# On Trial

## Advocacy Skills
## Law and Practice

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> 1. The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence.
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> 2. A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence.
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> 3. When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so, and shall then adduce evidence.
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> (2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.
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> (3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.
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> (4) Where a party is represented by counsel, the right to address the jury shall be exercised by counsel.[2]

There exists a discretion both at common law[3] and in many local rules[4] to alter the usual order of opening addresses. The general discretion may be exercised, among other circumstances, where the *entire* burden of proof in respect of all issues in the action is on the defendant. *Smart v. Rayner*[5] is an example of such a case. The plaintiff had sued on a bill of exchange and the defence was that the bill had in fact been paid. The onus was, of course, upon the defendant to demonstrate this and as this was the only issue in the case, Baron Parke ordered the defendant to begin. This order governed the entire order of proceedings in that case.

Any reversal of the usual order of opening addresses, is unlikely to occur in anything other than the most unusual case. The plaintiff inevitably has the burden of proving at least one issue. As a result, the plaintiff will almost always proceed first.

It now appears to be well-established practice to grant leave to the defendant to proceed with the defence opening address immediately following the plaintiff's opening, where defence counsel indicates a desire to do so. This is a sound practice as it is defence counsel who is in the

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2 Ontario, *Rules of Civil Procedure*, O. Reg. 560/84, r. 52.07.

3 *Seldon v. Davidson*, [1968] 2 All E.R. 755 (C.A.), being a case where the plaintiff had advanced money to the defendant, and the defendant admitted the advance, but denied the obligation to repay on the ground that the money was a gift. The Court of Appeal ruled that the ruling of the trial judge to the effect that the state of the pleadings was such that the entire onus rested upon the defendant, and therefore the defendant should begin, was correct.

4 See the words "unless the trial judge directs otherwise" in the opening words of r. 52.07(1), *supra*, note 2.

5 (1834), 6 C. & P. 721.

best position to assess whether it is necessary to clarify the issues in the case or put the theory of the defence to the jury prior to the cross-examination of the plaintiff's witnesses. There is no good reason not to allow the defendant to proceed immediately following the plaintiff.

The right of defence counsel to open absent an undertaking to call evidence is much in doubt. It is submitted for reasons outlined hereinafter[6] that counsel ought to be able to open in such circumstances if so desired. Any such opening, however, must of necessity be limited to a clarification of the issues and an explanation of the position of the defence on same.

The order of opening addresses, where multiple defendants are separately represented, is entirely a matter within the discretion of the trial judge.[7] In the ordinary case, defence counsel will be asked to proceed with their opening addresses in the order in which their clients are named in the pleadings.

Potential problems may arise if all defence counsel are not unanimous in their desire as to when to proceed with their respective openings. In those cases where defendants' counsel cannot agree, all ought to be required to make any opening address they choose to deliver at the beginning of the presentation of their own case. This avoids unfairly "sandwiching" the plaintiff's case between two sets of defence openings. It promotes the orderly presentation of evidence and lessens the prospect of confusion.

The right to address the jury is generally to be exercised by counsel except in the case of an unrepresented litigant.[8]

### *(b) Criminal Jury Cases*

The criminal jury trial begins with an opening address by counsel for the Crown to the jury, the purpose of which is to outline to the jury a brief summary of the evidence to be adduced by the Crown in order that the jury may intelligently follow the case to be presented. There is no statutory provision conferring upon the Crown a right to make an opening statement; however, the practice is so clearly established that it amounts to a virtual rule.

The *Criminal Code* allows counsel for the accused to open;[9] however, this legislation does not clearly specify when that opening should take place. The weight of authority appears evenly divided as to whether or not there is a discretion in the court to permit defence counsel to open

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6 See below, Section 5.02.

7 See, for example, Ontario r. 52.07(3), *supra*, note 2.

8 See, for example, Ontario r. 52.07(4), *supra*, note 2.

9 Section 651(2) of the *Criminal Code*, R.S.C. 1985, c. C-46.