DEFENDING MILD TRAUMATIC BRAIN INJURY CASES

Chapter 4

4. GETTING AND KEEPING THE JURY

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CHAPTER 4

4. GETTING AND KEEPING THE JURY

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GETTING AND KEEPING THE JURY

I. Introduction

Getting a jury is the easy part; hanging on to a jury can be challenging. This paper addresses some of those challenges. In particular, the difficulties faced in mild traumatic brain injury cases by defence counsel in opposing applications to strike jury notices and some of the mistakes that can be made at trial that lead to losing a jury.

II. Getting a Jury

A litigant's right to a jury is set out in Section 17 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443.

The *Supreme Court Rule* which governs the issuance of a jury notice is *Rule* 39(26) which provides:

> (26) Subject to subrules (25) and (26.1), a party may require that the trial of an action be heard by the court with a jury by
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> (a) filing and delivering to all parties of record, within 21 days after delivery of the notice of trial and not later than 30 days before trial, a notice in Form 38, and
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> (b) paying to the sheriff, not later than 30 days before trial, a sum sufficient to pay for the jury and the jury process.

Counsel should strive to have their client's instructions regarding the preferred mode of trial as soon as possible and prior to the trial date being set. Whether the matter is going to proceed before a jury will impact upon the length of the trial. Further, having those instructions in advance allows counsel to ensure that his or her office is well aware of the need to issue a jury notice on a particular file. This will avoid a mishap should counsel be away on holiday when a notice of trial is received in their office. As a matter of practice, the jury notice should be issued with the notice of trial or immediately upon the notice of trial being served.

Not all is necessarily lost if a jury notice is served late. In certain circumstances, the court may grant an extension of time to file a jury notice pursuant to the provisions of Rule 3(2). The party seeking to extend the time must demonstrate that there was an existing desire or intention to seek trial by jury within the 21 day period, or must satisfy the court that there has been a fundamental change in circumstances (see for example: *Smith Estate v. Vancouver General Hospital*,

(1981) 28 B.C.L.R. 282 (B.C.C.A.); *Hoare v. Firestone Canada Inc.*, (1989) 42 B.C.L.R. (2d) 237 (B.C.C.A.); and *Robertson v. Canadian Imperial Bank of Commerce* (1994), 99 B.C.L.R. (2d) 246 (B.C.C.A.)).

A late filed jury notice is a nullity and, accordingly, an application should be brought on to extend the time: *Lanci v. Marpole Transport Ltd.* et al, [2000] B.C.J. No. 1701, (B.C.S.C.); and *Coulson v. Sra*, (2001) 91 B.C.L.R. (3d) 259 (B.C.S.C.).

Once you have filed a jury notice, counsel should ensure that they have appropriate reminders to pay the jury fees in compliance with subrule 39(26)(b). If the fees are not paid at least 30 days before, there is no remedy. For example, bring forwards starting 60 days prior to the 30-day deadline are appropriate. This allows ample time to obtain the jury fees from the client.

If the jury has been called for by the plaintiff, as a matter of practice, I use the same bring forward reminders as I would had I issued the jury notice. It is not unheard of for a party to reconsider the wisdom of a jury as the trial date approaches. If a plaintiff gives up the right to a jury by failing to pay the fees, the defence has the opportunity to choose to keep the jury by merely paying the jury fees. Accordingly, 60 days before the 30-day deadline, counsel should address the question of proceeding before jury with their client. If the instructions are to proceed with a jury, counsel must ensure that the fees are paid in compliance with subrule 39(26)(b).

III. Applications to Strike a Jury

A. Timing of an Application to Strike a Jury

There are two rules that govern the timing of Jury Strike applications. The first is *Rule* 39(27)(a) which states:

> (27) Except in cases of defamation, false imprisonment and malicious prosecution, a party to whom a notice under subrule (26) has been delivered may apply
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> (a) within 7 days for an order that the trial or part of it be heard by the court without a jury on the ground that
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> (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation which cannot be made conveniently with a jury, or

(ii) the issues are of an intricate or complex character

Accordingly, this rule required that the application be brought within 7 days of receipt of the jury notice. Prior to the enactment of *Rule* 35(4)(a), if a party failed to bring the application within the time period under *Rule* 39(27)(a) it was difficult to extend the time and the party seeking to strike had the onus to demonstrate that there had been a change in circumstances.

However, in practice, the pre-trial conference rule has considerably changed the timing of these applications.

Rule 35(4)(a) provides:

> At the pre-trial conference, the judge or master may, whether or not on the application of a party, order that
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> (a) the trial, or part of it, be heard by the court without a jury, on any of the grounds set out in Rule 39 (27)

The authorities are clear that an application to strike a jury notice can be made at any time during a pre-trial conference and the pre-trial judge or master has a wide discretion over the granting or dismissing of such an application outside of the 7 day time period: *Robitaille v. Vancouver Hockey Club Ltd.* (1979), 14 B.C.L.R. (377 (B.C.C.A.) aff'g (1979), 12 B.C.L.R. 355 (B.C.S.C.); *Sadowick v. Doobay* [1982] B.C.J. No. 447 (B.C.S.C.); and *Patterson v. Rankel*, [2001] B.C.J No. 1335 (B.C.S.C.).

There has been some criticism of bringing an application to strike a jury notice on a pre-trial conference late in the day (for example, see *Gerbrand v. North American Life Assurance Company* [1994] B.C.J. No. 203 (B.C.S.C.)).

In *Menendez v. Insurance Corporation of British Columbia*, (unreported), September 12, 2002 the plaintiff sought to strike a jury notice on a Chambers application. The material facts upon which the plaintiff sought to strike the jury notice were well known years before the application was made. In considering the timing restriction under Rule 39(26) with the apparent unfettered discretion of the pre-trial conference rule, Master Tokarek said:

> I have not been given any authority directly on point, but I would suggest that the appropriate way to reconcile those two rules would be to insist that he application to strike the jury notice be brought within the prescribed time unless something changes or some event transpires that was not known or could not reasonably have been foreseen, or perhaps if there were something as simple as

> inadvertence, that required the matter to be raised again. When such a change or explanation is made, the court can exercise a discretion as to what to do to ensure that a fair trial take place, which is the overriding consideration of Rule 35. There has to be meaning given to Rule 39 and the requirement to apply within a prescribed time frame. There must be some meaning given to the rule that would require a party to apply to extend the time to make an application where a time restriction applies. The attempt to reconciling the two rules I just referred to seems to be to accomplish that objective. If I am wrong in all of the above, then applying the rules on a more literal basis, clearly this matter before me now is not here pursuant to a pre-trial conference, it is a chambers application in which no application has been made to extend the time which, if made, would of course entail some explanation as to the reasonableness to accede to that request.

In mild traumatic brain injury cases the plaintiff's arguments for striking the jury is often based upon the medical evidence being of a complex nature or of a type which is inconvenient for a jury. The mere assertions of counsel are not appropriate nor should the court be asked to decide the application based upon anticipated evidence. The application should be made when the court can examine the medical legal reports to determine whether the reports are of an intricate or complex nature. In *Forliti (Guardian ad litem of) et al v. Woolley et al*, (2003) 12 B.C.L.R. (4th) 342 (B.C.S.C.), Madame Justice Garson found that the authorities supported the view that an application to strike a jury should be heard once the relevant medical reports upon which the matter was to proceed to trial had been exchanged. Typically, medical legal reports are not exchanged until 60 days prior to trial.

B. General Principles on an Application to Strike a Jury

The cases involving applications to strike jury notices where there are allegations of mild traumatic brain injury are very much fact driven and there is no clear theme identified in the decisions. There are several factors the court considers relevant in exercising its discretion to strike a jury notice, including the number and type of expert witnesses, the number of lay witnesses, the length of the trial, liability issues, credibility issues, and causation issues such as pre-existing injuries and or conditions.

The following briefly addresses the general principles to be applied.

In *Nichols v. Gray* (1978), 9 B.C.L.R. 5, the Court of Appeal outlined the scope of the judge's discretion under Rule 39(27). Lambert J.A. delivering the majority judgment stated, at page 14:

> On the basis of the evidence before him, the chambers judge may find or may decline to find:
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> 1. That the issues require prolonged examination of documents or accounts;
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> 2. That the issues require a scientific or local investigation; or
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> 3. That the issues are of an intricate or complex character.
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> When he makes those findings he is not, at that stage, exercising a discretion, but, rather, making findings of fact on the basis of evidence. If, after considering the evidence, he does not make one of those findings, then there is no ground for granting the order. However, if the evidence is such that one or more of those findings of fact is made, or should be made, then the judge is required to exercise the discretionary jurisdiction contemplated by the subrule. If the finding is either that issues require prolonged examination of documents or accounts, or that the issues require a scientific or local investigation, then the discretion must be exercised in relation to the question of whether the examination or investigation can be made conveniently with a jury. If the finding is that the issues are of an intricate of complex character then the discretion must be exercised in relation to the question of whether the trial should be heard by the court without a jury. Clearly the discretion in the latter case has a broader amplitude.

The meaning of "convenience" in the context of Rule 39(27) was reviewed in *Wipfli v. Britten* (1981), 32 B.C.L.R. 343, where McEachern C.J.S.C., as he was then, stated, at page 347, the following:

> Convenience, in the sense in which that word is used in the rule does not depend solely upon whether or not the jury can be made to understand the evidence. I accept the evidence of Drs. Riddell and Henniger, whose useful evidence on their cross-examination satisfies me that they can probably make an understandable description of the actual surgical procedures and they can explain the present condition of the infant plaintiff. But that is not the point. What is required before it is convenient to have a scientific investigation made with a jury is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

I have provided a table below which summarizes recent decisions of the British Columbia Supreme Court and the Court of Appeal which have considered the court's discretion under Rule 39(27) in the context of brain injured plaintiffs.

C. Top Ten Tips For Opposing an Application to Strike a Jury Notice

1. Take care in choosing the experts you retain as you are preparing your case.

- Avoid retaining experts who are notorious for producing lengthy reports or reports which contain complicated technical language.
- Explain to your expert that you intend to have the matter proceed before a jury and that short easily understood reports are necessary and helpful.
- Try to minimize the number of experts upon which you rely.
- Ensure that you provide your expert with only those documents upon which you intend to rely at trial and that your expert has clearly set out the documents upon which his opinion is based. This is an opportunity for you to minimize the volume of documents that you will be required to place before the jury.

2. If you receive lengthy and or technically complicated reports, edit them.

- Take the time to explain to your expert that opposing counsel may rely upon the length of the report or any complicated language in support of an application to strike a jury.
- Work with your expert to pare lengthy reports to a manageable size.
- If need be, assist your expert in rewriting technically complicated passages using lay language.

3. Minimize the number of documents which you intend to put before the jury.

- Turn your mind to what clinical or financial records must be placed before the jury. Ensure that it is those documents upon which any of your experts have based their opinion.
- If your list of documents is lengthy or there is voluminous clinical or financial documentation, identify for the court the specific documents you intend to put before the jury.

4. Argue the timing of application: either it is premature or it is too late.

- The court should not make a determination as to the appropriateness of a jury on anticipated evidence (*Forliti (Guardian ad litem of) et al v. Woolley et al*, supra; and *Sadowick v. Doobay*, supra) or counsel's assertions that the evidence will be complicated. If the application is brought prior to the exchange of expert opinions, argue that it is premature. It is possible that such evidence could narrow the issues between the parties.

- If the application is brought late in the day argue that the application is prejudicial and there has been no change in the circumstances. An applicant seeking an extension of time must provide some explanation for the delay, which should be founded upon some substantial change in the nature of the action: *Shairp v. Almeida*, (25 June 1998) New Westminster No. S025254 (B.C.S.C.); *MacKinnon v. Ebner*, supra; and *Menendez v. ICBC*, supra.

5. Start with the basics in your submissions when opposing an application to strike a jury notice.

- Emphasize your client's right to a jury trial. Quote from cases that speak of a party's right to trial by jury unless the applicant can **clearly** convince the court that one or more of the exceptions in Rule 39(27) applies. The right to a jury trial is a substantive right, a prima facie right and a party should not be deprived of that right lightly.

  Nichols v. Gray (1978), 9 B.C.L.R. 5 (B.C.C.A.); *Pierre v. Pacific Press Ltd.* (1992), B.C.L.R. (2d) 223 (B.C.C.A.); and *World Wide Treasure Adventures Inc. v. Ralph* (1995) B.C.J. No. 579 (B.C.S.C.).

6. Remind the court that there is a heavy burden upon the applicant seeking to strike the jury.

- Talk about the substantial onus upon the applicant seeking to strike the jury to establish that their case **clearly** falls within the exceptions and that the onus is not easily satisfied. Juries notices ought not to be struck out routinely in cases where there are serious injury.

  MacPherson v. Czaban, (2002) 5 B.C.L.R. (4th) 258 (B.C.CA.) and *Novak v. Bond* [1997] B.C.J. No. 1597 (B.C.S.C.).

7. Make the case simple.

- Provide a clear simple statement of the issues to demonstrate that the case is simple.

- Distill the issues to the questions that the jury will be asked to answer to render their verdict.

- Remind the court that there is an obligation upon counsel to ensure that the issues are accurately, simply and clearly defined for the jury, and to relate the evidence to the issues in the same fashion: *Rosko v. Mason* (16 September 1997) Victoria Registry, No. 93 2456; and *MacKinnon v. Ebner* [1997] B.C.J. No. 364 (B.C.S.C.).

8. Cite cases showing juries have heard complicated issues.

- The trend of the law in British Columbia is to allow cases to proceed before a jury even thought complex and scientific evidence must be considered and evaluated: *Penner v. Great-West Life Company Assurance Co.* (2002) 41 C.C.L.I. (3d) 254.

- Juries are capable of dealing with complex personal injury cases involving calculations of past income loss, future income loss, analysis of engineering reports and complicated medical evidence (*MacKinnon v. Ebner,* supra; *Speers v. Drake* [2001] B.C.J. No. 132 (B.C.S.C.) aff'g [2000] B.C.J. No. 1527 (B.C.S.C.); *Thomsen v. Gorrill*, [2001] B.C.J. No. 1251; and *Molnar (Guardian ad litem of) v. Hardham Estate,* (1987) 12 B.C.L.R. (2d) 48 (B.C.C.A.).

- Juries are capable of dealing with concepts of forseeability and causation even where multiple causes for the injury are alleged (*Penner v. Hugill*, supra, *Rosko v. Mason* supra; *Jennings Estate v. Gibson* [1992] B.C.J. No. 1822 (B.C.S.C.); and *Shairp v. Almeida*, supra).

9. If possible, cite precedents in which similar issues went before a jury.

- Speak to your adjuster at ICBC or other defence counsel who may be able to tell you about other similar cases going before a jury (be aware that there are many more of these cases than are reported, or carried on the BCSC website or Quicklaw).

- Be creative: for example, to counter an argument that a jury should not be asked to address multiple motor vehicle accidents, cite *McCallum v. Hough*, (2001) 88 B.C.L.R. (3d) 175 (B.C.S.C.).

- The following are good cases to rely upon in which jury notices were upheld and involve complicated head injury issues:

  Stewart v. Chen (13 June 2002) Chilliwack No. S10365 (B.C.S.C.): head injury, causation in issue, 16 expert reports

(including from neurologist, neurosurgeon, neuropsychologist) for the plaintiff alone.

Sartore v. Beckley [2002] B.C.J. No. 56 (B.C.S.C.): head injury, depression, post traumatic stress disorder, TMJ complaints, multiple symptoms, whether there was a traumatic brain injury, causation in issue, contributory negligence, and reports which are described as scientific and of an intricate and complex nature.

Ball v. Novlesky et al [1981] B.C.J. No. 677 (B.C.C.A.): head injury, causation in issue, pre-existing depression.

Rosko v. Mason et al (16 September 1997), Victoria No. 93 2456 (B.C.S.C.): dispute as to the diagnosis, dispute as to the existence in medical terms of the condition, causation in issue, difficult issue arising from income loss, mitigation in issue, 11 to 13 medical experts, pre-existing condition and post accident injury.

Tesfamichael v. Mengisteab : (10 May 2002) Vancouver Nos. B982000, B990095, B990339, M005519 (B.C.S.C.): mild traumatic brain injury in issue, orthopedic injuries plaintiff was in eight car accidents in total four of which were in issue and contributory negligence in issue, significant psychological problems, pre-existing injuries, immigrant who spoke very little English, difficult income loss calculations, large body of medical evidence anticipated including from urologist, psychiatrist, psychologist, orthopedic surgeons, physiatrists, general practitioners, rehabilitation consultants, vocational consultants and engineers.

Haward v. Macklin et al (17 June 2002) New Westminster Registry No. S034776 (B.C.S.C.): psychological disorder and or post concussion syndrome, two previous car accidents, plaintiff alleging that there would be evidence from a general practitioner, seven psychiatrists, four psychologists, four neurologists, one neurosurgeon, four ear, nose and throat specialists, two orthopedic surgeons, three chiropractors, one physiatrist, one dentist, significant conflict between the experts on the issue of causation, issues of contributory negligence and pre-existing conditions.

10. Wherever possible emphasize that the case is really about credibility.

- For centuries it has been recognized that juries are uniquely well qualified to assess the credibility of witnesses and to determine issues involving conflicting evidence: *Stewart v. Peterson* [1987] B.C.J. No. 1748 (B.C.S.C.); and *MacKinnon v. Ebner*, supra.

- A jury is competent to deal with significant disputes arising from the medical evidence: *Rosko v. Mason*, supra; and *Penner v. Hugill* (1993), 12 C.P.C. (3d) (3d) 99 (B.C.S.C.).

- Emphasize that although there are a host of issues, it is really a factual dispute: *Stewart v. Chen*, supra.

IV. Loss of a Jury during the Trial

A. General Principles Regarding the Discharge of a Jury During a Trial.

Counsel must be careful in what they say and do when presenting a case to a jury. Although a jury trial is not a tea party, there are important limits upon counsel's conduct and to exceed those limits is to invite the risk of a mistrial.

Rule 41(6) of the *Rules of Court* provides:

> Where, for any reason other than the misconduct of a party of the party's counsel, a trial with a jury would be retried, the court, with the consent of the party who required the jury trial, may continue the trial without a jury.

Rule 41(7) of the *Rule of Court* provides:

> Where, by reason of the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury.

When a trial judge is faced with a motion to discharge a jury, he or she must consider whether the misconduct complained of caused a substantial wrong or miscarriage of justice which would likely result in real prejudice and, therefore, interfere with the fairness of the trial. If the trial judge finds that such prejudice exists and that the prejudice cannot be rectified (i.e. with a charge to the jury which attempts to overcome the prejudice) then the jury should be discharged (*Hamstra v. British Columbia Rugby Union,*[1997] S.C.J. No. 43 (SCC)).

Below is a summary of some of the cases decided in the past five years which deal with applications to discharge a jury.

In *McLachlan v. Hamon*, [2001] B.C.J. No. 2663, after submissions to the jury, Burnyeat J. stated that he had concerns about comments made by defence counsels during the course of the trial and in his submissions. He stated that he did not know whether he

could disabuse the minds of the jury regarding the inflammatory remarks that were made. He invited counsel for the plaintiff to make an application pursuant to Rule 41(7) to proceed without a jury.

The following are some of the concerns that Burnyeat J. had with defence counsel's actions:

(1) He made a statement on the issue of causation which suggested that the plaintiff must show that the accidents caused all of the problems.

(2) He suggested that there was something inappropriate in the challenges by counsel for the plaintiff to the potential jurors, leaving the impression with the jury that plaintiff's counsel was trying to find a jury that would be sympathetic to his client.

(3) He suggested that the plaintiff was taking advantage of the social security system.

(4) He provided an opinion that he was not qualified to give, namely that the plaintiff was completely resistant to treatment.

(5) He suggested that the plaintiff had decided that going to the doctors and taking treatments was preferable to doing other things.

(6) He stated that the evidence of the doctors would be discounted because they were relying on the words of the plaintiff, with "nothing else to corroborate".

(7) He made a statement which led to the inference that the jury should ignore what the doctors believed and rely upon their own and defence counsel's beliefs.

(8) He stated that there were "sinister" imperfections in the plaintiff's memory.

(9) He suggested that the plaintiff evidence relating to the accident itself was an exaggeration and was not supported by the evidence.

(10) The plaintiff attended the Lions Gate Hospital for marriage counseling but he referred to her attendance as a visit for "psychiatric assessment".

(11) He asked the jury to 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.

(12) He testified himself about what accommodations at work might allow someone to be productive at work.

(13) He described the plaintiff's testimony relating to the issue of her nausea as "crafty", rather than simply pointing to the inconsistencies in her evidence.

(14) He told the jury that what the plaintiff tells her doctors is "all over the place" without providing specific examples.

(15) He attacked the character of the plaintiff's husband (but now separated), Mr. McLachlan, and as such he attempted to develop a guilt by association. There was no evidence that Mr. McLachlan was doing anything improper or illegal and no indication that the plaintiff condoned any activities which he implied that Mr. McLachlan was engaged in.

(16) He attacked the testimony of two of the expert witnesses and suggested that they ignored the possibility of secondary gain, which was not an accurate reflection of their testimony.

Burnyeat J. declared a mistrial and ordered that the matter proceed without a jury. He stated that if they did not proceed with the trial it would put both parties to the expense of another trial and significant delay which could not be justified. As such, requiring a new trial would result in prejudice and that the parties interests were best served by continuing the trial without a jury.

In *Leslie v. Parmar,* [2003] B.C.J. No. 2020 the plaintiff applied for an order that the trial continue without a jury for the assessment of damages. The plaintiff was involved in a motor vehicle accident and was seeking significant damages, including past and future wage loss. The jury awarded $45,000 for past wage loss and nothing for future wage loss. During the trial the defendant called a witness who testified that there was a back to work program that the plaintiff could have attended. Shortly after the witness testified (and in the absence of the jury) counsel for the plaintiff indicated to the court that he was informed by another employee that the evidence given by the witness was in error. The witness had relied upon what she had been told by others but when she was advised by the other employee that he believed her evidence to be incorrect she followed up with it and learned that she was in fact in error. The judge concluded that it was not necessary to recall the witness to testify.

Defence counsel in his closing address to the jury reiterated the evidence of the witness that there was a return to work program available. Loo J. stated that from the jury's award it seemed likely that the jury was influenced by the witnesses evidence about the return to work for lighter duties and her evidence also impacted on the plaintiff's credibility. The plaintiff argued that counsel for the defendant was aware that the witness did not have any knowledge in the matter and elicited evidence from her which subsequently turned out to be incorrect.

Loo J. held that the jury had made its verdict on false and misleading evidence and granted the plaintiff's motion to continue without a jury for the assessment of damages.

In *Lawson v. McGill*, [2003] B.C.J. No. 1332 Shaw J. allowed an application by the plaintiff to discharge the jury and to continue the trial without the jury. On cross-examination, the psychologist called on behalf of defence counsel declined to give a diagnosis due to some problems with the testing conducting. As such, her evidence went solely to the plaintiff's credibility. Shaw J. told the jury that the psychologist's testimony and reports should be disregarded. However, he was concerned that the jury would not be able to disabuse their minds of the evidence. No motion to discharge the jury was made at that time.

The following day, counsel made their closing addresses to the jury, during which counsel for the defendant, mischaracterized medical evidence and claimed, without basis, that the plaintiff had lied.

Shaw J. held that while he may have been able to overcome each separate point by appropriate directions to the jury, he was of the view that given the situation created with respect to the defence psychologist, further warnings to the jury would not ensure fairness. In addition, ordering a mistrial and putting the trial off to a later date would seriously prejudice the plaintiff given that the case was complicated and related to a motor vehicle accident which had taken place seven years earlier.

Shaw J. noted that he did not attribute deliberate wrongdoing to the defence counsel and, adopting the decision of Southin J.A. in *Burkin v. Barnes,* [1992] B.C.J. No. 1440, he acknowledged that there can be misconduct even if counsel (and other members of the bar) believes he or she is behaving honourably.

In fact, several of the cases clarify what exactly is meant by "misconduct" with respect to an application pursuant to Rule 41(7). Misconduct is distinguished from impropriety on the part of counsel. It is not the type of misconduct which results in censure of counsel with the Law Society or elsewhere. Rather, it is whether inflammatory comments are made during the trial which the trial judge is not able to disabuse the minds of the jury (*McLachlan v. Hamon, supra*).

In *Gemmell v. Reddicop*, [2003] B.C.J. No. 30 plaintiff's counsel made several inappropriate comments during his opening address to the jury including theatrics, rhetoric, and throwing documents out of the court windows. As a result of this behaviour, the court declared a mistrial and continued the trial without a jury.

In *Brophy v. Hutchinson*, [2003] B.C.J. No. 46, a recent decision of the Court of Appeal, Finch C.J.B.C., on behalf of Court, held that the matter should be remitted to trial court for a new trial. Mr. Justice However, he stated that he was unable to find any authority to support an order that the new trial proceed without a jury. At the trial, Hutchinson's counsel asked to give his opening address immediately after Brophy's counsel finished her opening address and the trial judge gave him permission to do so. The opening

address was found by the Court of Appeal to have "overstepped the bounds of propriety by including irrelevant, prejudicial, premature and argumentative statements". At the trial, counsel for Brophy did not object to the timing or the content of the address by defence counsel.

In finding that there was no authority to support an order for a re-trial by judge alone where the original trial was by judge and jury, Finch, C.J.B.C. stated, at page 12, paragraphs 61 and 62:

> If objection had been taken when defence counsel completed his opening address, the trial judge might have considered exercising his discretion to continue the trial without a jury. He was not bound to do so however. Defence counsel made his improper statements before any evidence was heard, and the judge might have simply have declared a mistrial, so that a new trial could commence at a later date before a new jury.
>
> I would allow the appeal with costs and remit the case to the trial court for a new trial.

B. Top Ten Tips on How to Keep a Jury Through the Trial.

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.

- 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 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*, supra.

- 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*, supra.

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 tending to arose 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* (2003) 9 B.C.L.R. (4^{th}) 46 (B.C.C.A.)).

- It is improper for the defendant to make an opening statement prior to the close of the plaintiff's case: *Brophy v. Hutchinson*, supra.

5. Do not put or allow inadmissible evidence to be placed before the Jury.

- See for example: *Lawson v. McGill*, supra; *Leslie v. Palmer* [2003] B.C.J. No. 2020 (B.C.S.C.); and *Mazur v. Moody* (1987) 14 B.C.L.R. (2d) 240 (B.C.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 (B.C.S.C.) in which plaintiff's counsel announced he would call a lawyer as a witness; the lawyer was not compellable.

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

- Do not offer any explanations about why your client does not testify: *Birken v. Barnes* [1992] B.C.J. No. 1440 (B.C.C.A.).

- Do not offer your theories of the case which is unsupported by the evidence: *Melgarejo-Gomez v. Sidhu*, supra.

- Counsel's personal opinions of the case are irrelevant.

- Never say "I think", "I believe" or "I accept". Instead, say I submit: *Melgarejo-Gomez v. Sidhu* (2002) 97 B.C.L.R. (3d) 154 (B.C.C.A.)

8. Do not misquote the evidence.

- *Lawson v. McGill* [2003] B.C.J. No. 1332 (B.C.S.C.) 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 per cent 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.

9. Do not ask the Jury to put themselves in the position of one of the parties or appeal to the juror's emotions.

- 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 (B.C.S.C.).

- 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.*, supra.

- Do not invite the jury to be angry at a party or to condemn their conduct: *Martin Estate v. Pacific Western Airlines Ltd.*, supra.

- Do not suggest that opposing counsel was attempting to find a jury that would be sympathetic to their client: *McLachlan v. Hamon*, supra.

10. Do not have any private communications with any member of the jury under any circumstances.

- Even if you see a member of the jury on the street, avoid them.

SAMPLE CASE SUMMARY TABLE

Jury Notice Struck	Summary	Jury Notice Upheld	Summary
Campbell v. Khan [1996] B.C.J. No. 2005	Facts: The plaintiff, who was involved in a motor vehicle accident, alleged that he suffered a closed head injury that resulted in personality changes. Further, the plaintiff alleged that the personality changes led to depression and an attempt to commit suicide by jumping from the Patullo Bridge. The defendants denied liability for the accident and denied that there was a causal link between the accident and the bridge incident. At the trial, which was set for 10 days, the plaintiff intended to call 10 expert witnesses, including a neurologist, a neurosurgeon, and a psychiatrist. Held: Low, J. struck the jury notice on the basis that the issues were extremely unusual and complex from both a legal and a scientific viewpoint making it inappropriate for a jury. The issues would require prolonged consideration and weighing of conflicting medical opinions and would require an understanding of intricate medical and legal matters, which would be difficult even for a judge to decide.	*Shairp v. Almeida,* unreported, June 10, 1998 No. S025354, , New Westminster (B.C.S.C.)	Facts: The plaintiff, who was involved in two motor vehicle accidents, alleged that he sustained a traumatic brain injury, depression, chronic fatigue syndrome and/or fibromyalgia, as well as other physical injuries. The plaintiff had pre-existing injuries and causation was at issue. The trial was set for five days. Held: Although there were conflicting medical reports with considerable complexity, Master Joyce dismissed the plaintiff's application to strike the jury notice. In doing so, he stated that as the case was "close to the line", but as the trial was only set for five days a jury ought to be able to follow and retain the evidence, and apply the judge's charge.

Guichon v. Johnston [1998] B.C.J. No. 2643	Facts: The plaintiff alleged a traumatic brain injury resulting from a motor vehicle accident, in which he was a passenger. As the vehicle was not insured, the insurer defended the claim under section 20 of the *Insurance (Motor Vehicle) Act*. Causation and volenti non fit injuria were at issue, as well as contributory negligence resulting from the plaintiff's history of drug abuse. Held: Master Baker set aside the jury notice on the basis that the medical evidence, which included a lengthy neuropsychological report, would be extremely difficult for a jury to understand, recall and analyze. In addition, he stated that the insurer was a statutory third party not a true defendant, so it did not have the substantive right to elect trial by jury.	*Thompson v. Gorrill,* [2001] B.C.J. No. 1251 (B.C.S.C.) *Harder et al. v. Nikolov et al.* 2001 BCSC 1101	Facts: The plaintiff was involved in two motor vehicle accidents, liability had been admitted for both accidents. Causation and quantum of damages were in issue. The plaintiff alleged that he suffered from a mild traumatic brain injury, and various soft tissue injuries as a result of the accidents, which have left her permanently disabled. The clinical records disclosed that there were psychological difficulties and depression pre dating the first accident. The trial of the actions was estimated to take ten days. At the trial of the actions evidence would be adduced from a neuropsychologist, a psychologist, a speech pathologist, an occupational therapist, a physiotherapist, an orthopaedic specialist, a psychiatrist, and a general practitioner. Held: Wedge J. dismissed the plaintiff's application to strike the jury notice. He did not find that the information would require a prolonged examination such that it would affect the proper conduct and management of the case. He stated that the central question was the extent of the cognitive impairment and its cause as well as quantum of damages and that these issues, either on their own or in combination did not approach the complexity required to strike the jury notice.
Coulson v. Sra [2001] B.C.D. Civ. 770.90.40.45-02	Facts: The plaintiff was injured in a motor vehicle accident. The Notice of Trial was served, but the trial was then adjourned at the plaintiff's request. A second Notice of Trial was served, after which time the defendant filed a jury notice. The plaintiff applied to strike the jury notice, arguing that it should have been filed within 21 days of the first Notice of Trial. Held: Although the plaintiff alleged a brain injury,		

	and had not done so before, the court struck the jury notice, stating that the character of the action had not been materially altered from the time the first Notice of Trial had been filed. The defendants could have filed a jury notice before and had failed to do so, and the court did not find any reason to extend the time to file the jury notice		
O'Ruairc v. Pelletier, unreported, September 21, 2001 No. S042234, New Westminister (B.C.S.C.)	Facts: The plaintiff was 16 years old when he was involved in two motor vehicle accidents a week apart. He alleged that he sustained a traumatic brain injury from the second accident. The plaintiff would have several general practitioners, two neurologists, three psychiatrist, two psychologists, a vocational expert and an expert relating to future care needs testify at the trial. The defendant expected to call seven or eight expert witnesses and 26 lay witnesses. Liability was in issue and the trial was estimated to take 6-8 weeks. Held: In holding that the jury notice should be struck, Wedge J. agreed with counsel for the plaintiff that the trier of fact will be required to make findings of fact with respect to the effects of medication, psychiatric diagnosis and the interplay between the organic injury, the emotional issues and the effects of medication. As such, the issues in the case required a prolonged examination of documents or a scientific investigation which could not be made conveniently with a jury and the issues		

	were of an intricate or complex nature.		
Patterson v. Rankel 2001 BCSC 952	Facts: The plaintiff was involved in a motor vehicle accident. Liability for the accident was in issue, including a possible inevitable accident defence and contributory negligence. The plaintiff alleged he suffered from a closed head injury with associated cognitive and personality impairment, a fractured skull, hearing loss and various soft tissue injuries. The plaintiff anticipated calling 10 lay witnesses and 17 expert witnesses, including a general practitioner, neuro-psychologist, otolaryngologist, neurologist, psychologist, psychiatrist, physiatrist, audiologist, economist, vocational rehabilitation consultant and a registered occupational therapy consultant. Held: Cohen J. held that the trial be heard without a jury. He stated that upon the evidence before him (particularly the various neuropsychological tests) the issues required a scientific investigation, which could not be made conveniently with a jury and were of an intricate or complex nature.	*Harder et al. v. Nikolov et al.* 2001 BCSC 1101 **[judgment is not clear whether this is a head injury case]**	Facts: This case involved three actions, which were scheduled to be heard for a five-week jury trial. In addition to the three accidents relating to the trial, the plaintiff had been involved in three previous accident. The plaintiff argued that the jury notice should be struck as the matter would require a prolonged examination of documents, which could not conveniently be made by a jury, or because the matter was intricate and complex. The plaintiff pointed out that the examination for discovery or the plaintiff was lengthy, there were over 5000 pages of documents (however, according to the defendant many were duplicates) and many medical experts as well as an economist, a vocational capacity assessor and accountants. Held: Holmes, J. agreed with defence counsel that lengthy pre-trial procedures do not necessarily indicate extensive evidence at trial but rather serve to refine the issues. He found that based upon the materials before him the plaintiff failed to establish that the jury would be required to engage in a prolonged examination of documents and that the calling of medical, economic, actuarial and other technical evidence does not necessarily meet the requirements of Rule 39(27)(a). He also found that the issues were not too intricate or complex.

Speers v. Drake, [2001] B.C.J. No. 132 (B.C.S.C.)	Facts: ICBC, third party, appealed a chambers order allowing the plaintiff's applications to strike the jury notice. The trial was scheduled to proceed for eight days. Liability was in issue as was the extent of the plaintiff's injuries. The appellant argued that the Master found that the issues did not require a scientific investigation and were not intricate or complex but he proceeded to strike the jury notice because he was of the view that the time scheduled for trial was insufficient. As such, he did not base his decision on the criteria in Rule 39(27). Held: The appeal was dismissed. Mackenzie J. held that the Master was not clearly wrong in exercising his discretion to strike the jury notice. The Master's decision to strike was not based on medical issues but rather on the liability issue. Mackenzie J. stated that the Master's analysis of convenience was predicated upon the assumption that the liability issue involves a scientific investigation. Although, the Master did not specifically state that the liability issue required a scientific or local investigation, he did discuss the engineering and DNA reports, which were clearly scientific in nature.	*Stewart v. Chen*, unreported, June 13, 2002 No. S10365, Chilliwack (B.C.S.C.)	Facts: Motor vehicle accident, plaintiff seeking damages relating to traumatic brain injury, back injury, emotional and psychological problems. The trial was scheduled to proceed for 15 days. Liability was not in issue. It was expected that there would be at least 16 expert witnesses for the plaintiff including experts in neurology, neurosurgery, neuropsychology, vocational rehabilitation and economics. Held: Application to strike jury notice denied. Juries are capable of dealing with complex issues, including head injury cases and have been entrusted in personal injury cases with the resolution of complex issues of causation.

MacPherson v. Czaban, [2002] B.C.J. No. 2208 (B.C.C.A.)	Facts: The defendant appealed an order striking the jury notice in a motor vehicle accident claim. Liability was admitted and the issues at trial were causation and assessment of damages for personal injuries allegedly sustained by the plaintiff. The chambers judged struck the jury notice because of the complexity of the issues, the most contentious issue was an alleged head injury resulting in cognitive difficulties and visual impairment. The trial was scheduled for 20 days, the plaintiff was calling 12 medical experts including two neuropsychologists, a psychologist, a neurologist, opthalmologist, otologist, orthopaedic surgeon, radiologist, a doctor of sports medicine and several therapists. The defendant was calling at least 3 experts. In addition, there was a significant pre-accident history, which complicated the issue of causation as it related to the psychological symptoms the plaintiff was suffering. Held: The appeal was dismissed. Mackenzie J.A. for the court of appeal stated that the chambers judge's conclusion that the case could not be fairly tried by a jury because of the complexity of the medical issues was a reasonable exercise of her discretion. However, Mackenzie J.A. also noted that a jury notice ought not to be struck routinely in	*Hayward v. Macklin et al.*, unreported, June 17, 2002 No. S034776, New Westminster (B.C.S.C.)	Facts: The action arose out of a motor vehicle accident that occurred in 1996. The plaintiff had been involved in two previous accidents in 1988 and 1989. As such, causation of damages was a significant issue. In addition, liability for the accident was also in issue. The plaintiff intended on rely on 28 experts including one general practitioner, seven psychiatrists, four psychologists, four neurologists, one neurosurgeon, four ear, nose and throat specialists, two orthopaedic surgeons, three chiropractors, one physiatrist and one dentist. The main injuries that the plaintiff alleges he sustained as a result of the accident were dizziness and depression/post traumatic stress disorder. Held: Wilson J. did not accept that the plaintiff would rely on all 28 experts. In addition, he stated that the effect of pre accident injuries is an issue that juries commonly have to deal with. He held that the application to strike the jury notice should be dismissed as the plaintiff had not shown that there was a scientific investigation which could not be made conveniently with a jury nor were the issues of such a complex nature that the they could not be properly heard by a jury.

	cases where there are serious injuries resulting in residual disabilities. He also reiterated that a jury trial in a personal injury case is a presumptive right, and a jury notice should only be struck if it is clear that the issues cannot be tried fairly by a jury.		
Lomax v. Weins, [2003] B.C.J. No. 664 (B.C.S.C.)	Facts: Liability for the motor vehicle accident was admitted however, causation of the plaintiff's injuries and quantum of damages was in issue. The trial was scheduled for 20 days. The plaintiff alleges that he suffered a neck fracture, closed head injury, chronic pain and post concussive syndrome. The plaintiff had been treated by 24 specialists including four neuropsychologists, three psychologists, a neurologist, three physiatrists, two chronic pain experts, numerous radiologists, a podiatrist, two oral surgeons and two neurosurgeons. In addition, the defendant had the plaintiff examined by six independent medical examiners. The plaintiff's credibility was another major factor affecting the determination of the issues. Held: There was substantial documentary and viva voce medical evidence of a highly detailed and technical nature. As a result of the length of the trial there was limited time allotted for a jury to review consider and analyze the evidence. As such the action requires a scientific investigation, which could not be conveniently tried with, a jury and the	*Tesfamichael v. Mengisteab et al.,* unreported, May 10, 2002 No. B982000, B990095, B990339, M005519, Vancouver (B.C.S.C.)	Facts: the plaintiff was involved in 8 motor vehicle accidents in five years. He commenced actions in four of the eight accidents. Liability was admitted in all four actions. The plaintiff alleged that he suffered from a head injury with resulting cognitive difficulties, chronic pain, and emotional and psychological disability. It was argued that the issues were complex because a pre-existing injury caused by the first accident complicates the causation issue. In addition, the last six accidents all involved similar injuries and the trier of fact would be required to determine to what extent the plaintiff was injured in each accident and how those injuries affect the injuries received in the previous accidents. The plaintiff's claim of a head injury would require both lay and expert witness testimony on whether the plaintiff was rendered unconscious and whether the plaintiff suffered a head injury and any resulting impairment in cognitive function. Although the plaintiff's expert evidence had not at the time of the application been completely developed, counsel for the plaintiff argued that she anticipated a large body of medical evidence including evidence from

	issues were intricate and complex.		urologists, psychiatrists and/or psychologists, orthopaedic surgeons, physiatrists, general practitioners, rehabilitation consultants, vocational consultants, engineers and actuaries. On the other hand, the defendant argued that the case on damages turns on the credibility of the plaintiff and that the medical evidence was not complicated or difficult to understand. Held: Sigurdson J. stated that there was nothing in the medical evidence before him which indicated that the circumstances of the case would be too intricate or complex for a jury to deal with. He added that the plaintiff's expert evidence was not fully developed, however, in deciding the application he is required to examine what the evidence and the issue will be at trial, not what they possibly might be. Furthermore, the fact that a case may take longer before a jury is not in itself a sufficient reason to deny a party their right to a jury trial.
Pinette v Beyea, unreported, April 13, 2003 No. S0010674, Chilliwack (B.C.S.C.)	Facts: The plaintiff was involved in two motor vehicle accidents. Liability for one of the two accidents was denied, but this was not expected to occupy much of the trial. The plaintiff alleged traumatic brain injury resulting in severe psychological, emotional and cognitive difficulties. Causation was at issue as the plaintiff had the plaintiff, prior to the accidents, had struck his head	*Sartore v. Beckley*, [2002] B.C.J. No. 56 (B.C.S.C.)	Facts: The plaintiff alleged she suffered from a multitude of injuries as a result of a motor vehicle accident, including a fracture of the right frontal parietal occipital skull, post-concussion syndrome, cognitive difficulties, dizziness, depression, clicking and stiffness in her jaw and various soft tissue injuries.

	on several occasions, had been in two previous motor vehicle accidents, and had been diagnosed with attention deficit disorder. The defendants also alleged contributory negligence based on the seat-belt defence. The plaintiff anticipated that there would be 20 expert witnesses and numerous challenges to the admissibility of several of the expert reports. Held: Joyce, J. set aside the jury notice on the basis that the issues in the case would involved a prolonged examination of documentary evidence that would be difficult to understand, retain and relate to the issues. re was complex medical evidence, 20 expert witnesses, challenges to the admissibility of the expert reports		Held: The application by the plaintiff for an order to strike the jury notice was dismissed. Lander J. stated that although there would be a scientific investigation into the nature, extent and cause of the plaintiff's brain injury and the issues were at least somewhat complex or intricate in nature, the case could be conveniently made by a jury. The plaintiff did not show that a scientific investigation could not be conveniently made by the jury or that the issues were too intricate or complex. The medical reports were clearly written and not too difficult to understand, especially if accompanied by expert testimony.
Joel v. Paivarinta, [2003] B.C.J. No. 1598 (B.C.S.C.)	Facts: The plaintiff was involved in two motor vehicle accidents. She claimed that she suffered from a brain injury that has left her unable to work and has ended her career as a police officer. The trial was scheduled to proceed for 14 days. Held: The jury notice was struck, the finding of fact was both intricate and complex due to voluminous documents, clinical records, expert medical reports and academic papers which contained very technical scientific knowledge. The trial would take more than 14 days and the jury would have difficulty retaining the complex technical evidence		

	throughout that period.		
Gwon v. Tan, [2002] B.C.J. No. 2405 (B.C.S.C.)	Facts: The plaintiff suffered a head injury with ongoing complications, a laceration resulting in a permanent disfiguring scar on her face. There were numerous expert reports including five engineering reports, accident reconstruction, numerous medical reports and expert testimony from a surgeon and a neuropsychologist. Held: Master Bishop held that collectively, the issues (differing opinions on causation, expert medical evidence, accident reconstruction and insurance issues) bring the action within Rule 39(27) and he utilized his discretion to strike the jury notice.		
Coulter v. Ball, unreported, May 10, 2002 No. B990583, Vancouver (B.C.S.C.)	Facts: The plaintiff was 18 years old when he was involved in a motor vehicle accident. Liability for the accident was in issue and a seat belt defence was being advanced as well as a third party claim. As such, engineering evidence would be adduced at trial. The plaintiff claimed that he suffered from a traumatic brain injury, which had resulted in permanent impairment. There were significant causation issues as well, prior to the accident the plaintiff had dropped out of school, had been involved with the police and was using drugs and alcohol. The trial was scheduled for 24 days, however, both parties agreed that this would not be		

	sufficient and the trial would take between 8 and 14 weeks. There was an estimated 17 experts and 60 to 70 lay witnesses. Held: Ross J. considered the length of the trial as a factor in exercising her discretion. She stated that although time saving is not a basis upon which to displace a party's right to a jury trial, the length of the trial is an important variable with respect to the issues of complexity and convenience. She stated that the issues in this case did require a scientific investigation including the interpretation of CT scans, MRI results, neuropsychological testing, the significance of the plaintiff's history of drug and alcohol consumption and behavioural and emotional problems. She held that the jury would have to examine all the evidence and look at the interplay between organic injury, emotional issues, and drug and alcohol use. As such, given the length of the trial, the number of witnesses and the number and complexity of issues, Ross J. held that the case presents matters which were intricate and complex and could not be conveniently heard by a jury.		