

## OPENING STATEMENT AT TRIAL: MISTAKES TO AVOID

The most important statement counsel will ever make in a case is the opening.<sup>1</sup> This has also been regarded as a neglected area of trial practice.<sup>2</sup>

Upon reviewing the recently reported ruling of Mr. Justice Ferguson in Hall et al v. Schmidt et al,<sup>3</sup> my attention was clearly drawn to mistakes which may be made when delivering an opening address. Mr. Justice Ferguson's ruling is of assistance as it cites numerous errors made by plaintiffs' counsel in the opening address which must be avoided.

### **Facts:**

The case before Mr. Justice Ferguson involved the trial of claims arising out of a fatal motor vehicle accident. The claims of some of the parties had been settled and the defendant had admitted liability with respect to the accident. The only remaining claims to be tried by Mr. Justice Ferguson were Family Law Act claims under Section 61 of The Family Law Act, R.S.O. 1990, c.F.3 for damages for loss of care, guidance and companionship.

The only issues to be determined during this abbreviated trial were the amount of damages for each of the remaining claimants and whether the stepfather of the deceased was a parent within the definition of The Family Law Act. The trial was to be conducted before Mr. Justice Ferguson and a jury.

### **Improper Content of the Opening Address:**

In Appendix "A" to his ruling, Mr. Justice Ferguson has reproduced the parts of the opening address of plaintiffs' counsel which he found to be unacceptable. These parts consisted of the beginning and the end of the opening address as the middle had included an outline of the anticipated evidence.

The ruling of Mr. Justice Ferguson identifies numerous errors in the opening address commencing with the second paragraph which stated:

"This case is about a defendant driver, who negligently, on May 14, 1997 causes a collision who kills Ben and which forever changes the lives of his family members. The proceedings in this Court room are an opportunity for us, for the

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<sup>1</sup> Richard J. Sommers, Q.C., "*The Opening Statement and Closing Argument to the Jury in a Civil Case*", in Moskoff Franklin R., ed., *Essays in Honour of Arthur Maloney, Q.C.*, Toronto: Canada Law Book, 1986 at p.163.

<sup>2</sup> Ibid.

<sup>3</sup> (2002) 56 O.R. (3d) 257 (Ont. Sup. Ct.).

justice system, to confirm the value of Ben's life to those family members who survived him."

Mr. Justice Ferguson found that this passage misinformed the jury as to the nature of the trial as the trial was not about the defendant or his negligence. Instead, the trial was about the two issues of quantum and the entitlement of the stepfather.

Plaintiffs' counsel continued his opening address by stating:

"It is a special honour for me today to speak for Ben because Ben is no longer with us."

Mr. Justice Ferguson held that this was a mischaracterization of counsel's role and inflammatory as counsel represents the plaintiffs, not the deceased.

In the course of his ruling, Mr. Justice Ferguson also cited a number of other improper comments by plaintiffs' counsel which were unacceptable for the following reasons:

1. Counsel mischaracterized the burden of proof by suggesting to the jury as proven facts evidence which it was necessary for the plaintiffs to prove. Mr. Justice Ferguson also chastised the plaintiffs' counsel for suggesting that it was improper that the defendant had not conceded these facts.
2. Counsel are not entitled to give evidence and therefore counsel are not entitled to tell the jury about their experience or lack of it. Counsel are not entitled to express their opinions.
3. Plaintiffs' counsel promised in his opening address to perform at his best during the trial. Mr. Justice Ferguson found that this improperly put counsel's integrity at issue.
4. In certain passages, plaintiffs' counsel told the jury about his feelings. Mr. Justice Ferguson ruled that it is improper for counsel to express their personal opinions or beliefs.

**Ruling:**

A very helpful passage of Mr. Justice Ferguson's ruling stated:

"If the remarks of counsel do not consist of mentioning evidence which will be called, of mentioning a point of law in issue or an explanation of how the anticipated evidence will relate to an issue, then they are irrelevant and probably constitute argument."

The harm caused by plaintiffs' counsel through the improper content of the opening address could not be overcome in this case. As the defence did not intend to call any witnesses, the defence could not mitigate any prejudice by commenting on the improper passages in its own opening address because the defence was not entitled to make an opening address.

Upon considering the objections of the defendant's counsel to the opening address, Mr. Justice Ferguson concluded that a mistrial was the only appropriate remedy. He then offered plaintiffs' counsel a choice of continuing with a trial by Judge alone or paying costs and commencing a new jury trial at a later date. Plaintiffs' counsel selected the option of proceeding before a jury.

A careful review of the ruling of Mr. Justice Ferguson is most helpful as he identifies numerous mistakes to be avoided when delivering an opening address. Even though the trial before Mr. Justice Ferguson involved a jury, the errors which he had identified should be carefully avoided by counsel whenever delivering an opening address.

### **Doing it Right:**

A concise statement of the purpose and necessary content in an opening address is contained in an article by Richard J. Sommers, Q.C.<sup>4</sup> Sommers identifies the overriding purpose of the opening statement as being to achieve a favourable setting, to create a receptive mood within the jury, a mood that will last throughout the trial, being reinforced by the evidence that is called.

In Sommers' article, he states that a thorough opening statement will contain the following major themes:

- “(a) introductory comments;
- (b) an explanation of the purpose of an opening statement;
- (c) the statement of a major theme or focal point of the case;
- (d) the presentation of the characters, the setting and the story;
- (e) the explanation of the evidence;
- (f) the explanation of any major exhibits; and
- (g) the explanation of the verdict that is asked for.”<sup>5</sup>

A very helpful statement of the purpose and proper content of an opening address is provided by Robert F. Reid and Richard R. Holland in their text “Advocacy: Views from the Bench.”<sup>6</sup> Reid and Holland identify a number of important factors.

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<sup>4</sup> Sommers, supra note 1 at p. 163.

<sup>5</sup> Ibid. at p.164.

<sup>6</sup> Reid, R.F. and R.E. Holland, *Advocacy: Views from the Bench* (Aurora, Ont: Canada Law Book, 1984) at p.109.

The first factor cited is the necessity of preparation. The opening address is one area of trial over which counsel has control. Counsel can use the opening address to make an important, favourable first impression.

Another factor cited by Reid and Holland is that an opening is intended to be a simple, well told narrative of the facts in chronological order without argument. Using excessive detail in the opening address may lose the interest of the Judge.

An important consideration identified by Reid and Holland is that counsel must be careful not to overstate their case. Obviously, if the evidence presented at trial does not meet the expectations created in the opening address, a Judge and jury may be reluctant to accept the case and may doubt the integrity of counsel.

**Conclusion:**

For counsel to deliver an effective opening at trial, careful preparation must be undertaken and counsel must possess a thorough understanding of the case. Once this has been achieved, a brief review of the purpose and content of the opening address as outlined by Richard Sommers in his article and Robert Reid and Richard Holland in their text may prove most helpful. Prior to preparing the opening statement before my next trial, I shall also review the ruling of Mr. Justice Ferguson in Hall et al v. Schmidt to attempt to avoid the errors made by plaintiffs' counsel in his opening address in that case.