# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cahoon v. Brideaux,*
2010 BCCA 228

Date: 20100511
Docket: CA036035

Between:

**Carol Cahoon**

Appellant
(Plaintiff)

And

**Dwayne David Brideaux and Cynthia Maria Brideaux**

Respondents
(Defendants)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, March 28, 2008
(*Cahoon v. Brideaux*, Victoria Docket No. 05 1188)

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| Counsel for the Appellant: | R. Gibbens |
| Counsel for the Respondents: | M. Virgin and S. Hoyer |
| Place and Date of Hearing: | Victoria, British Columbia<br>December 10 and 11, 2009 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>May 11, 2010 |

**Written Reasons by:**
The Honourable Mr. Justice Smith

**Concurred in by:**
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Groberman

**Reasons for Judgment of the Honourable Mr. Justice Smith:**

## Introduction

[1] This appeal reprises a theme heard in civil appeals in this Court with increasing frequency, it seems, in recent years – a gullible jury, beguiled by counsel's improper tactics and inflammatory rhetoric, returned a perverse award of damages.

[2] That a jury might be improperly influenced by the words and tactics of counsel is no doubt possible: see, for example, *Brophy v. Hutchinson*, 2003 BCCA 21, 9 B.C.L.R. (4th) 46 [*Brophy*]; *de Araujo v. Read*, 2004 BCCA 267, 29 B.C.L.R. (4th) 84; *Knauf v. Chao*, 2009 BCCA 605, 100 B.C.L.R. (4th) 76. But it must be rare in modern times that counsels' words and actions alone could hoodwink eight citizens chosen at random and properly instructed in the law and so divert them from the due discharge of their duty. The average citizen is neither stupid nor naive. Rather, as McIntyre J. said, writing for the majority in *R. v. Mezzo*, [1986] 1 S.C.R. 802 at 845,

> ... There may have been a time when a paternalistic approach to unsophisticated jurors was justified. That time is now past and modern jurors represent a well-educated, well-informed and experienced cross-section of our society.

To the same effect, Cory J., writing for the majority in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at 761, said, "Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner", and McLachlin J. (now C.J.C.) writing in dissent in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 31 reiterated, "Jurors today are far more sophisticated and better educated than in the past."

[3] To be sure, these remarks were made about criminal juries, but juries in criminal and civil trials are chosen from the same community and our confidence that properly instructed juries can and will adhere faithfully to their oath to "well and truly

try the case and a true verdict give according to the evidence" applies across the board: see *Hovianseian v. Hovianseian*, 2005 BCCA 61at para. 25.

[4] Since jurors are chosen from all walks of life, juries collectively possess a broad range of education and life experiences. The level of formal education of jurors will range from elementary school to post-graduate university degrees, but education is not the primary attribute of a competent juror. Juries are judges of the facts and the ability to find facts rests less heavily on erudition than it does on sophistication acquired through experience in the affairs of life, experience that is possessed eightfold by civil juries. It follows that the collective ability of juries to understand things, to evaluate motives, to analyze probabilities, to determine what is in harmony with human experience, and to reason from evidence to fact and from fact to rational inference must be, with rare exception, at least equal to that of any single individual. It follows as well that juries will generally recognize misrepresentations of the evidence, that they will be offended by unfairness and by submissions that insult their intelligence, and that they will not be moved by sophistry or by appeals to cheap sentimentalism, prejudice, or base motives. As Riddell J.A. aptly said almost a century ago, in *Dale v. Toronto R. Co.* (1915), 24 D.L.R. 416 at 417 (Ont. C.A.),

> ... jurymen are not the compounds of ignorance, weakness and prejudice they are sometimes supposed to be; and in many cases in my own observation, I am confident that unfair argument and "mud-slinging" hurt rather than helped those who indulged in them.

[5] Carol Cahoon, the plaintiff below and the appellant in this Court, would have us conclude that the jury in this case was atypical – that it was so influenced by defence counsel's improprieties that she was denied a fair trial. She appeals from a judgment dated March 10, 2008 awarding her damages for personal injuries and related losses she suffered as a result of a motor vehicle collision in Victoria, British Columbia on September 29, 2003. Liability was admitted by the respondents and damages were assessed by a jury following a 25-day trial in the Supreme Court of British Columbia at Victoria, the Honourable Mr. Justice Johnston presiding.

[6] Mrs. Cahoon claimed damages in excess of $1.3 million. She asked the jury for a substantial award of non-pecuniary damages for pain, suffering, and loss of enjoyment of life and presented evidence in support of claims of $82,532.01 for special damages, $185,900.00 for past lost income, $248,353.00 for loss of earning capacity, and $791,500.00 for cost of future care, including the cost of providing palliative care for her terminally-ill husband, whose life-expectancy was estimated to be from two to four years.

[7] However, the jury did not accept her claims. Rather, it returned a verdict that was incorporated in the formal judgment of the court as follows:

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|---|---|
| Non-pecuniary Damages: | $8,900 |
| Special Damages: | $1,900 |
| Past Loss of Income: | $12,100 |
| Loss of Capacity to Earn Future Income: | $0 |
| Cost of Future Care: Amount assessed with the exception of prescription drugs or chiropractic care | $8,900 |
| Cost of Future Care: Amount assessed for prescription drugs | $1,700 |
| Cost of Future Care: Amount assessed for chiropractic care | $0 |
| Damages to compensate for the Plaintiff's anticipated inability to take care of her husband during his palliation | $1,100 |
| TOTAL: | $34,600 |

[8] Mrs. Cahoon asks this Court to set aside the judgment and to order a new trial on the following grounds:

1. She was deprived of a fair trial because:

   a) Defence counsel prejudiced the jury against her by employing the following improper tactics:

      (i) Defence counsel unfairly surprised her during cross-examination by using a document, a photocopy of her mortgage

on her home, that had not been properly described in advance in the respondents' list of documents (she describes this as "trial by ambush");

(ii) Defence counsel misled the jury about how they should assess her credibility;

(iii) Defence counsel improperly asked the jury to draw an adverse inference against her for her failure to call her treating physicians to testify.

b) Defence counsel made inflammatory and improper remarks that prejudiced the jury against her by suggesting, without any adequate evidentiary basis, that

(i) she was faking her injuries,

(ii) she was presenting a dishonest claim, and

(iii) one of her witnesses was complicit in this scheme.

c) The trial judge erred in his instructions to the jury concerning the use they could make of evidence that the motor vehicles involved in the collision suffered only minimal damage.

2. The jury's award was internally inconsistent.

3. The jury's award of non-pecuniary damages was wholly out of proportion to the injuries she suffered.

[9] For the following reasons, I have concluded that none of the grounds of appeal has been made out and I would dismiss the appeal.

**Background**

[10] Mrs. Cahoon was 55 years of age at the time of the collision and 59 years old when her action came to trial in March 2008. She was trained as a practical nurse and was employed as a first-aid examiner with the Workers' Compensation Board for several years. Concurrently, she worked for a private firm doing practical nursing work. After upgrading her qualifications, she obtained full-fledged status as a licenced practical nurse in 2000. In late 2001, she took part-time nursing employment at a residential care home while continuing her work with the WCB. In August 2002, she left the WCB when her position became redundant and began full-time work at the home. She partially mitigated her resulting reduction in income by invigilating first-aid examinations in her off-hours under the business name CHC Enterprizes.

[11] In June 2003, Mrs. Cahoon suffered a shoulder injury while working at the care home and was disabled from her job. However, she continued with her part-time business while she was recuperating. Before she was fit to return to work at the home, she was involved in the automobile collision that resulted in these proceedings.

[12] The collision was a minor "rear-ender". It caused minimal damage to the vehicles involved. Immediately before it occurred, Mrs. Cahoon was stopped in a line of vehicles at a red light at an intersection in Victoria. When the light changed to green, the respondent Cynthia May Brideaux, who was operating the vehicle stopped immediately behind Mrs. Cahoon, negligently moved forward into the rear of Mrs. Cahoon's vehicle and knocked it into the vehicle stopped ahead of her which, in turn, bumped the next vehicle in the line.

[13] Mrs. Cahoon claimed she suffered serious and debilitating injuries. She claimed the collision aggravated her work-related shoulder injury and caused her a neck and upper back injury, a lower back injury, and related bowel and bladder disorders. She claimed the low-back injury and related conditions caused her intense pain and suffering and permanently altered virtually every aspect of her activities – her recreation, her marital relations, her social interactions, her ability to

work and earn a living, her normal household chores, her ability to care for her husband, and her enjoyment of life generally. She said her shoulder injury had almost recovered at the time of the collision and that, but for its aggravation and the other injuries she suffered, she would have been able to return to full-time work at the residential care home. She said her invigilation business was growing and that she would have continued with it and with full-time employment in practical nursing as well until age 65. She claimed she required extensive renovations to her home to accommodate her condition and that she would require ongoing care for the rest of her life.

[14] The respondents' position at trial was that Mrs. Cahoon was not a reliable or credible witness and that she was exaggerating her claim. They said the weight of the opinions of her expert medical witnesses was diminished by their heavy reliance on her complaints of pain and disability. They did not seriously contest that Mrs. Cahoon suffered soft-tissue neck and upper back injury, although they questioned its severity. As well, they argued that the diagnoses of low-back injury and related bowel and bladder conditions were not supported by any objective evidence and, in any event, these conditions had not been shown to have been caused by their negligence. Moreover, they said, even if it could be accepted that the collision caused some low back pain, Mrs. Cahoon's claims of disability were disproportionate and beyond reason since the force of the collision was so insignificant that it was unlikely to have caused the injuries she attributed to it. Further, they contended that, contrary to her testimony she intended to continue to work until age 65, she had been planning before the collision to retire and had already embarked on a retirement path. In any event, they said, if she was completely disabled from working after the collision her total disability arose from her work-related shoulder injury and lasted only until 2005, when her shoulder injury was surgically repaired. Thereafter, they said, she continued to suffer residual impairment from that injury that prevented her from working as a licenced practical nurse. They argued she was capable of full-time work in some capacity, however, and that she had made no effort to return to the work force. They submitted she was

minimizing her functional capacity for work and for homemaking in order to enhance her claim for damages.

## Discussion



[15] It must be noted that Mrs. Cahoon's counsel (who is not counsel on the appeal) did not object at the trial to any of the tactics or remarks of defence counsel of which Mrs. Cahoon now complains, that she collaborated with defence counsel and the trial judge in the preparation of the judge's charge to the jury, and that she made no objection to the judge's instructions to the jury and did not ask him to redirect the jury on any point. Counsel's inaction when timely intervention would have permitted corrective steps to be taken by the trial judge, who was best situated to deal with any perceived injustice, would, in the absence of exceptional circumstances, support an assumption that these matters "could not have been seriously misleading or unfair and there would be no reason for suspecting injustice": *Brophy* at paras. 52-54. There are no exceptional circumstances here but I will nevertheless discuss the submissions made on Mrs. Cahoon's behalf and explain why, in my view, no injustice occurred in this case.

### 1. Fair Trial

[16] Mrs. Cahoon's complaints about the conduct of defence counsel should be considered in the context of the duties of counsel and the skills and techniques employed by competent advocates to discharge those duties.

[17] The *Canadian Bar Association Code of Professional Conduct*, (Ottawa: The Canadian Bar Association, 2009) online only: <http://www.cba.org/CBA/activities/code/> states, at 61, that a lawyer must represent the client "resolutely, honourably, and within the limits of the law" and adds,

> The advocate's duty to the client is [*sic*] "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" must always be discharged by fair and honourable means, without

> illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.
>
> [Internal citations omitted.]

[18] Thus, counsel should ask every question she thinks will help her client's case and make every argument in her client's favour that is legitimately open on the evidence. In contrast to an opening statement, which should be purely informational, a closing jury submission is argument (see *Brophy*, para. 41) and the object of argument is persuasion. Thus, counsel should state her client's positions as forcefully as the evidence reasonably permits and without fear of offending the sensibilities of witnesses and other parties. Drama and pathos are permissible, though their use may be risky before modern sophisticated juries who may resent theatrical attempts to divert them from a reasoned analysis. Competent counsel will marshal the evidence in as favourable a light as possible for her client, analyze the evidence, relate the evidence to the law, and suggest inferences while leaving it to the jury to draw the desired inferences. She will not make irrelevant and prejudicial appeals designed to provoke hostility to or prejudice the jury against her opponent: see, generally, "Closing Arguments" in Thomas A. Mauet, Donald G. Casswell, & Gordon P. Macdonald, *Fundamentals of Trial Techniques*, 2nd Canadian ed. (Toronto: Little, Brown & Company (Canada) Limited, 1995) and "Summation Before A Jury" in R. Roy McMurtry, *Days in Court*, (Toronto: The Carswell Company Limited, 1958).

[19] In my view, the conduct of defence counsel in this case was comfortably within the limits of responsible and effective advocacy.

### (a) Improper Tactics

#### (i) "Trial by Ambush"

[20] Mrs. Cahoon submits the respondents improperly used a photocopy of a mortgage she granted on her home to cross-examine her and that this operated to her prejudice since the cross-examination took her by surprise and her spontaneous

answers reflected unfairly on her credibility. This contention arises from the following circumstances.

[21] After the trial had begun, but before Mrs. Cahoon began her testimony, defence counsel requisitioned a title search of the home owned by Mrs. Cahoon and her husband. As a result, counsel received photocopies of several documents obtained from the Land Title Office, including a photocopy of a mortgage in favour of a credit union to secure the principal amount of $800,000 at prime plus 5% interest that had been executed by Mrs. Cahoon and her husband and registered as a charge against their title in November 2007, about three months before the trial. Defence counsel prepared a supplemental list of documents in which she claimed litigation privilege for these photocopies and described them by letters and numbers, giving no indication of their nature. She delivered the supplemental list to Mrs. Cahoon's counsel on the first day of Mrs. Cahoon's testimony in chief.

[22] Later that week, during cross-examination of Mrs. Cahoon as to whether she had failed to reasonably mitigate her losses, defence counsel brought out that, although Mrs. Cahoon had testified that she could not afford to purchase a treadmill that had been recommended by her rehabilitation expert to facilitate her recovery, she and her husband had used about $50,000 obtained from selling their old travel trailer and from cashing two whole-life insurance policies to pay for improvements to their home and to repay the principal outstanding on their mortgage.

[23] Later in the cross-examination, defence counsel drew on her knowledge of the terms of Mrs. Cahoon's mortgage as the impetus for her questions in the following exchange:

> Q Now, you and Mr. Cahoon managed to pay off the mortgage on your home by the end of March of 2007. You're free and clear mortgage-wise, correct?
>
> A Yes and no. The mortgage was clear, but there was money on the Visas.
>
> Q Okay. But at least in terms of having a mortgage on your property over at 860 Clairmont --
>
> A It was clear, yes.

Q -- it was clear title. So I understand that you and Mr. Cahoon took out an $800,000 mortgage on your house as of November, 2007.

A No, I never took out an $800,000 mortgage on the house.

Q At prime plus five percent?

A I do not have an $800,000 mortgage.

[24] At that point Mrs. Cahoon's counsel interrupted and advised the trial judge that she had just been handed a document that had not been listed. Defence counsel responded, "It is listed". Without further ado, the trial judge announced that proceedings were adjourned until the following morning. It must be noted that defence counsel had not yet shown the document to Mrs. Cahoon.

[25] The next morning, the following colloquy occurred in the absence of the jury:

MS. YOUNG [Defence counsel]: And just to clarify, My Lord, my friend's not taking an issue with respect to the document they referred the plaintiff to yesterday, as I understand her position.

MS. ACHESON [Mrs. Cahoon's counsel]: Correct. She signed. So --

THE COURT: Which one is that?

MS. ACHESON: The mortgage document.

THE COURT: Oh, I see.

MS. ACHESON: So she has signed a mortgage, so if my friend -- if that's an area -- I'm not taking issue to the document. There's some argument about the relevance --

THE COURT: Yes.

MS. ACHESON: -- but we'll deal with that later.

THE COURT: All right.

[26] Then, cross-examination before the jury resumed:

Q All right. Mrs. Cahoon, when we broke off yesterday afternoon, we were discussing the issue of a mortgage on your property at 860 Claremont Avenue. And I'm going to suggest to you, Mrs. Cahoon, that on the 27th of November, 2007 you and Mr. Cahoon arranged for a mortgage in the amount of $800,000 which was registered against your property, isn't that true?

A No, that's not true.

Q And --

A Not for $800,000, no.

[27] At this point, defence counsel showed the copy of the mortgage to Mrs. Cahoon, who then admitted she had signed the mortgage but explained that the principal amount was a mistake, that the mortgage was to secure a line of credit for only $180,000. After cross-examining briefly on this answer, defence counsel continued:

> Q All right, Mrs. Cahoon. So your evidence is that you didn't sign an $800,000 line of credit/ mortgage?
>
> A That's correct.
>
> Q Notwithstanding that this document, which is publicly -- did you -- did you know that documents at the land title office are publicly available?
>
> A Yes, I did. But I have never -- I don't have the $800,000. So I'd like to talk to my lawyer about this.
>
> Q I see. All right. So you're saying that as of November 2007, in fact, it's not 800,000 but a $180,000 --
>
> A It's a --
>
> Q -- line of credit?
>
> A -- line of credit. Yes.
>
> Q And I'm going to suggest to you, Mrs. Cahoon, that the purpose of a line of credit for you and your husband is that you have other plans in terms of starting out with some sort of business after this lawsuit is over, isn't that true?
>
> A No, that's not true.
>
> MS. YOUNG: My Lord, I wonder if this might be marked for identification at this time.

[28] The trial judge marked the mortgage photocopy for identification and, following a brief but abortive attempt to cross-examine on the interest rate agreed upon, defence counsel left this subject and went on to cross-examine Mrs. Cahoon on other matters.

[29] Mrs. Cahoon's counsel returned to the mortgage in re-examination of her client. She began as follows:

> MS. ACHESON: I am proposing to show this witness now a line of credit which is under the mortgage that she's been asked about and to ask questions about the full extent of the line of credit, why it was taken out and how much is currently taken out. And I say all of that is fair ground for me to cover in the limited scope of re-examination because

> my friend has put forward the umbrella mortgage without the relevant documentation that lies underneath it.

[30] Defence counsel objected that this evidence was collateral and irrelevant but, after the trial judge stated he would permit it to be led, defence counsel withdrew her objection. Accordingly, Mrs. Cahoon's counsel had Mrs. Cahoon identify the line-of-credit agreement, which was in the amount of $180,000, and had her explain that she and her husband had drawn only $140,000 or $145,000, that the purpose of the line of credit was to refinance their debts, and that they had used the money to pay for renovations to their home, to pay credit card balances, and to pay for the purchase of their new trailer. Then, Mrs. Cahoon's counsel had the line-of-credit agreement and the photocopy of the mortgage marked in evidence as exhibits.

[31] Mrs. Cahoon's counsel subsequently called the solicitor who acted for the credit union in the transaction. He testified that it was the policy of the credit union to "overwrite" such mortgages without regard to the value of the mortgaged property, that is, to secure the line of credit with a mortgage in a greater amount so as to facilitate possible future extensions of the line of credit. Thus, in this case, he said, although the maximum available on the line of credit was $180,000, and although the Cahoons' property was worth much less than $800,000, the line of credit was secured by a mortgage for $800,000. He said he explained these things to Mr. and Mrs. Cahoon when they attended at his office and signed the documents. He also said he was not involved in the application for the line of credit.

[32] In addressing the jury, defence counsel referred to several matters that she suggested reflected adversely on Mrs. Cahoon's credibility, including the mortgage. In this respect, she said,

> The mortgage. She said a lot of -- you know, certain treatments she couldn't afford, there was certain adaptive equipment that she couldn't get into her house because they couldn't afford it, and yet she was free and clear on her mortgage by last year, notwithstanding the fact she's been off work for nearly four and a half years from her job as an LPN. She went out with her husband and they bought a brand new 23 foot trailer, and then there's this curious $800,000 charge on their property. We don't really know what that is about.

> We know that she apparently has a $180,000 line of credit. Mr. Clapp, the lawyer who came and gave evidence, he fairly conceded that he didn't know what the underlying arrangements were for Mr. and Mrs. Cahoon and their bank, or what their credit facility actually was, all he knew was that to date this is what had been advanced. It's very curious as well.

[33] In reply, Mrs. Cahoon's counsel (her junior counsel addressed the jury) said,

> So she [defence counsel] says, why not call somebody from the bank to explain the transaction in relation to the $800,000 charge against the property? [Defence counsel did not say this to the jury.] Well, we called the lawyer because he's the one that dealt personally and registered that document and he says he does it on a regular basis and it's just the way the bank does business. He says there's a $180,000 maximum line of credit relating to consolidation of debt. If they think there's something sinister, which clearly they do, they theorized about some scheme to start a business with $800,000 and carry on after this trial. Well, they can subpoena the bank manager, have that bank manager bring all the documents in and we can go through them. You would think if they were going to advance that theory they might have taken that step.

[34] Mrs. Cahoon submits that the respondents did not make discovery of the photocopy of the mortgage or produce it for inspection and copying and that defence counsel's use of the document to cross-examine her without leave of the trial judge was improper and contrary to Rule 26 of the *Rules of Court*, B.C. Reg. 221/90, which provides,

> (14) Unless the court otherwise orders, where a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

[35] She submits first that the photocopy was not a privileged document and that it should have been listed and produced to her for inspection. In support of this submission, she relies on *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) at 335, where the court preferred the reasoning of Craig J.A. in dissent in *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at 144-48 (C.A.) [*Hodgkinson*], to the effect that copies of original documents which were not prepared for the dominant purpose of actual or anticipated litigation do not become privileged simply because counsel makes photocopies of them for his litigation brief.

However, the majority judgment in *Hodgkinson* is the applicable authority in this province. There, McEachern C.J.B.C. said, at 142,

> ... where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of ... conducting ... litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

As I read *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at para. 64 [*Blank*], the court considered this passage to be generally consistent with the purpose for which the litigation privilege is granted, which is "the need for a protected area to facilitate the investigation and preparation of a case for trial by the adversarial advocate": R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984) at 165 (cited in *Blank* at paras. 28, 40).

[36] I would reject the submission that the photocopy of the mortgage was not privileged. In my view, it was the sort of document described by McEachern C.J.B.C. in *Hodgkinson* and it was privileged as part of the litigation brief of defence counsel.

[37] Next, Mrs. Cahoon says, if the mortgage copy was privileged, the respondents were nevertheless precluded from using it to cross-examine her because their description of the nature of the document in their document list did not comply with Rule 26(2.1), which states,

> (2.1) The nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege.

[38] Mrs. Cahoon relies on *Stone v. Ellerman*, 2009 BCCA 294, 92 B.C.L.R. (4th) 203 [*Stone*] leave to appeal ref'd. [2009] S.C.C.A. No. 364, in support of this submission. In *Stone*, a negligence case arising out of a motor vehicle accident, the plaintiff had been requested by her lawyer early in his retainer to record the symptoms and effects of her injuries for him in a "pain diary". It was not disputed

that the pain diary was subject to the litigation privilege. At trial, the plaintiff was unable to give her evidence fully without refreshing her recollection from these notes. Defence counsel objected that plaintiff's counsel had not complied with Rule 26(2.1) but the trial judge permitted the plaintiff to use her notes to refresh her recollection. This Court ordered a new trial, holding that the trial judge erred because the plaintiff had not described the diary in the privileged-documents section of her document list in a manner compliant with Rule 26(2.1) and had not given a reasonable explanation for her failure to do so, and because the defendant was thereby prejudiced by the loss of an opportunity to assess the validity of the claim for privilege and perhaps to approach settlement negotiations and preparation for trial in a different way.



[39] However, in this case, no similar prejudice resulted from the failure of the respondents to describe the mortgage copy in compliance with Rule 26(2.1) since the trial was already underway when the document came into existence and into the possession of defence counsel. Moreover, in contrast to *Stone*, the information in the copy document was known to Mrs. Cahoon – the original mortgage was her own document. In the context of this discussion, the photocopy was evidence of an inconsistent out-of-court statement made in writing by Mrs. Cahoon before the trial. I do not understand *Stone* to stand for the proposition that cross-examining counsel's possession of such evidence must be disclosed to the witness before cross-examination on the statement will be permitted or, to frame the proposition as Mrs. Cahoon frames it, that to permit cross-examining counsel to surprise a witness with such a statement is improper "trial by ambush". Such a rule would insulate witnesses against the effects of cross-examination on prior inconsistent statements and would undermine the search for truth in the litigation. As well, it would be contrary to the purpose identified in *Blank* for which litigation privilege is granted.

[40] In summary, Mrs. Cahoon made false statements (that her home was "clear title" and that she had no mortgage on it, let alone one for $800,000) and defence counsel confronted her with the copy of the mortgage and demonstrated the falsity of her earlier answers. Mrs. Cahoon gave an innocent explanation for her false

answers – she said she had been mistaken – and she amplified her explanation in re-examination. Her counsel called further evidence from the credit union's solicitor to explain the transaction and to support Mrs. Cahoon's explanation of her inconsistent answers. Counsel for both parties addressed the jury as to the weight and significance they should attach to this evidence.

[41] All of this was relevant to Mrs. Cahoon's credibility, which was a central issue in the case. There was nothing improper or unfair in the way in which defence counsel dealt with this evidence at trial and I would reject this ground of appeal.



### (ii) Misleading the Jury on Credibility

[42] Mrs. Cahoon contends defence counsel's submission invited the jury to conclude that they could use the absence of objective signs of injury as a reason not to believe her subjective complaints of injury and that this prejudiced her by misleading the jury as to the proper way to assess her credibility. She refers to the following passage:

> Now, why can't we accept the plaintiff's evidence? In my submission there are quite a number of reasons why we can't. Overwhelmingly, the medical doctors agreed in cross-examination or direct examination that there were no real objective signs of injury. All of them based their opinions, quite properly, because they're not the triers of fact, you're the triers of fact, you're the ones who get to decide what's real or not real, they all base it on what she tells them, subjective signs, subjective symptoms.

[43] Defence counsel's submission continued,

> That's how doctors do their work. So for the plaintiff's counsel to say, well, it's been proven these doctors say these things, well they say it based on what Mrs. Cahoon has told them in the interviews.

[44] These remarks were not directed to Mrs. Cahoon's credibility but rather to the weight of the expert medical opinions on which Mrs. Cahoon relied and the jury would surely have understood them as such. In any event, the trial judge properly instructed the jury on how they should approach the assessment of testimonial credibility and the reliability of expert opinion evidence and his instructions would

have dispelled any misapprehension the jury might have been under in this regard. In my view, there is no merit in this ground of appeal and I would reject it.

### (iii) Adverse Inference

[45] With the exception of her family physician, Mrs. Cahoon did not call her treating medical doctors to testify. Rather, she relied on expert medical witnesses retained for the purpose of presenting her case. Defence counsel asked the trial judge to direct the jury that they could draw an adverse inference against Mrs. Cahoon for her failure to call her treating physicians, that is, that she did not call them because they would not have supported her case. During defence counsel's submission on this request, the trial judge noted that the clinical records kept by Mrs. Cahoon's family physician had been marked in evidence; that they contained consultation letters from the treating doctors who were not called; and that he had acceded to defence counsel's objection that the respondents had not been given proper notice that Mrs. Cahoon intended to use the consultation letters as expert opinion evidence in the trial and had instructed the jury they could not consider the opinions contained in those consultation letters. Then, the following occurred:

> THE COURT: ... the medical adverse inferences are the ones I've got problems with, given that the jury is sitting there, capable of reading the consultation letters of all of these witnesses, being told by me how many times you can't take that as the opinion. And then I'm to tell them that not only can you not take that as an opinion for or against Mrs. Cahoon, but you can use it against her.
>
> MR. VIRGIN: It can be suggested by argument, My Lord, that --
>
> THE COURT: Well you can argue whatever you like there --
>
> MR. VIRGIN: Yeah.
>
> THE COURT: -- but I mean to invite me to instruct them that an adverse inference can be drawn is -- I need to be pushed a bit harder on that one because I'm pretty reluctant to go there.

[46] Subsequently, defence counsel addressed the jury as follows:

> Another question that really comes to mind though when we look back over the last four weeks is, who did we not hear from? Ask yourself this. Why is it that the vast majority of the witnesses that were put forward on

> behalf of the plaintiff were these paid experts? It wasn't really the treating people at all.
>
> We did hear from Dr. Duvenage, the GP, but interestingly, who did we not hear from? We didn't hear from, firstly, treating neurologist, Dr. Parton. We didn't hear from the treating neurosurgeon, Dr. Stuart Cameron. We didn't hear from Dr. Steinhoff, who was the treating urologist. We didn't hear from Dr. Holland, who was the treating gastroenterologist. We didn't hear from the people who were treating the plaintiff's shoulder before the car accident.
>
> Ask yourself why it is the plaintiff hasn't called these people to give evidence on her behalf.

[47] Mrs. Cahoon contends the effect of the trial judge's remarks in his colloquy with Mr. Virgin quoted above is that he "ruled" that the jury could not be asked to draw an inference against Mrs. Cahoon from her failure to call her treating physicians to testify. In the face of that ruling, she says, defence counsel deliberately and for tactical advantage "went against" what the trial judge had said and invited the jury to weigh this failure against her. She says this made the trial unfair and that the unfairness was compounded by the failure of the trial judge to instruct the jury that defence counsel was wrong to invite them to draw an adverse inference.

[48] However, the trial judge made no such ruling. He simply refused defence counsel's request that he tell the jury that an adverse inference was open to them. He also told defence counsel, correctly in my view, that counsel could "argue whatever you like there". As was said in *Vieczorek v. Piersma* (1987), 36 D.L.R. (4th) 136 at 140-41(Ont. C.A.):

> ... It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [the plaintiffs] was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by any trier of fact. There are no authorities which cast any doubt upon the proposition.

[49] Thus, whether or not the trial judge told the jury an adverse inference was open, defence counsel was entitled to invite the jury to draw such an inference. Indeed, it was counsel's duty to the respondents to make every argument fairly open

on the evidence to advance their case. There was nothing unfair or improper in what defence counsel said on this topic.

[50] In any event, defence counsel's suggestion could have had no effect on the outcome since the trial judge instructed the jury not to draw an adverse inference. He said,

> Let me go back to adverse inference. In this case you should not draw an inference adverse to Mrs. Cahoon because she did not lead opinions from Dr. Parton, Dr. Stuart Cameron, Dr. Holland or Dr. Steinhoff. Mrs. Cahoon has produced their consultation letters. They are found in Dr. Duvenage's clinical records, and I am going to have, I am afraid, quite a bit more to say about what use you can make of some of those documents, but for the purpose of this adverse inference instruction what I say to you is that although Mrs. Cahoon cannot rely upon those opinions to prove her injury, she should not be subjected to an adverse inference for failing to produce those opinions or to produce those positions. They are there. They are there for limited purposes, but it would be, in my submission to you, inappropriate for you to draw the adverse inference from the failure to produce evidence from those doctors. You have got those consultation records, albeit for a limited purpose.

[51] Accordingly, this instruction would have counteracted defence counsel's impugned remarks. I would reject this ground of appeal.

**(b) Inflammatory and Improper Remarks**

**(i) Faking injury**

[52] In her submissions to the jury, defence counsel said,

> The bowel and bladder symptoms. They are very curious. They are very unusual. Her story seems to change if you actually look at what she says over time. As I said to you earlier, she said it started the day of the accident. She's a sophisticated, medically sophisticated person. Remember, she's a paralegal -- pardon me, paramedic, she's an LPN, she's an occupational First Aid attendant, this is not your average citizen. She knows more medically than your typical person. She's spent years probably assessing people in acute distress.
>
> I suggest that if she had the kind of symptoms she had, those would have been reported to her doctor a lot earlier. They don't show up in Dr. Duvenage's records until sometime in November. It's weeks and weeks after the car accident.

[53] Mrs. Cahoon does not submit that there was any factual inaccuracy in these remarks by defence counsel. Rather, she contends there was no evidentiary support for the argument, which unfairly inflamed the jury against her by inviting them to conclude she exaggerated her injuries. She says this invitation was directly contrary to the evidence of "their own doctor", Dr. Regan, an orthopaedic surgeon, who examined Mrs. Cahoon on August 24, 2007 at the behest of the respondents to investigate her complaints of intense low-back pain accompanied by bowel and bladder dysfunction.

[54] Mrs. Cahoon relies for this submission on two sentences in Dr. Regan's comprehensive medical-legal report in which he stated, under the heading "Physical Examination",

> On clinical examination, she was noted to be straight forward in her affect. There was no exaggerated pain behaviour noted.

[55] That Mrs. Cahoon did not display an exaggerated pain response on examination at that particular time is a slim reed on which to base the contention that the respondents' suggestion that Mrs. Cahoon was exaggerating her injuries was contrary to the medical evidence. In opining that Mrs. Cahoon's low-back pain was attributable to the collision, Dr. Regan relied largely on the history given by Mrs. Cahoon and noted that there was little objective evidence to support her complaints. He said,

> In review of the exhaustive amounts of information presented and her own history it is clear that her back pain is the result of her September 29, 2003 motor vehicle accident. It is a problem with subjective complaints but very few objective physical findings. She does have some right-sided lumbar paraspinal muscle pain and objective decrease in lumbar spinal movement. That is essentially the only physical findings that are noted. ....

[56] As for her complaint of bowel and bladder dysfunction, Dr. Regan said,

> She has been thoroughly worked up and there is no objective evidence of either bowel or bladder abnormality that is related to her back pain. There is no evidence on imaging studies of a cauda equina lesion to explain her symptoms. There is no organic pathology that can be directly related to her persistent symptoms of bowel and bladder dysfunction.

> Although her symptoms appear to be tied to her back pain, there is no objective evidence. I can not reach a conclusion that her bowel or bladder difficulties are in any way related to organic pathology and would agree that they are likely functional in nature as noted by Dr. P.J. Pommerville.

[57] He added that Mrs. Cahoon was "somewhat fixated" on the connection between her back pain and her bowel and bladder difficulties and that it was important that she "move on from this particular syndrome that defies diagnosis and subsequent definitive management".

[58] Dr. Pommerville, a urologist, was engaged by the respondents to examine Mrs. Cahoon for the purpose of evaluating her claim of bladder dysfunction. Dr. Pommerville said his examination "suggests that this lady has overactive bladder syndrome and may have uninhibited bladder activitiy." He recommended further evaluation and follow-up. He attributed Mrs. Cahoon's inability to work to "chronic pain in the region of the thoracic lumbar spine, and pre-existing shoulder injury which does not allow her to move patients or lift heavy objects". With respect to her claim she suffered bowel and bladder injury as a result of the collision, he said,

> In my opinion, I do not feel that her bladder and bowel dysfunction is associated directly to the motor vehicle accident but rather co-incident to the fact that she had an injury that may have aggravated her bladder function. There does not appear to be a cause – effect relationship between the accident and her bladder dysfunction, as indicated by normal CT scan and MRI of the lumbar sacral spine. I agree that Ms. Cahoon is restricted because of lower pain and discomfort involving the lower back area, but her bladder dysfunction, I do not feel is associated with any neurological injury directly related to this motor vehicle accident.

[59] This evidence was capable of supporting an inference that Mrs. Cahoon's claims of shoulder, low-back, and bowel and bladder injury were not related to the collision. As well, there was considerable other evidence from which, depending on how they viewed it, the jury could have inferred that Mrs. Cahoon was exaggerating her claim.

[60] In the circumstances, defence counsel's suggestion that Mrs. Cahoon was presenting an exaggerated claim was in keeping with the respondents' theory of the case and had potential support in the evidence. The impugned remarks were an

appeal to reason, not an invitation to decide the case on the basis of irrelevancies. They were not calculated to arouse the jury's passions against Mrs. Cahoon so as to distract them from the proper performance of their duty. In my view, the remarks were not inflammatory and they caused no unfair prejudice to Mrs. Cahoon. I would reject this ground of appeal.



### (ii) Dishonest Claim

[61] Mrs. Cahoon submits, as set out in her factum, "Counsel for the Defendant asserted that Mrs. Cahoon committed forgery in that [she] fraudulently went back after the fact and wrote a number of cheques to her husband for driving services to somehow bolster her claim. She then mischaracterized the evidence during both cross-examination and the final submissions as two chequebooks with the same number sequence, even though Mrs. Cahoon testified that she had two different chequebooks." This submission arises from the following circumstances.

[62] In support of her claim for special damages Mrs. Cahoon marked in evidence a book made up of schedules of itemized expenses she said resulted from her injuries. The schedules were backed up by copies of receipts and other relevant documentation. Included was a claim for "Driver Services for Business re: doctors' appointments" in the amount of $9,774.32 (later reduced to $8,700). The claim was in the form of a schedule that listed twelve payments on various dates from April 29, 2004 to May 31, 2006 in amounts ranging from $250 to $1,000. Attached to the schedule were copies of non-negotiable duplicate cheques in amounts corresponding to the itemized claim, all drawn on an account in the name of CHC Enterprizes, Mrs. Cahoon's business account. All were made payable to Arthur Cahoon, her husband. Mrs. Cahoon explained to the jury that this claim was in respect of payments made to her husband for driving her from their home in Victoria to such places as Duncan and Nanaimo, waiting each time for four hours while she conducted her invigilating business, and driving her home. During Mrs. Cahoon's testimony about this claim, her counsel, in the presence of the jury, interrupted her

testimony and withdrew the claim on the basis these expenses had also been claimed in her claim for loss of business income from CHC Enterprizes.

[63] It is apparent from the documents that the dates on cheques 017, 018, 019, 022, and 023, which was dated June 24, 2005, were in chronological harmony with the cheque numbers. However, anomalously, the next cheque in the numerical sequence, cheque 025, was dated April 6, 2006, and cheques on earlier dates bore higher numbers. As well, cheque 062, dated in September 2005, and cheque 041, dated in October 2005, appeared to be out of numerical sequence.

[64] In the following cross-examination of Mrs. Cahoon, defence counsel brought out these inconsistencies:

> Q Now, if you could just turn over the page -- or over to Tab 5, ladies and gentlemen and Mrs. Cahoon?
>
> A Thank you.
>
> Q And if you go to the last part of that tab you will see there is a number of cheques that were written out to Mr. Cahoon, starting with a cheque number 14 near the back of that tab. Do you see that, Mrs. Cahoon?
>
> A Yes, I do.
>
> Q So when I look through these cheques, they start off with a first cheque for $1,000, and it's cheque number 14.
>
> A Okay.
>
> Q And then on June 24th, cheque number 17 for another $1,000. And then at the bottom of the page there, November of 2004, cheque number 18. And going over, we've got cheque number 19, 22 and 23. Do you see that?
>
> A Yes, I do.
>
> Q The next cheque in the sequence is actually on the very last page, and you will see that it's cheque number 25 for $1,000, written on April 6, 2006. Do you see that?
>
> A I'm sorry. Can you say that again? I got lost.
>
> Q Yes. The last page of Tab number 5 there is a cheque, and it's cheque number 25 and you've got a copy of it here for -- and it's $1,000 in April of 2006.
>
> A Oh, okay. I'm sorry. I found it. Thank you.
>
> Q Do you see that?
>
> A Yes, I do.

Q So that logically would have been written shortly after cheque number 23. Doesn't that make sense?

A Well, yes and no. Looks like we've got two book -- chequebooks going here.

Q Well, Mrs. Cahoon, if you look at the receipts you will see that they've got the same account number. It's not a different account.

A Yeah, but I -- okay. I -- okay.

Q And then the next cheque in the sequence is actually cheque number 41, which is dated before cheque number 25. You see that?

A Yeah.

Q And then you've got cheque number 62, and it's dated before cheque number 41.

A We have two chequebooks going. I just grab a chequebook and write a cheque. I don't -- I don't keep the sequence like that. You got a chequebook for the company, I write it, and obviously I've got more than one book going here that's --

Q So you've got two chequing books with exactly the same numbers from one bank account. Is that right?

A I'm confused.

Q Well, I'm going to suggest to you, Mrs. Cahoon, that what in fact you have done is after the fact you've gone back and written out a number of cheques and tried to suggest that you paid Mr. Cahoon back in 2005 and 2006, and those cheques were written much later in time.

A You'll have to give me a minute here, please. No. I think what I've done here is just grabbed another chequebook and wrote in it.

Q I see. And so you just coincidentally happened to have two sets of cheques with identical numbers for the same chequing account. Is that right?

[65] At this point, counsel for Mrs. Cahoon interrupted the cross-examination and asked defence counsel to explain what she meant by “identical numbers”. She said she did not “follow the question”. There followed these remarks:

THE COURT: It’s the suggestion of identical numbers in two different books that Ms. Acheson asks you to clarify, Ms. Young.

MS. YOUNG: What I am -- my understanding of what the witness is saying, My Lord, is that she’s got two sets of cheques. They both coincidentally have the same numbering sequence, and that would explain why these cheques --

THE COURT: Well, I don’t think she said that the two chequebooks had the same numbering sequence. She said she had two chequebooks.

...

THE COURT: The evidence so far is, “I had two chequebooks and I pulled whatever chequebook was available.”

MS. YOUNG: All right.

THE COURT: I don’t think the witness has ever said that the two chequebooks had the same numbering sequence.

MS. YOUNG: All right. I will try and clarify that, then, My Lord.

MS. YOUNG:

Q So you’re saying, then, Mrs. Cahoon, that you have two different chequebooks with two different sets of numbers.

A Well, when you order them from the -- from the Credit Union, this is where it’s from, you get a whole box of them. Right? Of -- I think there's how many you order, six, seven, eight, I don't -- not sure, that come, and I obviously took from two different books.

Q So you just use the cheques sort of randomly depending on what book is -- happens to be around the house.

A Well, not around the house. In my office.

[66] In submissions to jury on this point, defence counsel said,

> Remember the driver services? These are the ones where the plaintiff claimed $8700 for driver services for Mr. Cahoon driving her around to appointments, and then in the middle of her evidence her counsel pointed out, geez, these have already been taken off your business income so they shouldn't be claimed again here. So they struck those off the claim as well.
>
> And I took her through those, you’ll remember all the cheque stubs and the different cheque numbering sequences, which I suggest was an attempt after the fact to try and create payment. And you know what, when you look at what those cheque stubs say and you compare it with what is claimed in her business statement, they don't match up. So the amounts she claims in -- for her business for her First Aid for driver services don’t match up with the amount of the cheques. The cheques add up to about 8700, she claims about 9450. And the years don’t match up in terms of dollars either. This is why I say you can’t really rely on what this lady is telling you.

[67] Thus, defence counsel suggested Mrs. Cahoon had created and documented the claim after the fact. That she did was an inference that was open on the evidence. Further, it was fairly open to defence counsel to suggest the jury should not accept Mrs. Cahoon’s evidence that she had two chequebooks bearing the same numerical sequence for the same account. Neither defence counsel nor the jury

were bound to accept Mrs. Cahoon's explanation. That was a matter for the jury to consider on the basis of their collective common sense and life experience.

[68] In my view, there was nothing misleading, improper, or inflammatory in either defence counsel's cross-examination or submission to the jury on this point. I would reject this ground of appeal.

### (iii) Complicit Witness

[69] Whether Mrs. Cahoon had suffered bowel and bladder dysfunction as a result of the collision was a hotly contested issue at trial. As I have already mentioned, in support of her claim for pecuniary damages, Mrs. Cahoon prepared and marked in evidence a book containing detailed schedules of expenses she claimed were made necessary by the injuries she sustained in the collision. Each item was supported by copies of receipts ranging in amount from a few dollars for parking charges to thousands of dollars for renovations done to her home. There was one exception – she submitted no receipts in support of her claim that she was spending $540 annually and would require $8,881 to pay for future expenditures for incontinence products made necessary by her bowel and bladder disorders. She testified that when her lower back went into spasm, which happened frequently and without warning, she would lose control of her bowel and bladder and said, "When we travel, I have to use Depends [Depend® underwear] because there's not always a bathroom close by."

[70] In cross-examination, after defence counsel had her acknowledge that she had been "quite good about keeping copies of all the receipts and things for the various things you've purchased over the last four and one-half years", defence counsel brought out that she had produced no receipts for incontinence products:

> Q Because one of the things that struck me, and I've read through Exhibit 5, I think about three times now, is I haven't seen a single receipt for any Depends. So I'm just wondering where in this binder I'm going to find a receipt? Maybe you can point me to that, Mrs. Cahoon?

A You're not. I'm allowed a little bit of pride, Ms. Young, and usually when I get those, I get them with my other prescriptions or groceries or whatever, and I can pay for it. I just didn't want to do that. I find that very embarrassing, and I think that's very private, and I didn't put it in here.

Q I see. So you've been incurring how much a month over the last four and a half years for Depends?

A I've probably -- I haven't kept track, but -- this is so embarrassing.

THE COURT: Sorry?

A This is so embarrassing.

THE COURT: I understand, ma'am, but you are making the claim.

A Yes, My Lord. I wear a sanitary pad every day, in case I don't have an accident, so that's seven pads a day, minimum. If we go out in the evening, I put another one on. If we travel any distance, I wear Depends, and I haven't -- I would have to sit down and figure out how many times I've been out of town. I know I probably go through a bag, depending on how much travelling we do, if we do a lot of travelling, I wear a Depends every day.

MS. YOUNG:

Q And yet you haven't saved a single one of those receipts to put in with all the other receipts for mileage, parking, and --

A No, I haven't.

Q Nail guns and countertops.

A I haven't put a lot of Tylenol or Robaxacet in either, for the same reason. It's when you go and buy groceries, it ends up in your grocery list and that's gone when you get home with the groceries. And that's my explanation for that.

[71] Later in the trial, Mrs. Cahoon's friend Mrs. Logan testified on her behalf. Mrs. Logan, a long-time resident of a city in interior British Columbia, said she had known Mrs. Cahoon since about 1980 and that they visited at each other's homes in alternate years. She testified as to changes she observed in Mrs. Cahoon's appearance and behaviour following the collision in 2003. During the course of her examination in chief, the following occurred:

Q What about the visit at your home in Kelowna, is there anything that stands out about her -- I'm sorry, your home in Cranbrook, is there anything that stands out about that trip -- or visit?

A What do you mean?

Q Any specific memory about her visit at your home in Cranbrook just this last year?

A Well, this last year she just -- she didn't want to do anything. She'd sit, you know, she'd have her pillows and that sort of thing. There was one time we were getting ready to go on a trip to Kimberley.

Q Yes?

A And we had her pillows and stuff like that, and I walked into the room to ask her a question, and here she's putting on her Depends.

Q Mm-hmm?

A And she also was putting on a little box on her back, and apparently that's supposed to send electrical impulses to her back to stop the spasms --

Q Was she alone --

A -- in her back.

Q Was she alone or with someone?

A No, she had Art helping her.

Q And what was Art doing?

A He was helping her put it on.

Q Put on the electrodes?

A Yes.

Q Okay. And how could you tell she was putting on Depends?

A Well, I walked in, and she had her pants half down and she had her Depends on, you know.

Q How did you know what they were?

A I do homecare and a lot of my clients have Depends. You know, they're paper diapers, you know, that are shaped like pants.

[72] Defence counsel cross-examined Mrs. Logan on this testimony as follows:

Q And also, ma'am, I take it that although Mrs. Cahoon and you are very close, she's also a private -- a somewhat private person?

A Yes.

Q And she doesn't tell you about all of her medical conditions, does she?

A No.

Q So you wouldn't know whether, for example, she might have been on any antidepressants before the accident?

A I never heard that, no.

Q And you don't know about her circumstances around menopause?

A No.

Q And yet, you stumbled upon her in her room pulling on her underpants?

A At my place, yes.

Q Yes. Completely by surprise?

A I went in there and asked her and she didn't know I was coming in, right.

Q You had no idea she was in there and she was clothing?

A I didn't realize she was getting dressed.

Q And it --

A I didn't know that -- sorry?

Q Sorry. And it happened to be right at that point in time when she was pulling on her Depends?

A Yes. She had them on, they were half up. Like her other pants were on too.

[73] In her submission to the jury, defence counsel said,

> Incontinence products, I've touched on that. Do you believe that Mrs. Coby Logan -- I mean, isn't that a strange story, a guest in your home, do you walk into the bedroom of a guest unannounced? And then finding somebody in a seemingly sort of intimate situation with pants down and what have you and her husband, a normal person would probably just turn around and leave. It's a very strange story. It's a very convenient story I might say.

[74] Mrs. Cahoon contends that this submission was intended to suggest to the jury that Mrs. Logan's evidence was fabricated and that she gave the evidence simply to support Mrs. Cahoon's claim. She says the evidence did not support such an inference, that the submission was inflammatory, and that it unnecessarily ridiculed Mrs. Logan for the purpose of creating partiality in the jury.

[75] Obviously, documentary evidence of the expenditures claimed for incontinence products might have lent credence to Mrs. Cahoon's claim that she suffered these problems and defence counsel had drawn to the jury's attention that no such documentary evidence had been produced. Since Mrs. Cahoon had produced receipts for virtually every other expense she claimed, this represented a potential weakness in her case and could have reflected adversely on her credibility and on her claim as a whole. Mrs. Logan's subsequent testimony, depending on

how the jury viewed it, could have served to shore up this weakness. It was therefore incumbent on defence counsel to attempt to attenuate Mrs. Logan's evidence in cross-examination. Given the friendship of Mrs. Cahoon and Mrs. Logan, the unusual nature of the event Mrs. Logan described, and the timing of her evidence, it was fairly open to defence counsel to suggest to the jury that they should carefully consider the credibility of Mrs. Logan's testimony on this point. Defence counsel in effect asked the jury to use their powers of reason and to consider the probabilities inherent in Mrs. Logan's testimony. Her remarks were neither inflammatory nor improper and I would reject this ground of appeal.



### (c) Evidence of Automobile Damage

[76] The respondents led evidence from estimators employed by the Insurance Corporation of British Columbia that the damage to Mrs. Cahoon's and Mrs. Brideaux's vehicles involved was merely cosmetic and was repaired by repainting the damaged areas. As well, they marked in evidence photographs of the damaged areas and estimates of the costs of repair.

[77] Mrs. Brideaux testified the traffic light had turned green and Mrs. Cahoon's brake lights were off when she began to move forward. She described the impact as a "bump" which was not of sufficient force to dislodge her purse or her two dogs from the front passenger seat of her vehicle. Mrs. Cahoon testified that as a result of the impact she "got thrown into the vehicle ahead and that vehicle hit the car ahead of that vehicle" and added, "I was jerked around when I was hit from behind and when I hit the car ahead". The elderly driver of the vehicle immediately ahead of Mrs. Cahoon, Mr. Hammer, died of unrelated causes before trial and did not testify. The driver of last vehicle involved testified that, although the light had turned green and cars ahead of her were starting to move, she was still stopped when she was struck from behind. She described the impact as "a very light touch at the back of my vehicle … just enough to know that something's going on". She said she was not hurt.

[78] In his charge to the jury explaining direct and circumstantial evidence and the possible inferences in respect of each, the trial judge used the evidence of the photographs of the vehicles and the repair estimates as illustrations of circumstantial evidence. He said,

> From that evidence you are asked to draw inferences about how hard Mrs. Brideaux struck Mrs. Cahoon, and from those inferences you are asked to draw another inference about what injuries that impact caused to Mrs. Cahoon.

[79] Mrs. Cahoon contends the trial judge erred in so instructing the jury.

[80] Her submission begins with the following passage from *Lubick v. Mei* and another, 2008 BCSC 555 [*Lubick*], an oral judgment given at the end of a one-day trial:

> [5] The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury. In *Gordon v. Palmer*, [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:
>
> > I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.
>
> He goes on to point out that the presence and extent of injuries are determined on the evidence, not with 'extraneous philosophies that some would impose on the judicial process'. In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.
>
> [Emphasis added.]

[81] In Mrs. Cahoon's submission, the emphasized passage demonstrates that the burden was on the respondents to establish that the force of the collision was so minor that she could not have suffered the injuries she claimed and, since there were medical opinions in evidence that her injuries were caused by the collision, the burden could be discharged only by expert evidence, such as medical or

biomechanical engineering evidence. It follows, she argues, that it was an error to permit the jury to draw inferences as to the force of the collision and as to the nature and extent of her resulting injuries and thereby to "override" the opinions of the medical experts.



[82] The issue addressed in the passage from *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236 (S.C.) quoted in *Lubick* was whether the "no crash, no cash" policy of the Insurance Corporation of British Columbia was founded on a valid legal or medical principle. Mr. Justice Thackray noted that no evidence was called to substantiate the theory that minimal impacts could not cause injury and went on to resolve the nature and extent of the plaintiff's injuries in that case on the lay and medical evidence before him. Similarly, it appears the issue addressed in this passage in *Lubick* was the defence contention that such a minimal impact could not have injured the plaintiff. However, these passages do not represent a statement of legal principle that in low-impact collision cases, the defendant has the burden of proving the plaintiff's injuries were not caused by the collision. It is well-settled law that the burden is always on plaintiffs in these cases to prove the nature and extent of their injuries and to prove they were caused by the defendant's negligence.

[83] Here, the respondents did not argue that Mrs. Cahoon could not have been injured in the collision. Rather, they conceded she suffered some injury but submitted that she was exaggerating her injuries and that she had not proven that all of the injuries and losses of which she complained were caused by the collision. The burden of proof of these matters lay with Mrs. Cahoon – the respondents did not bear the burden of proving that the injuries she claimed were not caused by the collision.

[84] The evidence of automobile damage was relevant to the question whether Mrs. Cahoon suffered the injuries she claimed as a result of the collision. In *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323-24 (Ont. C.A.), Doherty J.A explained relevance as follows:

> ... Relevance ... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.



[85] Human experience and logic, qualities for which juries are particularly valued, are the essence of common sense. They suggest there is a relationship between the force of an impact between two vehicles and the resulting damage to the vehicles. Thus, evidence of minimal damage makes it more likely the force of the impact was minimal (Fact A). Human experience and logic also suggest there is a relationship between force exerted on the human body and injury caused by the force. Thus, evidence of minimal force applied to the human body tends to make it more probable that the resulting injury would not be serious (Fact B). It follows that the evidence of vehicle damage was relevant on this issue and the trial judge did not err in instructing the jury that they could use it as circumstantial evidence.

[86] It follows, as well, that I would reject Mrs. Cahoon's submission that the trial judge erred in permitting the jury to use this evidence to "override" the expert medical opinion evidence on causation. The weight to be given low-impact evidence will depend on the particular circumstances of each case. Here, Mrs. Cahoon led expert medical opinion evidence that the collision caused her very serious injuries. These opinions on the causation issue were based on various facts, including Mrs. Cahoon's descriptions of her injuries and the dynamics of the collision. The jury was required to consider the expert opinions but was not bound to accept them. Rather, it was for the jury to determine what weight to assign to those opinions after weighing all of the evidence, including the circumstantial evidence of the force of the collision.

[87] An alternative and related submission turns on some hearsay evidence and the judge's instructions in this regard. Mrs. Cahoon's counsel elicited evidence from her, without objection, that Mr. Hammer, who was in the vehicle immediately ahead of her, told her after the collision that his neck was sore. Later, in cross-examination

of Mrs. Brideaux, Mrs. Cahoon's counsel elicited that she spoke to Mr. Hammer and he said he had a sore neck. At this point, the trial judge interjected and told the jury that this evidence was hearsay. In charging the jury, the judge said,

> During the trial you heard some evidence you should not have heard because it was hearsay evidence. You heard some hearsay evidence that you should have heard, but you should not misuse.
>
> With respect to the first hearsay or things you may have heard and should not have heard at all, my example for you is Mrs. Cahoon's evidence that the man in front of her, the one she hit, complained of a sore neck. Mrs. Brideaux said the same thing in her evidence, and you may recall that is when I interjected and said, no, that is hearsay evidence.
>
> Both statements, that of Mrs. Cahoon and Mrs. Brideaux, are not admissible to prove that this man, this is Mr. Hammer, the fellow who has since died, had a sore neck, or that he had a sore neck as a result of the accident. You do not have any admissible evidence on either matter. And even if his neck had been injured in the accident, I say to you that whether or not Mr. Hammer's neck was injured in this accident is irrelevant to whether or not Mrs. Cahoon's neck was injured, or any part of Mrs. Cahoon's body was injured.

[88] Mrs. Cahoon does not suggest the trial judge erred in telling the jury that the evidence of Mr. Hammer's statements was inadmissible hearsay and they must disregard it. Rather, she contends he erred in telling the jury that whether Mr. Hammer's neck was injured was "irrelevant to whether or not Mrs. Cahoon's neck was injured". In her submission, if evidence of damage to the vehicles was circumstantial evidence of the nature of her injuries, evidence that Mr. Hammer's neck was sore immediately following the collision must also be circumstantial evidence of the nature of her injuries. Thus, she submits, the judge's impugned instruction was inconsistent with his earlier instruction that the evidence of damage to the vehicles was relevant circumstantial evidence. In her submission, these inconsistent instructions must have confused the jury to her prejudice.

[89] I cannot agree. The judge told the jury the evidence was inadmissible and they should disregard it. Thus, if the jury was confused by this instruction, it could only have been with respect to whether they could use the evidence of the damage to the vehicles as circumstantial evidence, and if they concluded the instructions were inconsistent and reasoned that, since evidence that Mr. Hammer's neck was

injured was irrelevant to whether Mrs. Cahoon was injured, evidence of the damage to the vehicles must also be irrelevant, that could only have worked to Mrs. Cahoon's advantage.

[90] Moreover, I consider it most unlikely that the jury would have been confused as Mrs. Cahoon suggests. I would reject this submission.

[91] Accordingly, I am satisfied that Mrs. Cahoon received a fair trial and I would dismiss her first ground of appeal on all counts.



**2. Inconsistent Awards**

[92] Mrs. Cahoon submits the award of $8,900 for non-pecuniary damages must be incorrect because it is inconsistent with the awards for future pecuniary losses. She contends the award of $1,100 for palliative care for her husband necessarily implies that she would be unable for at least two years post-trial to provide the care herself because of the ongoing effects of her injuries. As well, she submits the awards of $8,900 for cost of future care and $1,700 for prescription drugs recognize that her pain and suffering will continue and she will require pain-killing medication for as long as three years post trial. She notes that she was injured 4 1/2 years before the trial and submits that the non-pecuniary damages award is so small as to be inconsistent with a pecuniary award that recognizes pain and suffering for as much as 6 1/2 to 7 1/2 years.

[93] This submission rests on an assumption that the pecuniary awards are correct. As Rowles J.A. said for the Court in *Gunderson v. Hoogerdyk*, [1995] B.C.J. No. 1602 (C.A.) [*Gunderson*], in a passage that was approved and applied in *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at para. 67, leave to appeal ref'd. [2003] S.C.C.A. No. 558,

> [6] The appellant's argument rests on the proposition that the jury's award for pecuniary loss should be taken to be incontrovertibly correct. Appellant's counsel could refer us to no authority to support that proposition, and I do not agree that it is a correct proposition in law.
>
> [7] This is a case in which the jury had to resolve various conflicts in the evidence, including the opinions provided by the medical doctors. The jury

> was also required to consider the credibility of the plaintiff, that is, how reliable her evidence was in respect to the nature and duration of the injuries she sustained in the two accidents. There were virtually no facts which were not in dispute. Had the jury award for pecuniary loss been based on facts not in contention, there might be some foundation for the appellant's argument but that is not the case here.



[94] Here, as in *Gunderson*, there were virtually no facts that were not in dispute and the jury had to resolve many conflicts in the evidence and to consider the reliability and credibility of Mrs. Cahoon's evidence. It is not irrelevant to note that, a few hours after they began their deliberations, the jury sent a question to the trial judge requesting his direction as to what they should do if they could not agree that Mrs. Cahoon suffered any injury at all in the collision. The jury ultimately resolved this impasse but we do not know how. In the circumstances, there is no clear foundation for Mrs. Cahoon's submission and I would reject this ground of appeal.

### 3. Non-pecuniary Award Wholly Out of Proportion

[95] Mrs. Cahoon contends that, at its best for the respondents, the evidence demonstrated that she suffered "musculoskeletal and soft tissue injury" to the neck, upper back, and lower back that caused her pain and suffering for 4 1/2 years before trial and, as I have discussed, that the future care awards necessarily imply that her pain and suffering would continue for up to two years after the trial. On that basis, she submits that the award of $8,900 for non-pecuniary damages was wholly out of proportion to her injuries. Relying on disparities with awards made by judges in more or less similar cases, she submits that these injuries would warrant an award in the order of $80,000. She cites a number of cases in support of that submission.

[96] The proper approach to appellate review of jury awards has historically been a matter of some difficulty. In *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58, Rowles J.A., writing for the Court, reviewed all of the important cases dealing with this question. She noted that, since damages are questions of fact or mixed fact and law, awards may be set aside only for "palpable and overriding error" (at para. 125). In a passage that concisely sets out the appropriate standard of review, she said,

> [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" … 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'" … or, in other words, when it is "wholly disproportionate or shockingly unreasonable" ….
>
> [Internal citations omitted.]

[97] The question, then, is whether this case is one of those rare cases in which the award is "wholly disproportionate or shockingly unreasonable".

[98] Since damages are a question of fact, juries are generally unsurpassed as assessors. Cory J. made this point, writing for the court on the point, in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (*Hill*), where he said,

> [158] Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community.

He added that the "assessment of damages is peculiarly the province of the jury" (para. 158). Although *Hill* was a defamation case, these words are equally applicable in my view in the context of non-pecuniary damages for personal injuries. As Dickson J. (later C.J.C.) noted for the court in *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, awards of non-pecuniary damages "will vary in each case 'to meet the specific circumstances of the individual case'". Non-pecuniary damages are inherently arbitrary and awards necessarily reflect the jury's subjective appreciation of the plaintiff's loss.

[99] In this case, the jury had to grapple with conflicting evidence on virtually every important issue of fact. Their task was made more difficult by the need to evaluate Mrs. Cahoon's credibility and to determine whether she was exaggerating her claim. This difficulty was made manifest when, as I have noted, the jury was at one point in their deliberations divided on whether Mrs. Cahoon had suffered injury in the collision. Although the award recognized some injury, we cannot know what injury it recognized or whether the jury concluded Mrs. Cahoon was exaggerating her complaints and, if so, to what extent.

[100] In these circumstances, I am unable to conclude that the award of non-pecuniary damages is “wholly disproportionate or shockingly unreasonable”. I would not accede to this ground of appeal.

**Conclusion**

[101] I would dismiss the appeal.

“The Honourable Mr. Justice Smith”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Groberman”