

CANADA / JUDGMENT

Brown v. Goodacre

2020 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

23 January 2020

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2020 BCCA 26 Brown v. Goodacre

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Brown v. Goodacre,

2020 BCCA 26

Date: 20200123

Docket: CA45516

Between:

Christopher Walter Brown

Respondent

(Plaintiff)

And

Nicole Goodacre

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated

July 19, 2018 (Brown v. Goodacre, Victoria Docket 134458).

Counsel for the Appellant:

M.J. Hargreaves

Counsel for the Respondent:

J.A.S. Legh

Place and Date of Hearing:

Victoria, British Columbia

October 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 23, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fisher

Summary:

The appellant seeks a new trial based on improper statements to the jury by plaintiff's counsel at trial. The statements inappropriately personalized the case and expressed personal opinions of counsel. No objection was made at the time by defence counsel and the trial judge on his own motion cautioned the jury in respect of the statements. Held: Appeal dismissed. In light of the failure to object by defence counsel and the judge's caution to the jury, appellate intervention is not warranted.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] In 2013, the respondent was injured when the pick-up truck he was driving was struck from the rear by a vehicle owned and operated by the appellant. The matter proceeded to trial before a judge and jury and, on July 19, 2018, the jury awarded damages totalling \$847,000. The appellant appeals this award based on a submission that counsel for the respondent misconducted himself in the opening statement and closing submissions to the jury to such an extent that the trial was rendered unfair.

- [2] The position of the appellant is that in his addresses to the jury, plaintiff's counsel personalized the case and expressed personal opinions to the jury to such an extent that the trial process was unfair. The appellant acknowledges that the trial judge did instruct the jury to caution them about counsel personalizing the case, but says that the corrective instruction was inadequate to ensure trial fairness. The appellant also acknowledges that defence counsel made only limited objections to the impugned submissions and advised the trial judge that he was content with the contents of the charge. Nevertheless, the appellant submits that this case falls into the category of exceptional circumstances which merit a new trial.
- [3] I agree that the submissions of plaintiff's counsel inappropriately personalized the case on several occasions and went beyond the proper role of counsel in addressing a jury. However in my opinion, the corrective instruction of the trial judge, when considered in light of the failure of defence counsel to object to most of the conduct that is now impugned or to request a mistrial, was sufficient to overcome the potentially prejudicial effect of counsel's submissions. For the reasons that follow, I would dismiss the appeal.

Issue on Appeal

- [4] The sole issue on appeal as framed by the appellant is whether counsel for the plaintiff misconducted himself in the opening statement to the jury and the closing submissions to the jury, to such an extent that the trial was rendered unfair, notwithstanding the directions of the trial judge, with the result that the verdict pronounced by the jury should be set aside and a new trial ordered.
- [5] The statements to the jury that the appellant says were improper fell into four categories:
- (i) personalizing the case by bringing himself into the opening statement and closing submissions;
 - (ii) giving his personal opinion on the issues, including putting his personal stamp of approval on the merits of his client's case;
 - (iii) giving engineering evidence in the guise of a common sense observation; and
 - (iv) in one case, quoting a statement from a medical report that was not in evidence at trial.
- [6] The respondent's position is that most of the contested submissions were appropriate and those that were objectionable were appropriately addressed by the trial judge with correcting instructions. The respondent further submits that if defence counsel considered that the statements of plaintiff's counsel, either individually or cumulatively, affected the fairness of the trial, defence counsel had a duty to object during the trial so that the jury might be properly instructed, a mistrial declared, or the jury struck.

- [7] In reviewing the arguments of the parties, I will refer to the trial counsel as plaintiff's counsel and defence counsel, and to the appellant and respondent when I am referring to the positions of the parties on appeal.

Legal framework

- [8] Before dealing with specific issues raised by the appellant, I propose to review the legal principles applicable to counsel's statements to a jury during an opening statement and closing submissions.
- [9] It is well-settled that in an opening statement, counsel must not express personal opinions about the merits of the case or engage in inflammatory comments designed to appeal solely to the emotions of the jury. The opening is not argument, and should not be delivered in the same manner as closing submissions, for which counsel have greater latitude: *McBryde v. Womack*, 2013 BCCA 260 at para. 44.
- [10] The leading case in this jurisdiction on the proper scope of an opening statement is *Brophy v. Hutchinson*, 2003 BCCA 21. Chief Justice Finch described the general parameters of a proper opening statement in these terms:
- [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
- [11] Similar comments were made by Justice Cronk for the Ontario Court of Appeal in *Brochu v. Pond* (2002), 62 O.R. (3d) 722, in a passage cited with approval by this Court in *Lawson v. McGill and McRae Equipment Corp.*, 2004 BCCA 68 at para. 38, and again in *Cleeve v. Gregerson*, 2009 BCCA 2 at para. 48:
- [15] Some restrictions apply to both opening and closing addresses. For example, the expression by counsel of personal opinions, beliefs or feelings regarding the merits of a case has no place in either an opening or a closing address to a jury. That restraint is designed to prevent lawyers from putting their own credibility and reputations in issue, and to avoid any indirect invitation to a jury to decide a case based on information or opinion not established in the evidence.

- [12] Counsel is afforded greater scope in the closing address to the jury, so long as the submissions made to the jury are not so prejudicial as to cause an injustice: Cleeve at para. 49, citing Brochu at para. 17. For example, it is not improper in a closing submission to appeal to the emotions of a jury, provided the comments do not undermine the fundamental requirement that the decision of the jury be based on evidence, not sympathy.
- [13] Trial judges have a wide discretion to control opening addresses and closing submissions. Where objection is made to a jury address as exceeding permissible limits, the trial judge as a matter of discretion may give a cautionary instruction to the jury, or in a more serious case strike the jury and conduct the trial by judge alone, or declare a mistrial: Brochu at para. 24. Even where several errors have been made by counsel, a timely instruction to the jury concerning the issues of concern may be sufficient to prevent a substantial wrong: Cleeve at para. 45.
- [14] Failure of counsel to object in a timely way to an improper jury address is a significant consideration in deciding whether to order a new trial: Brophy at para. 50. Chief Justice Finch explained the rationale for treating the failure to object as a waiver of the right to object at an appellate level except in exceptional circumstances, in these terms:
- [52] In other words, the trial judge is in the best position to observe the effect of counsel's statements on the jurors, and to fashion an appropriate remedy for any transgressions. Where no objection is taken, the assumption is that the effect of any transgression could not have been seriously misleading or unfair and there would be no reason for suspecting injustice.
- [15] In Brophy, this Court held that there were two significant errors that impacted the fairness of the trial and required that a new trial be conducted. One was improper statements to the jury by defence counsel. The other was an error by the trial judge in permitting defence counsel to give an opening statement to the jury immediately after plaintiff's counsel's opening, although consent for that procedure had not been obtained. A new trial was ordered notwithstanding the failure of plaintiff's counsel to object to either of these deficiencies.
- [16] The appellant relies on the fact that a new trial was ordered in Brophy, and also on the comments of Justice Thackray writing for the majority in *de Araujo v. Read*, 2004 BCCA 267. In *de Araujo*, defence counsel did ask the judge to caution the jury about statements made by plaintiff's counsel to the jury, but the judge declined to do so, stating that "the language was a bit over the top, but I'm not going to say anything [to the jury]": paras. 45-46. Justice Thackray concluded that the language was excessive and "had to be dealt with": para. 47.
- [17] In the case at bar, the situation is reversed. Defence counsel did not ask the judge to caution the jury about the personalization by plaintiff's counsel, but the judge did so of his own motion.

- [18] Chief Justice Finch clarified the significance of failing to object in a judgment released one year after de Araujo. In an appeal based solely on improper submissions to a jury, the Chief Justice stated that the failure of counsel to move for a mistrial was a complete answer to the appeal based on counsel misconduct: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at para. 7. He pointed out the practical implications of allowing an appeal based on trial unfairness when defence counsel failed to object to the trial judge:
- [11] It would be quite wrong in my view to permit defence trial counsel to remain silent, and rest his clients' fortunes on a possible favourable verdict, and then to complain in this court that the trial process was unfair.
- [19] In a judgment concurring on this issue, Madam Justice Southin came to a similar conclusion, commenting that "the appellants, having had a remedy below which they chose not to seek, ought not to be granted it now" (para. 30) and addressing the trial fairness assertion in this way:
- [32] But the fairness of a trial is often in the eyes of the participants. A transcript does not give a complete sense of events in a courtroom. Counsel for the appellants, by not moving for a mistrial, obviously did not consider the trial "unfair" and I am not prepared to say that he was in error.
- [20] There are many reasons counsel might not object to statements to the jury that go beyond the proper scope of a jury address. As Southin J.A. points out, the most obvious inference is that counsel did not consider the statements so improper as to imperil trial fairness. Counsel may also fail to object because they have made a strategic assessment that the comments amount to pandering and that a jury will react negatively to them. Justice K. Smith pointed out in *Cahoon v. Brideaux*, 2010 BCCA 228 that:
- [4] 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.
- [21] Whatever the reasons for the failure to object, an appellate court will be very reluctant to permit an appellant to base an appeal on improper statements by opposing counsel that could have been raised with the judge at the time but were not.
- [22] This Court has taken a consistent approach to the failure to object to what are later alleged to be improper statements to a jury. In *Ramcharitar v. Gill*, 2008 BCCA 430, referring to *Brophy*, Justice Lowry stated at paras. 23-24:

This Court will rarely intervene in a civil case where complaints in the nature of those raised for the first time here were not raised at trial. ...

The nature of the statements now complained of does not raise this to an exceptional case that would justify ordering a new trial. The judge, who was in the best position to observe the effect of what defence counsel said, made no comment at all. Mr. Ramcharitar's counsel said nothing other than what he said in reply. If he had sought it, some instruction might have been given. It was apparently thought to be unnecessary.

[23] In *McBryde*, after citing this passage from *Ramcharitar*, Justice Hinkson (as he then was) resolved a similar problem in this way:

[56] I am compelled to the same conclusion as that of Mr. Justice Smith in *Cahoon* at para. 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 ...

[57] There are no exceptional circumstances here, and I would not accede to the appeal concerning the conduct of counsel for the respondents at trial.

Proceedings at Trial

[24] The trial began on June 4, 2018 before the judge sitting with a jury. Liability had been admitted, so the only issue was quantum of damages. The trial lasted for 30 days and the jury deliberated over three days.

[25] At the commencement of the trial, the trial judge explained to the jury the nature of the opening statement:

Following these remarks that I am giving them to you now, the trial will proceed as follows. First, counsel for the plaintiff, will make an opening statement. He will outline the nature of Mr. Brown's case. I remind you, or I tell you right now, what [plaintiff's counsel] says is not evidence. His opening remarks are a road map of where he thinks the case is going to go, but it is not intended to be nor is it evidence. The evidence is the testimony of the witnesses who will take the stand Counsel will try to be helpful to you in understanding the evidence; but what they say, as I have indicated, is not evidence, and you must not accept it as that.

[26] In his opening address to the jury, counsel for the respondent made a number of statements that the appellant says went beyond the proper scope of an opening statement. The appellant identified the impugned statements as follows:

(a) "I have the privilege of representing Chris Brown."

- (b) "At the end of the day, we have to decide how much money has to be paid to Mr. Brown as a result of what happened that day."
- (c) "What you'll see is the hitch, which is welded to the frame of the truck, it's whacked. The front of her car gets dented in, and the grille and everything is dented in. Doesn't look like there's a lot of damage to his vehicle, but the reality is that's why we have bumpers. When you hit a bumper, it's going to take the blow; and in fact, you might not be hurt at all. But it didn't hit the bumper. It hit the hitch, hit the frame. And all of that force goes into the body

You could have a major accident and not be hurt, or you could have a minor accident and have lifelong ramifications. There's no engineering evidence. You know, sometimes we get engineers. I've heard of that. I've never done it. Actually, once. I shouldn't say never."

- (d) "Now, you've got whiplash. Whiplash is not a legal term. It's not a medical term. But it basically talks about your head. When you get hit, when your head or upper body goes forward and comes back, you rip -- that you can rip and tear the muscles and the soft tissues. I'd rather break a leg and have that pain, because it gets better, than I'd ever want -- in my submission, anybody would want -- from whiplash. Because those pains often, and in this case, clearly continue."
- (e) "I mean, one of the hardest trials to have is about chronic pain."
- (f) "His condition is chronic; it's ongoing. I have no idea if it's going to end."
- (g) "What I wanted to give you an example of in dealing with somebody like Mr. Brown, who clearly, you know, has some pre-existing issues -- which my friend's going to make a lot of hay out of. It's like my friend who has a hernia, and a hernia -- if you do too much, it can be a pain. And so I don't know if you know anybody that has that, but -- anyways, she just has to limit herself. We go climbing sometimes. She doesn't go as far as I do; she turns around. And you just have to know your limits, work within it. And that's what Mr. Brown was fully capable of doing prior to this accident."
- (h) "Now, it's an interesting system because you're victimized when you're hit. Now you're victimized when you're on trial because, ultimately, although the defendant's the one that should be on trial, this is a case where Mr. Brown's going to be on trial. And that is just the way what it is. But you have to recognize that there is an element of unfairness to that."
- (i) "Right now, the past five years was an awesome time to be in the trades, and he's missed out on that."
- (j) "On a personal note, on behalf of Mr. Brown, I want to thank you. Sometimes that doesn't happen, but it should; This is a huge imposition, I think, to have to sit through this. But I want to thank you for having agreed, though not quite voluntarily, but to act as a jury."
- (k) "I'm going to make some mistakes; and if I do, His Lordship is going to point them out, I anticipate, and I apologize for that. If I make mistakes, please don't put it on Mr. Brown. I mean, I'm only human too; and if I've screwed up in some way by reaching too far or saying

something that I shouldn't have, that's my fault as a lawyer, but not Mr. Brown's fault. I mean, he is the person that we're all here to deal with and -- so don't lay that at his feet if I do, please. He has been, in my submission, hurt immensely, and he's entitled to some reasonable compensation as a result."

- [27] No objection was made by defence counsel to any aspect of the opening statement and the trial judge made no comment on it.
- [28] The appellant does not suggest that any one of these statements individually would warrant a new trial, but submits that cumulatively, taken with the impugned statements from the closing submissions, they have that effect.
- [29] On July 13, 2018, following the conclusion of the evidence, counsel for the plaintiff addressed the jury in closing submissions. The appellant takes issue with the following statements by plaintiff's counsel:
- (a) "Chris and his wife Lynn have asked me to begin by thanking you."
 - (b) "They know, and I do, what a sacrifice you've made. This has been a very long trial and for all these weeks out of your lives, it is greatly appreciated. You have to know that."
 - (c) "You know, I've been in a few jury trials and I just wanted to tell you that, you know, the care and that the attention that you set have paid is extraordinary and for such a length of time and I thank you for that because you've clearly paid attention. And I sincerely hope that we've done our part here to present the evidence carefully, fully and courteously because that's my goal."
 - (d) "Before I go on further, I want you to know I've been committed to Chris, to help him. So committed that maybe I've objected when I shouldn't have. Maybe I was a bit too zealous and I apologize. If it ever seems like I'm overreaching, or not being accurate, if there's a mistake it's mine, not Chris's. You know this trial took far too long and it's my fault, I'm sorry. I may have called too many witnesses. I might have cross-examined too long. You know, this is not an easy job. It can be challenging to get it all right, and I find myself second guessing myself sometimes."
 - (e) "And it reminded me that law partner, Tyler, he coaches baseball and he says, he gives you pep talks and he says you know, nobody who ever gives his best ever regrets it. And I hope I have. It's also true of Chris."
 - (f) "He's given his best to get over this. There can be no doubt about that. If anyone tells you that he didn't do his best to get better or didn't do his best to work and to try to overcome his pain, you can tell them that he did his best and that he should never regret that."

- (g) "And thankfully she hit her bumper because it did what it was designed to do. It took the impact such that she didn't think there was any damage before she saw it. She was shocked at the damage to her car. It allowed her to avoid getting hurt, go on to get married, have a child, work on her career and really not care about this trial. She has no idea when this trial started. She has no idea what's going on. This isn't about her. She gets to live her life."
- (h) "On the other hand, Chris did not benefit from getting hit in a bumper. If he had, this might be all different. We have bumpers to minimize the force, so people don't get hurt. In this case the Honda rammed the hitch, the hitch is welded to the frame of the car. All of that force goes into the vehicle, pushing it forward one and a half car lengths and all that force is transferred into the people inside. We have bumpers for that reason to reduce injury and she missed it."
- (i) "Chris Brown, I was trying to figure out the right word for Chris. I decided he's a muddled fellow. He's certainly not sophisticated, but he's also a clear example of somebody that's in chronic pain."
- (j) "So it's clear to us all that Chris was profoundly affected on March 30, 2013 and for five years has been desperately trying to find relief. For five years he's been hemorrhaging money. Money hasn't been coming in. It's been going out and there is no relief in sight."
- (k) "You know that he wanted to get better. He didn't want to be in pain. And you know that if there was something else that he didn't do or had done over the past five years, you'd know about it. And you'd know about in part because they hired [Action Pacific] investigations, who followed both Chris, Lynn and the boys at times, three years, 2015 and 2016 and 2018. So they spent over \$11,000 following him to try to deny that he was hurt."
- (l) "My friend will argue that Mr. Brown will be able to work once he deals with his psychiatric issues and that you should reduce his claim accordingly. Well, there was one psychiatrist that testified, that was Dr. Spivak and that was my new word for the trial, risible; I've never heard about risible before. I had to look it up. And risible means laughable and his comment was when the defence witnesses, Dr. Heran and Dr. Kemble said, oh well, oh yes, he's clearly got pain, he's got problems. It really is all in his head and you know, if we could fix him psychiatrically, he will have no more pain or less pain, he said this was risible."
- (m) "It is my opinion that Mr. Brown has done everything reasonably possible to mitigate his loss. His [sic] been shown to be faithful to attending prescribed physiotherapy appointments in the past. He's tried his best with his own remedial programme at home, including ergonomic changes. He's shown a great motivation in traveling to Germany to undergo his surgical treatments. He has mitigated his loss as best he can."

[Note: This is not a submission to the jury, but a reference to a passage from a medical report. I refer to this particular passage (m) later in my Reasons as the "Expert Evidence Quote".]

- (n) "I did want to mention, there is a loss that we can't claim in law but, but there is evidence before you. I think it's Exhibit 8, Tabs 27 and 28 because he borrowed money as a result of basically not having money that, his own money. He ended up borrowing \$40,000 over the past five years, and if you look and calculate it out, interest that is accumulative on those loans is \$58,078 to the start of the trial. That's not something that you're entitled to get back as what we -- pecuniary loss. What I'm suggesting is it is something to be looked at to be cognisant of when we're figuring out, well, what amount should we get for his pain and suffering? I'm not saying it equals that. I'm just saying it's something to be aware of that's an expense he's had as a result of this collision."
- (o) "So, I've spoken for a long time. I've made some mistakes, and I'm sorry again if I have gone on too long. But it's the last chance that I have to advocate on behalf of Chris. At the end of all this, Chris will be waiting your verdict on next week and after that everything is over for us, we all go home. Chris lives with this for the rest of his life, you need to remember that this is the end for him, there's is no -- he doesn't get a chance to, you know, to look at it again. So I trust you'll be fair, and I thank you for listening to me. Thank you for overlooking my faults. Thank you."
- [30] At one point during closing submissions, plaintiff's counsel broke down and the jury had to stand down. In the absence of the jury, plaintiff's counsel explained to the judge that the emotion he had shown was unconnected with the case, and agreed that the trial judge should explain to the jury that it should be ignored. That request was made by defence counsel as well. The trial judge then went on to address plaintiff's counsel regarding some of the matters that have been raised in this appeal, although no objection had been made by defence counsel:

But the second issue that I am more concerned about, is counsel should not be personalizing the case for the jury and adding their personal stamp to a party, to the party's position, to the party's claims, and that is what I am going to be telling them. Because in my view you are going there. Whether you have actually crossed the line, I am not being asked to decide that. But it is not for counsel, in my respectful view, to say if mistakes were made, they were not Chris's, as you have said, they were mine, as you have said. That is bringing counsel into the equation and counsel's conduct and counsel's integrity in my view and that is not proper advocacy.

- [31] I have underlined one sentence in this passage to reinforce the important point that the trial judge had not been asked by defence counsel to grant one of the remedies available to a trial judge, such as declaring a mistrial or taking the case away from the jury. The concerns raised were raised by the judge.

- [32] When the jury returned, the trial judge made the following statement to the jury:

COURT: Please have a seat, folks.

A couple of things I want to say to you before I ask [plaintiff's counsel] to continue with his closing submissions. First off it deals with the emotions, the challenges of trial work. Obviously, [plaintiff's counsel] was upset. You cannot allow that to sway you one way or the other, I am not suggesting that it would. But you have taken an oath, or you made a formal affirmation to decide this case strictly upon the evidence they presented and not to be swayed by any sympathy for or against someone and antipathy against someone. Nor can you allow counsel's conduct to allow you to sway it either. You have to be impartial deciders, triers of facts, impartial judges and decide this case on the evidence.

I am also going to tell you that counsel should not be expressing their personal opinions about a case or about a witness. If counsel does and you decide that, you have to disabuse your mind of that. You cannot allow counsel's personal views to sway you.

Counsel cannot put a personal stamp on a case. Obviously, they work with their client, they represent their client. That is what lawyers do, but if you have perceived, if you perceived, because you decide this, if you perceived that anything [plaintiff's counsel] has said seems as though he is putting his stamp on the case, personalising it, you have to disabuse your mind about that, because that is not counsel's role.

Counsel's role is to bring the evidence to Court and to advocate on behalf of their client, not to express personal opinions. So you are not to be swayed one way or the other. If you think, if you have concluded that what [plaintiff's counsel] has said, or for that matter what anybody else says, personalizing a case, you decide your case, this case, strictly on the evidence.

[33] Later in the plaintiff's closing submissions, another issue arose. Plaintiff's counsel referred the jury to a paragraph from a medical report that had been redacted from the exhibit (the Expert Evidence Quote referred to above). At the next break, defence counsel raised this with the judge and asked the judge to instruct the jury that the passage read by plaintiff's counsel was not evidence and should not be considered. During discussion with counsel, this exchange occurred:

[DEFENCE COUNSEL]: Well, my proposal is --

THE COURT: Are you making an application?

[DEFENCE COUNSEL]: Well, my proposal -- I'm not making any application, My Lord.

THE COURT: Okay.

[DEFENCE COUNSEL]: But -- far from that, but I think that the jury needs to be instructed that, that was not part of the evidence. And that is, it was not -- it's not in the report before them.

[Emphasis added.]

[34] I have underlined the reference to an application, as this was another opportunity to seek either a mistrial or continuation with judge alone, but defence counsel presumably considered that this issue could be dealt with by a further instruction to the jury.

[35] The trial judge then brought the jury back and gave them a detailed instruction, beginning with:

I think it has been said more than once, that what counsel say or what I say, is not evidence. What is evidence is what the witnesses say or the documents that have been filed as exhibits in this trial.

The judge then explained in detail the error that plaintiff's counsel had made in referring to a document not in evidence.

[36] Plaintiff's counsel then completed his submissions and defence counsel made his submissions to the jury. Following completion of the submissions, the trial judge discussed his charge with counsel. Defence counsel requested a charge concerning plaintiff's counsel's submission in these terms:

I did have some concerns with some of my friend's comments in regards to his closing on Friday, and that was with respect to my client, Nicole Goodacre, in personalizing it on the basis that she didn't care because she wasn't here, she was able to get on with her life, have a family and a baby; and characterizing his client as, well, he hasn't been here because he's -- sometimes because he's in pain. I think that's unfair to put it in that vein, and I think you need to do to, in your instructions and charge to the jury, point that out. That's improper, in my submission, to personalize both of them in that sort of a vein, whether they're here or not and the reasons that that may or may not be. Thank you.

[37] No other objections were made to plaintiff's counsel's submissions and defence counsel made no other request for a corrective charge.

[38] In his charge to the jury, the trial judge repeated his direction concerning plaintiff's counsel's emotion during submission and the personalizing of the case:

Before addressing the defence case, let me comment briefly on plaintiff counsel's final submissions to you and the manner in which they were done. You are aware, ladies and gentlemen, that [plaintiff's counsel] became emotional during those submissions and began crying. He explained to you afterwards that it had nothing to do with Mr. Brown and that you should not allow his emotions to influence you in any way. He is right in that. Counsel's feelings have no place in your deliberations. In saying this, I also note that neither counsel should have personalized this case or be seen to have put their stamp of approval or endorsement on their client's position. It matters not, ladies and gentlemen, that [plaintiff's counsel] says he is committed to helping Mr. Brown or that he hopes he has given his best for his client. What matters is the evidence that both sides have presented to you, the arguments they have made based on that evidence and your assessment of that evidence.

[39] The position of the appellant on this appeal is that notwithstanding the failure of trial counsel to object in a timely way, the cumulative effect of plaintiff's counsel's statements to the jury was so prejudicial to a fair trial that a new trial is required. The respondent accepts that some of the comments inappropriately personalized the case, but says that the failure to object is a factor that strongly militates against the serious remedy sought in this appeal.

Analysis

[40] I agree with the appellant that many of the comments of plaintiff's counsel improperly personalized the case or expressed a personal opinion inappropriate for a jury address. I would not, however, give effect to the appeal on that ground for two reasons. First, the trial judge instructed the jury appropriately concerning personal opinions of counsel on two separate occasions, once in the middle of closing submissions of plaintiff's counsel and once in his charge to the jury, to caution them not to be influenced by such comments.

[41] On the first such occasion, the judge specifically cautioned the jury that:

counsel should not be expressing their personal opinions about a case or about a witness. If counsel does and you decide that, you have to disabuse your mind of that. You cannot allow counsel's personal views to sway you.

if you have concluded that what [plaintiff's counsel] has said, or for that matter what anybody else says, personalizing a case, you decide your case, this case, strictly on the evidence.

[42] In his charge to the jury, the trial judge reiterated his caution that "neither counsel should have personalized this case or be seen to have put their stamp of approval or endorsement on their client's position" and addressed another issue that the appellant has raised in this Court, the assertion that plaintiff's counsel had attempted to inoculate his client from weaknesses in the case by deflecting any such weaknesses onto himself:

It matters not, ladies and gentlemen, that [plaintiff's counsel] says he is committed to helping Mr. Brown or that he hopes he has given his best for his client. What matters is the evidence that both sides have presented to you, the arguments they have made based on that evidence and your assessment of that evidence.

[43] These instructions are appropriate to deal with the concerns arising from the submissions of plaintiff's counsel. Judges should not be quick to assume that the manner in which counsel addresses a jury will unduly influence them. As Justice Smith said in *Cahoon*:

[2] That a jury might be improperly influenced by the words and tactics of counsel is no doubt possible: 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.

[Citations omitted.]

[44] The second reason I would not give effect to this ground of appeal is that defence counsel (who is not counsel on the appeal) did not object to plaintiff's counsel's personalizing of the case, or ask the judge to take any of the stronger steps the appellant now asks this Court to take. I say this without being in any way critical of defence counsel's decisions. He may well have considered that any unfair aspect of the plaintiff's jury address was adequately addressed by the judge's instructions to the jury. He may not have considered the comments of plaintiff's counsel to be very serious at all. He may have considered that plaintiff's counsel was doing more harm than good to his own client's cause. In any event, the failure to object weighs heavily against appellate intervention.

[45] I should add that not all of the comments to which the appellant takes exception as improper personalization are in fact improper. One clear example is the appellant's submission that plaintiff's counsel exceeded the parameters of a proper opening statement when he said to the jury:

His condition is chronic; it's ongoing. I have no idea if it's going to end.

[46] On its face, this would be an improper statement of counsel's opinion. However, the respondent points out that what plaintiff's counsel was doing in this part of his opening was paraphrasing one of the medical opinions he intended to adduce. The full context makes this clear:

You're going to hear from Dr. Gee. The family doctor's going to come testify. He's going to indicate that he initially believes the soft tissue injuries that he has -- Mr. Brown -- and that Mr. Brown has not responded to conservative measures, which included various therapies that I just mentioned. His condition is chronic; it's ongoing. I have no idea if it's going to end. And the chance of him showing significant improvement in the future is unlikely, he will tell you. And in his opinion, it's unlikely he was going to be able to return to his occupation as a painter.

[Emphasis added.]

[47] There is nothing improper about this statement when read (or heard) in context.

[48] Defence counsel did object to one other statement the appellant contests, the reference to a portion of a medical report that was not properly in evidence (what I referred to earlier as the Expert Evidence Quote). However, the judge gave a cautionary instruction to the jury concerning this matter. On this occasion, the trial judge asked defence counsel whether he was making an application and was advised that he was not. Defence counsel was presumably satisfied with a cautionary instruction. Absent exceptional circumstances, it would not be appropriate for this Court to intervene when counsel at trial adverted to the issue and elected not to ask for a stronger remedy.

[49] The final area of dispute in this Court concerned statements made in both the opening statement and closing submissions that the appellant characterizes as giving what amounts to engineering evidence concerning the impact of the collision on the hitch of the plaintiff's car as contrasted with the bumper of the defendant's car, and the transfer of the force of the

impact to the occupants of the plaintiff's vehicle. The trial judge was in the best position to assess the significance of these statements on the jury. They are not of themselves sufficient to conclude that the trial was unfair, and once again, the failure of defence counsel to object to the statements weighs heavily against any conclusion that the statements imperiled the fairness of the trial.

[50] Having in mind the cautionary instructions given by the trial judge to the jury, it is my opinion that there are no exceptional circumstances in this appeal sufficient to overcome the absence of objection by defence counsel to the conduct about which the appellant now complains. I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fisher"

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