2021 LSBC 08
Decision issued: March 5, 2021
Citation issued: April 26, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	October 8 and 9, 2020
Panel:	Steven McKoen, QC, Chair Lindsay R. LeBlanc, Lawyer Brendan Matthews, Public representative
Discipline Counsel:	J. Kenneth McEwen, QC and Emily Kirkpatrick
Counsel for the Respondent:	Gerry Cuttler, QC and Oliver Pulleyblank

BACKGROUND

[1] On April 26, 2018, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and the Law Society Rules (the "Citation"). The Citation provides as follows:

1. In or about April 2012, while acting as counsel for the plaintiff JW in Supreme Court Action No. [number] (Vancouver Registry), you made improper submissions to the jury in closing argument which resulted in Mr. Justice Voith declaring a mistrial on April 30, 2012 and awarding costs against you personally on February 25, 2014. In particular, you did one or more of the following:

    (a) implied that opposing counsel were not forthright or honest;

(b) knowingly and intentionally made an expert witness an object of derision and ridicule;

(c) asserted directly or indirectly that the expert was dishonest and had falsified measurements, misrepresented evidence or misquoted scientific literature, without any evidentiary foundation;

(d) mischaracterized the issues before the jury by conflating how your client was injured with whether he was injured;

(e) inaccurately and improperly asserted that the defendant's position was that your client was feigning his injuries;

(f) misstated in your submissions to the jury that the standard of care in negligence is to "protect the innocent";

(g) misstated the legal principles applicable to future cost of care calculations; and

(h) encouraged the jury to award future costs of care or wage loss, or both, when there was an inadequate evidentiary foundation for those awards.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

2. Between or about June 29, 2012 and July 11, 2012, you made improper comments to a journalist about one or both of Dr. AT, an expert witness, and the judiciary, in that the comments were false, misleading, denigrating, unjust, disrespectful or otherwise inappropriate, contrary to one or more of Chapter 1, Rules 2(1), 2(2) and 3(4) of the *Professional Conduct Handbook*, then in force.

   This conduct constitutes professional misconduct or conduct unbecoming a lawyer, pursuant to section 38(4) of the *Legal Profession Act*.

FACTS

Procedural history

[2] The Citation was authorized on April 19, 2018 and issued on April 26, 2018, and the Respondent admits that he received notice of the Citation.

[3] The Panel was advised that the Law Society was not proceeding with sub-allegations 1(f), (g) and (h) of the Citation. As a result, the Panel has not considered nor made any findings on those allegations.

[4] In a preliminary application made in 2019, the Respondent sought to have the Citation stayed because of alleged inordinate or unacceptable delay by the Law Society or, in the alternative, dismissed on *Charter* principles. On August 15, 2019, the Panel dismissed the Respondent's application on the basis that there was no inordinate delay and that the *Charter* argument could be raised at the Facts and Determination phase of the hearing. That decision is indexed as 2019 LSBC 30.

[5] The Panel was provided with a Document Agreement dated May 10, 2019 entered into by the parties for the Common Book of Documents (3 Volumes). Paragraph 7 of the Document Agreement provides as follows:

> Certified transcripts of proceedings are agreed to contain accurate and complete records of what was said by the persons who are represented in those transcripts of having said them.

[6] The Panel was also provided with an Agreed Statement of Facts dated May 9, 2019.

[7] Neither party called any witnesses during the Hearing.

2012 jury trial

[8] In April 2012, the Respondent represented JW, the plaintiff in the trial of a personal injury claim against an unknown motorist and ICBC. It was a jury trial and Justice Voith of the British Columbia Supreme Court presided.

[9] At issue in the trial was whether JW was injured in the manner he asserted, the extent of his injuries, whether he made reasonable efforts to identify the unknown motorist and whether he had made sincere efforts to find employment post-injury.

[10] Counsel for ICBC retained an expert, Dr. AT, to prepare two reports for trial.

[11] Dr. AT gave evidence at trial and was cross-examined by the Respondent. During the course of cross-examination, the Respondent attempted to reenact a Johnny Carson sketch known as "Carnac the Magnificent". In the Carnac sketches, Johnny Carson played a mystic who would provide answers to questions in sealed envelopes. The punchline of the joke occurred when Johnny Carson opened the envelope to read the question to which he had already provided the answer. The Respondent's reenactment was successfully objected to.

[12] At the end of the trial, the Respondent prepared a written closing address that was read to the jury (not verbatim). As a result of the Respondent's closing address, Justice Voith declared a mistrial.

[13] With respect to sub-allegations 1(a), (d) and (e) of the Citation, the Law Society directs the Panel to the following portions of the Respondent's closing address:

Regarding ICBC's theory of the case:

> The defence theory is that everything JW says about that night of August 7th, 2007, is a lie. Everything he said to Husky Gas ladies is a lie. Everything he told the hospital people at VGH the next day, a lie. Except for one thing: that he was going 110 kilometres an hour. Leave aside he said it was about the Coquihalla. But they say that's true, the 110 kilometres an hour, just that, nothing else, the whole time he was at VGH.
>
> Everything he told ICBC's adjusters and estimators, investigators, lawyers, all lies. Everything he told his various doctors about how he was injured, lies. Everything he told Dr. C and Dr. Y about how his injuries happened, lies. Everything he told ICBC's Dr. W about how his injuries happened, lies.
>
> For five years, supposedly, he lied to his mother LW. For five years, he didn't play with his son the way he used to, didn't ride a bike, didn't lift weights, didn't go running, didn't ride his motorcycle, all supposedly to put across a scam on ICBC and on you.
>
> …
>
> It's the same thing for GG, all lies, all the time to everyone. So these two must be criminal masterminds. Do they seem like criminal masterminds to you?

Regarding approach of ICBC's counsel:

> If there was one single person in the whole world who could come here and say they saw JW doing something, anything, just one thing that shows he's a liar and a faker, that he could have worked, that his injuries aren't so bad, don't you think that ICBC with all of its resources would have brought that person here to tell you? So where is that person? Nowhere. Because there is no such person.

> All ICBC has is insinuations, nasty suggestions and the tiniest differences between memories over five years of being asked about the same events over and over. And those aren't evidence.
>
> …
>
> You saw JW lose his temper on the witness stand. He pretty obviously disliked defence counsel. They have a job to do, and it's their duty to do it. As we say, vigorously, fearlessly and thoroughly. You also heard how JW has a life-long dislike of bullies, of injustice, of false accusations. Ask yourself if his reactions were the honest reactions of an unsophisticated man who feels himself accused of lying, of dishonesty. Would you expect a man like JW to smile when he's called a liar? To shrug off accusations of laziness, to nod politely when accused of fabricating this case?
>
> …
>
> There's a word for getting money by lies. It's a word that the defence has been careful not to say out loud. Think about that word. That ugly, ugly word. Now think about why they don't say it out loud. They just hint at it and hope you'll believe their ugly insinuations. Think about how the truth isn't afraid to speak out loudly.

[14] With respect to sub-allegations 1(b) and (c) of the Citation, the Law Society directs the Panel to the following portion of the Respondent's closing address:

> And it seems that although Johnny Carson is dead, the Amazing Karnak lives among us.
>
> Deliberately manipulating a test … claiming to know things without data.

[15] Following the Respondent's closing remarks, ICBC applied for a mistrial. After considering the case law applicable to mistrial applications in jury trials, Justice Voith declared a mistrial in oral reasons for judgment on April 30, 2012.

[16] An appeal of the mistrial was commenced and subsequently discontinued.

Vancouver Sun article

[17] On July 3, 2012, the *Vancouver Sun* published an article by Ian Mulgrew titled "Mistrial declared after lawyer channels Carson to mock witness." Relevant portions of the text of the article include:

> Harding was unrepentant, however, and is appealing the decision. Although there will be a new trial regardless of the appeal, Harding wants the province's high bench to say the judge was wrong because under the rules, his client is on the hook for the exorbitant costs of the aborted trial.
>
> On Aug. 7, 2007, the 43-year-old Metro Vancouver man said he was injured when a tire fell off an unidentified vehicle and hit him while he was riding his motorcycle near Chilliwack.
>
> ICBC argued he was a long-time welfare recipient who concocted the story to milk the system.
>
> "You expect a bit of outrage when they accuse you of criminal offences," Harding explained in an interview.
>
> "They accused my client of fraud and perjury. There were accusations of heavy narcotic abuse – and there was no truth to any of that whatsoever."
>
> He said that [Dr. AT]'s testimony – that the accident could not have occurred as described – added insult to the false charges.
>
> "This guy testified that any tire under any circumstances would have flipped the Harley and catapulted my guy into the sky," Harding said.
>
> "He said physical effects that happen to every other object didn't apply to motorcycles. … I pulled out a gyroscope and spun it on the court bench – the jury laughed … I asked him about his measurements: 'Is 'pretty similar' an engineering term?' They laughed at that too."

[18] The Respondent has acknowledged that the statements attributed to him in Mr. Mulgrew's article are fair representations of what he said during his interview.

July 11, 2012 email to Mr. Mulgrew

[19] On July 11, 2012, the Respondent emailed Mr. Mulgrew again. The full text of the email is set out below:

> Does it occur to you that every jury mistrial ruling is based on a presumption by the judge that the jury were so swayed by some improper comment that they would be incapable of rendering a fair decision, based on the evidence?
>
> One authoritative case says:

Although rhetoric which verges on the extravagant may be made use of by counsel, there is a general rule which common sense alone dictates, and that is that the language of counsel to a jury should not be of such character as is likely to prejudice the cause of an opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice.

One of the principal questions to be considered by this Court is whether that portion of the address of counsel with regard to which complaint is taken is merely an earnest plea to the jury, although perhaps an exaggerated one … or whether it is prejudicial to the appellant's case to the extent that the jury were influenced by it to reach a verdict without due and just consideration of the evidence.

And, the judge NEVER asks the jurors about this?

Seems pretty paternalistic, don't you think?

Seems like judges presume jurors are idiotic children, don't you think?

You likely know that in every trial, the lawyers have all the names, addresses, occupations of each juror. But are you aware that most experienced counsel then research the empanelled jurors – it's all proper so long as only public sources are used, like Google, Facebook, Land Titles Office, etc. (i.e., not like ICBC data-mining their motor vehicle files to check out jurors). If you are my juror and I find an old letter from you to the Georgia Straight, extolling massage therapy, I will use that in my presentation.

You likely know that it is illegal to talk to jurors about their DELIBERATIONS, but that it is not improper to discuss whatever happened in the courtroom. In the instances where the jurors render a verdict, it's very hard to draw a line between what happened in the courtroom and what they jurors discussed in the deliberation room. Hence, wise people avoid any discussion.

However, any time there is a mistrial due to allegedly improper remarks, NO DELIBERATION occurred. Thus the mistrialed jurors are fair game.

Wouldn't it be interesting to talk to some actual jurors, where the judge ruled they were incapable of deciding the case?

Wouldn't that be an interesting follow-up to your story?

Events following *Vancouver Sun* article

[20] On July 5, 2012, Dr. AT, through counsel, wrote to the Respondent demanding an apology for the comments made in the *Vancouver Sun* article.

[21] On July 20, 2012, Dr. AT provided the Law Society with the Respondent's written address to the jury, and on July 31, 2012, Dr. AT commenced an action in defamation against each of the Respondent, Mr. Mulgrew, and the editor in chief and the president and publisher of the *Vancouver Sun*.

[22] On August 10, 2012, the Respondent delivered a signed apology to Dr. AT. The text of the apology reads as follows:

> Apology to AT, Ph.D., P. Eng
>
> I recently disparaged Dr. AT to the *Vancouver Sun* reporter Ian Mulgrew concerning Dr. AT's testimony as an expert witness during a civil jury trial in B.C. Supreme Court concerning a motorcycle accident. I regret my comments which were reported in the July 3rd, 2012 of the *Vancouver Sun* [sic].
>
> I hereby unequivocally withdraw my allegations about Dr. AT and acknowledge that they contained misleading descriptions of his trial testimony and placed him in a false light.
>
> I accept without reservation that Dr. AT gave his testimony at trial in a professional manner, and complied with his obligation as an expert witness to seek to assist the court and not be an advocate for any party.
>
> I sincerely apologize to Dr. AT for any distress and embarrassment caused to him or his family by my disparaging comments, which I deeply regret.
>
> Signed August 10th, 2012

[23] The *Vancouver Sun* published an apology to Dr. AT on August 16, 2012.

Justice Voith's costs ruling

[24] On January 24, 2014, ICBC brought an application seeking special costs of the mistrial, payable by the Respondent.

[25] On February 25, 2014 Justice Voith issued reasons on the costs application. The Respondent was ordered to pay increased costs at one and one-half times Scale B arising from the mistrial.

ONUS AND STANDARD OF PROOF

[26] The Law Society has the onus of proving the allegations in the Citation and the standard of proof is the balance of probabilities: *Foo v. Law Society of BC,* 2017 BCCA 151, at para. 63 and *Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43.

TEST FOR PROFESSIONAL MISCONDUCT AND INCIVILITY

[27] The test for what constitutes professional misconduct is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin,* 2005 LSBC 16, at para. 171.

[28] In *Re: Lawyer 12*, 2011 LSBC 11, at para. 14, the hearing panel summarized previous applications of the *Martin* test as follows:

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[29] As summarized in *Law Society of BC v. Lyons,* 2008 LSBC 09, in determining whether the conduct constitutes professional misconduct, the Panel must give weight to factors including:

(a) the gravity of the misconduct;

(b) its duration;

(c) the number of breaches;

(d) the presence or absence of *mala fides;* and

(e) the harm caused by the respondent's conduct.

[30] The Law Society referred the Panel to the following from the Canons of Legal Ethics in the *Professional Conduct Handbook*, which was in force at the relevant time:

> A lawyer is a minister of justice, an officer of the courts, a client's advocate, and a member of an ancient, honourable and learned profession.
>
> In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

[31] The Law Society further referred the Panel to the following provision of the Canons of Legal Ethics which it submits are engaged by the Respondent's conduct:

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

[32] The Citation alleges incivility inside and outside the courtroom. The Supreme Court of Canada decision of *Groia v. Law Society of Upper Canada,* 2018 SCC 27 at paras. 2 to 5 and 79, confirmed the Law Society Appeal Panel's approach for determining whether incivility crosses the threshold into professional misconduct:

> To achieve their purpose, it is essential that trials be conducted in a civilized manner. Trials marked by strife, belligerent behaviour, unwarranted personal attacks, and other forms of disruptive and discourteous conduct are antithetical to the peaceful and orderly resolution of disputes we strive to achieve.
>
> By the same token, trials are not — nor are they meant to be — tea parties. A lawyer's duty to act with civility does not exist in a vacuum. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. Care must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility.
>
> The proceedings against the appellant, Joseph Groia, highlight the delicate interplay that these considerations give rise to. At issue is whether Mr. Groia's courtroom conduct in the case of *R. v. Felderhof*, 2007 ONCJ 345, 224 C.C.C. (3d) 97, warranted a finding of professional misconduct by the Law Society of Upper Canada. To be precise, was the Law Society Appeal Panel's finding of professional misconduct against Mr. Groia

> reasonable in the circumstances? For the reasons that follow, I am respectfully of the view that it was not.
>
> The Appeal Panel developed an approach for assessing whether a lawyer's uncivil behaviour crosses the line into professional misconduct. The approach, with which I take no issue, targets the type of conduct that can compromise trial fairness and diminish public confidence in the administration of justice. It allows for a proportionate balancing of the Law Society's mandate to set and enforce standards of civility in the legal profession with a lawyer's right to free speech. It is also sensitive to the lawyer's duty of resolute advocacy and the client's constitutional right to make full answer and defence.
>
> …
>
> The Appeal Panel's approach strikes a reasonable balance between flexibility and precision. The Appeal Panel described its approach to assessing whether a lawyer's uncivil behaviour warrants professional sanction as "fundamentally contextual and fact specific", noting the importance of "consider[ing] the dynamics, complexity and particular burdens and stakes of the trial or other proceeding": paras. 7 and 232. By focussing on the particular factual matrix before it, the Appeal Panel's approach is flexible enough to accommodate the diverse array of situations in which courtroom lawyers find themselves.

POSITION OF THE PARTIES

[33] The Law Society submits that the case raises two questions:

1. In what circumstances will a course of conduct by a lawyer that results in a mistrial not be held to constitute professional misconduct?

2. When are comments by a lawyer about expert witnesses and the judiciary that disparage and mislead acceptable?

[34] The Law Society submits that the facts of the case establish that the Respondent conducted himself in the course of a closing address to a jury that creates a real risk of jury prejudice and in a manner that is "reprehensible" and "obdurate". The result was that a mistrial was declared. Subsequently, in a telephone interview with a journalist in relation to the mistrial, the Respondent ridiculed the opposing expert and misrepresented the nature of his evidence. In a follow-up email with the same

journalist, the Respondent suggested that the judiciary was "paternalistic" to the extent it declared mistrials without canvassing the opinions of the jury members.

[35] The Respondent submits that, with respect to allegation 1, the Law Society has not proven that he did not have a factual basis for the statements he made, or that they were not made in good faith. He relies on *Groia*. With respect to allegation 2, the Respondent submits that the statements were reasonably based in fact and did not disclose "an excessive degree of vituperation in context and tone." He relies on *Doré v. Barreau du Québec*, 2012 SCC 12.

CONSIDERATION OF JUSTICE VOITH'S FINDINGS

[36] The Law Society relies heavily on the reasons of Justice Voith and the parties are at odds as to how this Panel is to consider the findings in this administrative proceeding.

[37] The Law Society submits that the doctrine of abuse of process precludes any attempt by the Respondent to contradict Justice Voith's findings. The Law Society frames the questions before Justice Voith as whether the Respondent's closing address was so improper and prejudicial as to amount to a "substantial wrong or miscarriage of justice" and on the costs application, the Respondent's conduct was "reprehensible" as being a "marked and unacceptable departure" from the standards of conduct of counsel. The Law Society submits that those findings are determinative of the questions in this proceeding.

[38] The Respondent submits that care must be taken by this Panel not to place too much weight on Justice Voith's findings as there were additional grounds being considered by him that are not before this Panel and that it does not follow axiomatically that the Respondent committed professional misconduct by causing a mistrial.

[39] The Panel agrees with the Respondent that the question put to this Panel differs from the questions that were before Justice Voith and that this Panel must confine itself to determining whether the Law Society has proven that the Respondent committed professional misconduct applying the *Martin* standard. The Panel rejects the Law Society's position that the findings of Justice Voith are determinative of the issues here.

[40] The Panel disagrees with the Respondent with respect to the weight that can be afforded to the findings of Justice Voith. Justice Voith sits as a judge of the Supreme Court of British Columbia and was a witness during the conduct

comprising allegation 1. His findings carry strong weight and the doctrine of abuse of process would preclude this Panel from contravening those findings.

ANALYSIS

Allegation 1 – Courtroom statements

[41] Allegation 1 has been broken down into five separate sub-allegations that the Respondent acted as follows:

(a) implied that opposing counsel were not forthright or honest;

(b) knowingly and intentionally made an expert witness an object of derision and ridicule;

(c) asserted directly or indirectly that the expert was dishonest and had falsified measurements, misrepresented evidence or misquoted scientific literature, without any evidentiary foundation;

(d) mischaracterized the issues before the jury by conflating how his client was injured with whether he was injured; and

(e) inaccurately and improperly asserted that the defendant's position was that his client was feigning his injuries.

[42] The Panel has considered the sub-allegations separately for the purposes of reviewing the evidence; however, in considering whether the Respondent's conduct amounts to professional misconduct, the Panel has considered the whole of the conduct comprising allegation 1. This approach is supported by *Lyons*, which directs this Panel to consider the duration and number of breaches. While one of the sub-allegations on their own may not constitute professional misconduct, we find the whole of the allegation takes the conduct past the threshold of what can be considered acceptable.

[43] The Law Society submits that this case raises the issue of when conduct causing a mistrial constitutes professional misconduct. The Panel disagrees with that characterization. The declaration of a mistrial was not a consideration in the Panel's analysis. Instead, the Panel considered the conduct of the Respondent isolated from the trial result of a mistrial. We do not find that all mistrials, even mistrials attributed to a lawyer's conduct, will necessarily result in a finding of professional misconduct. The analysis is fact specific.

Allegations 1(b) and (c) – Attacks on expert witness

[44] Justice Voith summarized the Respondent's attacks on Dr. AT at paras. 24 to 34 in his oral reasons for judgment on the mistrial as follows:

> The Submission addresses Dr. AT and his evidence at paras. 78-87 and elsewhere. The attack made on Dr. AT had at least two components or aspects, each of which was repeated in different ways and each of which was inappropriate. The first was that Dr. AT, a professional person, was knowingly and intentionally made an object of derision and ridicule. Counsel for the plaintiff accepted this and did not resile from it. If Dr. AT's evidence was ridiculous, he argued, Dr. AT deserved to be ridiculed. Paragraph 84 of the Submission states, in part:
>
> > [84] The best skill Dr. AT claimed, was the ability to *"know"* that JG's measurements were wrong – without even knowing how he measured the levers. He *"knew"* what Harley-Davidson's manufacturing standards are, without ever asking. It seemed that although Johnny Carson is dead, the amazing Karnak [*sic*] lives on.
> >
> > [emphasis in original]
>
> This paragraph has multiple difficulties. It asserts, as does para. 102 of the Submission, that Dr. AT never made certain inquiries of Harley-Davidson, the manufacturer of the motorcycle JW was riding, about the gearshift levers which Dr. AT and JG addressed in their reports in evidence. This is not correct. Dr. AT made such inquiries. He was unable, however, to obtain any information.
>
> The second statement, "although Johnny Carson is dead, the Amazing Karnak lives on", is inappropriate. The defendant in argument described the Karnac figure as a "wizard buffoon". Counsel for the plaintiff agreed. He went on to accept that the Karnac figure was a "ridiculous, turbaned and bejewelled caricature".
>
> Earlier during the trial, counsel for the plaintiff had held up a sealed envelope in his hand and began to ask Dr. AT what was in it. I prevented counsel from proceeding. I did not appreciate at the time, however, that this bit of theatre was intended to presage things to come and to lay the groundwork for counsel's subsequent submissions. I accept that counsel can be vigorous in its attack on the evidence and qualifications of an expert. That attack may well use some "drama and pathos": *Cahoon v.*

Brideaux, 2010 BCCA 228, at para 18. I do not consider or accept that it should extend to ridicule based on counsel's belief that a witness's evidence is ridiculous. It should not depict or describe a professional person, qualified to give expert evidence, as a fool or buffoon based on counsel's perception of that witness. In this case, the indirect assertion that Dr. AT was a buffoon was reinforced by the sarcastic tone, again often independently acceptable, which counsel for the plaintiff used in these submissions.

…

The second concern in this regard arising from the closing submissions of the plaintiff stems from the description of Dr. AT as dishonest. In concept, such assertions are open to counsel. In order to advance such an assertion, however, it must be properly grounded and the alleged act of dishonesty should, as a matter of fairness, be put to the witness. The more central the assertion is to the matters at issue, the greater the obligation on counsel to provide the witness with an opportunity to respond to it. This is still further reinforced where a witness, *qua* expert, attends before the court and has provided the certification which is now required by Rule 11-2.

The assertion that Dr. AT was not honest was made both directly and indirectly. Paragraph 82 of the Submission states

> [82] Dr. AT was repeatedly caught out misquoting what the four studies he referred to, actually say. He repeatedly excused himself by saying it had been a long time since he'd read them.

The suggestion that Dr. AT "misquoted" the studies he referred to was not put to him and does not accurately reflect the exchange between counsel for the plaintiff and Dr. AT. It is fair to say that counsel for the plaintiff directed Dr. AT to each of the four studies he had referred to and questioned the circumstances in which the testing referred to in the studies was undertaken. It was open to counsel to argue that such testing or its circumstances was so different in nature from the circumstances pertinent to the collision as described by JW that it was not relevant. This is markedly different, however, from asserting that an expert has misquoted a study he or she has relied on.

Paragraph 83 of the Submission states:

> [83] He also fairly conclusively demonstrated that if the measurements were falsified by slipping washers under the gear levers, then they would be different.

The submission that Dr. AT "falsified" measurements is also repeated in para. 87. This submission has no basis. It is not a proposition that was ever put to Dr. AT. Dr. AT's evidence was directed to the proposition that a modest manufacturing difference at one end of a gearshift lever would result in a more dramatic difference at the far end of the lever. Dr. AT argued that JG, in his report, had incorrectly calculated and magnified these differences. Dr. AT, in a visual demonstration before the jury, and with the use of a washer, depicted what he had earlier described orally. It was open to counsel to argue that this visual depiction was flawed. There was, however, no "falsification of measurements."

Paragraph 78 of the Submission states, in part:

> [78] … He Photoshopped some illustrations and say: "Aha!". Well, if we had a photograph of Hosni Mubarak at a meeting with other heads of state, and Photoshopped it, that would not prove Mr. Mubarak walked at the head of the group and was physically larger than Barack Obama. Photoshop disasters are not science.

Counsel for the defendant argued that in referring to Mr. Mubarak and Dr. AT in the same paragraph, counsel for the plaintiff was endeavouring to draw some parallel between them. I did not understand that to be the case. I understood instead that the object of the submission was to establish that a Photoshopped picture could be used to misrepresent what was being depicted, through the use of scale or otherwise. In this case, Dr. AT used Photoshop technology to combine two things. One was some enlarged photographs JG had used; the other was a ruler to provide some scale for the photographs. Dr. AT was asked both what he did and how he did it. Counsel never suggested to Dr. AT that the photographs he had Photoshopped constituted or reflected a misrepresentation.

[45] The Panel finds the attacks on Dr. AT to be egregious. The Johnny Carson skit was planned, deliberate and intended to ridicule an expert witness. After being cautioned, the Respondent continued the ridicule in his closing remarks with the intention of embarrassing Dr. AT. The Respondent alleged that Dr. AT misrepresented evidence without putting the alleged misrepresentation to him to address. The Respondent did not have a good faith reason for engaging in the

totality of this behaviour. In total, these actions were an unwarranted personal attack that was not necessary to the resolute advocacy of the plaintiff's case.

[46] The Respondent's conduct is the type of belligerent behaviour and unwarranted personal attack that undermines the objects of the trial process.

Allegation 1(a) – Implied opposing counsel not forthright or honest

[47] Justice Voith set out the Respondent's submissions regarding opposing counsel at para. 20 of his oral reasons:

> At para. 75 of the Submission, counsel for the plaintiff said:
>
> > [75] He was hurt in the August 7th, 2007 collision. The defendants admit his injuries. They say that somehow he was injured and then fabricated a complex story, with GG to get money under false pretenses. There's a word for getting money by lies. A word the Defence has been careful not to say out loud. Think about that word. That ugly, ugly word. Now think about why they won't say it out loud. They just hint at it and hope you'll believe their ugly insinuations. Think about how the truth is not afraid to speak out loud. Think about why.

[48] This statement, combined with the attacks on Dr. AT, demonstrates an ongoing lack of civility on the part of the Respondent towards the participants in the trial process. Lawyers ought not to be the subject of personal attacks when they are advancing positions of their clients. The Respondent was implying that counsel had not been candid in the courtroom. Honesty and candour are cornerstone duties of a lawyer, and the suggestion that a lawyer has not fulfilled those duties carries with it serious consequences. In this case, it was a factor in the mistrial. The Respondent may have disagreed with ICBC's defence to his client's case; however, it was not acceptable that the Respondent accused counsel of disingenuous conduct without evidence to support that extraordinary claim.

Allegations 1(d) and (e) – Mischaracterization issues/position

[49] Justice Voith also summarized the missteps the Respondent took mischaracterizing ICBC's position at trial and the issue to be decided by the jury at paras. 36 to 42 and 51:

> At paras. 44-55 of the Submission, counsel for the plaintiff addresses the contention of the defendant that JW was not forthright in his evidence. In

doing so, he inaccurately and improperly argued that the defendant's position was that JW was feigning his injuries. He carefully conflated the issue of how JW was injured with the issue of whether he was injured. The position of the defendant is said, at para. 55, to be that "he's [JW] a liar and a faker". This was not the position of the defendant. Such an assertion necessarily also misrepresents the import of the evidence actually before the jury.

Paragraph 53 of the Submission states:

> [53] For five years he did not play with his son, bike, lift weights, go running, ride his motorcycle. All, supposedly, to put across a scam on ICBC.

Again, no one questions that JW was injured; the question is how that injury occurred.

Paragraphs 36 to 37 of the Submission give rise to a different issue and state:

> [36] You may have some thought that a person who was apparently on welfare for a long time, doesn't deserve to receive compensation for his injuries. That a 16-month job history is not enough to support a long-term career. That at most, you should treat JW as if he had been on Welfare when he was injured. His Lordship will tell you that is wrong. You must compensate JW for what he lost on August 7th 2007. The Rule is: "*You take your victim as you find him*". The defendant does not get to say: "*Well, if I had hurt him BEFORE he got that good job, it would have cost me less. It's HIS fault that he had a good Job. I shouldn't have to pay*".
>
> [37] This is like someone smashing into a newly-restored vintage car, then saying: "*Last year, BEFORE IT WAS RESTORED, it was worth only $1,000. Just because today it was worth $50,000 until I hit it, is not my fault. I'll give you $1,00[0] and you can start again*". People are allowed to improve themselves. It's usually considered admirable.
>
> [emphasis in original]

These submissions are flawed in multiple respects. It was not the position of ICBC that the plaintiff's wage loss was to be calculated as though he was on welfare when he was injured. The position of the defendant was that JW's extended history of being on welfare was relevant to and probative of the diligence with which he sought alternative employment after he was injured. In addition, though it is true that a defendant must take the plaintiff as he or she is found, that principle has no direct applicability in the present case. Those standard jury instructions which assist a jury in understanding that a defendant is to "take the plaintiff as he or she finds him" are not directly engaged. Indeed, plaintiff's counsel did not suggest during the pre-charge conference we held that any such charge was appropriate in this case. The example used in para. 37, to which I have alluded, is also, for self-evident reasons, inapt and misleading.

Though this statement is not found in the Submission, counsel for the plaintiff, during the discussion of negligence in his oral submission, said: "The standard of care is to protect the innocent". This is incorrect or misleading in several respects. The concept of "innocence" is irrelevant to an action in negligence and to the concept of a standard of care. The reference to "innocence" also intimates that the usual burden of proof which the plaintiff bears may be affected. Finally, the proposition advanced is simply not correct.

Counsel for the plaintiff, in advancing his future cost of care calculations, made several additional statements which are incorrect. In relation to this head of loss, the Submission, at para. 129, states:

> [129] Of course, you do not have to accept our calculations. If you find as a fact that his future costs of care would likely be less, then you should award less. Conversely, if you decide there is a real possibility that he will have to spend more, then you should award more. You decide the facts.

The standard of proof for both negative and positive contingencies is "a real possibility". To suggest that the jury could only award less than the amount the plaintiff had calculated on the balance of probabilities is incorrect.

…

I accept that juries are comprised of intelligent individuals with much life experience. In this case, however, the jury has been provided with

> calculations and submissions which, in combination: (a) advance incorrect legal standards; (b) advance expenses or figures for which, at least in part, there is no objective evidence; (c) extrapolate those figures to an unreasonable end date; and, (d) double those figures on a speculative basis and on a basis which is at odds with the relevant statutorily-prescribed discount rates. At a minimum, such difficulties place an unreasonable burden on the jury and increase the prospect of it being misled. This, in turn, results in unfairness to the defendant.

[50] The frequency of the misstatements weighs in favour of those statements not being innocent mistakes. Further, the statements were written in advance, eliminating any suggestion that the statements were made in the heat of the moment.

[51] The Respondent had time to carefully consider these submissions and opted to proceed in a fashion that was intended to advance the position of his client in a manner that was patently unfair to the defendant.

[52] The conduct described in the sub-allegations, combined with the other trial conduct, is conduct aimed at undermining the legal process and is worthy of rebuke.

Allegation 2 – Out of court statements

[53] The statements attributed to the Respondent in the *Vancouver Sun* article and the subsequent July 11, 2012 email to Mr. Mulgrew fall below the standard of conduct expected of lawyers in two ways. First, the Respondent continued the unnecessary demeaning of Dr. AT. Second, the Respondent criticized the judicial system by relying on statements that were false and intended to undermine the reader's perception of the integrity of the trial process.

[54] The statements attributed to Dr. AT by the Respondent were not accurate. The Respondent's comments suggested that Dr. AT's evidence had been laughable and unprofessional. The Respondent's comments also suggested that the jury was fond of his ridicule of Dr. AT and that his courtroom tactics ought to be acceptable. Whether or not ridicule of a witness is popular with the jury is not relevant to whether that ridicule is proper conduct. Such statements undermine the integrity of the system and may lead the public to believe that this type of conduct is normal or acceptable. It is not.

[55] Continued criticism of Dr. AT accomplished no useful purpose. The criticism was not fair as it contained inaccurate information concerning the actual events and evidence at trial.

[56] The following statements contained in the July 11, 2012 email are clearly directed at Justice Voith and were a patently untrue characterization of the law and Justice Voith's findings:

> And, the judge NEVER asks the jurors about this?
>
> Seems pretty paternalistic, don't you think?
>
> Seems like judges presume jurors are idiotic children, don't you think?

[57] The Canons of Legal Ethics identify that judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Here, the Respondent has criticized a particular judge of the Supreme Court of British Columbia unfairly. The first part of the statement suggests that it was open to the judge to interact with the jury and that failure to do so was paternalistic. The Respondent, being a senior member of the trial bar, would have known when making this statement that it was not open to the judge to canvass the views of a jury prior to declaring a mistrial. The second part of the statement implies that Justice Voith (or judges in general) holds juries in contempt. Again, this was untrue as Justice Voith had addressed the sophistication of juries in his reasons.

[58] The Supreme Court of Canada in *Doré* recognized that constraints are properly placed on lawyers when they criticize the judicial system.

[59] It was open to the Respondent to engage in a respectful dialogue on the jury trial process. Where the Respondent fell below the standard expected of lawyers was his demeaning, untrue and misleading comments directed at specific participants in the trial process.

[60] We find that the Law Society has met the burden of proving that the Respondent committed professional misconduct as stated in allegation 2.

ORDERS

[61] The Law Society requested an order under Rule 5-8(2) of the Rules that exhibits containing confidential client information or privileged information not be disclosed to members of the public. The Respondent consents to the order. However, recent amendments to Rules 5-8 and 5-9, in particular Rule 5-9(3), have made such an order unnecessary to prevent the disclosure of confidential or privileged information to the public. See *Law Society of BC v. Edwards*, 2020 LSBC 57 at paras. 118 to 121.

[62] We find that the Law Society has met the burden of proof and the Respondent's conduct is a marked departure from the conduct expected of lawyers and that, as a result, he committed professional misconduct as alleged in allegations 1(a) to (e) and 2 of the Citation.