DEFENDING PERSONAL INJURY

TOP TEN TIPS ON HOW TO AVOID A JURY MISTRIAL

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(1) Ask the judge.

- If you have any concerns about a question you wish to ask, evidence you wish to present or a statement you wish to make, seek directions from the judge in the absence of the jury before proceeding.
- Anticipate concerns you may have regarding the conduct of your friend's case and, preemptively, raise those concerns with the judge in the absence of the jury.

(2) Immediately deal with any prejudicial conduct by opposing counsel.

- If opposing counsel's conduct prejudices your client, you should address those concerns immediately with the court and in the absence of the jury so that the court can instruct the jury on any misconduct at the earliest opportunity thereby minimizing any prejudicial impact: *Brophy v. Hutchinson*, 2003 BCCA 21 and *Giang v. Clayton, Laing and Zheng*, 2005 BCCA 54.
- Generally, you should not interrupt counsel's opening or argument, but ask to speak to the judge in the absence of the jury immediately after opposing counsel have made their presentation.

(3) Use great care when calling the credibility of the plaintiff, defendant or a witness into question.

- Do not use prejudicial language. For example, to call the plaintiff a drug dealer is highly prejudicial when it is not relevant to the matters in issue (i.e., on the quantum of damages or liability). Such an allegation could only be relevant to credibility if proven independently and denied by the plaintiff; in this case the only purpose was show that the plaintiff was engaged in criminal activity to prejudice the jury: *Brophy v. Hutchinson*.
- It is not appropriate to suggest that a plaintiff is taking advantage of the social security system and thus is the type of person that would take advantage in her action: *McLachlan v. Hamon*, 2001 BCSC 1679.
- Do not allow an expert to improperly opine on a plaintiff's credibility: *Fast v. Insurance Corp of British Columbia*, 2004 BCSC 966.
- Do not attack the character of a witness associated with the plaintiff in an attempt to develop guilt by association: *McLachlan v. Hamon*.
- Do not question the moral tenor of the defence by making such comments in the opening or closing addresses as: "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 the 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: is it fair to an innocent woman who has already been through so much?": *de Araujo v. Read*.
- Suggestions about a doctor's anticipated evidence such as: "I am not sure what else he will say or what arguments the defence will try to raise to deny Estela fair compensation" are entirely inappropriate: *de Araujo v. Read*.

(4) Careful what you say in your opening statement.

- An opening is intended to be a road map of the case that will be presented and to provide a general notion of what will be given in evidence.
- "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 intended to encourage hostility, or statements that appeal to the juror's emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use or rhetoric, sarcasm, derision and the like is impermissible.": *Brophy v. Hutchinson*; *de Araujo v. Read*, 2004 BCCA 267; and *Schram v. Osten*, 2004 BCSC 1789.
- It is improper for the defendant to make an opening statement prior to the close of the plaintiff's case: *Brophy v. Hutchinson*.

(5) Do not put or allow inadmissible evidence to be placed before the jury.

- See, for example: *Ennis v. Allenby*, 2006 BCSC 145; *Lawson v. McGill*, 2004 BCCA 68; *Leslie v. Palmer* 2003 BCSC 1344; and *Mazur v. Moody* (1987), 14 B.C.L.R. (2d) 240 (S.C.).

(6) Do not promise evidence that you cannot or do not deliver.

- For example, *Beddow v. Megyesi* (1992), 63 B.C.L.R. (2d) 158 (S.C.) in which plaintiff's counsel announced he would call a lawyer as a witness; the lawyer was not compellable.
- Do not tell the jury that the defence hired investigators to spy on the plaintiff when counsel does not know whether that evidence will be placed before the jury: *de Araujo v. Read*.
- Use care in relying upon undisclosed documents in cross-examination of a witness: *Stevenson Estate v. Vancouver (City)*, 2006 BCCA 6.

(7) As counsel, do not give evidence or express your own personal beliefs or opinions.

- Counsel's personal opinions of the case are irrelevant.
- Do not offer your theories of the case which are unsupported by the evidence: *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 400.
- Do not offer your own opinions on such matters as: that the plaintiff is completely resistant to treatment (in the absence of any such evidence); that the plaintiff had decided that going to doctors and taking treatments was preferable to doing other things; that the jury should ignore what the doctors believed and rely upon their own and defence counsel's own beliefs: *McLachlan v. Harmon*.
- Do not offer your own evidence, for example: you own evidence as to what accommodations at work might allow someone to be productive: *McLachlan v. Harmon*.

- Do not offer your own version of the body movements to which the plaintiff was subjected during a collision: *de Araujo v. Read.*
- Do not refer to irrelevant matters such as the practices of ICBC or to the general public hysteria against insurance claims: *Giang v. Clayton et al.*
- Never say "I think," "I believe" or "I accept." Instead, say I submit: *Melgarejo-Gomez v. Sidhu.*
- Do not enter into "pacts" with the jury making promises to them: *de Araujo v. Read.*
- "I'm honoured to represent Alice and say on her behalf that we're asking for your help in this case, based on the evidence" is an inappropriate expression of counsel's personal feelings: *Giang v. Clayton et al.*
- Do not offer any explanations about why your client does not testify: *Birken v. Barnes*, [1992] B.C.J. No. 1440 (C.A.).

(8) Do not misquote the evidence or the law.

- *Lawson v. McGill* contains several examples of comments made by counsel which were considered to be prejudicial misquoting of the evidence including:
  - Submitting that a doctor has a duty to accept a patient's history; that the doctor does not check the patient's complaints, when the evidence was that the doctors conducted an examination;
  - Submitting that diagnostic labels were not helpful because they only meant that the plaintiff had complained for a long time. Whereas, the diagnosis was based upon the patient's history and their physical examination of the patient.
  - Submitting that a doctor found the plaintiff to be 70% better when it was merely the doctor reporting what the patient had advised.
  - Submitting that the diagnosis of a psychologist was not acceptable because the psychologist was not entitled to determine whether the plaintiff was malingering, when the psychologist had considered it.
  - Submitting that the plaintiff had lied on her tax returns by describing herself as single when she had lived with her parents for a portion of that year.
  - Submitting that the plaintiff had lied to welfare when she had denied that she had lied and there was no such evidence.
- *Giang v. Clayton et al.* also contains several examples of misquotes of evidence in counsel's closing.
- Do not exaggerate the evidence, for example, describing an attendance for marriage counseling as an attendance for "psychiatric assessment": *McLaclan v. Harmon.*
- Comments that the defendants have failed to take responsibility puts them on trial and reverses the onus of proof. Saying that the defendants have not accepted their share of the responsibility leaves a jury with the impression, wrongly, that liability is a concluded result and they need only apportion it: *Schram v. Osten.*

(9) Careful with any props.

- PowerPoint slides which contain highly prejudicial and wrong comments can further compound the prejudice before a jury: *Schram v. Osten*.

(10) Be passionate but do not make prejudicial remarks that tend to arouse hostility or make statements that appeal to juror's emotions.

- Three recent cases which serve as informative roadmaps of where not to go in front of a jury are: *Brophy v. Hutchinson*; *de Araujo v. Read*; and *Giang v. Clayton et al.*
- Mere earnestness, fervour or even passion is appropriate but counsel should not transgress the decorum which should be observed in the courts: *de Araujo v. Read*; *Brophy v. Hutchinson*; and *Giang v. Clayton et al.*
- Do not suggest that the jury consider the case in terms of their own lives: *Martin Estate v. Pacific Western Airlines Ltd.*, [1981] B.C.J. No. 1214 (S.C.); do not suggest that the jury imagine themselves in the place of the plaintiff or defendant: *Brophy v. Hutchinson*; *de Araujo v. Read*.
- Do not appeal to the juror's own financial interests by suggesting that they should assess the case as to what they believe would be proper compensation if "you were suddenly taken away from your family" or ask themselves "If I were X, how much ought I to be paid": *Martin Estate v. Pacific Western Airlines Ltd.*
- Do not invite the jury to be angry at a party or to condemn their conduct: *Martin Estate v. Pacific Western Airlines Ltd.*
- Do not suggest that opposing counsel was challenging jurors as an attempt to find a jury that would be sympathetic to their client: *McLachlan v. Hamon*.
- Do not suggest that a jury should compare the plaintiff against people who are disabled but still work, leaving the inference that damages are a form of sympathy and should only be awarded to those who are not only disabled but who are working: *McLachlan v. Hamon*.
- Do not refer to a party by his or her first name: *de Araujo v. Read*; *Giang v. Clayton et al.*