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| Law 435C.001 | Personal Injury Advocacy | 2020 Term 2 |
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**WEEK 9:**

**Opening Statements, Closing Arguments, & Instructions to the Jury**

* 1. **Teaching Objectives**
* Openings – boundaries (case law review) and use of the Ball approach in BC.
* Closing submissions – tying it all together in a persuasive argument.
* Instructions to the Jury
	1. **Housekeeping**

Remaining classes:

* WEEK 10: March 16, 2020 – Evidence at Trial
* WEEK 11: March 23, 2020 – Post Trial/Settlement Procedures
* WEEK 12: March 30, 2020 – Part 7, Subrogated First Party Insurers, HCCRA
* WEEK 13:  April 6, 2020 – Review of Course Materials, Overarching Principles and Exam Prep
* FINAL EXAM:  MONDAY, APRIL 20, 2020 at 9:00 AM
* Materials required for open book exam:
	+ Motor Vehicle Act – Part 3 (sections 119 to 214.6)
	+ Insurance (Vehicle) Regulations - Part 7
	+ Negligence Act
	+ Occupier’s Liability Act
	+ All readings posted on the website
	+ Cases posted on website
	+ Lecture notes posted on the website and your own notes.
	1. **Openings**
* *Necessary reading:* [*“Jury Openings: Persuading Without Advocating,” by Mike Slater, Q.C.*](https://docs.wixstatic.com/ugd/682071_b38eca7a172e4c5783cf6f7986086103.pdf)
* Purpose of opening statement:
* Jurors will not be persuaded which way to decide a case by an opening, but they will develop a belief of what the case is about;
* Give the jury an idea of what will be given in evidence;
* Frame the legal issues.
* Avoid:
	+ Giving personal opinions;
	+ Discussing any evidence other than what will come from the party’s own witness (or which the court takes judicial notice);
	+ Irrelevant facts;
	+ Prejudicial remarks, sarcasm, derision, argument;
	+ Appealing to the sympathy of the jury.
* David Ball Approach:
	+ Liability
	+ Rules of the Road: What are the rules and how did the defendant break the rules
	+ EXAMPLES
	+ Focus on the defendant’s conduct
	+ Damages
	+ Describe the case in terms of harms and losses

***Brophy v. Hutchinson*** [**2003 BCCA 21**](http://media.wix.com/ugd/682071_76360bdeca474e64aadae75afb63e097.pdf) **:**

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

. . .

[41] In an opening statement, counsel may not give his own personal opinion of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors’ emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible.

***Aberdeen v. Langley (Township),*** [**2006 BCSC 2062**](http://media.wix.com/ugd/682071_78b5251639fc48489d51c3b4dbc7193d.pdf)

* Psychology of persuasion (how far is too far in an opening statement)
* [26] Generally, in an opening, counsel is permitted to persuade the jury during this address in an attempt to engage their imagination in viewing their evidence from a certain perspective. Counsel is not supposed to discuss law during an opening statement although to completely avoid doing so would be difficult. Comments on the law should be limited to framing legal issues for the jury while avoiding intricate and lengthy discussions.
* [27] Counsel are expected to outline the evidence that will be given and who will testify. Counsel may say what facts the evidence will prove.
* [28] What counsel can do in an opening has often been described as setting a roadmap for their case so that the jury can appreciate the significance of the evidence that is being called as it is being called.
* [29] However, there are numerous limitations imposed upon counsel in delivering an opening statement. If counsel transgresses these limits, the judge can offer instructions to the jury to disregard certain aspects of the statement. Alternatively or additionally, instructions may be issued during the charge to the jury to ignore certain aspects of the opening statement. In circumstances of significant disregard of what is permissible, the judge may dismiss the jury and hear the rest of the case without a jury or can order a mistrial.

…

* [47] In anticipating such an opening, one would expect a relatively brief opening. This opening, however, was by counsel for the plaintiff's timing, which I do not doubt, at eighty minutes. It started out in a traditional way, a way which was expected, and it ended in a traditional way. But the balance of the opening can only be characterized as a closing.
* [48] The balance of the opening analyzed the evidence already called. On liability, counsel for Langley explained to the jury the difficulties he sees in the plaintiff's evidence, the difficulties related to uncertainty as to speed of the vehicle and about the significance of warning signs and potentially speed reduction signs. Counsel for Langley called on the jury to draw a conclusion on the evidence. His submissions were replete with "it is submitted" or "it will be submitted."
* [49] Essentially, an argument was put forward about the ultimate issue of liability, and an argument was put forward prior to Langley calling any evidence.
* [50] Counsel additionally made submissions and arguments about the evidence of Mr. Lisman and Mr. Godfrey, experts who had provided opinions, one for the plaintiff and one for the Zanatta defendants, on the status of the guardrail.
* [51] Counsel for Langley employed the use of rhetoric and argument to analyze that evidence of Lisman and Godfrey, but also to analyze the evidence of the Zanatta defendants and the evidence of Mr. Aberdeen, and of his chief witness as to the liability issue Mr. McGee.
* [52] Counsel for Langley asked the jury, prior to all evidence being in, prior to the plaintiff exercising his right as a plaintiff, to close his case first, to draw conclusions about key determinations that the jury would have to make. He requested of the jury, essentially, to conclude that Mr. Aberdeen was traveling too quickly, that he conducted himself without due regard to his own safety.
* [53] It is true that you may in opening state your position, but you are not in opening entitled to formulate an argument as to why it is your position pointing to evidence already led as to why that is so.
* [55] As in the case of Melgarejo-Gomez v. Sidhu counsel for the Township of Langley's use of the words "I think," "I submit," "I will be submitting." This choice of language pits the credibility of one counsel against the credibility of the other so that if the jury were more impressed with Mr. Hobkirk, it would no doubt prejudice Mr. Slater's client.
* [58] In my view, the plaintiffs, and to a lesser degree, the Zanatta defendants, have been significantly prejudiced by Langley's opening. One must bear in mind we were at the 24th day of trial. We are now at the 26th day of the trial. The jury on day 25 was only brought into the courtroom for a few minutes to be sent away for the day while this application was argued. The last thing on their minds for almost two days has the inappropriate closing disguised as an opening of Langley. They will now, if allowed to continue, hear a short amount of evidence, a day and a half to two days, and then get into the actual closing.
* [65] I have reluctantly concluded that in order to overcome the significant prejudice resulting from the defendant Langley’s opening it is necessary to strike the jury and to proceed as permitted under Rule 41(7) on a continuation of the trial as a judge alone.

***Knauf v. Zheu et al,*** [**2009 BCCA 605**](http://media.wix.com/ugd/682071_8e013514eccc4af29ebca4cce43d44db.pdf)

* Case involving two motor vehicle accidents.
* Jury trial. Jury awarded more than $500,000 in damages.
* ICBC appealed on three grounds:
	+ 1) Evidence was improperly admitted;
	+ 2) Plaintiff’s counsel made “improper statements” during his opening and closing addresses to the jury; and
	+ 3) There were errors in the judge’s charge to the jury with respect to the plaintiff’s loss of future earning capacity.
* At para. 21: “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.”
* What did Plaintiff’s counsel do wrong?

[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.

* At para. 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.”
* At para. 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.”

***Moskaleva v. Laurie*** [**2009 BCCA 260**](http://media.wix.com/ugd/682071_212f1eaaf2084113b63a52a4dcb14d4d.pdf) **:**

* The defendant (ICBC) appealed a (significant) jury award
* ICBC argued five grounds of appeal, including that the defendant was deprived of a fair trial because of (a) PC’s opening was improper and prejudicial; (b) the cross-examination of a psychiatrist exceeded the proper bounds of cross and prejudiced the jury; (c) the TJ’s interventions during the testimony of three expert witnesses called by the defence impugned the credibility of those witnesses. The defendant also argued that the TJ erred in his instructions to the jury by failing to explain properly the law relevant to past and future economic loss and by inaccurately stating the appellant’s position on that issue.
* Let’s focus on the objections to the opening:
	+ No explanation of the purpose of an opening - but the judge did this in his charge
	+ Gave descriptions of facts as if they were already established in fact
	+ Emotional appeal to the challenges faced by the plaintiff as an immigrant from Russia
	+ Plaintiff’s counsel chose words that suggested the defendant’s actions were intentional and not merely negligent i.e. “chose to launch her car forward”. Demonizing the defendant?
	+ PC used photographs in the opening – but DC did not object
* “None of the arguments put forward … can succeed.”
* At para. 24: “The appellant’s characterization of what was said in the respondent’s opening is overstated and, in some instances, inaccurate.”
* Key: DC told the TJ that he was not seeking a mistrial as a result of anything said during the opening. At para. 31: “**This is a case in which appellant’s counsel specifically put his mind to the effect of the opening and elected not to seek an order discharging the jury. A deliberate election, such as occurred in this case, is a powerful circumstance militating against the appellant’s submission that a new trial is required to rectify an unfair trial**.”
	1. **Sample Opening Statements**
* **EXAMPLE: *L. vs. Jiwa, January 2019***
* **EXAMPLE: *Crawford v. Nazif* *et al, September 2019***
	1. **Closings**
* Generally counsel is offered greater latitude in closing argument than in an opening statement.
* ***Cahoon v. Brideaux*,** [**2010 BCCA 228**](http://media.wix.com/ugd/682071_ed45c6112714425bb69cf58e6be67d33.pdf) **:**

DC’s closing submissions:

“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.”

* Nothing improper about these closing submissions. At para. 18: “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…”
* ***Ellis v. Duong,* Harris, J.,Oral Reasons, BCSC 20160720: Mistrial following the defendants’ closing argument.**
* ***Walker v. Doe:* One case, many lessons**
* The use of **visual aids**: [2012 BCSC 1112](http://www.courts.gov.bc.ca/jdb-txt/SC/12/11/2012BCSC1112.htm) beginning at para. 19
	+ PC wanted to use a bar graph or visual timeline to explain the period of time that the heads of damages cover and how a future wage loss claim or cost of future care claim should be calculated – not itself evidence – but a useful visual tool.
	+ Judges have a wide discretion to permit the use of aids to the jury: at para. 33.
	+ Summaries are akin to notes jurors themselves could have made and summaries can be helpful in very lengthy and complex trials.
	+ The jury must be appropriately cautioned on the use to be made of any summary.
	+ Enlarged photos? Not likely to be permitted: there must be some verification in evidence of the source and accuracy of such items before they can be allowed to form part of the record of the case before the jury.
	+ [35]         In this case, subject to the comments I am about to make, I am satisfied that counsel for the plaintiff can proceed as he wishes. The intended use of the "demonstrative aids" that he has described is **modest, finite, and would assist the jury in understanding the issues that are before them**. This is also consistent with the guidance provided in each of *Bengert*, *Fimognairi* and *Basi*. Still further, my instructions will contain a caution confirming that neither the time line nor the calculations constitute “evidence” before the jury.
* **Attack on opposing counsel** - Cannot be justified even if opposing counsel attempts to paint a party in a harsh light or as a retaliatory measure for other conduct by opposing counsel.
* Counsel **cannot misrepresent the issues** or the position taken by another party (para 36).
* **Mischaracterization** of issues before the jury
* Counsel **should not accuse an expert of dishonesty** **unless it is put to the expert in cross examination**
* The danger of a mistrial: **special costs**:

*Walker v. Doe,* [2013 BCSC 2005](http://www.courts.gov.bc.ca/jdb-txt/SC/13/20/2013BCSC2005.htm)

* + ICBC sought an order for special costs or costs thrown away against PC, Thomas Harding, after a mistrial was declared and a new trial date scheduled.
	+ Trial proceeded before a jury and ended on April 27, 2012 on day 14 – a mistrial was declared after PC’s closing submissions
	+ The issue in this decision: Should the mistrial judge deal with the issue of costs or should costs be in the discretion of the ultimate trial judge?
	+ At para. 21: “… courts have consistently commented that an award for costs, including party and party costs, against a lawyer is “to be used sparingly and only in rare or exceptional cases”; *Nazmdeh v. Spraggs*, 2010 BCCA 131 at para. 103. Awards of special costs, which rely on reprehensible conduct or conduct worthy of rebuke, will be rarer still.”
	+ At para. 24: “The benefit of having the judge who heard the trial and counsel’s submissions which gave rise to a mistrial, also hear the ensuing special costs application is obvious.”
	+ At para. 25: “Notwithstanding the passage of time, my memory of the trial and of the matters leading to the mistrial remains good. My memory of many events remains vivid.”

***Walker v. Doe,*** [**2012 BCSC 1112**](http://www.courts.gov.bc.ca/jdb-txt/SC/12/11/2012BCSC1112.htm)

* + Hearing of the motion for special costs – after the appeal of the mistrial ruling was dispensed with.
	+ (M. Kazimirski is counsel for PC) accepts that an order that PC pay ICBC’s party and party (regular) costs arising from the mistrial is appropriate.
	+ At para. 10: “…fitting because the mistrial arose solely as a result of the closing address of Mr. Harding.” A wayward address is the act of counsel alone, no reason that the client should bear the responsibility for the adverse consequences of such an address.
	+ At para. 11: “… it is worth emphasizing certain aspects of party and party cost awards that are made against a lawyer and, in particular, those aspects that are different from cost awards that are made against a lawyer on a special cost basis.”
	+ Rule 14–1(33) of the *Supreme Court Civil Rules*, formerly Rule 57(37), provides:

(33)      If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

(a)   disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;

(b)   order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;

(c)   order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;

(d)   make any other order that the court considers will further the object of these Supreme Court Civil Rules.

* + The court has the power to award costs against a lawyer under its inherent jurisdiction (see *Nazmdeh v. Spraggs,* 2010 BCCA 131)
	+ The power is discretionary but it is “a power to be exercised with restraint” and “only in rare or exceptional cases”.
	+ At para. 16: “The concession by counsel for Mr. Harding that an award of party and party costs against Mr. Harding is appropriate recognizes that ICBC should be partially indemnified for its legal expenses arising from the mistrial. Such an award would not, however, carry a “punitive or deterrent” component nor would it signal the court’s rebuke as an award of special costs would.”
	+ At para. 19 (quoting *Nazmdeh, supra* at para. 61): “…there must be “reprehensible” behaviour for an order of special costs against a party, there must also be “reprehensible” conduct by a lawyer if he is to be responsible for those special costs. This is, with respect, a reasonable conclusion. “Special costs” are meant to chastise reprehensible conduct, and there is no apparent reason why, if a lawyer is to be ordered to pay special costs personally, the lawyer should be held to a different standard than a party.”
* **The Factual Question: Were Those Portions of Mr. Harding’s Closing Address that Gave Rise to the Mistrial the Product of Excessive Zeal, Mistake or Negligence?**
	+ [29]      “The Mistrial Ruling describes at some length the concerns that I had with Mr. Harding’s closing address. Those concerns were many and varied. They included, *inter alia*, **disparaging comments about opposing counsel**, **unsupported allegations that an expert, Dr. Toor, had misrepresented or falsified evidence**, **misrepresenting the position of the defendants**, **misstating various legal propositions and appealing to the emotions of the jury**. There were multiple examples within several of these categories of wrong.”
* [30]         “I do not believe that these various improprieties were the product of zeal or of some mistake. Mr. Harding’s conduct was deliberate and wrongful and reflects an obdurate belief that his conduct was, or ought to be, acceptable.”
	+ At para. 31: “…this is not the first time that Mr. Harding has engaged in conduct that has given rise to concern”.
	+ At para. 35: “…the fact that Mr. Harding, who is an experienced trial lawyer, would engage in the very forms of conduct that he had recently been told by another judge of this court, in unequivocal terms, were unacceptable, militates against the conclusion that his repeated conduct constituted over-exuberance, or a mistake or even negligence. Instead, following the stern admonishment of Mr. Justice Williams, and recognizing that his conduct had nearly caused a mistrial, one would have thought that Mr. Harding would have been assiduously careful to avoid engaging in any like form of conduct in subsequent trials.”
	+ At para. 39: “In this case the difficulties with Mr. Harding’s closing address went well beyond the introduction of inappropriate theatrics. Still further, the nature of some of these difficulties are not consonant with either excessive zeal or a lack of care. Thus, Mr. Harding, on more than one occasion and in more than one way, significantly mischaracterized the nature of the issues facing the jury. He stated that ICBC was arguing that Mr. Walker was feigning his injuries. This was not so. It was crystal clear from multiple sources, including the defendant’s opening, that ICBC accepted that Mr. Walker had suffered a relatively serious injury. The fact that such misstatements were captured in a written address, presumably carefully prepared, is also inconsistent with the conclusion that they were made inadvertently or through a lack of care.
	+ At para. 46: “I wish to make clear that I am acutely aware of how cautiously and rarely the court should arrive at such findings. There are many reasons for this. Counsel should be able to vigorously advance difficult cases without being deterred by the inappropriate use of cost awards or judicial censure. Furthermore, counsel’s conduct in some instances is protected by solicitor-client privilege. It is further protected through the recognition that counsel can make mistakes or can even be negligent. Such conduct in those circumstances is not deserving of rebuke or sanction.”
	+ At para. 54: “… the underpinning of a mistrial ruling, arising from the closing address of plaintiff’s counsel, is that the address has imperiled the trial fairness rights of the defendant in a way that cannot be rectified. The submission that counsel can deliberately or willfully engage in conduct that gives rise to a mistrial, and then seek refuge from sanction because the matter was hard-fought or “polarized” is without basis.”
	+ At para. 57: “…Mr. Harding is a relatively senior member of the bar. His reputation will be important to him. The Supreme Court of Canada recognized a good reputation to be “the cornerstone of a lawyer’s professional life” (*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 118). The explicit findings that I have made about his conduct already constitute a very serious reprimand. They constitute, for counsel who regularly appears before this court, a significant admonishment and significant reproach. They unequivocally signal the court’s disapproval.”
	+ At para. 58: “… I do not consider that such reproach need be supplemented or reinforced by an award of special costs. At the same time I consider that some cost award, in addition to the conceded award for party and party costs, is appropriate.”
	+ In the end, Voith, J. ordered increased costs under sections 2(5) and 2(6) of Appendix B of 1.5 times the value that would otherwise apply to a unit on the tariff.

See also:

***Giang v. Clayton, Liang and Zheng,*** [**2005 BCCA 54**](http://media.wix.com/ugd/682071_622def1f8d8f4b67a75b49ecc5ecdc65.pdf)

***De Araujo v. Read,*** [**2004 BCCA 267**](http://media.wix.com/ugd/682071_433a6fe59e1d4f3b8854068cdc2b0e63.pdf)

**CLOSING ARGUMENT EXAMPLES:**

* ***MacGillivray v. Holthe,* 2019 – Opening and Closing**
* **IN A JUDGE-ALONE TRIAL: *Johnberlyn v. Uy,* June 2019**
	1. **Reply Submissions**
* The focus of the **reply**  should be to **respond** to defence counsel's **arguments**. It is not an opportunity to restate or reiterate earlier arguments made.
* If a new point is raised in reply, the court may allow the defence to respond to it.
	1. **The Judge’s Instructions to the Jury**
* In a jury trial, after counsel have completed submissions, the trial judge will “charge” the jury. This usually takes about a half-day.
* The trial judge will often give counsel a draft of the instructions to the jury – these can be lengthy. These are taken out of *CIVJII*, the CLEBC’s bible on Civil Jury Instructions: <https://store.cle.bc.ca/productdetails.aspx?pid=4275000>
* The draft instructions are provided to counsel throughout the course of a trial at what are usually referred to as “Jury Charge Conferences”. This is an opportunity for counsel to make submissions, objections, and suggest amendments.
	+ Should the judge instruct the jury on mitigation? Is there sufficient evidence led by the defendant for that instruction to go to the jury?
	+ Should the judge instruct the jury on contributory negligence?

***Walker v. Doe,*** [**2012 BCSC 1112**](http://www.courts.gov.bc.ca/jdb-txt/SC/12/11/2012BCSC1112.htm)

* In *Walker,* there was debate as to whether the judge should instruct the jury about deductions to be made according to statute for other insurance monies payable (i.e. LTD benefits), since this was an unidentified driver case. It was agreed by the parties that the trial judge should deal with s. 24 deductions to be made, if any, from any award the jury may make. The evidence of the LTD insurer’s representative would give evidence in a *voir dire* and the judge would rely upon that evidence to make the deductions, if any.
* The instruction to the jury cannot be inaccurate or without an adequate basis (para. 18), e.g. the trial judge would not instruct the jury on the meaning of “permanent or total disability” without the LTD contract in evidence.