

Opening Statements

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“Now, the framers of the current treatises on rhetoric have constructed but a small portion of that art. The modes of persuasion are the only true constituents of the art: everything else is merely accessory. These writers, however, say nothing about enthymemes, which are the substance of rhetorical persuasion, but deal mainly with non-essentials. The arousing of prejudice, pity, anger, and similar emotions has nothing to do with the essential facts, but is merely a personal appeal to the man who is judging the case. Consequently if the rules for trials which are now laid down in some states - especially in well-governed states - were applied everywhere, such people would have nothing to say. All men, no doubt, think that the laws should prescribe such rules, but some, as in the court of Areopagus, give practical effect to their thoughts and forbid talk about non-essentials. This is sound law and custom. It is not right to pervert the judge by moving him to anger or envy or pity - one might as well warp a carpenter's rule before using it. Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust, the judge must surely refuse to take his instructions from the litigants: he must decide for himself all such points as the law-giver has not already defined for him.”

Aristotle, 350 B.C.E.

Introduction

The purpose of this paper is to canvas some of the substantive legal principles that govern what is permissible in opening statements and to offer some thoughts on how to prepare and structure an opening statement.

Opening statements before a judge differ significantly from opening statements made to a jury. For what should be obvious reasons the case law concerning opening statements is concerned almost exclusively with jury trials.

Much of the advocacy literature on opening statements also focuses on plaintiffs and jury trials. Nevertheless, many of the considerations apply equally to openings by defence counsel and openings made before a judge alone. Where there are differences I have tried to highlight them.

Importance of an Opening

A great deal has been written on “primacy” – the importance of what is heard first. Social science research has determined that there is a strong tendency for people to believe the first thing they have heard about a topic or subject. It can then become hard to change their minds. U.S. studies have demonstrated many jurors make up their minds upon hearing the opening statement at a trial: see Oatley, Addressing the Jury 2nd Ed. (Canada Law Book, 2006) pp. 4, 20, 21. Some studies suggest that up to 80% of the time jurors make up their minds after the opening and do not change it: Olah, The Art and Science of Advocacy (Toronto: Carswell 1990), p. 8-3. Primacy is not limited to jurors. It affects all of us.

An effective opening should make it clear to the decision maker why certain evidence is relevant and important. Without this it is quite possible the judge or jury members may not appreciate the significance of evidence when it is lead.

Furthermore, all of us can only retain a certain amount of information. A judge or a juror is not going to remember all the evidence presented throughout a trial (especially a long trial). Important evidence in your case should be repeated during the trial. You do not want to take the chance that the judge or jury missed or overlooked a critical piece of evidence. Some argue you should drive home important evidence at least **three** times during a trial to ensure the decision maker gets it. If you are a defendant and you skip your opening, you are taking a chance that the decision maker knows your position on the issues from hearing your questions in cross examination or that the decision maker will “get it” in closing argument. That is taking a needless risk when you have the opportunity to focus the decision maker on issues and evidence that are important to your client’s case in your opening statement.

Olah, in The Art and Science of Advocacy (Toronto: Carswell 1990) refers to the opening address as the “forgotten art”. He states: “The opening address has been described as the single most important phase of the trial. Yet the opening statement is one of the most neglected aspects of trial work.” Many defence lawyers do not bother with openings even in jury trials.

It has been suggested by some that a lawyer is like a salesperson. Instead of selling a product you are selling ideas, the theory of your case, your client and the evidence you lead. The opening then, is the launch of your sales campaign. To neglect it is to miss a “golden opportunity” to sell the theory of your case to the decision maker.

In *Brophy v. Hutchinson* 2003 BCCA 21, Finch, C.J.B.C. said:

“[25] The right of a plaintiff to open is a considerable advantage. It enables counsel to explain in a few minutes a case which may take days or weeks to develop in evidence, and to state her case in the way most favourable to her client’s interests. The opening can give the trier of fact a framework within which to understand and evaluate the plaintiff’s case as it unfolds. For the party bearing the burden of proof, this can be a most useful tool.”

Further, the opening is also vital to establish your credibility with the court. Whether before a judge or a jury (but especially a jury) the opening statement is your chance to give off a positive first impression.

Purpose of the Opening

Often because we have lived with a case for years before it gets to trial our focus tends to become increasingly myopic. Stand back from your case and think of how you would explain it to a non-lawyer. That should be the starting point of your opening. Your opening should answer the question: What is this case all about?

Keep in mind that your trial judge will often know virtually nothing about the case before court starts on the first day of trial.

According to Halsbury, Laws of Canada, at p. 797, the opening statement is intended to enable the trier of fact to follow the evidence better as it is developed at trial: *Baillargeon v. The Paul Revere Life Insurance Co.*, [2006] 81 O.R. (3d) 35.

One of the leading B.C. cases on this subject is *Brophy v. Hutchinson* 2003 BCCA 21. In that case Finch, C.J.B.C. said:

“[23] The order of speeches prescribed by Rule 40(53)(now 12-5(72)) reflects the purpose an opening speech is intended to serve. *Halsbury, supra*, at para.103 says:

The object of an opening is to give the jury a general notion of what will be given in evidence. Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the court takes judicial notice.

[24] The opening’s purpose is to outline the case the party bearing the onus of proof (usually the plaintiff) intends to present. Counsel’s goal in opening is, or should be, to assist the jury in understanding what his or her witnesses will say, and to present a sort of “overview” of the case so that the jury will be able to relate various parts of the evidence to be presented to the whole picture counsel will attempt to present.

In *Aberdeen v. Langley (Township)* 2006 BCSC 2062, Groves, J. said:

“[28] What counsel can do in an opening has often been described as setting a roadmap for their case so that the jury can appreciate the significance of the evidence that is being called as it is being called.”

Keep this in mind as you prepare your opening. Even in a non-jury trial the judge may have no sense of the importance or relevance of certain evidence if you have not provided him or her with a roadmap of where the case will be heading.

Order of the Opening

Again, *Brophy, supra*, is the leading case on this subject. In that case the trial judge, presiding over a jury trial, allowed defence counsel to open immediately after the plaintiff’s lawyer had given her opening statement. The rule (now 12-5(72)) does not permit this procedure unless the parties consent.

In *Brophy* the court of appeal said:

“[34] The judge’s direction that counsel could make his opening “at the start” if he chose to do so, was an order made without jurisdiction. It is also an order which in my view caused prejudice to the plaintiff.

...

[36] Before leaving this first issue, I would offer some comments on what the various text writers have said about the practice of defence counsel’s opening before any evidence is called. There is a suggestion that this is a growing trend in British Columbia practice. There may well be many cases where such a practice is desirable. One can think of cases involving particularly complicated facts, or a consideration of many documents, or complex and contradictory expert evidence. For these, and other compelling reasons, a judge may well consider that hearing both (or all) sides “open” their case before any evidence is called would facilitate a better understanding of the case. Even in these cases, however, it would appear that the Rules require the agreement of all parties before the court may exercise its discretion to so order.

[37] I would also observe that the cases calling for consecutive openings are generally of such a nature as would be tried by judge alone. While opening statements can always be effective tools, the initial impression to be made by an opening statement is, in my view, of less importance in a trial by judge alone, than in a trial by judge and jury. That is so because judges will already be familiar with the two or more sides of the case to be presented from reading the pleadings, and because of the judge’s experience with the adversarial process.”

In jury trials, therefore, the defendant will almost never open until the close of the plaintiff’s case. Nevertheless, when acting for a defendant you should have your opening prepared for the first day of trial in case the trial judge calls upon you to give your opening. In a judge alone trial, especially a lengthy or complicated case, it is much more common for the defendant to deliver an opening statement after the plaintiff.

Restrictions on openings

Again, *Brophy* contains a very good summary of some of the do’s and don’ts of opening statements:

“[41] 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 arouse hostility, or statements that appeal to the jurors' emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible: see *Halsbury, supra*, at para.103; Williston and Rolls, *The Conduct of An Action* (Vancouver: Butterworths, 1982); Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 1990) at 8-8; Lubet, Block and Tape, *Modern Trial Advocacy: Canada, 2nd ed.* (Notre Dame: National Institute for Trial Advocacy, 2000)."

In *Aberdeen, supra*, the court made the following observations:

"[36] In that case, (*Schram v. Osten* 2004 BCSC 1789) slides of the plaintiff's Power Point presented during her opening stated the defendant had denied all responsibility, blamed other defendants and blamed the plaintiff. This gave the impression that the wrongdoing had been predetermined. It mischaracterized the evidence instead of clearly stating it was merely the plaintiff's suggestion of what it expected the witnesses to say.

[37] By stating that the defendant was not taking responsibility for their actions, plaintiff's counsel improperly indicated that the defendant had not accepted his share of responsibility and thereby incorrectly reversed the burden of proof.

[38] In the case of *Melgarejo-Gomez v. Sidhu* 2002 BCCA 19, Braidwood, J.A. speaking for the court of appeal dealt with the situation in which plaintiff's counsel used words such as "I think," "I believe," "I accept," and "I submit." The court found that the use of these words pits the credibility of one counsel against the credibility of the other. So that if the jury were more impressed with counsel for the plaintiff, it would prejudice the respondent and vice versa.

[39] In addition to those B.C. authorities, counsel for the plaintiff relies on a recent decision of the Ontario Supreme Court of justice in the case of *Morrison v. Greig*, [2006] O.J. No. 4154.

[40] In that case, Glass, J. states the following in paragraph 10:

An opening address has the purpose of providing an outline for jurors to understand what is going to be presented to them so that they can make decisions. It is not a time to put a spin on the evidence telling the jurors how they should interpret the evidence.

[41] In paragraph 14 and 15, Glass, J. comments on the inappropriateness of calling upon the jury to speculate and to make conclusions prior to hearing all the evidence. In paragraph 15, the court opines:

That should not be raised until the end of the trial when closing argument is given to the jury after evidence has been presented to the jury. That is the time of the trial when a jury has the opportunity to assess evidence. “

In *Burke v. Behan* 2004 Carswell Ont 5535 Quinn, J. set out a list of 8 principles relating to opening statements:

Opening addresses

[7] There are a handful of long-standing, key principles that govern opening addresses to a jury (and, although there is not much of a distinction between such addresses in civil and criminal trials, I will confine my comments to the former out of an abundance of caution):

- (a) “The object of an opening is to give . . . a general notion of what will be given in evidence . . .”: see *Brochu v. Pond* 2002 CanLII 20883 (ON CA), (2002), 62 O.R. (3d) 722 at para. 12 (C.A.).
- (b) “. . . counsel states what he submits are the issues . . . which have to be determined . . . the substance of the evidence he has to adduce and its effect on proving his case . . .”: *ibid.*
- (c) Counsel may not “assert his personal opinion on the facts or the law . . .”: *ibid.*
- (d) Counsel should avoid inflammatory comments, in other words, comments “that appeal to the emotions of the jurors and invite prohibited reasoning”: see *Brochu v. Pond, supra*, at para. 16.
- (e) “Inadmissible and irrelevant evidence may not be mentioned”: see, for example, *Hall v. Schmidt* 2001 CanLII 28008 (ON SC), (2002), 56 O.R. (3d) 257 at para. 51 (S.C.J.).
- (f) Counsel must not argue his or her case in the opening address: see, for example, *Hall v. Schmidt, supra*, at para. 28.
- (g) Counsel should not “explain the importance of certain evidence, or comment on how evidence should be weighed” or “urge the jury to draw inferences from facts or to reach certain conclusions”: see The Honourable Mr. Justice Dan Ferguson, “The Law Relating to Jury Addresses,” 16 *Advocates’ Society Journal* No. 2 (July 1997), pp. 19-23.
- (h) Counsel must not read law from other cases to the jury: see *Cooper v. Powis*, [1946] O.W.N. 783 at 784 (C.A.).

The last point (reading law) requires comment. How far one can go in referring to law and legal issues in the opening is a difficult question. In *Aberdeen, supra*, the court said:

“Counsel is not supposed to discuss law during an opening statement although to completely avoid doing so would be difficult. Comments on the law should be limited to framing legal issues for the jury while avoiding intricate and lengthy discussions.”

Also on this issue, the court in *Burke, supra*, said:

“reading law

[9] The above statement by Mr. Lingard (that damages were the “only means we have of expressing the sympathy and the humanity of our society”), ended with, “to quote one of the leading decisions of this area.” In the argument of the mistrial motion, Mr. Lingard provided me with a copy of the decision upon which he was relying, *Thornborrow v. MacKinnon* (1981), 32 O.R. (2d) 740 (H.C.J.), where, at p. 746, it was said:

One of the noble goals of tort law is to compensate for the individual losses of each claimant, non-economic as well as economic. It is an expression of our sympathy and our humanity to do so.

[10] I told Mr. Lingard that, with the greatest of respect for the trial judge in the *Thornborrow* case, the passage just quoted is wrong and contrary to all of the authorities of which I am aware.

[11] Mr. Lingard read law to the jury, and incorrect law at that. Apart from references to rudimentary and non-contentious legal principles, counsel should not discuss the law in an opening address without first having sought leave of the court (and leave will rarely, if ever, be given).” (emphasis added)

If you are going to refer to some legal principles, often it is a good practice to tell the jury that the judge will instruct them on the law and they should listen to the judge over what you tell them, nevertheless you wish to explain some legal concepts to them.

Hall v. Schmidt 2001 Carswell Ont 3899 is an interesting case study in what not to do in an opening before a jury. In that case the trial judge declared a mistrial after the plaintiff’s opening statement. He ordered costs be paid on a solicitor and client basis and granted leave for submissions on whether plaintiff’s counsel should personally pay the costs, since it seemed his transgressions were deliberate.

While this paper has referred to many restrictions on opening statements in jury trials, it may be that these restrictions are starting to be relaxed. I will leave it to others whether this is a good or bad thing. Nonetheless, some cases suggest this may be the modern trend. For

example in *Cahoon v. Brideaux* 2010 BCCA 228, Mr. Justice Smith began his judgment saying the following:

[1] This appeal reprises a theme heard in civil appeals in this Court with increasing frequency, it seems, in recent years – a gullible jury, beguiled by counsel’s improper tactics and inflammatory rhetoric, returned a perverse award of damages.

[2] That a jury might be improperly influenced by the words and tactics of counsel is no doubt possible: see, for example, *Brophy v. Hutchinson*, 2003 BCCA 21, 9 B.C.L.R. (4th) 46 [*Brophy*]; *de Araujo v. Read*, 2004 BCCA 267, 29 B.C.L.R. (4th) 84; *Knauf v. Chao*, 2009 BCCA 605, 100 B.C.L.R. (4th) 76. But it must be rare in modern times that counsels’ words and actions alone could hoodwink eight citizens chosen at random and properly instructed in the law and so divert them from the due discharge of their duty. The average citizen is neither stupid nor naive. Rather, as McIntyre, J. said, writing for the majority in *R. v. Mezzo*, [1986] 1 S.C.R. 802 at 845,

... There may have been a time when a paternalistic approach to unsophisticated jurors was justified. That time is now past and modern jurors represent a well-educated, well-informed and experienced cross-section of our society.

To the same effect, Cory, J., writing for the majority in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at 761, said, “Today’s jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner”, and McLachlin, J. (now C.J.C.) writing in dissent in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 31 reiterated, “Jurors today are far more sophisticated and better educated than in the past.”

[3] To be sure, these remarks were made about criminal juries, but juries in criminal and civil trials are chosen from the same community and our confidence that properly instructed juries can and will adhere faithfully to their oath to “well and truly try the case and a true verdict give according to the evidence” applies across the board: see *Hovianseian v. Hovianseian*, 2005 BCCA 61 at para. 25.

[4] Since jurors are chosen from all walks of life, juries collectively possess a broad range of education and life experiences. The level of formal education of jurors will range from elementary school to post-graduate university degrees, but education is not the primary attribute of a competent juror. Juries are judges of the facts and the ability to find facts rests less heavily on erudition than it does on sophistication acquired through experience in the affairs of life, experience that is possessed eightfold by civil juries. It follows that the collective ability of juries to understand things, to evaluate motives, to analyze probabilities, to determine what is in harmony with human experience, and to reason from evidence to fact and from fact to rational inference must be, with rare exception, at least equal to that of any single individual. It follows as

well that juries will generally recognize misrepresentations of the evidence, that they will be offended by unfairness and by submissions that insult their intelligence, and that they will not be moved by sophistry or by appeals to cheap sentimentalism, prejudice, or base motives. As Riddell J.A. aptly said almost a century ago, in *Dale v. Toronto R. Co.* (1915), 24 D.L.R. 416 at 417 (Ont. C.A.),

... jurymen are not the compounds of ignorance, weakness and prejudice they are sometimes supposed to be; and in many cases in my own observation, I am confident that unfair argument and “mud-slinging” hurt rather than helped those who indulged in them.

[5] Carol Cahoon, the plaintiff below and the appellant in this Court, would have us conclude that the jury in this case was atypical – that it was so influenced by defence counsel’s improprieties that she was denied a fair trial.”

Lest one thinks a relaxation of the restrictions on openings in jury trials is a trend favoured by the plaintiff’s bar, it is worth noting the parties alleging that they were denied a fair trial in both *Brophy* and *Cahoon*, were the plaintiffs.

Form and Content of the Opening

Halsbury’s Laws of Canada at p. 797 states: “The opening statement will usually begin with an introduction of the parties, an overview of the events giving rise to the subject-matter in dispute, a statement of the issues that are to be resolved, the identification of witnesses who certainly will be called and a commentary of what each will say. It is also appropriate for counsel to comment on the weaknesses in the other party’s case. However the opening statement is not intended to be argument, so the use of rhetoric, sarcasm, derision and the like are impermissible. It should be a brief summary only of the case that is to be presented.”

Again, in *Aberdeen*, the court said:

[26] Generally, in an opening, counsel is permitted to persuade the jury during this address in an attempt to engage their imagination in viewing their evidence from a certain perspective. ...

[27] Counsel are expected to outline the evidence that will be given and who will testify. Counsel may say what facts the evidence will prove.

Many of the rules referred to above can and will be relaxed in a judge alone trial. While an opening statement even in a judge alone trial should not descend into argument, it is common to refer to the law and to refer to the evidence in greater detail.

While brevity is preferred in most trials, in a complex case with many documents and many witnesses, counsel should not be afraid to give a lengthy opening: Nordlinger and Kirkham, Opening Address in a Civil Case, CLE Advocacy Conference, 2001.

The nature and length of your opening will vary depending on the complexity of the case. As noted above, in a complex case it may even be appropriate for defence counsel to open immediately after the plaintiff has made an opening statement.

Before a judge alone your opening should be in writing unless it is a very simple case. You might give the court a “cast of characters”. Many judges like this because a full witness list enables the judge to check if he or she knows any witness, to avoid any potential conflicts (although nowadays this should be contained in the Trial Briefs filed before the trial). A chronology may also be helpful depending on the complexity of the case.

Sopinka, in The Trial of an Action, 2nd Ed. (Toronto: Butterworths, 1998) at p. 75, breaks down the content and form of an opening into: the Beginning; The Facts and Issues; and, the Relief. Olah, *supra*, suggests the following format as a guideline:

- i. The introduction
- ii. Parties and witnesses
- iii. Setting the stage
- iv. The events
- v. The issues
- vi. The basis for liability of the defence
- vii. Preview the weaknesses in your case
- viii. Damages

ix. The conclusion

I intend to use Sopinka's form for my purposes but obviously the form your opening takes should be adjusted to the nature of your case, the theme you are selling, and your own style.

(a) The Beginning

Sopinka suggests the opening statement should begin with a broad assertion of the events that give rise to the action. Olah says: "It is vital to open on a dramatic note and capture the jury's attention."

Many times counsel start off not talking about the case but instead spending some time explaining the trial process, to put the jurors at ease. Keep in mind for the jurors this is an alien environment. So you may want to point out a few things about the trial process; who the other lawyers are; explain how you will go first, etc. Usually the trial judge will have covered much of this after the jury is empanelled but every judge is different. You may wish to have a short introduction prepared regarding what will be going on, in case the trial judge does not address these issues.

You may then give a short introduction to the parties and witnesses but I generally prefer to do so as I refer to their expected evidence.

(b) Facts & Issues

i. The issues

Sopinka suggests you should state the issues raised and the evidence you propose to call. If there is more than one issue, it is preferable to outline the evidence proposed to be called in respect of each, followed by a clear and concise statement of the issue. Sopinka notes one should not argue in the opening and then states: "This does not mean however, that the statement of the evidence proposed to be called need be a barren recital. 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.”

Oatley, *supra*, suggests you develop a theme for your case and that theme should guide your opening. The theme or themes are really the issue or issues but framed in a manner that is most favourable to your case.

For jury trials I have often convened a focus group and then developed my themes with the focus group asking them for their reactions to a few different ways of characterizing each issue.

ii. Documents and Demonstrative Aids

As mentioned, in a judge alone trial there are fewer restrictions on openings. While you should still explain in your opening that you expect the evidence will show a, b and c, etc., you can take greater liberties in actually pointing to the evidence. For example, in a commercial case it may be appropriate to refer at some length to some of the key documents in the opening. Indeed, in most judge alone trials you may even file the books of documents (when their admission has been agreed to) and then take the judge to the key documents. In a personal injury case you might refer to expert reports and clinical records in your opening: Murphy, TLABC, Opening Statements and Closing Arguments, 2007.

In front of a jury it will be rare to introduce documents or expert reports during the opening. If one wants to do so, you probably should seek leave before hand (to avoid a potential mistrial) and then one has to be careful to not give the jury the impression that contentious facts are settled or that the jury should start weighing the evidence.

Using some demonstrative aids may be appropriate at this stage in a jury trial. For example, you may want to show the jurors pictures of the damage to the motor vehicles or pictures of the plaintiff's injuries. To avoid problems you should raise these issues with the other side and the court, probably at a Trial Management Conference.

In a recent B.C. case, counsel for the plaintiff in a personal injury action wanted to open with a Power Point presentation. Madam Justice Brown did not allow the Power Point presentation, noting as follows:

[6] I was also provided with *Schram v. Austin*, 2004 BCSC 1789 and *Ramcharitar v. Gill*, 2007 Oral Ruling, Docket 01-2332, a decision of Mr. Justice Macaulay.

[7] In *Ramcharitar*, the defendant did not object to the use of the presentation but to the form and some of the specific content.

[8] At para. 9, Mr. Justice Macaulay said:

Counsel should not expect to use a presentation as an aid during an opening unless he or she has first shown it to opposing counsel and the court, so that any issues about form and content can be addressed in the absence of a jury.

As pointed out in *Schram*, and as was done here, the proposed use should be raised at a pre-trial conference. The risk of a mistrial arising otherwise from the improper use of a presentation is simply too great, and any counsel who seeks to rely on the use of a presentation at the last minute, without seeking consent or permission beforehand, may find that the proposed use is not permitted.

[9] Here, there are problems with the content of the Power Point, which include references to the contents of opinions not yet in evidence. The Power Point would need to be modified before it could be used before the jury. However, the Power Point was delivered too late to the defendant and to the court to permit this to be done. As Mr. Justice Macaulay indicated, the Power Point presentation should be dealt with at a trial management conference, it should not be left to the morning of trial to be addressed. In this case, there was simply no time available to deal with this problem.

Obviously, had counsel raised the Power Point at a TMC then it could have been modified and once it was acceptable, put into use.

iii. References to Law

In a judge alone case you can make slightly more fulsome references to the law. While you should not embark on argument you can and should identify significant legal issues in the case. You may even refer to some of the cases and possibly give the judge some of the main

authorities at the outset, to explain their impact on the case, so long as you avoid slipping into argument. Often a trial judge will ask counsel for copies of their cases at the outset so they can review the law early in the trial. Be prepared for this.

iv. Addressing or Previewing the weaknesses in your case

When I act for a plaintiff I always try to meet, head on, the key defences. You want to appear objective and like you have nothing to hide. Whether it is a jury trial or a judge alone I will tell the trier of fact something like: the main issue here is causation. Then I will explain how the evidence will show the accident caused the plaintiff's condition. Oatley calls it "inoculating" the jury. It is my view that it will be far worse if you say nothing and then the issue arises during the course of the trial.

A demonstrative aid may be very effective in this situation, if allowed. For example, in a plaintiff's case you might use a "measles board" or a table of pre-accident and post-accident visits to the doctors. Again, you should be prepared to show the aid to the trial judge before hand to ensure it is acceptable.

When opening for a defendant, without slipping into argument, you have a good chance to address your defences in more detail and explain how the evidence you will be calling will respond to the plaintiff's case.

(c) Relief

Obviously in a personal injury case you will not set out a specific monetary amount you are requesting in your opening. Usually you will speak of seeking fair and reasonable compensation. In a more complicated case you may want to spend a fair bit of time on the relief sought. The trier of fact, whether a judge or jury will want to know early on what it is they are being asked to do. You need to be up front about this.

I recall a personal injury case I was defending where the trial judge wanted to know from the plaintiff's lawyer how much he was asking for, right in the opening. He clearly wasn't prepared for this and fumbled around and the judge kept pressing him. That is unusual but still something one should be prepared for.

Manner and Style

"It is clear, then, that rhetorical study, in its strict sense, is concerned with the modes of persuasion. Persuasion is clearly a sort of demonstration, since we are most fully persuaded when we consider a thing to have been demonstrated."

Aristotle, 350 B.C.E.

Make your opening interesting and persuasive. You don't have to open with something dry like: "This case is a claim for damages arising from a motor vehicle accident that took place on December 7, 2008. The plaintiff suffered soft tissue injuries in the areas of his cervical spine, his lumbar spine and his shoulder." Instead, consider this opening by Eleanor Cronk excerpted in Olah, supra, at 8-13:

"On July 2, 1986, Mark Evans was a young man with everything going for him. He was 25 years old, in good health, very athletic, and participated in many sports events and community activities. He had recently married, and, two years earlier, had just graduated from a four-year science degree at York University here in Toronto. He had also successfully completed a pilot's course which entitled him to fly planes recreationally. He enjoyed flying, as did his wife, and they spent many weekends together doing just that, either alone or with their family and friends.

You will also hear that in June of last year, Mr. Evans was particularly excited, as he will tell you. He had just learned that he had been accepted into the Air Canada training program for commercial pilots. Mr. Evans will explain to you that this was no small achievement, because historically, as the evidence will show, Air Canada has only accepted 25 persons a year, on average, out of hundreds of applicants, to participate in that course. Mr. Evans was very much looking forward to being a commercial airline pilot, and he and his wife were hoping that after he had successfully completed the course, they might be in a position financially for Mrs. Evans to leave her job and they might begin a family. He, therefore, was looking forward to a very different kind of future."

Even with a judge alone trial you want to have an interesting opening. Judges get bored too.

Many authors refer to the “picture method” of argument. That is, you paint a picture for the judge or jury in your opening statement. To a large extent that is what is being done in the example above. One can almost picture Mr. Evans in his prior life. Another effective (and related) tool is to tell a story in your opening. Consider this example by Oatley (at p. 43): “Every morning when Bill wakes up, there is a brief moment when he looks forward to the day, just as you and I do. When that moment passes, Bill remembers he is a quadriplegic.”

I caution, however, that this statement is in danger of running afoul of some of the restrictions on openings. Some judges will admonish you for referring to your client as “Bill” instead of Mr. Smith. More importantly, the story is not being presented as evidence the jury will hear but as an established fact. You needn’t start every single sentence with “The evidence will show...” but like the Cronk example, you ought to intersperse your comments periodically with this phrase so the jury is not misled.

Oatley (at p. 45-46) offers these contrasting examples of the same opening:

Example 1

We are here because none of the defendants have accepted responsibility for wrecking Bill’s life. Not the defendant Bergsma, who drove his car in the wrong lane and almost collided with the defendant Morrison’s car, where Bill was a back seat passenger.

Not the defendant Morrison who was fiddling with his radio and failed to see Bergsma until it was too late, and who was speeding.

Not the defendant Gateway and not the defendant General Motors – the manufacturers of [this small part] and [this Pontiac vehicle] in which it should have been installed. Together these corporate defendants are responsible for Bill Tennant’s defective seatbelt – a device which is supposed to save lives and prevent injury, but which destroyed Bill’s life because [this small part] was missing – a part that was worth pennies but that cost Bill Tennant something which is priceless.

We’re here because the phrase “Buckle up for Safety” only saves lives and prevents injury when the seat belt works.”

Example 2

Each of the defendants blames the other for Bill's injury. You will decide. We'll learn the defendant Bergsma drove on the wrong side of the road. We'll learn the defendant Morrison was fiddling with his radio. He failed to see Bergsma until it was too late. He was speeding. And we'll learn Gateway and GM made this seatbelt. That this small part was missing so the seatbelt was useless. Bill will tell us he buckled up for his own safety. He'll tell us he relied on that seatbelt to work. It didn't work. Now he's a quadriplegic. An engineering expert will tell us: buckling up for safety only saves lives if the seatbelt works."

The second example is far less contentious because the lawyer explains to the jury this is evidence they will hear during the trial. Oatley also cautions he would only include the last sentence if he was absolutely certain his engineer expert would use the exact phrase attributed to him.

I like to write my closing argument before the trial and before I write my opening. Obviously my closing will change and I will add to it as the trial progresses, but still I write a fairly comprehensive closing ahead of time. It helps me focus on what I have to prove and then I can focus the evidence I must lead. After I have written my closing, then I copy the closing and paste it into my opening statement document. I then strip it down significantly (obviously all law and argument gets removed). But the basic outline will be similar. And all high points, issues and themes will be noted. From there I go on to prepare and write my opening.

I like to list or number my issues. People remember better when information is organized, especially into threes or less. I also prefer the Shakespearean form of: 1. Tell them what you are going to say; 2. Say it; 3. Tell them what you just said.

Consider putting your issues into catch phrases (especially with a jury). Johnny Cochrane's famous closing "if it doesn't fit, you must acquit" was the subject of some derision but it was memorable and effective.

Simply stating a conclusion does not help the court decide the case. You want to share the reasons that lead you to arrive at the conclusion. For example, suppose you want to argue the plaintiff's current painful condition was not caused by the motor vehicle accident but instead by a combination of the plaintiff's pre-existing psychological and physical condition. Simply saying, the accident did not cause the plaintiff's present problems, is weak and ineffective. The listener will think, "why should I accept your word for it?" Instead, walk through the evidence that will be called with the judge or jury and tell them how they will hear from an expert who will explain how all these problems before the accident are what really brought this condition on. We all feel smart when we have guessed who the killer was in a murder mystery before it is actually revealed to us at the end of the book or movie. You want to point the jury or judge to key the evidence so they will be compelled to reach the same conclusion as you. In the example opening by Cronk above, she did not start off by telling the jury the accident had ruined Mark Evans' life. Yet she told them all about the background, so that by the time she says the accident has ruined his life they, hopefully, will have already arrived at that conclusion.

As noted above, Sopinka suggests the evidence be marshaled in such a way that the conclusion to be drawn will be obvious so that to state the issue is to answer it. This is how one can persuade without arguing the case.

Mr. Justice Fichaud of the Nova Scotia Court of Appeal advises lawyers to "get on the judge's wavelength". He notes judges walk into a courtroom in "a problem solving frame of mind. The parties are at odds over a thorny issue. They need an answer. The judge wants to solve this problem, with legally sound reasons grounded in common sense". Therefore, counsel should adopt this approach. He notes: "It is a delicate exercise to be objective while promoting your client's point of view, like juggling while riding a bicycle. But it is the heart of advocacy."

Your opening is your opportunity to objectively explain to the court what the issues are, yet doing so while promoting your client's case.

Every case will demand a different approach to the opening and everyone will have their own style of presentation. J.J. Robinette evidently always wrote his entire arguments out. You can do this and present your argument effectively, without sounding like you are just reading off the page, if you are well prepared. Find the style that works best for you. The most important thing is to be interesting and persuasive.

Objections

If the other side violates one or more of the rules discussed above in their opening before a jury, you need to object. I am of the school of thought that you should not object during the opening but rather you should wait until the end of the opening, although perhaps in an extreme enough situation you may have to object during the opening. In a jury trial, a failure to object could be fatal to any appeal against the opening: *Moskaleva v. Laurie* 2009 BCCA 260. In that case defence counsel complained about the plaintiff's opening but specifically did not ask for a mistrial. Instead he asked the court to caution the jury that the comments were not evidence. This militated against the court of appeal ordering a new trial. Again, *Brophy* is the leading case on the subject. In that case the court allowed the appeal, however, despite a failure to object because the plaintiff's lawyer was quite junior (she was doing her first jury trial).

The appropriate way to handle the situation would be to stand after the opening, and before the first witness is called, and advise the trial judge you wish to raise certain objections. Usually the trial judge will send the jury out and then hear the submissions in the absence of the jury. In an extreme case you may ask for a mistrial. Otherwise you may ask the trial judge to give directions or caution the jury to correct some of the transgressions in the other party's opening.

In a judge alone trial you may object during the opening but again I am of the belief this should be extremely rare. One way to handle a particularly argumentative and misleading opening is to ask to open immediately for the defendant. Bear in mind, however, a defendant cannot open after the plaintiff without their consent. If no consent is forthcoming, then you should set

out your objections to the opening and in doing so you will invariably explain your client's side of the story to some extent. While in a judge alone trial there would not likely be any need to caution the judge, you may object to whether certain matters are or are not relevant and have the trial judge rule on these issues before the evidence is lead.

Conclusion

Whether you act for a plaintiff or a defendant, always give an opening statement even if it is brief. Be persuasive without being argumentative. Think of the opening as complementary to your closing. Use the opportunity to start selling the court on your theory of the case.