2003 CarswellBC 31, 2003 BCCA 21, 9 B.C.L.R. (4th) 46, [2003] B.C.W.L.D. 163, 27 C.P.C. (5th) 14, 176 B.C.A.C. 258, 290 W.A.C. 258, 119 A.C.W.S. (3d) 176

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Brophy v. Hutchinson

PATRICK DEVIN BROPHY (PLAINTIFF / APPELLANT) AND NEIL ROBERT HUTCHINSON (DEFENDANT / RESPONDENT)

British Columbia Court of Appeal

Finch C.J.B.C., Rowles, Huddart JJ.A.

Heard: November 27, 2002
Judgment: January 14, 2003
Docket: Vancouver CA029317

Counsel: *E.P. Caissie*, for Appellant

S.B. Stewart, *L.J. Bell*, for Respondent

Subject: Civil Practice and Procedure

Practice --- Trials — Jury trial — Addresses and remarks by counsel — Order of addresses

Plaintiff was injured when bicycle he was riding collided with defendant's motor vehicle — At trial, plaintiff and defence counsel made opening remarks to jury prior to any evidence being presented — Defence counsel's opening remarks referred to plaintiff as drug dealer, school drop-out and not gainfully employed — In opening remarks, defence counsel was sarcastic regarding expert's recommendation, stated that jury should place themselves in defendant's position and claimed that plaintiff and his mother were using accident as excuse for what had gone wrong in plaintiff's life — Plaintiff's counsel made no objection to defence counsel's opening remarks at any time during trial — Jury concluded that accident occurred without negligence on defendant's part — Plaintiff appealed — Appeal allowed — Rule 40(53) of Rules of Court did not give court specific discretion to permit defence opening before evidence was called — Under R. 1(11), general discretion existed for court to order that any provision of Rules did not apply but only if all parties to proceeding agreed — Nothing on record indicated plaintiff's agreement — Defence counsel made statements that were irrelevant, argumentative and prejudicial — Nature and character of impropriety outweighed counsel for plaintiff's failure to make timely objection — Plaintiff's right to have evidence led on his behalf heard and understood by jury whose minds were not diverted from their true task was lost — New trial was ordered — Rules of Court, 1990, B.C. Reg. 221/90, R. 1(11), 40(53).

Practice --- Trials — Jury trial — Addresses and remarks by counsel — Improper or inflammatory remarks

Plaintiff was injured when bicycle he was riding collided with defendant's motor vehicle — At trial, plaintiff and defence counsel made opening remarks to jury prior to any evidence being presented — Defence counsel's opening remarks referred to plaintiff as drug dealer, school drop-out and not gainfully employed — In opening remarks, defence counsel was sarcastic regarding expert's recommendation, stated that jury should place themselves in defendant's position and claimed that plaintiff and his mother were using accident as excuse for what had gone wrong in plaintiff's life — Plaintiff's counsel made no objection to defence counsel's opening remarks at any time during trial — Jury concluded that accident occurred without negligence on defendant's part — Plaintiff appealed — Appeal allowed — Rule 40(53) of Rules of Court did not give court specific discretion to permit defence opening before evidence was called — Under R. 1(11), general discretion existed for court to order that any provision of Rules did not apply but only if all parties to proceeding agreed — Nothing on record indicated plaintiff's agreement — Defence counsel made statements that were irrelevant, argumentative and prejudicial — Nature and character of impropriety outweighed counsel for plaintiff's failure to make timely objection — Plaintiff's right to have evidence led on his behalf heard and understood by jury whose minds were not diverted from their true task was lost — New trial was ordered — Rules of Court, 1990, B.C. Reg. 221/90, R. 1(11), 40(53).

Cases considered by *Finch C.J.B.C.*:

Basra v. Gill (1994), 99 B.C.L.R. (2d) 9, [1995] 2 W.W.R. 213, 50 B.C.A.C. 37, 82 W.A.C. 37, 1994 CarswellBC 501 (B.C. C.A.) — considered

Boudreault v. Redpath, 77 B.C.L.R. (2d) 224, 24 B.C.A.C. 108, 40 W.A.C. 108, 1993 CarswellBC 63 (B.C. C.A.) — referred to

Dale v. Toronto Railway (1915), 34 O.L.R. 104, 24 D.L.R. 413 (Ont. C.A.) — referred to

Hesse v. Saint John Railway, 30 S.C.R. 218, 1899 CarswellNB 40 (S.C.C.) — referred to

Morton v. McCracken, 7 B.C.L.R. (3d) 220, 57 B.C.A.C. 47, 94 W.A.C. 47, 1995 CarswellBC 292 (B.C. C.A.) — referred to

R. v. Jacquard, 113 C.C.C. (3d) 1, 4 C.R. (5th) 280, 143 D.L.R. (4th) 433, 157 N.S.R. (2d) 161, 462 A.P.R. 161, 207 N.R. 246, [1997] 1 S.C.R. 314, 1997 CarswellNS 13, 1997 CarswellNS 14 (S.C.C.) — considered

Rendall v. Ewert, 60 D.L.R. (4th) 513, [1989] 6 W.W.R. 97, 36 C.P.C. (2d) 117, 38 B.C.L.R. (2d) 1, 1989 CarswellBC 111 (B.C. C.A.) — referred to

Sornberger v. Canadian Pacific Railway (1897), 24 O.A.R. 263 — considered

Statutes considered:

Court of Appeal Act, R.S.B.C. 1996, c. 77

s. 27 — referred to

Rules considered:

Rules of Court, 1890 (B.C.)

Generally — referred to

R. 358(31) — referred to

English Rules, 1883 (U.K.)

R. 460 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 52.07(1) — referred to

Rules of Court, 1990, B.C. Reg. 221/90

Generally — considered

R. 1(9) — considered

R. 1(11) — considered

R. 2(1) — considered

R. 40(53) — considered

R. 41(7) — referred to

APPEAL by plaintiff from jury's finding of no negligence regarding collision between platiniff's bicycle and defendant's motore vehicle.

***Finch C.J.B.C.*:**

I.

1 The plaintiff appeals the dismissal of his action for damages, tried by judge and jury in December 2001. Several grounds of appeal are raised, but in essence, the question is whether the trial was fair, or whether a miscarriage of justice occurred. Specifically, counsel for the plaintiff (not counsel at trial) says: the learned trial judge erred in permitting defence counsel (not counsel on the appeal) to address the jury immediately following the opening address by counsel for the plaintiff, without giving plaintiff's counsel an opportunity to be heard on that issue; and in permitting, and failing to correct in his directions to the jury, improper argumentative and inflammatory statements made by defence counsel in both his opening and closing remarks. The conduct of plaintiff's trial counsel is also called in question, because of her failure to object to what are now said to be serious flaws in the process.

2 Counsel for the plaintiff raises other issues as to the adequacy of the judge's charge on the central issue at trial of credibility, but on the view I take of this matter, it is not necessary to address those other issues.

II.

3 At trial, the jury concluded that the accident giving rise to this action occurred without any negligence on the defendant's part. No other facts were found in this case, and of course, no findings of fact are made on this appeal. What follows is a brief summary of some of the evidence that the jury heard, for the purposes of providing a context to the issues raised on this appeal.

4 The accident occurred on the morning of 9 January 1996. The plaintiff was then a 14 year old boy, with dyslexia, a learning disability. He was riding his bicycle on the way to school. He was riding north on the sidewalk on the east side of 216th Street in Langley. To his right was a tall fence. The defendant's vehicle emerged from a driveway on the east side of 216th Street. The tall fence obscured the view of both the defendant and the plaintiff for one another. There was a collision between the defendant's vehicle and the plaintiff's bicycle, and the plaintiff was thrown to the ground.

5 The plaintiff and defendant gave conflicting versions as to how the accident occurred. The plaintiff said the defendant's vehicle came out from behind the fence when he was so close he had no time to stop. He said he tried to avoid a collision by swerving to his left, but the defendant kept moving and he was struck by the front left bumper. The defendant said he pulled out and stopped, saw the plaintiff approaching from some distance, and remained stationary in his vehicle while the plaintiff, who appeared to panic, and to lose control of his bicycle, rode into the side of the defendant's front fender.

6 There was also conflicting evidence as to the nature and extent of the injuries caused by the accident. The plaintiff alleged soft tissue injuries to his face and right knee, a phobia for bike riding, and severe depression and anxiety. He alleged the psychological trauma to be the cause of his finding a new set of friends who had a negative influence on him, of his developing the habit of smoking marijuana, and of his subsequently doing poorly at school. At the time of trial, when the plaintiff was 20 years old, he had not completed high school, and had a very limited record of gainful employment.

7 The defendant's case was that the plaintiff's physical injuries were inconsequential, that he had always been a poor student and that he and his mother were using the accident as an excuse for the poor start in life the plaintiff had made.

III.

8 Before the jury was empanelled, counsel had a brief discussion with the learned trial judge about the issues to be tried, and the evidence to be called. In the course of that discussion, this exchange occurred:

> [DEFENCE COUNSEL]: One other issue I'd like to bring up now rather than while the jury's here is I would very much like to give my opening after my friend gives her opening. I don't know if there's any objection to that or not.
>
> THE COURT: Well, you're entitled to do it either at the start or the opening of your defence. It's all right.

9 Counsel for the plaintiff made no submissions. She opened her case to the jury. She told them the defendant had chosen trial by jury, and that it was her first jury trial. She asked the jury not to hold her short-comings against the plaintiff.

10 Counsel outlined the evidence she expected to lead. She said that sports and physical activities were an

important part of the plaintiff's life before the accident. After the accident, he no longer rode his bicycle. He lost his friends. He took up smoking "pot". He became depressed and anxious. He tried to work as a roofer but could not because of pain in his knee. She told the jury they would hear conflicting versions of how the accident occurred, and that their job would be to decide which version was true.

11 Counsel for the defence then made his opening speech to the jury. He summarized what he expected the defendant's evidence about the accident would be. He referred to what plaintiff's counsel had said in opening about the alleged consequences of the accident. Then he said this:

> And I suspect you'll hear evidence that, because he developed this fear of bike riding, he lost contact with the kids that he used to ride bike with — bikes with, and that he fell into the wrong crowd. And as my friend said, he ended up smoking a lot of marijuana.
>
> At times — I anticipate at times he will admit to you or tell you that he was smoking up to ten joints a day. And his habit was such that in order to support it, he had to deal drugs himself. It's no surprise, but he eventually dropped out of school; and I understand that the plaintiff is not gainfully employed. And the gist is, the plaintiff is saying, or will say, that this is Mr. Hutchinson's fault, from this incident that happened six years ago, has led to an effect on this plaintiff's life. And again, I'm here to tell you that that's not true.
>
> Now, given the things that have happened to this plaintiff, you would have anticipated that the plaintiff was seeing all sorts of doctors for his right knee problem, or for the psychological effect of this accident. And again, this is not evidence, but in anticipation of evidence, five times the plaintiff went to his family doctor, complaining about knee problems or other problems. Five times in almost six years.
>
> You've also heard my friend talk about the psychologist that the plaintiff saw. Now, the psychologist, Dr. Schultz, saw the plaintiff in 1999, almost three years after the accident. And the psychologist will explain to you what evidence she had before her, when she came to her conclusions and recommendations.
>
> And I'm here to tell you now that one of her recommendations, one of her recommendations to get the plaintiff back on track, was that funding be provided so that he could take up professional jet-ski racing. It's true. It's true. That's one of the recommendations.
>
> You'll hear evidence from the plaintiff that, when he was racing B.M.X., it wasn't unusual to fall down. Sometimes he would hit the jump the wrong way, land the wrong way, or sometimes a rider would cut him off. But of course, this had no effect on his psychological well-being.
>
> Now, when you hear the evidence, I do want you to consider Mr. Hutchinson. I want you to consider yourself being in Mr. Hutchinson's position. You're obliged to be fair to Mr. Hutchinson, and you're obliged to be fair to the plaintiff. And I tell you now, that it's Mr. Hutchinson's position that he's in no way responsible for this accident or how the plaintiff's life has turned out.
>
> And our position will be that the plaintiff and his mother cannot use this motor-vehicle accident as an excuse for all the things that have gone wrong in his life; and that this accident is not an excuse to shirk his responsibilities. Responsibilities that we all deal with, day in and day out. Thank you.

12 Counsel for the plaintiff did not object to the defence opening either during its presentation, at its conclusion, or later in the trial. The learned trial judge did not comment on the defence opening address at the time it

was given or later in the trial.

13 The defendant's closing address included this:

> Now, again, I'd like you to put yourself into Mr. Hutchinson's position, and think about the accusations that have been levelled against him. And I'm here to tell you he's not responsible for this accident. He's not responsible for Mr. Brophy becoming a drug abuser. He's not responsible for him becoming a drug dealer, who continues to deal in drugs.
>
> He's not responsible for this man's troubled life; and I would ask you, in your verdict, to send a message to the plaintiff and to his mother, that this — and the message is that this motor-vehicle accident cannot be used as an excuse for all the things that have gone wrong. This is not an excuse for Mr. Brophy to shirk his responsibilities, and that Mr. Brophy should focus his attention elsewhere, and not look to my client, Mr. Hutchinson, to make his life bright. Particularly when Mr. Hutchinson had nothing do with making his life wrong.

14 Counsel for the plaintiff made no objection to the defendant's closing address, and the learned trial judge did not suggest it was improper in any way.

IV. THE ORDER AND TIMING OF COUNSEL'S ADDRESSES

15 The order and timing of counsel's addresses to a civil jury are governed by Rule 40(53) which provides:

> 40(53) Addresses to the jury or the court shall be as follows:
>
> (a) the party on whom the onus of proof lies may open his or her case before giving evidence;
>
> (b) at the close of the case of the party who began, the opposite party, if that party announces his or her intention to give evidence, may open his or her case;
>
> (c) at the close of all of the evidence, the party who began may address the jury or the court, and the opposite party may then address the jury or the court and the party who began may then reply and the court may allow the opposite party to be heard in response to a point raised in the reply;
>
> (d) where a defendant claims relief against a co-defendant, that defendant may address the jury after that co-defendant;
>
> (e) where a party is represented by counsel, the rights conferred by this rule shall be exercised by the party's counsel.
>
> [am. B.C. Reg. 95/96, s.18.]

16 On a plain reading of this Rule, as the plaintiff almost invariably has the initial burden of proof, the defence has no right to open its case until " . . . the close of the case of the party who began", and then only if he announces his intention to give evidence. The Rule gives both parties a discretion whether to address the jury or not, but the order of the addresses is mandatory.

17 The present Rule is more complete than its predecessors. The first B.C. Supreme Court Rules, 1890, dealt only with closing addresses:

358(31) Upon a trial with a jury the addresses to the jury shall be regulated as follows: The party who begins, or his counsel, shall be allowed at the close of his case, if the opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same heretofore.

18 That Rule was copied verbatim from Rule 460 of the English Rules, 1883.

19 The practice as to opening addresses in England is summarized in *Halsbury's Laws of England*, 3rd ed., Vol.3, at para.107:

When counsel for the new party who does not begin announces his intention to call witnesses, then on the close of his opponent's case he opens his own case, and comments on the evidence that has been given, and states the effect of the evidence which he proposes to adduce.

20 Counsel for the defence suggested that the literal reading of Rule 40(53) is modified by other Rules:

Transition

1(9) Unless the court otherwise orders, all proceedings, whenever commenced, shall be governed by these rules.

. . . . .

Waiver of rule by agreement

1(11) Upon application and if all parties to a proceeding agree, the court may order that any provision of these rules does not apply to the proceeding.

Non-compliance with rules

2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

21 Counsel for the defence says there is a long-standing practice in British Columbia giving a judge discretion to permit counsel for the defence to give an opening address immediately upon the conclusion of the plaintiff's opening. No case authority is cited but, counsel referred us to a paper prepared for the Trial Lawyers Association of British Columbia, 1991: Marvin Storrow, Q.C., "Winning the Case Before Calling Your First Witness" (Trial Lawyers Association of British Columbia Seminar, "Trial by Jury", 18 October 1991) [unpublished].

22 Some statements of learned authors appear to support the defence right to open before any evidence is called: Geoffrey Adair, *On Trial: Advocacy Skills Law and Practice* (Vancouver: Butterworths, 1992); Sopinka, Houston and Sopinka, *The Trial of an Action, 2nd ed.* (Vancouver: Butterworths, 1998) at 77; and Bennett and Cascadden, *Procedural Strategies for Litigators in British Columbia and Alberta* (Vancouver: Butterworths, 2001) at 143.

23 The order of speeches prescribed by Rule 40(53) reflects the purpose an opening speech is intended to

serve. *Halsbury*, *supra*, at para.103 says:

> The object of an opening is to give the jury a general notion of what will be given in evidence. Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the court takes judicial notice.

24 The opening's purpose is to outline the case the party bearing the onus of proof (usually the plaintiff) intends to present. Counsel's goal in opening is, or should be, to assist the jury in understanding what his or her witnesses will say, and to present a sort of "overview" of the case so that the jury will be able to relate various parts of the evidence to be presented to the whole picture counsel will attempt to present.

25 The right of a plaintiff to open is a considerable advantage. It enables counsel to explain in a few minutes a case which may take days or weeks to develop in evidence, and to state her case in the way most favourable to her client's interests. The opening can give the trier of fact a framework within which to understand and evaluate the plaintiff's case as it unfolds. For the party bearing the burden of proof, this can be a most useful tool.

26 Unlike the Rule in Ontario governing the presentation of jury addresses, Ontario, Rules of Civil Procedure, r.52.07(1), Rule 40(53) does not give the court a specific discretion to permit a defence opening before any evidence is called. The discretion to permit such a practice in British Columbia must therefore be found in the general provisions of Rule 1(9) and (11). Rule 1(9) is headed "Transition". It appears to give the court a discretion to dispense with the application of the Rules to any proceeding, but it is clearly a transitional provision applying to proceedings "whenever commenced". My present view is that this Rule was intended to make the Rules promulgated by B.C. Reg. 221/90 effective September 1, 1990 applicable to proceedings commenced before those Rules came into force. I do not think the Rule can be read as conferring an unfettered discretion on the court to dispense with the application of the Rules at will.

27 Rule 1(11) does confer a general discretion on the court to order that "any provision of the Rules does not apply to the proceeding", but that Rule may only be relied upon "if all the parties to a proceeding agree". Apart from the silence of counsel for the plaintiff when the defence sought to make his opening, there is nothing in the record to indicate the plaintiff's agreement.

28 On the record presented in this case, I am not prepared to infer that counsel for the plaintiff agreed, within the meaning of Rule 1(11) to the non-application of Rule 40(53). And, without the agreement of all parties, Rule 1(11) confers no discretion on the court to dispense with the application of any provision in the Rules.

29 The difficulty in this case is that counsel for the plaintiff was given no opportunity either to agree or to object. Immediately after defence counsel's request to make an opening before evidence was called, and his saying "I don't know if there's any objection to that or not", the Court said: "Well, you're entitled to do it either at the start or the opening of your defence. It's all right".

30 With respect, that statement does not accord with anything that appears in the Rules. The judge did not purport to exercise any discretion granted by Rule 1(11) or any other Rule. He said the Rules provided for something which they do not.

31 A more experienced counsel for the plaintiff would, I expect, have drawn this misstatement to the judge's

attention, and if counsel did not agree to the defence opening "at the start" would have voiced her objection to that course of action. I will consider, later in these reasons, whether counsel's failure to object in a timely way is fatal to raising the issue on appeal. It is perhaps, however, understandable that counsel trying her very first jury trial would be reticent to challenge the judge on a matter of law, if she was aware of what the Rules in fact provided.

32 Counsel for the defence also contended that Rule 40(53) should be read in light of Rule 2(1) which says that a failure to comply with the Rules shall be treated as an irregularity and does not "nullify a proceeding". I do not regard the presentation of defence counsel's address immediately after the plaintiff's opening, and before any evidence was called, as a mere technical breach of the Rules. It cost the plaintiff's counsel a large measure of the advantage her opening should have had. Instead of listening to the plaintiff's case with the overview or framework that plaintiff's counsel provided, the jury would have listened in an entirely different frame of mind. The connection between the plaintiff's opening and the various pieces of evidence presented on his behalf would have been disrupted, and replaced by the impressions defence counsel sought to implant.

33 Rule 2(1) does not apply in this case because the question is not whether any proceeding was a nullity, but whether the trial was fair. A trial judge has the discretion to order that failure to comply with the Rules be treated as something other than an irregularity, and this court has the power to make the same order.

34 The judge's direction that counsel could make his opening "at the start" if he chose to do so, was an order made without jurisdiction. It is also an order which in my view caused prejudice to the plaintiff.

35 The degree of that prejudice will be considered in the next part of these reasons.

36 Before leaving this first issue, I would offer some comments on what the various text writers have said about the practice of defence counsel's opening before any evidence is called. There is a suggestion that this is a growing trend in British Columbia practice. There may well be many cases where such a practice is desirable. One can think of cases involving particularly complicated facts, or a consideration of many documents, or complex and contradictory expert evidence. For these, and other compelling reasons, a judge may well consider that hearing both (or all) sides "open" their case before any evidence is called would facilitate a better understanding of the case. Even in these cases, however, it would appear that the Rules require the agreement of all parties before the court may exercise its discretion to so order.

37 I would also observe that the cases calling for consecutive openings are generally of such a nature as would be tried by judge alone. While opening statements can always be effective tools, the initial impression to be made by an opening statement is, in my view, of less importance in a trial by judge alone, than in a trial by judge and jury. That is so because judges will already be familiar with the two or more sides of the case to be presented from reading the pleadings, and because of the judge's experience with the adversarial process.

38 I would not wish anything said in these reasons to be interpreted as suggesting a limitation on the judge's discretion to vary the procedure laid down by Rule 40(53) if all parties consent. It is a discretion which must, however, be exercised judicially, and in accordance with the Rules. That did not occur here.

V. THE CONTENT OF DEFENCE COUNSEL'S ADDRESSES

39 The plaintiff now contends that the opening address of defence counsel was highly prejudicial because he said:

1. The plaintiff was a drug dealer in order to support his own use of marijuana;

2. The plaintiff was a school drop-out and not gainfully employed;

3. The plaintiff's physical and psychological injuries could not have been serious or "he would have anticipated the plaintiff was seeing all sorts of doctors . . . ";

4. The recommendation of the plaintiff's psychologist that he should take up professional jet-ski racing was so far-fetched as to be deserving of sarcasm — "It's true. It's true.";

5. The jurors should put themselves in the defendant's position; and

6. The plaintiff and his mother were using the accident as "an excuse for all the things that had gone wrong in his life".

40 Before commenting on each of these objections, it will be useful to describe the proper limits of an opening statement.

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

42 1. Referring to the plaintiff as a drug dealer was highly prejudicial and improper. It portrayed the plaintiff as someone engaged in criminal activity. There is nothing in the record to suggest the defendant could prove the allegation in any way other than on cross-examination. And in any event, it was irrelevant to any matter in issue before the jury. It could not assist the jury on any question of liability or damages. The allegation could only be relevant to the plaintiff's credibility, if proven independently, and denied by the plaintiff. The statement's only purpose could have been to prejudice the jury.

43 2. The statements that the plaintiff dropped out of school and was not gainfully employed were relevant to the issue of damages. However, they were not necessary to explain any evidence which the defence intended to adduce, and when made at a time in the trial when no evidence had been heard they took on an argumentative quality designed to portray the plaintiff's claim as undeserving of the jury's consideration.

44 3. The statement that "You would have anticipated the plaintiff was seeing all sorts of doctors" is not a comment upon any evidence the defence proposed to lead. It is a purely argumentative statement, suggesting to the jury how they should assess the plaintiff's credibility.

45 4. The suggestion that the psychologist's report was far-fetched, by treating it with sarcasm, has no place in an opening statement. It is argumentative and rhetorical, and goes only to the issue of the psychologist's credibility. Whether such a statement would have been permissible in a closing address would depend on what the

witness said in cross-examination. Here, the psychologist did not testify. The plaintiff relied only on the report, and the defence apparently did not require her attendance for cross-examination. (In his closing address, defence counsel said of Dr. Schultz's report — "I feel it's garbage in, garbage out". This expression of counsel's personal opinion was also improper.)

46 5. The statement that "I want you to consider yourself being in [the defendant's] position" is also improper. The jury's duty is to follow the judge's instructions in assessing the evidence. What defence counsel "wants" is irrelevant. More importantly, it was wrong to suggest that the jury should place themselves in the defendant's position. That is a direct appeal to the jury's sympathies and interests, calculated to divert them from their proper role as impartial arbiters between two adversaries. In *Hesse v. Saint John Railway* (1899), 30 S.C.R. 218 (S.C.C.), at 239, the Supreme Court of Canada said:

> It is perhaps impossible to prevent jurors looking at a case in this way, but at least they ought not to be invited to do so, and such direct resorts or appeals to the feelings and interests of the individual jurymen can only exercise a disturbing or misleading influence.

47 6. The statements that the plaintiff and his mother used the accident "as an excuse for all the things that have gone wrong in his life" and as "an excuse to shirk his responsibilities" were improper. They imply that the accident did not cause all of the plaintiff's difficulties, that the plaintiff would say that it did, and that he was therefore being dishonest or exaggerating. The statements were therefore an attack upon the credibility of the plaintiff and his mother, argumentative and rhetorical.

48 It is, of course, impossible to say what effect these improper statements had upon the jury's consideration of the evidence in this case. It seems, however, inevitable to me that collectively they could only have had a very damaging effect on the way the jury listened to and understood the evidence presented on the plaintiff's behalf. Their impact is bound to have been much greater having been heard in advance of any evidence and they would, in my view, largely have undermined any advantage the plaintiff might otherwise have had by his own counsel's opening address.

VI. 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 (B.C. C.A.); *Boudreault v. Redpath* (1993), 77 B.C.L.R. (2d) 224 (B.C. C.A.); and *Morton v. McCracken* (1995), 7 B.C.L.R. (3d) 220 (B.C. 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:

> 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*, 5 O.R. 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* (1915), 24 D.L.R. 413 (Ont. C.A.). In *R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.C.), 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". (My emphasis.)

54 In *Basra v. Gill* (1994), 99 B.C.L.R. (2d) 9 (B.C. 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.

VII. THE REMEDY

57 Counsel for the plaintiff submitted that if we were disposed to allow the appeal, the case should be referred back to the judge who presided at this trial. He says that would be a more speedy and economical resolution than ordering a new trial. It would also reflect the result that might have been obtained if the judge had discharged the jury for defence counsel's improper statements and (with plaintiff's consent) continued the trial by judge alone: see Rule 41(7).

58 Counsel for the defence submitted that if we were disposed to allow the appeal, we should order a new trial so that the defendant would not be deprived of his right to trial by judge and jury. He says plaintiff's failure to object at trial should not result in a penalty to the defence.

59 The authority of this court to order a new trial is found in s.27 of the *Court of Appeal Act*, R.S.B.C.

1996, c.77:

> 27(1) If on the hearing of an appeal it appears to the court that there should be a new trial or hearing, the court may set aside the verdict, finding or order and direct a new trial or hearing;
>
> (2) If the court considers that the new trial or hearing should be limited, the court may give final judgment as to part or parts only of the matter in controversy or as to some or one only of the parties and direct a new trial or hearing as to the remaining part or party.

60 We have not been referred to any authority where this court has referred a case for re-trial by judge alone, where the original trial was by judge and jury. I have been unable to find any authority to support such an order.

61 If objection had been taken when defence counsel completed his opening address, the trial judge might have considered exercising his discretion to continue the trial without a jury. He was not bound to do so however. Defence counsel made his improper statements before any evidence was heard, and the judge might simply have declared a mistrial, so that a new trial could commence at a later date before a new jury.

62 I would allow the appeal with costs and remit the case to the trial court for a new trial.

63 There remains the issue of the disposition of costs at trial. I have concluded that the appeal should be allowed for two reasons: first, because defence counsel was allowed to open before evidence was called, on the judge's misapprehension of the law; and second, because defence counsel over-stepped the bounds of propriety in his opening remarks. Although plaintiff's counsel did not object to either of these defects in the proceedings at trial, in my view the plaintiff should nevertheless have the costs thrown away. I would not have been disposed to make that order if the appeal had succeeded on the first ground alone. But as the real prejudice was caused by what defence counsel said in his opening, it is only fair that the defence bear the costs thrown away at trial.

Rowles J.A.:

I agree.

Huddart J.A.:

I agree.

Appeal allowed.

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