THE OPENING STATEMENT IN A CIVIL JURY TRIAL: IMPROPER INFLUENCE OR IMPROPER TO INFLUENCE

By Michael P. Maryn

In recent years, the conduct of counsel during an opening statement has received a great deal of judicial scrutiny and criticism. This has, in turn, created a climate in which mistrial applications arising from the opening statement have become commonplace, trial judges are watchful and counsel are wary.

Starting with *Brophy v. Hutchinson*[1] in January 2003, the B.C. Court of Appeal issued a series of decisions which were critical of statements made by counsel in the presence of the jury during the opening and other stages of the trial.[2] These decisions, necessarily, focused on what counsel should not do. *Giang v. Clayton*[3] followed *Brophy*. In *Giang*, the following conduct was considered inappropriate: saying "Good Morning" to the jurors, referring to the plaintiff by her first name, appealing to the jurors' emotions, and anything tending to arouse hostility. These decisions, which deal with jury trials in which counsel committed a number of instances of misconduct, are now relied on by trial judges to declare mistrials even where only one transgression has occurred. These decisions have encouraged applications for mistrials and judicial admonitions based on counsel's misconduct during the opening. They have resulted in rulings restricting the form and content of counsel's opening address to the jury. In this writer's experience, mistrial applications following plaintiff's opening have become routine.

Following are some recent examples of fault found by the court or alleged by opposing counsel:

- The opening was not a "neutral statement of facts".
- Counsel referred to the defendant driver falling asleep at the wheel when liability was admitted.
- Plaintiff's counsel showed an MRI of the plaintiff's injuries to the jury (even when it was known that the MRI would be entered as an exhibit during the trial).
- Counsel for the plaintiff showed the jury photographs of the plaintiff.

- Counsel used a PowerPoint presentation.
- Counsel referred to the defendant driver's conduct where the defendant had admitted liability for a car accident.

It is submitted that these examples have a common element: although the fairness of the trial was not threatened by what counsel did or intended to do, there was an apprehension that counsel might have unfairly influenced the jury.

The writer will declare his bias at the outset: in a personal injury negligence trial, it is counsel, not the court, who should decide how best to open the case, subject only to the undoubted power of the trial judge to ensure a fair trial.

The idea that the court must strive to preserve the neutrality of the jury during the opening statement by imposing limits on counsel's efforts to persuade through the use of modern communicative tools is dated, given the sophistication, education and, quite often, skepticism of the average juror.

Thus the recent decision of *Moskaleva v. Laurie*[4] is a welcome breath of fresh air. In *Moskaleva*, the appellant argued that the opening submissions of the respondent/plaintiff's counsel were improper, prejudicial and resulted in an unfair trial. The appellant took issue with the following:

- Rather than outlining the facts, counsel's opening described the accident, the mechanism of brain injury and the plaintiff's training and employment—all as if they were established facts.
- The plaintiff's symptoms were couched in pathos through an emotional appeal to the challenges faced by the plaintiff as an immigrant.
- The statement that the defendant "chose to launch her car forward from that stop sign and not pay attention to who [sic] was in the cross-walk" had the effect of demonizing the defendant by presenting the plaintiff as victim and the defendant as culprit.

In dismissing the appeal, Rowles J.A. noted that the appellant's characterization of what was said in the plaintiff's opening was "overstated" and that the remarks made in the opening about the defendant's manner of driving did not result in the kind of prejudice that would require a new trial when, among other reasons, liability was in issue and counsel for the defendant told the jury in closing submissions that it was open to them to find that the defendant was negligent.

With this decision, the Court of Appeal affirmed what has long been the law: using persuasion in an opening statement is not improper per se.[5]

The purpose of an opening is not merely to provide a road map of anticipated evidence. The opening serves to educate the jury and to make them

more receptive and understanding of the plaintiff's case. This can only be done effectively by capturing and maintaining the jury's attention. The opening communicates to the jury the plaintiff's view of the justice of the case.

In civil litigation, it is the right, privilege and burden of the plaintiff to open the case. Plaintiff counsel's advantage in putting forward the first description of the case is tempered by the professional responsibility of counsel to assert only what, in counsel's judgment, is capable of proof and will be proven in the course of the trial. Although argument is improper in an opening statement, persuasion is not. Persuasive language, photographs or demonstrative aids are the tools of the trade for trial counsel. They may be used to introduce the salient facts, which will be proven in a manner that maintains the jury's interest and attention.

An opening statement need not consist of neutral language:

> In dealing with [a thorough opening statement], the over-all purpose must always be borne in mind—the creation of a receptive mood; a mood that will make the jury want to put themselves on the side of our client; a mood that ideally will leave them with the feeling of wanting to help our client...
>
> The language should be powerful, the choice of words should enhance the credibility of counsel and the content of his statement. There is no neutral language, or language without connotation.[6]

If the opening statement is truly persuasive, the jury will remember it. An opening that is soon forgotten is a missed opportunity. A memorable opening is one that seizes and maintains the jury's attention. Creating a sense of drama, without inflammatory remarks or appeals to sympathy, should not be considered improper. Persuasion through the use of language or a particular presentation should not be subject to sanction unless it crosses over into argument, is inflammatory or is otherwise improper. Advocacy is an art, not a science.

One of the leading authorities in Canada on trial advocacy, Geoffrey D.E. Adair, Q.C., captures the essence of a jury opening:

> It is now beyond doubt that the fundamental purpose of an opening address is to outline the nature of the case to the jury in order that they will be better able to follow the evidence. Words to this effect have been said so often that this proposition is undeniable. It means that counsel may provide the jury with the background as to how the cause of action arose, outline the nature of the evidence that will follow and identify the issues.
>
> One would think in the face of such established law that the content of opening addresses would present little problem for trial judges. Counsel must, however, be given much latitude by the court in terms of deciding how to best impart the necessary information to the jury that will more effectively allow them to follow the case. Modern advocates are seizing upon this latitude to deliver powerful and compelling opening addresses in the expectation that they will gain a significant head start on the process of persuasion.[7]

The task of a trial lawyer is to persuade the court to put itself on the side of the lawyer's client. In other words, counsel's duty is to advocate on behalf of the client. Trial counsel are expected to advocate. They stand before the bar to plead their case—they do not merely file a brief of evidence and leave it to the court to choose the better essay. Without an element of advocacy, an opening statement would likely fail to capture and maintain the jury's interest.

There was a time when juries were regarded as a relatively unsophisticated lot who required considerable judicial supervision and protection from counsel. This view is a relic from a bygone era. Canadian jurors are far more sophisticated and knowledgeable about the world around them than their early forebears ever were. Public education, air travel, television and the Internet are but a few of the changes that have increased the average juror's access to information.

In *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*,[8] Major J. wrote:

> I agree with the Court of Appeal for British Columbia in the case at bar, at p. 141, that "juries are held in higher esteem now than they perhaps were at the time of the decisions of the courts of Ontario upon which *Theakston v. Bowbey* is founded".This view has been supported by statements of this Court. In *R. v. Swain*, [1991] 1 S.C.R. 933, Lamer C.J. stated at p. 996: "I have a high regard for the intelligence and common sense of Canadian juries and for the ability of trial judges to explain difficult concepts of law to the jury."

In *Martin Estate v. Pacific Western Airlines Ltd*,[9] Trainor J. observed:

> Certainly it is true...that juries today are composed of reasonable people who are, I believe, sophisticated and generally well educated.I think that they have the capacity to understand many of the things that in the past they have not been given credit for.

We trust juries to properly assess the credibility of witnesses. The standard CIVJI instructions to the jury include the instruction that the jury should observe the demeanour of a witness. Juries do the same with counsel. Anyone who has done a jury trial will recognize that look from the jury when counsel embellish, hyperbolize or go "over the top". What might seem to be an inflammatory comment in the transcript would more likely have been greeted with disbelief and disdain by the jury.

Is it likely that a jury of intelligent citizens applying a healthy measure of common sense will be deceived by the photograph of a plaintiff or her family? By counsel's use of descriptive words? By PowerPoint? Probably not. The court should defer to counsel's judgment about how best to accomplish the purpose of educating the jury about the issues in the trial.

An independent bar ensures an independent judiciary. It is counsel's role to advocate; the trial judge's role is to ensure that the trial is conducted fairly and to instruct the jury on the law, and the jury's role is to come to a decision on the facts. The task of educating the jury lies with counsel on both sides as well as with the trial judge.

To return to the examples referred to above:

- *Cannot refer to defendant driver falling asleep in single vehicle accident when liability is admitted*—It should not be improper to refer to the defendant's careless conduct when liability is admitted, provided that this is done in a way that is not an obvious attempt to demonize the defendant or inflame the jury. Done properly, it is difficult to see how this could unfairly prejudice the defendant when, in an action for negligence, an admission of liability is an admission of "fault" or blame. In *Moskaleva v. Laurie*, the Court of Appeal rejected the argument that the statement in the opening of counsel for the plaintiff that the defendant "chose to launch her car forward from that stop sign and not pay attention to who was in the cross-walk" demonized the defendant.
- *Cannot use MRI or photographs*—Demonstrative aids during an opening should be permitted. The objects of persuading and educating the jury are met without sacrificing fairness.
- *Cannot use PowerPoint*—It provides more of a level playing field if both sides can enhance their opening with effective visual information. Unlike natural attributes, such as a winning smile or a melodic voice, tools such as PowerPoint are available to all counsel and their use should be permitted.

A trial is not an afternoon tea party. In *R. v. Chambers*,[10] Esson J.A. said:

> [192] In our reasons in *Moore-Stewart v. Law Society of British Columbia* (unreported—V 00545 Victoria Registry, reasons filed November 14, 1988) [since reported 54 D.L.R. (4th) 482, [1989] 2 W.W.R. 543, 32 B.C.L.R. (2d) 273 (B.C.C.A.)], we quoted at p. 30 [p. 501 D.L.R.], this summation of the duty of Crown counsel: "He may prosecute with earnestness and vigour—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.": Sir Robert Megarry, *A Second Miscellany-at-Law* (Stevens, 1973, p. 36). The question whether any given blow was foul, or merely hard, is often one about which reasonable people can reasonably differ. The question arises in the context of an adversarial system of trial which expects of counsel that he will strike blows. The system will not work if appellate courts are too ready to find any given blow to have been foul.
>
> [193] It is also important to keep in mind that the question for us is not whether foul blows were dealt; it is whether in the end the right to a fair trial was

> unfairly prejudiced. In any trial of the length and complexity of this one, it is virtually certain that there will be some foul blows. The collective common sense of a jury is likely to be effective in identifying a foul blow as such and in discounting it. Furthermore, it must be kept in mind that questions or arguments which at first blush seem to have been foul blows may, when regard is had to context, be seen as innocuous or even appropriate.

Thus, in those rare circumstances where counsel has attempted to influence the jury by improper means, the court ought not automatically to order a mistrial. In *Giang v. Clayton*, Mr. Justice Thackray set out the various remedies available. They include:

> (1) an immediate correction or rebuke at the time the offending behaviour occurred; (2) a prompt warning to the jury to dispel the potential effect of the misconduct; (3) a specific instruction in the charge to the jury which identified the problem and corrected it; (4) striking out the jury and, with the consent of the innocent party, continuing the trial without a jury (*Supreme Court Rules*, B.C. Reg. 221/90, Rule 41(7)); or (5) declaring a mistrial.[11]

In the case where counsel's opening statement does create the risk of an unfair trial, a mistrial or a Rule 41(7) order should be used as a last resort. In most instances, the transgression can be addressed with a correction or a rebuke accompanied by an explanation to the jury.

CONCLUSION

It is time to adjust the threshold for a mistrial in order to reflect the skills of the average juror. The public understands the role of counsel. When serving on juries, the public expects opposing counsel to advocate the position that best suits their client. Jurors can tell right from wrong, embellishment from accuracy, and good advocacy from bad. Exaggeration, gilding the facts and excessively histrionic language must be avoided. Not only is it improper, the jury is intelligent enough to see through it. This behaviour is in the same class of conduct as eye-rolling and smirking to a jury during a witness's evidence—it may appear to work in the movies, but it seldom works in real life. This is, perhaps, the most effective safeguard against an "over-the-top" opening statement: instead of "getting jurors into your camp", it will leave them fleeing to more comfortable ground.

It is not improper to influence. Influence is the hallmark of good advocacy. Advocacy is the essence of being an effective trial lawyer, and an effective trial lawyer should use advocacy to the fullest advantage for his or her client in the opening statement. In an environment that recognizes and encourages counsel to use the opening statement to both persuade and educate, advocacy is the fulfillment of counsel's duty to obtain for a client the benefit of every remedy and defence authorized by the law.

ENDNOTES

1. *Brophy v. Hutchinson*, 2003 BCCA 21.
2. *Lawson v. McGill*, 2004 BCCA 68; *de Araujo v. Read*, 2004 BCCA 267; *Giang v. Clayton*, 2005 BCCA 54; *Gemmell v. Reddicopp*, 2005 BCCA 628.
3. *Giang v. Clayton*, *ibid.*
4. *Moskaleva v. Laurie*, 2009 BCCA 260.
5. The purpose of advocacy is to gain the court's attention, to arouse interest and to persuade. As was stated by Ferguson J. in *Hall v. Schmidt* (2001), 56 O.R. (3d) 257 (S.C.) in a judgment declaring a mistrial after the plaintiff's opening: "There is a significant distinction between overt argument and persuasive narrative." As the late John Sopinka put it, "The *evidence* should be marshaled in such a way that the conclusion to be drawn is obvious so that to state the issue is to answer it": Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1981) at 59. John Olah puts the point this way: "Remember, that you cannot argue your case in your opening remarks. Persuasion is achieved by arranging the *evidence* in a compelling manner and by the choice of language": Olah, *The Art & Science of Advocacy* (Toronto: Carswell, 1995) at 8–7. Sometimes the distinction between argument and persuasive presentation of proper submission is blurred.
6. Richard J. Sommers, Q.C., "The Opening Statement and Closing Argument to the Jury in a Civil Case" in Franklin R. Moskoff, ed., *Advocacy in Court: A Tribute to Arthur Maloney, Q.C.* (Toronto: Canada Law Book, 1986) at 163.
7. Geoffrey D.E. Adair, *On Trial: Advocacy Skills Law and Practice*, 2nd ed. (Toronto: LexisNexis Canada, 2004).
8. *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092.
9. *Martin Estate v. Pacific Western Airlines Ltd.*, [1981] B.C.J. No. 1214 (S.C.).
10. *R. v. Chambers*, [1989] B.C.J. No. 295 (C.A.).
11. *Giang v. Clayton*, *supra* note 2 at para. 143.