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ETHICAL ISSUES WITH JURIES AND HOW TO PROPERLY DEAL WITH THEM

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Ethical Issues with Juries and How to Properly Deal with Them

Any time a lawyer is considering ethical issues, a good way to start is by reviewing the Cannons of Legal Ethics in Chapter 1 of the Professional Conduct Handbook:

These Canons of Legal Ethics are a general guide, and not a denial of the existence of other duties equally imperative and other rights, though not specifically mentioned.

...

In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

2. To courts and tribunals

(1) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

. . .

(3) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered

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before the court.

(4) A lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer's or a client's favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery, or pretended solicitude for their personal comfort

3. To the client

. . .

(4) A lawyer should treat adverse witnesses, litigants, and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

4. To other lawyers

(1) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.

(2) A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A lawyer should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the lawyer knows is represented therein by another lawyer, except through or with the consent of that other lawyer.

(3) A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests which do not prejudice the rights of the client or the interests of justice

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Chapter 8 of the Professional Conduct Handbook is also instructive:

Prohibited conduct

1. A lawyer must not:

. . .

(b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable,

. . .

(d) attempt or acquiesce in anyone else attempting, directly or indirectly, to influence the decision or actions of a court or tribunal or any of its officials by any means except open persuasion as an advocate,

(e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,

(e.1) make suggestions to a witness recklessly or that the lawyer knows to be false,[1]

(f) deliberately refrain from informing the court or tribunal of any pertinent authority directly on point that has not been mentioned by an opponent,

(g) dissuade a material witness from giving evidence, or advise such a witness to be absent,

(h) knowingly permit a party or a witness to be presented in a false way, or to impersonate another person, or

(i) appear before a court or tribunal while impaired by alcohol or a drug.

[amended 09/06; 09/07]

Offering to give false testimony

. . .

2. When a client advises a lawyer that the client intends to offer false testimony in a proceeding, the lawyer must explain to the client the lawyer's professional duty to withdraw if the client insists on offering, or in fact does offer, false testimony.

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3. When a client who has been counseled in accordance with Rule 2 advises the lawyer that the client intends to offer false testimony in a proceeding, the lawyer must withdraw from representing the client in that matter, in accordance with Chapter 10.

4. A lawyer who withdraws under Rule 3 must not disclose to the court or tribunal, or to any other person, the fact that the withdrawal was occasioned by the client's insistence on offering false testimony.

5. A lawyer must not call as a witness in a proceeding a person who has advised the lawyer that the witness intends to offer false testimony.

Lord Denning the described the duties of a lawyer to the Court in the case of *Rondel v. Worsley*:

*[The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not conspicuously mis-state the facts. He must not knowingly conceal the truth … He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all these things is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.**[2]***

The *Rondel* case went to the House of Lords where Lord Reid said:

*Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every questions, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with the client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.**[3]***

The case of *de Araujo v. Read* 2004 BCCA 267, contains a fairly comprehensive review of things that you should not do in a jury trial:

OPENING COMMENTS BY COUNSEL FOR THE PLAINTIFF AT TRIAL

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[8] After introducing himself, counsel at trial, who was not counsel on this appeal, said:

Imagine that you are 22 years of age. You've put in four hard years of university. You've gotten a Bachelor of Arts degree. You've got one more year to go to get your Bachelor of Education degree and your teacher certificate so that you can do what you've always dreamed of doing: being a teacher. You're just ready to start school again. School starts in about 10 days at UBC. It's a beautiful August day. You're driving your car to pick up some supplies at a shopping centre. As you drive forward on that day you think everything is going perfectly well, I'm in control of my life, I'm ready to tackle the world.

And yet in the next instant that all changes. Because you have been paying attention to your driving, because you have been waiting for vehicles ahead of you to turn left, you came to a stop. But the driver behind you, who is not paying attention, doing who knows what but certainly not paying attention to the road ahead, crashes into you.

[9] Counsel for the plaintiff then painted a word picture: "you hear … the screech of rubber"; "you feel and hear an explosion"; "your car is struck, sending you rocketing forward into the car ahead of you". He continued:

The driver who hit you clearly had a choice to make: pay attention to the road and do what you should do when you're driving or do other things that end up causing who knows what degree of damage to people like Estela de Araujo. That choice was made by the defendant. That choice has cost Estela de Araujo dearly, and that's why we're here. Although you're not aware of it at that moment that your life has changed forever, because that driver that crashed into you was doing something more important than keeping his eye on the road. …

[10] The condemnation of a negligent driver for doing "who knows what degree of damage to people like" the plaintiff, was improper. These comments suggested that Mr. Read was, as a driver, a general threat to other drivers. There had to be an anticipation of such evidence before this type of comment became appropriate. As it was, it had no purpose other than to prejudice the jury against the named defendant.

[11] Plaintiff's counsel, while inappropriately referring to the plaintiff as "Estela", then said, "we are here today to ask for your help. We are in this together… Estela would much rather have had the defendant accept responsibility" and allow her to have her life as it was before the accident. "We are here because he has not done that." The fact is that the defendant admitted liability. The defendant was negligent and his negligence caused injuries to the plaintiff. He admitted to this and nothing more was required of him.

[12] Consequently, this comment could do nothing other than arouse hostility. Plaintiff's counsel

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continued:

You may be asking yourself why do you need to know about Estela's past anyway? She isn't on trial here. You may be asking yourself and thinking to yourself: Why is this past important? If Estela fully recovered many months before this accident, the subject of this lawsuit, what has this got to do with the fact that Estela had her life changed by the negligence of the defendant, Read, and deserves to be compensated for what she has suffered and for what her losses are and will be?

These are good questions. But I know how these cases are sometimes defended. Perhaps this case will be different and the defendant's lawyer will take the high road. But sometimes lawyers for defendants try to distract juries from the real issues. Sometimes defence lawyers hope that by bringing up past injuries or by asking hundreds of questions on side issues they can uncover some inconsistency, lack of memory or forgetfulness to make a plaintiff look like they are perhaps unreliable, thus fooling a jury into thinking that she is not deserving or to be trusted. I hope that won't happen here because Estela does not deserve that. If the defendant's doctors or lawyers harp on any of this, you are entitled to ask yourselves: why are they doing this? And you're entitled to ask: is it fair to an innocent woman who has already been through so much?

The first paragraph is argument, not suitable for an opening. The second paragraph is not only argument but attacks the moral tenor of the defence. The suggestion that defence counsel in some cases do not always "take the high road" is not proper comment in an opening, or in a closing for that matter.

[13] Counsel for the plaintiff told the jury that the "defence" hired "investigators to spy on Estela." This never surfaced as evidence. He said:

... I should also be fair and warn you that the defence hired investigators to spy on Estela. When you understand the nature and seriousness of her injuries you may ask yourself: what was the point?

These investigators videotaped Estela going about her normal life. If and when you see these videotapes you may ask yourself: what could these videotapes possibly have to do with this case? But again, I know how these cases are sometimes defended. Sometimes the videotapes are used to create an impression that an innocent victim is exaggerating her problems when it is quite obvious that real and lasting injuries have been suffered. Sometimes the defence will try to persuade a jury that the plaintiff is someone who cannot be trusted or believed and will argue that since there are no signs of disability on this small snippet of tape that the plaintiff shouldn't be trusted.

[14] Counsel for the plaintiff acknowledged to the jury that he did not know if the videotaped film would be

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shown to the jury. No such film became evidence. As said in *Halsbury's Laws of England,* 3rd ed., an opening statement is to be "a general notion of what will be given in evidence." The only purpose of saying that "the defence hired investigators to spy on Estela" was, to paraphrase from *Brophy*, *supra*, to arouse hostility and to prejudice the jury.

[15] Plaintiff's counsel then said that if the defence took the approach which he outlined:

... you will soon realize that it is misguided, that Estela has endured years — four now and going on five — of constant limitation, of pain, of restricted activity. You will see and hear her and realize that Estela would not be before you letting you know about her life and what it has been like for the last four years, exposing every medical record of her life for eight strangers to review, if her problems were not legitimate and serious.

[16] Plaintiff's counsel informed the jury as to his version of the body movements to which Ms. de Araujo was subjected during the collision and the extent of her injuries. He told the jury that connective tissues supporting the spine were damaged, and that muscles, ligaments, tendons, cartilage, blood vessels and nerves surrounding the spine were damaged. He added:

The structural integrity of the spine, meaning the tightness with which it is held together by these ligaments and muscles and tendons is now destroyed.

[17] None of this became evidence before the jury. As was said in *Brophy*, *supra*, at ¶24, counsel may not mention matters that require proof. Counsel's "opening is, or should be, to assist the jury in understanding what his or her witnesses will say." It must not go beyond the evidence.

[18] Plaintiff's counsel then informed the jury that the defence had referred Ms. de Araujo to an orthopaedic surgeon for an assessment. He made suggestions as to what the doctor would say in evidence and added: "I am not sure what else he will say or what arguments the defence will try to raise to deny Estela fair compensation." This was an unacceptable and unfounded impugning of an officer of the court. There is no place, ever, for such a remark.

[19] Plaintiff's counsel then turned to the medical expert witness for the defence. He said, "Is he trying to help Estela get justice or is he merely trying to assist the defence that hired him?" This inappropriate remark reflected badly upon both the doctor and defence counsel. The objectivity of the doctor might have been open to challenge after he had testified, but not at the stage of an opening.

[20] Plaintiff's counsel then unilaterally entered into a pact with the jury to keep his end of a bargain. He

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said that at the end of the trial:

… I sincerely hope that I will have kept my promise to you to present the evidence in a complete, fair, and courteous way. I also promise you that at the end of the trial I will only ask you to do one thing for Estela and that is to be fair. I am confident that in being fair you will give her the justice that she deserves

. . .

[29] Plaintiff's counsel then read his words in opening regarding the hiring of "investigators to spy on Estela" and said:

And that's all there was to that and I don't see anything, with respect, My Lord, that was the least bit derogatory about ICBC or anybody. I have the right to characterize my case without – even if I was to demonize somebody, the defence – the defendant in this case was the negligent party.

THE COURT: And as long as you demonize the defendant, I see nothing wrong with that.

[30] I do not know what definition counsel and the trial judge were putting on the word "demonize". However, even putting it at its mildest, it has no role to play in an opening before a jury. There was no pleading suggesting any form of conduct on the part of the defendant that could be so categorized. It was an error to approve the demonizing of Mr. Read.

. . .

[36] But there was no evidence at trial on the point about hiring investigators and there should have been no reference to I.C.B.C. in the opening nor evidence from the plaintiff regarding the expenses allegedly unpaid by I.C.B.C. What the trial judge did was confirm the hiring of investigators and a failure to pay expenses.

[37] Then the trial judge said that plaintiff's counsel was "perfectly entitled to criticize the defendant." He told the jury to ignore evidence about I.C.B.C. "but take into account Mr. Jarvis' remarks about the defendant." None of plaintiff's counsel's remarks about the defendant were appropriate other than that he was negligent and admitted it.

CLOSING REMARKS OF COUNSEL FOR THE PLAINTIFF

[38] Plaintiff's counsel commenced by referring to his own conduct:

Ladies and gentlemen, Stela has asked me to begin by thanking you for your care and attention. She

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understands the sacrifice that each of you have made to take two weeks basically out of your lives to be here.

I sincerely hope that in the course of this trial I have done my part, by keeping the promise that I made at the beginning to bring the evidence carefully, fully, and courteously. Your attention has made it a pleasure for me to keep that promise. I assure you it isn't always that way.

I also promised you that all I'd ask at this time would be fairness and justice for Stela and I intend to keep that promise, too.

[39] Having improperly inserted his own conduct into the case and having sealed his pact with the jury, plaintiff's counsel turned to his cross-examination of Dr. Fenton:

… I know I got upset when I was cross-examining Dr. Fenton yesterday. I asked myself why I got so angry at Dr. Fenton. It is because Stela is driving on 12th Avenue on a beautiful summer day in August. She's rammed by a driver who is not paying attention. She has to wait over four years to ask a jury for justice. And what happens? The driver of that vehicle doesn't even have to testify. All he has to do is instruct his lawyer to admit that he was at fault and he becomes a safe spectator while the defence puts Stela de Araujo on trial. While the woman who is suffering is forced to justify every move she made or didn't make in her life, the defendant is defended by a doctor who is a professional disgrace, a doctor who cared nothing for the woman who could be hurt even more by his testimony, a man whose bias, whose arrogance and whose neglect were an insult to this courtroom.

[40] I can find nothing in this that could be defended as comments properly included in a closing address to a jury. It is not for counsel to tell a jury why he got upset over an accident. It was improper to criticize Mr. Read, or the system, for the fact that Mr. Read did not testify. It was incorrect to say that the defence put Ms. de Araujo on trial or that Mr. Read "becomes a safe spectator".

[41] It was not only incorrect to say that Mr. Read was "defended by a doctor" but it was also a sarcastic comment designed to characterize the defendant in the light that counsel had cast upon Dr. Fenton.

[42] To then tell the jury that Dr. Fenton is a professional disgrace was an unfounded attack upon professional integrity. Plaintiff's counsel had cross-examined Dr. Fenton as to the source of his income and about not reading certain reports. This line of inquiry gave a foundation for addressing the jury as to bias and the quality of his report. However, the evidence gave no foundation for characterizing Dr. Fenton as a professional disgrace.

[43] Plaintiff's counsel further said as follows:

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Do you believe that the April 1996 accident, and all the time that the defence took to question Stela about various doctors and witnesses about it, were anything other than distraction? The defence hoped that by repeating this theme to you on innumerable occasions that you might be fooled into thinking that there was some merit to it.

[44] This was an attack on defence counsel. It did, as submitted in this appeal, put defence counsel on trial.

From the dissenting Judgment of Mr. Justice Smith.

. . .

[92] On the other hand, counsel's remarks that the doctor was a professional disgrace and was guilty of arrogance and neglect were immaterial, gratuitously rude, and insulting. That they were improper hardly needs to be said. However, these remarks would have reflected more unfavourably on the professionalism of counsel who made them than on that of the doctor in the minds of any eight reasonable citizens.

[93] I agree with my colleague's remarks, at paras. 8-11, 20 above, about counsel's personalization of the trial. In particular, I would emphasize that jurors are judges of the facts. It is highly improper to ask them to put themselves in the position of a litigant. They are to judge the evidence objectively, without passion or favour. That no reasonably competent counsel would consider making such suggestions to a judge underscores the impropriety of the approach plaintiff's counsel took in this case. Further, I agree that many of counsel's comments in his closing address were an "abuse of the privilege of counsel."

[94] Although my colleague and I differ on the extent of the misconduct, I accept the premise that there was serious impropriety in the conduct of plaintiff's counsel at trial. I turn now to consider whether this finding necessarily leads to the conclusion that a new trial is warranted.

The case of *Brophy v. Hutchinson* 2003 BCCA 21, also provides guidance:

. . .

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

40(53) Addresses to the jury or the court shall be as follows:

(a) the party on whom the onus of proof lies may open his or her case before giving evidence;

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(b) at the close of the case of the party who began, the opposite party, if that party announces his or her intention to give evidence, may open his or her case;

(c) at the close of all of the evidence, the party who began may address the jury or the court, and the opposite party may then address the jury or the court and the party who began may then reply and the court may allow the opposite party to be heard in response to a point raised in the reply;

(d) where a defendant claims relief against a co-defendant, that defendant may address the jury after that co-defendant;

(e) where a party is represented by counsel, the rights conferred by this rule shall be exercised by the party's counsel.

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

…

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

And I suspect you'll hear evidence that, because he developed this fear of bike riding, he lost contact with the kids that he used to ride bike with – bikes with, and that he fell into the wrong crowd. And as my friend said, he ended up smoking a lot of marijuana.

At times – I anticipate at times he will admit to you or tell you that he was smoking up to ten joints a day. And his habit was such that in order to support it, he had to deal drugs himself. It's no surprise, but he eventually dropped out of school; and I understand that the plaintiff is not gainfully employed. And the gist is, the plaintiff is saying, or will say, that this is Mr. Hutchinson's fault, from this incident that happened six years ago, has led to an effect on this plaintiff's life. And again, I'm here to tell you that that's not true.

Now, given the things that have happened to this plaintiff, you would have anticipated that the plaintiff was seeing all sorts of doctors for his right knee problem, or for the psychological effect of this accident. And again, this is not evidence, but in anticipation of evidence, five times the plaintiff went to his family doctor, complaining about knee problems or other problems. Five times in almost six years.

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You've also heard my friend talk about the psychologist that the plaintiff saw. Now, the psychologist, Dr. Schultz, saw the plaintiff in 1999, almost three years after the accident. And the psychologist will explain to you what evidence she had before her, when she came to her conclusions and recommendations.

And I'm here to tell you now that one of her recommendations, one of her recommendations to get the plaintiff back on track, was that funding be provided so that he could take up professional jet-ski racing. It's true. It's true. That's one of the recommendations.

You'll hear evidence from the plaintiff that, when he was racing B.M.X., it wasn't unusual to fall down. Sometimes he would hit the jump the wrong way, land the wrong way, or sometimes a rider would cut him off. But of course, this had no effect on his psychological well-being.

Now, when you hear the evidence, I do want you to consider Mr. Hutchinson. I want you to consider yourself being in Mr. Hutchinson's position. You're obliged to be fair to Mr. Hutchinson, and you're obliged to be fair to the plaintiff. And I tell you now, that it's Mr. Hutchinson's position that he's in no way responsible for this accident or how the plaintiff's life has turned out.

And our position will be that the plaintiff and his mother cannot use this motor-vehicle accident as an excuse for all the things that have gone wrong in his life; and that this accident is not an excuse to shirk his responsibilities. Responsibilities that we all deal with, day in and day out. Thank you.

. . .

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

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

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

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

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

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

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

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wrong in his life".

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

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

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

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

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

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

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

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

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

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

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

I also offer the following suggestions:

1. Always be on time. Judges and juries do not like to be kept waiting. Do not let the 15 minute recess become the 20 minute recess.
2. Always have witnesses available. We all try to convenience witnesses as much as possible, but we must also consider the convenience of the Judge and jury. I have no way of knowing for sure, but I would expect that jurors would be disappointed if they are told at 3:00, "plaintiff's counsel has no other witnesses available today. We will reconvene tomorrow morning at 10:00, but now we will

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probably have to sit an extra day

3. My personal view is that it is never permissible to interrupt opposing counsel during opening or closing. Some lawyers would say that in extreme circumstances this can be done, but I personally think the only appropriate thing to do is to wait until counsel is finished, then raise any issue that has arisen with the Judge in the absence of the jury so that (hopefully) the Judge can correct things.
4. Do not put on a theatrical performance by doing such things as rolling your eyes, snickering, sighing, etc.
5. Never discuss the case with a juror after the trial.
6. Remember to remind witnesses that they are not to discuss the case with anyone while they are under cross-examination.
7. I always refer to opposing counsel as "my friend." Some counsel prefer "my learned friend." Former Chief Justice Allan McEachern once wrote that either is acceptable.

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[1] The Supreme Court of Canada in *R. v. Lyttle*, [2004] 1 S.C.R. 193 reviewed the question of what foundation counsel must have before cross-examining a witness on an issue and concluded that a lawyer may pursue any hypothesis that is honestly advanced on the

strength of reasonable inference, experience or intuition

[2] [1966] 3 W.L.R. 950 at 962-63 (C.A.)

[3] *Rondel v. Worsley*, [1967] 3 All E.R. 993 (H.L.) per Lord Reid at 998.

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