COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Knauf v. Chao,*
2009 BCCA 605

Date: 20091229
Docket: CA036688; CA036689

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Between:

Brigitte Knauf

Respondent
(Plaintiff)

And

Jian Fu Chao and Feng Zheu

Appellants
(Defendants)

– and –

Docket: CA036689

Between:

Brigitte Knauf

Respondent
(Plaintiff)

And

Hesam Chaemi-Zadeh and
Enterprise Rent-A-Car Canada Limited

Appellants
(Defendants)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, November 26, 2008
(*Knauf v. Chao*, Docket M043662; *Knauf v. Chaemi-Zadeh*, Docket M044448)

Counsel for the Appellants: T. H. Pettit and J. V. Marshall

Counsel for the Respondent: M. Tsurumi

Place and Date of Hearing:	Vancouver, British Columbia December 1, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 29, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The plaintiff was awarded an aggregate of $500,957 by a jury as damages in respect of injuries sustained by her in two motor vehicle accidents. The defendants seek a new trial on the grounds that (i) evidence was improperly admitted, (ii) counsel for the plaintiff made improper statements during his opening statement and closing address to the jury, and (iii) there were errors in the judge's charge to the jury with respect to the plaintiff's loss of future earning capacity.

[2] In the alternative, the defendants request that the jury's awards for non-pecuniary damages, loss of past earning capacity (also commonly referred to as past income loss) and loss of future earning capacity be reduced because they are inordinately high or unsupported by the evidence.

[3] The defendants concede that their counsel at trial did not make objections in connection with any of the alleged improprieties or errors they raise on appeal.

Background

[4] The accidents occurred within two months of each other in the fall of 2002. In each accident, the plaintiff's vehicle was rear-ended by the other vehicle.

[5] At the time of the accidents, the plaintiff was 35 years of age. She was an active person, and enjoyed playing badminton, skiing, running and "dragon boating".

[6] The plaintiff began working at a company as an accounts payable clerk in 2001 at a salary of $30,000. She wanted to supplement her income and took a second job at a restaurant in August 2001. She began as a server's helper and a hostess but she worked her way into the position of server a few months before the first accident. At the time of the first accident, the plaintiff was working one or two nights a week, and was earning a wage of $8.50 an hour plus tips ranging from $80 to $200 per shift. She was still in training as a server and anticipated that the

amount of her tips would increase when she gained experience and was given more tables to serve.

[7] The plaintiff sustained whiplash injuries in the first accident. Her head and back went forward when her vehicle was rear-ended. She suffered from headaches, severe neck pain and back pain, and her range of motion in her neck was restricted. These symptoms were aggravated by the second accident. The plaintiff testified that her condition improved over time but she continued to have intermittent pain on a daily basis at the time of the trial.

[8] The plaintiff did not miss any work at her full-time job as a result of her injuries. She tried to go back to her job at the restaurant but had to quit because her pain prevented her from doing the server's job properly.

[9] The plaintiff never took any medications for her injuries. She received physiotherapy and massage therapy treatments. Approximately two and one-half years after the accidents, x-rays showed a reversal of the plaintiff's normal cervical curvature and some degenerative changes in the cervical spine. Her physician felt that these findings accounted for her stiffness and pain in the mornings and after prolonged sitting.

[10] The physician stated in her prognosis that it was "highly unlikely [the plaintiff] will completely return to the level of functioning and pain-free status she had prior to the accidents." She felt that the plaintiff's underlying osteoarthritis, which may have pre-existed the accidents but was asymptomatic until the accidents, could continue to be a partial cause of the plaintiff's morning stiffness and neck pain.

[11] The plaintiff was curtailed in her recreational activities as a result of the injuries. She began to play badminton again approximately six months after the accidents, but she suffered a permanent knee injury in April 2003 and had two surgeries in 2004. Her knee injury prevented the plaintiff from playing badminton, skiing or running.

[12] The plaintiff looked for other forms of physical activity, and she took up salsa dancing in 2004. She started taking dance classes twice a week. She met a man at the classes, and they married in January 2005. The plaintiff stopped going to dance classes later in 2005 as a result of a run-in with her husband. The marriage was not successful, and the couple separated in mid-2006. There was evidence from the plaintiff's physician that the marital issues caused the plaintiff a great deal of stress.

[13] The plaintiff resumed dancing after she separated from her husband, and was attending classes for salsa, tango and cha-cha dancing up to six times a week by the end of 2006. She gave up dancing in 2007 because she did not want to run into her ex-husband anymore.

The Trial

[14] The trial took place before a judge and jury over three days in November 2008. As is usual, the plaintiff's counsel made an opening statement to the jury before any evidence was introduced, and a closing address to the jury at the conclusion of the evidence. The defendants say on appeal that some of the comments made by the plaintiff's counsel were improper, and I will set out these comments when discussing the issue.

[15] One of the witnesses called by the plaintiff was Mr. Paul Pakulak, an occupational therapist, whose written report was also introduced into evidence. The defendants say on appeal that portions of his testimony should not have been admitted into evidence because his statements offended the prohibition against oath-helping. They also say that plaintiff's counsel made an improper comment about the evidence in his closing address to the jury. I will refer to the impugned statements when I address the issue.

[16] The judge gave his charge to the jury in the form contained in chapter 1A of J.P. Taylor, J.C. Bouck and R.D. Wilson, *CIVJI: Civil Jury Instructions* (Vancouver: Continuing Legal Education Society of British Columbia, 2002 update). The chapter is entitled "Abbreviated Instructions", and the user note states that they are meant

for jury trials of from one to three days arising out of motor vehicle accidents where the issues are relatively simple. The defendants say on appeal that the judge erred by not including two paragraphs from the full CIVJI instructions dealing with the standard of proof in respect of future losses and the amount of the award.

[17] The jury was requested to make combined awards in the two actions. Its awards were as follows:

$235,000	– non-pecuniary damages;
90,000	– past loss of income;
150,000	– loss of future earning capacity;
20,000	– cost of future care; and
5,957	– special damages
$500,957	– total

The award for past loss of income was gross of any tax and, after deduction of notional income tax as required by s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the net amount ordered to be paid to the plaintiff for past income loss was $66,632.

Discussion

[18] The plaintiff says that even if the alleged improprieties and errors exist, the jury's award should not be set aside because there was a lack of any objection at trial by the defendants' counsel. It will, therefore, be useful to first consider the effect of a lack of objection in the context of a civil trial. The law is quite different in criminal matters.

[19] The law in this regard was summarized over 50 years ago by the Ontario Court of Appeal in the decision of *Arland v. Taylor*, [1955] 3 D.L.R. 358 at 364-365, [1955] O.R. 131 (C.A.). After reviewing a number of case authorities, Mr. Justice Laidlaw set out the following four propositions he extracted from the case authorities:

> (1) A new trial is contrary to the interest of the public and should not be ordered unless the interests of justice plainly require that to be done.

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

These propositions were cited with approval by this Court in *Christie v. Westcom Radio Group Ltd.* (1990), 75 D.L.R. (4th) 546, 51 B.C.L.R. (2d) 357 (C.A.).

[20] More recently, Chief Justice Finch considered the effect of a lack of objection in *Brophy v. Hutchinson*, 2003 BCCA 21, 9 B.C.L.R. (4th) 46, an appeal dealing with improper remarks to a jury by counsel:

> [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: ...
>
> * * *
>
> [52] ... 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: ...
>
> [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.

In that case, the Court concluded that the nature of the impropriety did outweigh the lack of an objection because the inappropriate comments of defence counsel were

made to the jury in an opening that preceded the calling of evidence by the plaintiff, something that was not sanctioned by the *Rules of Court*.

[21] Thus, the general rule is that a new trial will not be ordered where no objection is taken to impropriety or error in the course of a trial unless there has been a substantial wrong or miscarriage of justice.

(a) Oath-Helping

[22] The rule against oath-helping was explained by the Supreme Court of Canada in the following passage from *R. v. Burns*, [1994] 1 S.C.R. 656 at 667-668, 89 C.C.C. (3d) 193:

> The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard*, [[1993] 4 S.C.R. 223]. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators to swear to the truth of his oath: see *R. v. Béland*, [[1987] 2 S.C.R. 398], *per* Wilson J. at pp. 419-20. In modern times, it is defended on the ground that determinations of credibility are for the trier of fact, and that the judge or jurors are in as good a position to determine credibility as another witness. Therefore the fundamental requirement for expert evidence – that it assist the judge or jury on a technical or scientific matter which might otherwise not be apparent – is not met. The rule, as Iacobucci J. noted in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 729, goes to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements".

The decision of *R. v. Jmieff* (1994), 94 C.C.C. (3d) 157, 51 B.C.A.C. 213, is an example of a case where a new trial was ordered because the evidence of an expert witness, a psychologist, not only indirectly supported the credibility of a witness, but crossed the line and purported to directly confirm the credibility of the witness.

[23] In the present case, Mr. Pakulak conducted a functional capacity evaluation of the plaintiff in support of her claim of an impairment of her earning capacity. Mr. Pakulak prepared a 22-page report that was entered as an exhibit at the trial without objection from the defendants' counsel. A section of the report was entitled "Level of Effort/Pain Profile" in which Mr. Pakulak explained that he administered a series of tests to ascertain whether the plaintiff was giving maximum and consistent

effort throughout the assessment. This testing is often referred to as validity testing. At the end of the section, Mr. Pakulak stated his belief that the "test results are a reliable measure of Ms. Knauf's maximum physical capacity at this time."

[24] During his examination in chief at trial, Mr. Pakulak explained why he conducted validity testing:

> Because we have to rely partially on what the individual is telling us during the course of the assessment it's important that we have ways to verify that the effort that they're providing is in fact a sincere effort so that we can be confident that what we're seeing and how we're interpreting the results of the testing are in fact accurate and reliable.

[25] The portions of the testimony of Mr. Pakulak to which the defendants object are the following:

> All those signs indicated to me that she was putting forth a sincere effort.... [T. 99, l. 46]
>
> In her case there was a significant decline in her speed and that's something that we would expect to see with significant increases in pain and again - - so that's consistent. [T. 100, l. 41]
>
> - - with the decline in her speed on the repetitive overhead reaching at the end of the day that again verified the legitimacy of those pain reports. [T. 101, l. 17]
>
> So again all of those things point to, yes, she can do it, but there's increases in symptoms and those reported increases were felt by me to be legitimate. [T. 102, l. 6]
>
> - - all three effort tests on the grip testing showed that she did provide a sincere and consistent effort. [T. 105, l. 20]
>
> In her case there were no significant inconsistencies in mobility or strength or capacity over the course of the day. [T. 110, l. 24]
>
> Distraction tests, those are different manoeuvres and tests that we administer in order to identify whether or not we can rely on the person's symptomatic reports. … In her case all of the distraction tests that were administered were negative, meaning or suggesting that I could rely on her symptomatic reports. [T. 111, l. 8 and l. 27]
>
> [Emphasis added.]

[26] The plaintiff's counsel commented on Mr. Pakulak's evidence in his closing address to the jury. He said the following:

> Now, you just heard Mr. Pakulak and Mr. Pakulak put Ms. Knauf through a series of tests designed [*sic*] what she could and could not do. And you'll see from what he told you and what's in his report that a very big part of what he did throughout the day in a whole bunch of different ways was to see if she was legitimate. For a lack of another phrase, to see if she was faking, to see if what she said was consistent with what his tests showed, and these were sophisticated tests. She was consistent throughout. What she said and what the test result showed were the same. She wasn't exaggerating; she wasn't saying she was in pain when the test results showed differently. She was consistent. And that's what those tests were designed to do to show if what she told Mr. Pakulak, if what she told her doctor, what she told you was real and legitimate.
>
> [Emphasis added.]

[27] In my opinion, there is nothing objectionable about validity testing *per se*. It goes to the reliability of the opinion expressed by the expert and the weight to be given to it by the trier of fact. That is a proper purpose. There will be occasions where there is an over-emphasis on the validity testing, and a concern may arise that the jury will use the evidence for the prohibited purpose of oath-helping. On such an occasion, the judge may intervene in the examination of the expert and limit the questioning on the topic. Alternatively, the concern may be addressed by a limiting instruction to the jury by the judge. This latter point was made by Mr. Justice Thackray in *Lawson v. McGill*, 2004 BCCA 68, 23 B.C.L.R. (4th) 254:

> [66] I am further of the opinion the trial judge erred in holding that he could not "perform surgery on her [Dr. Hayes'] evidence" by telling the jury that the credibility finding went only to the issue of the weight, if any, to be given to psychological tests. There is nothing unusual or uncommon in explaining to a jury that certain evidence can be used only in a particular way.

In the case at bar, no objection to the questioning of Mr. Pakulak was taken by the defendants' counsel, nor was a request made of the judge to include a limiting instruction in his charge to the jury.

[28] If that were the end of the matter, I would not be prepared to reach the conclusion that the jury made an improper use of Mr. Pakulak's evidence to decide that the plaintiff was telling the truth in court about her injuries and their symptoms. However, the remark made by the plaintiff's counsel in his closing address to the jury was clearly improper (this was conceded on appeal by counsel for the plaintiff, who was not counsel at trial). The plaintiff's counsel effectively told the jury that they

could use Mr. Pakulak's evidence for the improper purpose of oath-helping. This was not corrected by an instruction in the charge to the jury.

[29] The issue then becomes whether a new trial should be ordered despite the lack of objection by counsel for the defendants at the trial. In my view, a new trial should not be ordered because this impropriety did not lead to a substantial wrong or miscarriage of justice. It was conceded on appeal that the plaintiff's credibility was not challenged at trial. There was no reason for the jury to disbelieve the plaintiff. As a result, it cannot be said that the oath-helping affected the jury's decision on the credibility of the plaintiff or influenced the damage awards made by the jury.

(b) Non-Direction by the Judge

[30] The portion of the judge's charge dealing with loss of future earning capacity was as follows:

> Loss of future earning capacity. You heard evidence suggesting that Brigitte Knauf will likely earn less income in the future from her former part-time occupation as a waitress. If you accept that evidence she is entitled to compensation for this loss from today until you expect such loss would end. Because this is a future loss she need only prove the possibility that the loss will occur. If you choose to make an award under this head of damages it should be based upon the evidence that you heard. When assessing the amount of this loss you should take into account the contingencies of life. For example, in the future Brigitte Knauf might acquire some other illness or disability unrelated to the complaints related to the motor vehicle accidents that would prevent her from working as a waitress. When considering an amount you may think about a calculation that involves an annual loss in the number of working years that she likely has. Remember that you must award a lump sum under this heading. If you do so she will have the money in hand today, so any sum must be discounted for the fact she receives it now rather than in periodic payments over a series of years. You may also think about contingencies that might reduce that amount. On the other hand, had the accident not happened she might have received unpredictable promotions or raises or other forms of good fortune.

[31] The trial judge sought input from counsel with respect to his charge before it was delivered to the jury. Most of the above-quoted passage came from CIVJI's Abbreviated Instructions. At his own instance, the judge suggested to counsel that he include an instruction about the present value of the lump sum award for loss of future earning capacity, and they agreed. The judge again asked for comments from

counsel after he had delivered the charge to the jury. There were submissions with respect to the portion of the charge dealing with cost of future care, but no submissions were made with respect to the above-quoted passage.

[32] On appeal, the defendants say that the charge should have included the following paragraphs from CIVJI's non-abbreviated instruction on loss of future earning capacity:

> 7. Since this is a future loss, neither [the plaintiff] nor [the defendant] is required to satisfy you on a balance of probabilities. You must assess the possibility that a particular event would have occurred or will occur. If you find that it is a real possibility and not merely guesswork, you must express that possibility in your award. The opportunity depends, of course, on [the plaintiff's] chances of getting a job: the less certain (he/she) was of getting a job, the lower the award.
>
> 8. Regarding future loss, if you find that the chances that [the plaintiff] will suffer a particular loss in the future are, say, 10% or 50% or 90%, you must award (him/her) 10% or 50% or 90% of the compensation (he/she) would have been entitled to if it were certain that loss would occur. In this case ... You must also assess the likelihood that [the plaintiff] might lose income due to unemployment in the future unrelated to the (injury/loss). Assess the likelihood that [the plaintiff] would have been unemployed and for what period of time. For example, if you find there was a 10% chance that [the plaintiff] would have been unemployed for three months due to [e.g., a plant closure or child care responsibilities], you must deduct from your award for lost income 10% of the income [the plaintiff] would earn in a three-month period, although you should take into account the fact that [the plaintiff] may well have received unemployment insurance benefits or sickness benefits and therefore would have lost only part of the income.
>
> [Emphasis in original.]

In support of the proposition that there must be more than a "mere possibility" of a future event giving rise to income loss, the defendants cite *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 27, and *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152 at para. 17.

[33] In my opinion, judges should be very cautious in using CIVJI's Abbreviated Instructions. The length of a trial does not necessarily correlate to the complexity of the issues raised in the trial. Even in short trials, judges should review CIVJI's non-abbreviated instructions to ensure their inapplicability before relying entirely on the Abbreviated Instructions.

[34] In this case, it is my view that the judge should have included the above paragraphs 7 and 8 of CIVJI's non-abbreviated instruction (particularly paragraph 7) in his charge. The plaintiff's counsel was asking the jury to make a substantial award for loss of future earning capacity (he mentioned the figure of $250,000 in his closing address). At the time of the trial, the plaintiff's injuries prevented her from performing a second job she had at the time of the first accident. There was some question as to how much longer the plaintiff would have worked at the second job. There were other occupations that were potentially closed to the plaintiff as a result of her injuries. The issues relating to loss of future earning capacity were not sufficiently simple for the abbreviated instruction to be adequate.

[35] Should the non-direction by the judge result in the ordering of a new trial? The fourth of the propositions that I quoted above from *Arland v. Taylor* is that counsel's failure to request the instruction when given an opportunity to do so is an absolute bar to a new trial. I do not consider this Court to have gone that far. In *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513, 38 B.C.L.R. (2d) 1 at 10 (C.A.), Mr. Justice Esson said the following in this regard:

> ... it appears that no objection was taken by counsel for the plaintiff (who was not counsel before us) to the absence of any instruction on the law. In a civil trial, that is a powerful circumstance militating against treating the defect as grounds for setting aside the verdict.

This comment has been referred to with approval in several subsequent decisions: see *Atherton v. Maurice* (1998), 55 B.C.L.R. (3d) 182, 105 B.C.A.C. 198 at para. 18; and *Matich-Robbins v. Roden*, 1999 BCCA 141, 121 B.C.A.C. 142 at para. 7.

[36] The award made by the jury for loss of future earning capacity was in the amount of $150,000. In his closing address to the jury, counsel for the plaintiff submitted there were many jobs that were no longer available to the plaintiff as a result of her permanent partial disability, and he focused on the loss of capacity to have a second part-time job as a server in a restaurant. He submitted that the plaintiff had less capacity to earn income for the remaining 20 to 25 years of her working life and observed that a loss of $10,000 a year for 25 years amounted to

$250,000. It was as a result of this observation that the judge modified his draft charge to include an instruction about the present value of a lump sum award in respect of a future loss.

[37] While the $150,000 award was generous, I do not regard it as a miscarriage of justice. It was open to the jury to conclude that the plaintiff would have worked at a second job as a server for many years if she had not sustained the injuries from the accidents. There was evidence upon which a properly instructed jury, acting judicially, could reasonably have made such an award.

[38] In my opinion, the non-direction did not result in a substantial wrong or miscarriage of justice. I would not order a new trial on the basis of the non-direction.

(c) Improper Comments to the Jury

[39] The opening statement made by the plaintiff's counsel to the jury included the following (with the comments the defendants say are objectionable emphasized by me):

> The statements of defence that were filed on behalf of the defendants say they are not responsible, and this confused and upset Ms. Knauf. … Responsibility was still denied, that is until last Friday, six years after these accidents, when the defendants' lawyer told us that they now admit responsibility; …
>
> Ms. Knauf comes to court to ask you to fix the harm that was done to her on those two days in 2002.
>
> * * *
>
> Ms. Knauf lost her ability to make good money as a waitress and save to buy a home back when prices were still reasonable. These accidents were six years ago and Ms. Knauf had already saved -- and by coincidence the figure is $6,000. She'd already saved that from the time a year before the accident when she started working as a waitress....
>
> Ms. Knauf has not collected any disability benefits or sick benefits or social assistance because of her injuries. She's a worker. She's struggling in an expensive city and wants to work not less but more.
>
> [Emphasis added.]

[40] His closing address included the following (with the similar added emphasis):

> It took six years for the defendants to acknowledge their responsibility for these accidents. We are now here, not for sympathy, but to collect the debt that is owed to Ms. Knauf and the rules require that that debt be paid.
>
> * * *
>
> Ms. Knauf does not stay at home and whine. She has not collected disability benefits; she has not collected welfare; she's not collected employment insurance or any benefits because of her injuries.
>
> * * *
>
> Now, Ms. Knauf has had to deal with other problems, big, difficult problems: the death of her mother; an unrelated knee problem; her marriage. Don't be sidetracked by those issues.
>
> * * *
>
> I said that we're here to collect a debt, a debt that is owed to Ms. Knauf by the defendants. That debt is compensation for the harm and the losses that they caused her. … You're not to consider any outside reasons. The rules don't allow that. You're only to consider the losses and the harms that were suffered by Ms. Knauf, nothing else. If any of you consider any outside reasons, you're breaking the rules and everyone here has to follow the rules.
>
> * * *
>
> You're going to be asked about special damages. That's the money that Ms. Knauf spent on treatment. That's Exhibit 1. It's just under $6,000 and those amounts were not challenged. And it's a coincidence, perhaps a sad coincidence, that the money Ms. Knauf has spent on her own treatment these last six years is about equal to what she had saved up hoping to buy her own home at the time of these accidents.
>
> [Emphasis added.]

[41] I have referred to *Brophy v. Hutchinson* in connection to the test to be applied to consider whether irregular or improper proceedings at trial should result in the ordering of a new trial when no objection was taken by the appellant at trial. One of the improprieties in that case was improper comments made by counsel in the opening statement to the jury. Chief Justice Finch said the following about opening statements:

> [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 ...

Many of these comments also apply to closing addresses to juries. Two other subsequent decisions of this Court dealing with improper comments by counsel are *de Araujo v. Read*, 2004 BCCA 267, 29 B.C.L.R. (4th) 84, and *Giang v. Clayton*, 2005 BCCA 54, 38 B.C.L.R. (4th) 17. I will return to these decisions when discussing the outcome of the appeal.

[42] Some of the comments made by the plaintiff's counsel were irrelevant and appeared to be designed to arouse hostility against the defendants. Others appeared to be designed to appeal to the emotions of the jury or otherwise engender sympathy for the plaintiff. Counsel improperly stated that his client was owed a debt by the defendants. He improperly suggested to the jury members that they would be "sidetracked" or "breaking the rules" if they considered the death of the plaintiff's mother, the injury of her knee or her unsuccessful marriage, all of which were relevant to the state of her health or enjoyment of amenities.

[43] The plaintiff concedes that some of the comments made by her counsel at trial were unfortunate or improper, but says there were no exceptional circumstances warranting interference by this Court in view of the lack of objection by the defendants' counsel. I do not agree. The effect of the improper comments is manifested in the jury's award for non-pecuniary damages, which, as I will discuss under the next heading, was wholly disproportionate and constitutes a substantial wrong.

(d) Excessive Awards

[44] The defendants say the award for non-pecuniary damages was inordinate and the awards for past income loss and loss of future earning capacity were unsupported by the evidence.

[45] I have already stated my conclusion that the award for loss of future earning capacity, while generous, was supported by the evidence. I reach the same

conclusion for the award in respect of loss of past earning capacity. The defendants say that the effect of the improper comments by the plaintiff's counsel is demonstrated by the fact that the jury awarded $90,000 for past income loss when counsel only asked for $50,000 in his closing address. It is inaccurate, in my view, to characterize the submission of the plaintiff's counsel in his closing address as a request for only $50,000. Counsel did mention the figure of $50,000, but he was using "figures in the middle" (one and a half shifts a week at $175 per shift for 48 weeks a year, giving an annual loss of $12,600) which he said produced a loss of "at least" $50,000 in a five-year period. Counsel's multiplication was in error ($12,600 x 5 = $63,000), there was a time period of more than five years between the dates of the accidents and the date of the trial, and the plaintiff's evidence was that she had anticipated earning more tips when she became more experienced.

[46] In support of their contention that the $235,000 award for non-pecuniary damages should be reduced, the defendants cite several decisions where judges awarded between $20,000 and $70,000 in cases of permanent soft tissue injuries. Those decisions are *Perren v. Lalari*, 2008 BCSC 1117 ($50,000); *Aulakh v. Poirier*, 2006 BCSC 2027 ($22,500); *Romanchych v. Vallianatos*, 2009 BCSC 669 ($45,000); and *Kasic v. Leyh*, 2009 BCSC 649 ($70,000). The defendants say that awards in the range of $235,000 are for devastating or catastrophic injuries, which normally include brain injuries.

[47] The defendants say that the $235,000 award should be reduced because it is inordinately high. The "inordinate" standard has long been applied to awards for non-pecuniary damages made by judges sitting without a jury. The recent decision of this Court in *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58, has clarified that a different standard applies to awards made by juries. After reviewing the authorities (including *Nance v. British Columbia Electric Railway*, [1951] A.C. 601, [1951] 3 D.L.R. 705 (P.C.) and *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108), Madam Justice Rowles summarized her conclusions, in part, as follows:

> [126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived

> and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para. 64 and [*Dilello v. Montgomery*, 2005 BCCA 56, 250 D.L.R. (4th) 83] at para. 39, both citing *Nance* at 614).
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> [127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" ([*Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184] at para. 32 citing *Nance* at 614, and referred to with approval in [*Boyd v. Harris*, 2004 BCCA 146, 237 D.L.R. (4th) 193] at paras. 13-14, *White v. Gait* [2004 BCCA 517, 244 D.L.R. (4th) 347] at paras. 10-11, and [*Courdin v. Meyers*, 2005 BCCA 91, 250 D.L.R. (4th) 213] at para. 22; [*Wade v. C.N.R.*, [1978] 1 S.C.R. 1064, 80 D.L.R. (3d) 214] at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or, in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young* at para. 64).
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> [129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: [*Cody v. Leonard* (1995), 15 B.C.L.R. (3d) 117, [1996] 4 W.W.R. 96 (C.A.)] at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

Hence, greater deference is to be given to juries than to judges sitting alone and appellate courts will only interfere with a jury's damage award in rare cases where the award is wholly disproportionate or shockingly unreasonable.

[48] In my opinion, the $235,000 award for non-pecuniary damages is wholly disproportionate. While the upper end of the range for judge-made awards for permanent soft tissue injuries may be somewhat higher than the $70,000 figure suggested by the defendants, the degree of the plaintiff's pain and discomfort cannot be considered to be the most severe in nature. The award is more than three times what I consider would have been an appropriate award for non-pecuniary damages. In my view, the jury's award for non-pecuniary damages was wholly disproportionate, and this is one of those rare cases where interference with the award by an appellate court is warranted.

[49] I am mindful that the jury's award this Court declined to set aside in *Moskaleva v. Laurie* was in the amount of $245,000. While the award in that case was similar to the award in the present case, it is my view that the injuries to the plaintiff in *Moskaleva v. Laurie* were significantly more serious than the plaintiff's injuries here. In addition to chronic pain, the plaintiff in that case suffered a mild traumatic brain injury, post-concussion syndrome, headaches, fatigue, depression and inability to concentrate. Madam Justice Rowles was of the view that it was open to the jury to conclude that the accident had a devastating, if not catastrophic, effect on the plaintiff. While the plaintiff's injuries here are unfortunate, they could not reasonably be classified as devastating or catastrophic.

(e) Appropriate Remedy

[50] The defendants request the setting aside of the jury's awards and the remittal of the actions to the Supreme Court for a new trial. In the alternative, the defendants seek a reduction in the awards for non-pecuniary damages, past income loss and loss of future earning capacity. If the appeal is to be allowed, the position of the plaintiff is that this Court should make an award in substitution of the jury's award. The defendants have not proposed amounts for the reduced awards, while the plaintiff says the substituted award for non-pecuniary damages should be in the amount of $160,000.

[51] The first of the propositions quoted above from *Arland v. Taylor* is that a new trial "should not be ordered unless the interests of justice plainly require that to be done". In *Atherton v. Maurice* at para. 21, Mr. Justice Hinds stated that "[n]ew civil jury trials are to be avoided wherever reasonably possible". It is settled that this Court has the jurisdiction to vary an award made by a jury instead of ordering a new trial: see *Vaillancourt v. Molnar Estate*, 2002 BCCA 685, 8 B.C.L.R. (4th) 260.

[52] As noted above, the decisions of *de Araujo v. Read* and *Giang v. Clayton* also involved improper comments made by counsel to a jury. In *de Araujo*, where the awards were high but "within a range not otherwise subject to variation" (para. 70), a new trial was ordered. In *Giang*, Chief Justice Finch would have dismissed the

appeal and Madam Justice Southin would have reduced the jury's award because it was excessive. While preferring to order a new trial as a result of counsel's improper comments, Thackray J.A. agreed to the reduction of the award proposed by Southin J.A.

[53] In my opinion, the interests of justice do not require a new trial in this case. While the lack of objection by the defendants' counsel does not act as a bar to the allowance of the appeal because the improper comments by the plaintiff's counsel did result in a substantial wrong, it is my view that the lack of objection remains a factor to be taken into account when deciding whether to order a new trial or to make a substituted award. A more forceful argument for a new trial would exist if the defendants had requested a mistrial because, if a mistrial had then been declared by the trial judge, a new trial would have been required.

[54] A new trial should be ordered because credibility is a live issue: see *Banks v. Shrigley*, 2001 BCCA 232, 154 B.C.A.C. 214; and *Toor v. Toor*, 2007 BCCA 354, 245 B.C.A.C. 12. In this case, however, the plaintiff's credibility is not in issue.

[55] Here, counsel for the defendants was apparently content with the way in which the case was left with the jury, and the defendants now seek relief from this Court in view of the magnitude of the jury's award. It is apparent the jury was favourably impressed by the plaintiff, and the defendants should not be given another opportunity to attempt to cast the plaintiff in a less favourable light. I believe relief can be adequately given to the defendants by substituting an award in place of the jury's award.

[56] The jury's awards for past income loss and loss of future earning capacity were supported by the evidence, and I am not persuaded that the improper comments by the plaintiff's counsel influenced these awards. It is the award for non-pecuniary damages that I believe was improperly affected by the comments.

[57] It would not be appropriate, in my view, to substitute an amount at the high end of the range of judge-made awards in respect of injuries of the kind sustained by

the plaintiff. That would have the effect of undermining the greater deference to be afforded to jury awards. Nor do I believe it would be appropriate to make the highest award possible without the award being considered to be wholly disproportionate because that would fail to take counsel's improper comments into account.

[58] Having regard to the greater deference to be given to juries and considering the effect of counsel's improper comments, it is my conclusion that the amount of the substituted award for non-pecuniary damages should be $135,000, representing a reduction of $100,000.

Conclusion

[59] I would allow the appeal on two bases. First, the plaintiff's counsel made improper comments during his opening statement and closing address to the jury and, despite the lack of any objection from the defendants' counsel, this Court should intervene because a substantial wrong was occasioned by the comments. Secondly, the jury's award for non-pecuniary damages was wholly disproportionate.

[60] In the circumstances of this case, I would not order a new trial. I would substitute an award of $135,000 for non-pecuniary damages in place of the jury's award of $235,000.

"The Honourable Mr. Justice Tysoe'

I agree:

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Frankel"