THE ART AND SCIENCE OF ADVOCACY

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In the criminal case, the order is usually a function of the order in which the accused are listed in the information or indictment.[10]

(c) Should You Waive the Opening Address?

The opportunity to open should never be relinquished by a plaintiff or the prosecution. The opening address is the roadmap to the case. For his part, the defendant in the civil case must use the opening to undo the harm created by the plaintiff. It is the opportunity to plant the seeds of doubt about the plaintiff's case. For this reason, the defendant should take advantage, under rule 52.07, of the opportunity to open immediately after the plaintiff. In view of the modern rules of discovery, there are very few surprises in a civil case. Indeed, the day of surprise defences has disappeared. Therefore, the primary tactical reason for waiving the opening address or for electing to open after the plaintiff's case is absent. In an exceptional case, the defence may decide to open in general terms or to delay the opening address until the conclusion of the plaintiff's case. Nevertheless, the right to open should be exercised.

In the criminal case, there may be tactical reasons for an opening address in brief and general terms. You may not want to alert the prosecution to your defence. However, your cross-examination at the preliminary inquiry may have already tipped your hand. It may be that you may have several defences available to you and you want to avoid revealing your primary defence. Or it may be that your real strategy is to find a weakness in the Crown's case. Perhaps you do not want to disclose to the Crown whether your client will be testifying. Even these cases take advantage of the opening address. Take this opportunity to advance a general denial; couple it with an explanation of the vital doctrines of presumption of innocence and proof beyond reasonable doubt.

These exceptions aside, the use of a general opening in the criminal case is a missed opportunity, for it squanders the potential of the opening statement as a tool of persuasion. The jury has waited for this moment. It is eager to hear from you why there should not be a conviction. The failure to exploit this occasion to persuade may be a fatal mistake.

(d) The Purpose of the Opening Address

Technically, the opening address has a narrow and limited function: to de-

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Defendant's Case to the Jury" (1959) *Special Lectures of the Law Society of Upper Canada: Jury Trials* (Toronto: Richard De Boo, 1959) 213 at 222.

[10] *R. v. Barsalou (No.3)* (1901), 4 C.C.C. 446 at 446 (Que. K.B.). Although the *Barsalou* case deals with order of cross-examinations, its logic also suggests that this is the order in which defendants should open. See also C. Granger, L. Carron, & P. Chumak, *Canadian Criminal Jury Trials* (Toronto: Carswell, 1989) at 232-233 [hereinafter Granger, Carron, & Chumak, *Criminal Jury Trials*]. In chapter 12, §12.6(j), the order of cross-examination in the case of multiple accused is discussed.

fine the issues in the case and to outline those facts that will be adduced to establish the allegations advanced by the party.[11] The purpose of the opening address has been defined in the following terms:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.[12]

While it is true that the opening is not intended as argument, this does not mean that the opening cannot be used as a vehicle for persuasion.[13] The opening statement can be used, for example, to criticize the prosecution's evidence.[14] Nevertheless, the trial judge has a wide discretion to control the opening address, and an appellate tribunal will rarely interfere with the exercise of this discretion.[15]

The opening serves as an overview of the case. The evidence will not come out during the trial in a logical fashion. The opening allows you to put the evidence into a framework. This is particularly important in a complex or lengthy case. The opening must tell a story, one designed to create a favourable impression of your case.

There are four additional objectives:

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[11] *R. v Barrow* (1989), 48 C.C.C. (3d) 308 at 313 (N.S. T.D.). In the *Barrow* case, the court pointed out that an opening statement is not an argument, but a review of the evidence to be called. Nathanson J. was also of the view that the review should not be limited to the evidence to be called by the defence if the defence does not indicate its intention to call evidence or does not intend to call evidence. Rather, the defence should be entitled to tell the jury what evidence it expects to elicit in cross-examination. See also *R. v. Edwards (No. 2)* (1986), 2 W.C.B. (2d) 220 (Ont. H.C.); W.B. Williston & R.J. Rolls, *The Conduct of an Action* (Toronto: Butterworths, 1981) at 35; J.R. Dyke, "The Opening Statement" [1966] 1 Willamette L. J. 1 at 3 [hereinafter Dyke, "The Opening Statement"]; Granger, Carron, & Chumak, *Criminal Jury Trials*, at 230; Ewaschuk, *Criminal Pleadings*, §16:2220; R.P. Moore, ed., *Halsbury's Laws of England*, vol. 37, 4th ed. (London: Butterworths, 1982) §513

[12] *United States v. Dinitz*, 424 U.S. 600 at 612 (1975) per Chief Justice Burger.

[13] Melvin M. Belli, *Modern Trials*, 2d ed. (St. Paul: West, 1982) §52.1; Julien, *Opening Statements*, c. 1.

[14] *R. v. Randall*, The Times, July 11, 1973 (C.A.), citing *R. v. Wainwright* (1875), 13 Cox C.C. 171, as authority for this proposition. However, a close reading of the *Wainwright* case suggests that the trial judge's comments therein related to the closing address and not the opening address. See also Stephen Mitchell, ed., *Archibold: Pleading, Evidence & Practice in Ciminal Cases*, 40th ed. (London: Sweet & Maxwell, 1979) §579a [hereinafter *Archibold*].

[15] *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at 55 (Ont. C.A.).

1. To educate the jury. This involves conveying an overview of your case by informing the jury of your evidence and your theory of the case. From the plaintiff's perspective, it is crucial that the jury understand the minimum proof required to establish your case. They must appreciate that you are not obliged to establish every fact you allege. The defendant, on the other hand, attempts to maximize the level of proof the plaintiff must advance. The defendant's main purpose in the opening address is to counteract the favourable impact of the plaintiff's or prosecutor's opening. In the criminal case, the defendant must emphasize the very heavy burden that the prosecution must discharge.

2. To preview for the jury the negative aspects of your case. This strategy is designed to defuse the weaknesses in your case.

3. To establish your credibility. At all stages of the trial, you must strive to enhance your credibility with the trier of fact. Your reliability and that of your witnesses may well be the determining factor in the case. The opening should be used to create a favourable first impression.

4. To persuade the trier of the righteousness of your case. You must furnish the jurors with the facts and arguments that will allow them to arrive at the just result. Your goal is to capture the jury's interest and to persuade them of the justice of your cause. Concurrently, you must also persuade the trial judge, since he will play a pivotal role during the jury trial.

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.

(e) Restrictions on the Opening Address

There are a number of rules that must be observed in your opening presentation. A breach of these prohibitions can result in a mistrial, in losing your jury, or even in a successful appeal by your opponent should you win the case at trial.

(i) *Inflammatory Remarks*

Counsel is given a wide latitude in his remarks to the jury.[16] However, if your comments are inflammatory and an objection is taken, then a mistrial may result. In a civil case, the trial may continue before the trial judge alone.

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[16] As Riddell J. stated in *Dale v. Toronto Railway Co.* (1915), 34 O.L.R. 104 at 107-108 (C.A.), in the context of the closing address, "counsel has the right to make an impassioned address on behalf of his client—nay, in no few cases it may be a duty to make an impassioned address—mere earnestness, fervour or even passion, is not in itself objectionable . . . a jury trial is a fight and not an afternoon tea."