember being on that jury, hearing that evidence and making those decisions. I want you to ask yourself, looking into the future, that you might say five, ten years from now, did we do right by Alice Giang that day in July 2003? I want you to answer "yes".

iii) Defence counsel's position on the closing address

[100] When the jury was excused the following exchange took place:

> MR. LAUK: My — I was tempted to move a mistrial, but we've come so far, I just felt with the proper charge we'll have to get through this.

> THE COURT: When were you tempted?
>
> MR LAUK: During my friend's summation, My Lord.
>
> THE COURT: The Robbie Burns quote?
>
> MR. LAUK: No. That would be a cultural comment. I was thinking of the x-ray that he's asked — but I'm sure that can be dealt with.
>
> THE COURT: Mr. McCrimmon, you were starting to rise?
>
> MR. McCRIMMON: There are, I submit, My Lord, numerous grounds for a mistrial, but they're all from the plaintiff's summary: how ICBC works, ICBC settlements, PR campaigns of some insurers, public hysteria against insurance claims, ICBC would say all Alice's injuries come from the first motor-vehicle accident, the party who has a responsibility to call — I lost it there, but it was defendants' evidence. It's an option, not a responsibility. Had we not included the first action which doesn't take into account that the first action was started long before the accident of April 28 occurred. She's off welfare.
>
> THE COURT: Are you making an application or not?
>
> MR. McCRIMMON: I — I am suggesting, My Lord, that these mis — misinformation should be dealt with in your charge.

[101] Mr. McCrimmon then cited to the judge many of the remarks of Mr. Lauk that I have quoted in these reasons. He submitted that "these are serious" and "should be addressed in the closing (sic)." Mr. Justice Parrett responded that "the reply (sic) had best be done with more care than those — those are at least some of the potential problems." He then charged the jury.

iv) Judge's charge to the jury

[102] Mr. Justice Parrett, near the beginning of his charge, said as follows:

> It is not your task to help Alice [!]. It is equally not your task to even things up with an insurance company. You must, so far as is humanly possible, decide this case without any bias or prejudice, reflect upon the evidence you've heard, weigh it and make a decision as to whether you accept it entirely, partially, or not at all. The ultimate approach you must take is to be as objective and dispassionate as you possibly can.
>
> While you are to carefully consider the views of counsel and my views in this area, you are not bound to give effect to them. Indeed, it is your sworn duty to disregard our views if, after careful consideration, you do not agree with them. That is the whole function that has been assigned to you at this trial.
>
> Counsel have sought to assist you, I am seeking to assist you in terms of what I am going to say to you now. But in the ultimate decision process, with respect to the facts and the evidence, that decision is yours.
>
> It is always necessary in a trial to pay close attention to what is said by counsel. But it is important, as I have already said to you, to recognize that what is said by counsel is not evidence. You are to decide this case by considering the evidence which is before you and the instructions contained within this charge. You must fulfill your role equally to the plaintiff and to the defendants.
>
> ...
>
> During their addresses to you, counsel made submissions about the credibility of the witnesses and the inferences to be drawn from their testimony.

> That, of course, is their right and duty, and you will likely find their comments helpful.

[103] With respect to the remarks of Mr. Lauk to which Mr. McCrimmon took objection and suggested the judge should correct in his charge, the judge informed the jury as follows:

> … Regrettably, during the course of his address to you, Mr. Lauk repeatedly referred to whether or not the driver of the defendant's vehicle had been drinking. He did it in a particular way. He asked you, "Why did they switch seats?" He then stated to you, "Usually people switch seats when they've been drinking."
>
> Evidence is your province, not mine at this trial, members of the jury. But I don't recall a single question being asked of either defendant when they were in the witness stand, about whether they had been drinking.
>
> ...
>
> Mr. Lauk, in his submissions, mentioned ICBC on a number of occasions, in particular, he suggested that they are one of the largest and most powerful insurance companies in the world. He suggested on a number of occasions that they know all about you and I, and went on to say that if there was such evidence, it would have been brought before you.
>
> With the greatest of respect to Mr. Lauk, this is not some kind of emotional fight between the big guy and the little guy. It is no part of your task to help Alice. Your task, as judges, is to fairly and justly consider the evidence that is before you and reach fair and just verdicts on that evidence.
>
> ...
>
> Regrettably, Mr. Lauk also told you that drivers often switch when — switch seats when they're drinking, or that the defendants must have been

> impaired. He also told you he was convinced the defendant, Zheng was driving.
>
> With the greatest of respect, it's no part of counsel's role to tell you what they believe, or to purport to give evidence that was not given at trial. …
>
> He also said to you that Sharon Leong testified that the defendant's vehicle darted out like a cannonball. The evidence, ladies and gentlemen, is for you to decide, but I don't recall any such description. …

[104] Mr. Lauk informed the judge that the charge was "meticulous and well thought out." Mr. McCrimmon said:

> The other difficulty I had, My Lord, was that you indicated that you made a ruling with respect to the expertise of the various witnesses, the expert witnesses, but my learned friend, in his closing remarks, left the inference, or the impression, that once one accepts an expert's qualification, one necessarily accepts their opinions, and he said, and I believe I'm quoting correctly, that their evidence was unchallenged.
>
> Well, it was anything but unchallenged. I challenged them upon the basis of their — the information that they had, and the information that they got from the plaintiff and what they were provided by way of documentation.
>
> Now I know that Your Lordship dealt with that, and in my view adequately, but it's not with respect to that, it's with respect to my learned friend's suggestion that if I accept their qualification I'm therefore accepting their opinion, which is not the case at all.
>
> Now, I merely mention that as — there were, in my submission, numerous areas of the plaintiff's counsel's closing arguments that I realize that had you commented upon all of them we might be here into next week. … But in any event, the concern I have is

> that some of these comments of my learned friend, which were obviously incorrect, and erroneous in law and in fact, are left with the jury.

[105] Mr. Lauk responded that he thought the judge had "covered off on the points that you – of my mistakes … ." The judge explained that he:

> … tried to walk a line between correcting what I thought were clear issues that I could not leave with them, and doing some of them in a different way so as to preserve the jury. I think any alternative would be to go beyond that and risk the jury being gone out of here. …

[106] The judge expressed the opinion that he did not "think any of them [jurors] went out of here with the view that you accepted their opinions." He accepted that he had overlooked charging the jury with respect to one witness statement but otherwise he declined the submissions as to further instructions to the jury.

DISCUSSION

[107] In ***Brophy***, para. 41, the Chief Justice said it is improper for counsel to make prejudicial remarks tending to arouse hostility, mention matters that are irrelevant, or make statements that appeal to jurors' emotions.

[108] Mr. Lauk, in his closing address, in spite of warnings from the judge, expressed personal opinions, referred

to his life "in another capacity", appealed to the jurors' emotions, mentioned matters that were irrelevant and made references to practices of the Insurance Corporation of British Columbia tending to arouse hostility. He also expressed pride in his client and tendered personal opinions.

[109] The respondent's factum makes efforts to justify some of the closing address. For instance, with respect to the comments about ICBC, counsel states that the remarks were "simply to call the jury's attention to the disparity in resources between the plaintiff and the defendants." The respondent also suggested that while Mr. Lauk expressed his own opinions, he then supported them "chapter and verse" from the evidence.

[110] Mr. Berger noted what was said in ***Dale v. Toronto Railroad Co.*** (1915), 34 O.L.R. 104 (Ont. S.C. (App. Div)) at 108:

> … 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.

[111] Even accepting that *caveat,* Mr. Lauk's remarks were improper. As was said in ***de Araujo v. Read*** (2004), 29

B.C.L.R. (4th) 84, 2004 BCCA 267 at para. 52, "Latitude has its limits."

[112] Mr. Berger conceded to this Court that Mr. Lauk "transgressed the decorum of the Court". Mr. Berger's concession did no go so far as to acknowledge any effect upon the jury by Mr. Lauk's conduct.

[113] It is not necessary to show that the misconduct actually affected the jury verdict. That, in many cases, is impossible. What is required is to show that the misconduct was likely to prejudice the jury, or may have affected a verdict or might reasonably be supposed to have deprived the innocent party of a fair trial. I see these, taken as they are from various cases that I will cite, as amounting to the same thing.

[114] It was held in ***Pender v. Hamilton Street R.W. Co.*** (1917), 12 O.W.N. 262 (S.C. App. Div.) that improper language is enough to order a new trial. During the trial, counsel for the plaintiff said to the jury that the defendant corporation "think they can kill a man for $1,000" and asked the jury to "startle the company by your verdict." The Court held that the language "was likely to prejudice the jury — that was enough." A new trial was ordered.

[115] In ***Kellum v. Roberts*** (1915), 19 D.L.R. 152 (Ont. S.C., App. Div.) Mulock, C.J. Ex. delivered the judgment of the Court and said, at pages 156 to 157:

> 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. …
>
> ...
>
> 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.

A new trial was ordered.

[116] In ***Brophy***, the improper remarks are set out commencing at para. 42 of the judgment. At para. 48 the Chief Justice said as follows:

> 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.

The Court ordered a new trial.

[117] In ***de Araujo***, the Court, with no reference to the quantum of damages awarded, held that the "cumulative effect of the transgressions … is such that there cannot be any assurance that the defendant received a fair trial." [para. 54] At para. 68 this was said:

> 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.

[118] An analysis of these cases leads me to conclude that the question that an appellate court might ask itself is, 'Is the cumulative effect of the transgressions such that there cannot be any assurance that the innocent party received a fair trial?' In the case at bar, in my opinion, there is no such assurance.

[119] The respondent submits that this Court should consider the post-trial remarks made by the judge in his reasons for judgment arising out of a hearing with respect to costs. The appellants say that it would not be appropriate for this Court to consider his remarks. I do not agree with the appellants. The remarks of Madam Justice Southin in

Johnson v. Laing (2004), 30 B.C.L.R. 103, 2004 BCCA 364, are applicable:

> [143] I have found it most helpful to have the learned trial judge's opinion on the reasonableness of the verdict which the Court would not have had but for the appellant's opposition to the motion for judgment. I do not know why it is that when a question of the reasonableness of the verdict arises, this Court does not make a practice of consulting the trial judge.

Madam Justice Southin went on to note that the trial judge's opinion does not bind the court but that does not deprive it of utility.

[120] The remarks of the judge are contained in his reasons for judgment reported at 2003 BCSC 1759:

> [8] Before turning to the specific allegations, I wish to make some general comments about the conduct of this action. It is regrettable when the relationship between counsel becomes such that it interferes with the proper process of the court. It appears to me, as an observer throughout this trial, that, in this case, that strained relationship was a factor.
>
> [9] The material before the court and my observations during the trial provide me with no insight into the genesis of the problem between counsel. Perhaps it is simply that they are each adherents to the philosophy expressed by Samuel Johnson as reported by James Boswell in The Life of Samuel Johnson, 1791:
>
> > Treating your adversary with respect is giving him an advantage to which he is not entitled.

[10] It is counsels' obligation, arising both from their duty to their client and as officers of the court, to set aside personal differences and ensure that the process, so far as possible, runs smoothly. Preconceptions as to actions taken by opposing counsel or their motivations do little to advance matters, and much to interfere with the orderly presentation of a case. In the present case, these types of preconceptions lie at the root of many of the difficulties which emerged in the form of objections and allegations of misconduct.

[11] Perhaps the zenith of these difficulties came during the course of Mr. Lauk's jury address. As a result of things he said during the course of that address, I delivered special instructions to the jury emphasizing their duties as jurors and the proper role of counsel.

[12] In my view, it is clear that the liberties taken by Mr. Lauk did not, in the end, interfere with the jury fulfilling their function. I draw that conclusion from three specific aspects of the verdict:

> (1) The jury drew, in the end, a clear distinction between the quantum of damages they awarded the plaintiff for the first collision (in which she suffered relatively minor injuries) and the second (in which she suffered much more significant injury.)
>
> (2) The jury obviously considered and drew a careful conclusion concerning their liability finding for the second accident. In making that decision they clearly rejected much of the evidence of the defendants Liang and Zheng.
>
> (3) Finally, in assessing past loss of income, the jury, in reaching the decision they did, clearly considered and rejected an award to the plaintiff for the continuing loss of her second job and accepting the defendants' submission that she had not returned to that job for other unrelated reasons.

[13] In my view those conclusions are amply supported by the evidence and display a careful

> analysis of the issues by the jury. I make these observations within these reasons for the purpose of noting that in the overall circumstances of this case the jury was not, in my view, deflected from their proper duty and course by the conduct challenged by the defendant in their application for special costs.

[121] If this Court is being asked to accept the judge's comments as saying that the misconduct did not affect the jury awards, I can only say that such a submission cannot prevail. In my opinion the judge did not, at the trial, recognize the seriousness of the misconduct. This can be seen in his failure to intervene promptly, and in most instances not at all, and in his failure to deal with many of the inappropriate remarks. In these circumstances, I cannot, with the greatest of respect to Judge Parrett, accept the respondent's suggestion that the judge's opinion, as applicable to the first ground of appeal, should be a factor in this Court's decision.

[122] I have been most critical of the conduct of Mr. Lauk while I have said little as to the conduct of Mr. McCrimmon. That should not be taken as suggesting which counsel most misbehaved. Rather, it is because it is the conduct of Mr. Lauk that requires analysis in order to come to a conclusion on the first ground of appeal.

[123] The other point I want to make is that my criticism of Mr. Lauk's conduct should be confined to this case. His reputation both in court and in his political and community endeavours is outstanding. Mr. Justice Parrett, in his reasons quoted at para. 42 of these reasons, was obviously dismayed and perplexed by counsels' conduct. I am satisfied that what occurred in this case was because of the strained relationship that developed between Mr. Lauk and Mr. McCrimmon.

[124] As to the second ground of appeal, that is that the awards are perverse, the judge, no doubt advisedly, avoided expressing any opinion as to what effect the misconduct might have had on the awards that are in issue in this appeal.

[125] The failure of defence counsel to apply for a mistrial is, arguably, of such significance that the appellant should not be afforded any remedy based upon misconduct by counsel for the respondents. This was the position taken in ***Brophy*** and it is worthwhile to reproduce the whole of that portion of the reasons dealing with that issue:

> PLAINTIFF COUNSEL'S FAILURE TO OBJECT
>
> [49] Counsel for the defence argued on appeal that it was now too late for the plaintiff to object to the order of counsel's addresses, or to any improper or inflammatory statements in defence counsel's address of which the plaintiff now complains.

Counsel for the defence noted that not only did plaintiff's counsel not object in a timely way, she did not object at any subsequent time in this four day trial. He says that plaintiff's failure to object at any time at trial is a strong indication that the trial was not unfair, and that the plaintiff suffered no real prejudice.

[50] This court has held that the failure of counsel to object in a timely way at trial to an alleged impropriety is a significant consideration in deciding whether to order a new trial: see *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.); *Boudreault v. Redpath* (1993), 77 B.C.L.R. (2d) 224 (C.A.); and *Morton v. McCracken* (1995), 7 B.C.L.R. (3d) 220 (C.A.).

[51] The rationale for treating the failure to object, in most cases, as a waiver of the right to object is apparent in *Sornberger v. Canadian Pacific Railway* (1897), 24 O.A.R. 263 (Ont. C.A.):

> It is a practice not to be encouraged to allow matters eminently proper to be disposed of by the Judge to be passed over *sub silentio* before him, and then made subjects of complaint in an appellate forum: *McDonald v. Murray* [(1884), 5 O.R. 559] at pp.575 and 582. He, present, hearing and seeing, can best rule as to whether there has been an undue invasion of the large privileges of counsel addressing the jury; and if the best and most immediate remedy of closure or the like is not invoked before him, it must be taken that the gravity of the situation was not so serious at the time of the address as it afterwards looms up in the light of the verdict.

[52] In other words, the trial judge is in the best position to observe the effect of counsel's statements on the jurors, and to fashion an appropriate remedy for any transgressions. Where no objection is taken, the assumption is that the effect of any transgression could not have been seriously misleading or unfair and there would be no reason for suspecting injustice.

[53] It is, however, recognized that there may be exceptional circumstances which merit a new trial, despite a failure on the part of counsel to object to an address: *Dale v. Toronto Railway Co.* (1915), 24 D.L.R. 413 (Ont. S.C. (App. Div)). In *R. v. Jacquard*, [1997] 1 S.C.R. 314 , the court declined to adopt a strict rule that the failure to object to a jury charge invariably waives the right of appeal. Lamer, C.J.C. noted: "Such a rule might also unequivocally prejudice an accused's right of appeal in cases *where counsel is inexperienced* with jury trials". [Emphasized in *Brophy*.]

[54] In *Basra v. Gill* (1994), 99 B.C.L.R. (2d) 9 (C.A.) the court recognized that where there is a "substantial wrong or miscarriage of justice" a new trial may be required, even in the absence of an objection.

[55] In my opinion, failure of counsel to make a timely objection to irregular or improper proceedings at trial is and must remain, an important consideration in determining whether there has been a miscarriage of justice. That consideration, however, is to be weighed against the nature and character of the irregularity or impropriety complained of.

[56] In this case, the latter outweigh the former. The judge declared defence counsel's right to open before any evidence was called without any foundation in the Rules, and without giving plaintiff's counsel an opportunity to be heard on the issue. Defence counsel then used this opportunity to make a number of statements that were irrelevant, argumentative and prejudicial. The plaintiff's right to have the evidence to be led on his behalf heard and understood by a jury whose minds had not been diverted from their true task was lost. The result, in my respectful opinion, and despite the failure of plaintiff's counsel to object, was an unfair trial and a miscarriage of justice.

[emphasis added]

[126] ***Brophy,*** in my opinion, is a powerful precedent in the case at bar. Here the conduct of plaintiff's counsel amounts to the "exceptional circumstances" that puts this case in the same category as ***Brophy***. To paraphrase the Chief Justice, the defendants' right to have the evidence heard and understood by a jury whose minds had not been diverted from their true task was lost. As in ***Dale*** and ***Jacquard,*** the circumstances are such that the failure of defence counsel to move for a mistrial must give way to the right of the defendants to a fair trial.

[127] Furthermore, it must be remembered that defence counsel in the case at bar did not sit idly by. While he only toyed with the idea of applying for a mistrial, he did make objections to the address of plaintiff's counsel, he asked the judge to correct the improper remarks and he expressed his dissatisfaction with the judge's charge.

[128] The charge, in my opinion, fell short of what was requested. It is not, of course, mandatory that a judge accept all of the suggestions of counsel as to making corrections to the charge. Nor am I suggesting that every one of the offending remarks should have been commented upon by the judge. It is an exercise of a judge's discretion as to what corrections to make, but I am of the opinion that the

judge's discretion was improperly exercised. There were several comments that cried out for correction, if not condemnation. For instance, it was critical that the judge inform the jury that it was factually and legally wrong to say:

> Now, the defendants have brought us into this courtroom, not Alice Giang. If they [had] accepted responsibility for their actions and their duty to their neighbour, we wouldn't be here. Please keep that in mind.

It is dismaying that defence counsel and the judge did not immediately take issue with such blatantly erroneous statements.

[129] The judge did instruct the jury that the views of counsel were not evidence. However, he told the jury that it would probably find their comments helpful. This is general advice that in most cases is acceptable without being qualified. But in the case at bar it should not have been said without some express *caveats*. The suggestion that there was a "plot" with regard to who was driving in the second accident, and implying that ICBC was the recipient of information on everybody, including criminal records, but "they don't share it readily" could not be left unscathed.

[130] This Court was referred to several texts on the subject of trial advocacy, in particular the portions dealing with jury addresses. They all identify the inappropriateness of inflammatory remarks, including appeals to sympathy. For instance, in *The Art and Science of Advocacy*, Vol. 2, by John A. Olah and Colin Piercey, the following is said at 18.4(a):

> This rule is clear: you cannot make a naked appeal to sympathy. The purpose of this rule is to prevent the jury from acting on sympathy rather than founding its verdict on the facts of the case. …

[131] In that context consider the following remarks of Mr. Lauk:

> … I think of Alice, a young woman, starting as a seamstress, having to leave her home country. She came to Canada, married, had a child and was deserted. She was left alone with her child, she raised her child by herself as a single mother, and then in another sense at the accident scene, the defendants left her standing in the street, and she never would have made it this far in court if it was her word against them. She was deserted once again, but somebody came to her rescue. I don't want her to be deserted again.

[132] Mr. Lauk asked the jurors not to "walk away" from the plaintiff and he suggested that in some future year they should be able to ask themselves, "Did we do right by Alice Giang?" and their answer should be "yes". He further said that the plaintiff was "off welfare" and should be given "an opportunity to retire and avoid a tremendous, almost a horror

show every day for the rest of her life and uncompensated on welfare or whatever happens."

[133] Those remarks had to be dealt with expeditiously, not days later. To leave them intact before the jury subject only to a charge that instructed the jury that its verdict was not to be based on sympathy, was inadequate. Both defence counsel and the judge had a responsibility to not only make it clear to the jury that these comments were wrong in fact and wrong in law, but to stop this form of address.

[134] In response to Mr. McCrimmon's complaints about the jury address of plaintiff's counsel and his request for corrections in the charge, the judge said that he "tried to walk a line between correcting what I thought were clear issues that I could not leave with them and doing some of them in a different way so as to preserve the jury." It may be that he was suggesting that by instructing the jury in a general way as to the weight to be given to the views of counsel was sufficient. In my opinion, in the circumstances of this case, it was not.

CONCLUSIONS

[135] Madam Justice Southin, in her reasons for judgment, set forth enough of the facts regarding the injuries that it

is unnecessary for me to do so. The awards for the various heads of general damages are, in my opinion, so excessive as to be subject to what I said in ***White v. Gait***, 2004 BCCA 517, albeit in dissent:

> [100] … the jury award was "a manifestly unreasonable verdict." That is, it was not a verdict that was simply questionable or somewhat out of line with reality or, if need be, with comparable cases. It was perverse. …

[136] As in ***Whiten v. Pilot Insurance Co.*** [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 108, the awards are "so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice." (Citing ***Hill v. Church of Scientology of Toronto,*** [1995] 2 S.C.R. 1130] at para. 159; and ***Walker v. CFTO Ltd.*** (1987), 59 O.R. (2d) 104 (C.A.) at page 110).

[137] Mr. Berger submitted that counsel's misconduct and the quantum of the awards are mutually exclusive and are in watertight compartments. I do not agree. The jury was instructed that its duty was to consider the evidence, the law, the judge's charge and the submissions of counsel.

[138] As I illustrated in the previous section of these reasons, there was misconduct. It may have had an influence on the verdict. The option chosen by defence counsel, while

dangerous and, in retrospect, unwise, cannot result in the egregious conduct becoming redundant.

[139] As was said by Mr. Justice Hall in ***Didluck v. Evans*** (1968), 67 D.L.R. (2d) 411 at 420, 63 W.W.R. 555 (Sask. C.A.):

> … 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 the circumstances, in my opinion, the appeal should be allowed and a reassessment ordered.

[140] In ***Ross v. Lamport***, [1956] S.C.R. 366 at 375, 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. …

[141] As I indicated when commenting on the post-trial remarks of Mr. Justice Parrett, it cannot be said that the amount awarded demonstrates that the jury was not influenced by the misconduct. In ***de Araujo*** this Court said:

> [70] … 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.

[142] Parties involved in litigation are entitled to a fair trial. They do not expect misconduct by counsel, but when it does occur they are entitled to be protected by their counsel and by the court. In the case at bar defence counsel made some efforts but they were both inadequate and ineffective.

[143] The remedies available to the judge included: (1) an immediate correction or rebuke at the time the offending behaviour occurred; (2) a prompt warning to the jury to dispel the potential effect of the misconduct; (3) a specific instruction in the charge to the jury which identified the problem and corrected it; (4) striking out the jury and, with the consent of the innocent party, continuing the trial without a jury (*Supreme Court Rules*, B.C. Reg. 221/90, Rule 41(7)); or (5) declaring a mistrial. The appellants received none of those. The appellants have no remedy, thereafter, but in an appeal.

[144] In ***de Araujo***, para. 59, it was said "there are cases where the conduct of counsel is so egregious that a continuation of the trial would be inappropriate." In the case at bar I am of the opinion that the jury should have been discharged. However, it was not and it is now for this Court to forge a remedy.

[145] Counsel for the appellants expressed the view that if the appeal is allowed the remedy should be to return the case to the trial court to be reheard. Mr. Berger declined to express an opinion. I have a general preference for returning cases such as this to the trial court to be reheard. This is particularly so in jury trials so that the parties can have a trial by the forum of their choice. In the case at bar both parties served notices of trial by jury. As I said in ***White v. Gait:***

> [79] Speaking generally, I suggest that it is a better practice for this Court, where it determines that an award cannot be upheld, to return the case to the trial court for re-trial. This avoids changing the forum that is, trial by jury, to trial by judges alone. This leaves it to the parties to again choose their forum. This also diminishes the concept that diverse and not truly comparable judge-made decisions have an elevated stature compared to cases decided by juries.

[146] I would prefer to return this case to the trial court to be reheard. However, after conferring with my colleagues and reading their draft reasons, I appreciate that such a result cannot be achieved. I therefore agree to the remedy suggested by Madam Justice Southin. That is, to allow the appeal and to award $225,000 to the respondent for general damages. In doing so I will add that I respect the comments of the Chief Justice in para. 13 of his reasons with respect to the "well settled practice of separating awards" for

general damages. However, in the circumstances prevailing I am prepared to accept the lump sum general damage disposition as suggested by Madam Justice Southin.

"The Honourable Mr. Justice Thackray"