Opening Statements Should Be Persuasive Not Insulting

By

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When crafting an opening statement for trial, the opening statement is an opportunity to present your case and evidence to the jury and not an opportunity to attack the other party or make argument.

The purpose of this article is to discuss the decision in *Spittal v. Thomas*, [2006] O.J. no. 1617, where Justice Glass considered a motion for the judge to instruct a jury to correct improper remarks by plaintiff's counsel in an opening address.

The Opening

Spittal v. Thomas concerned a plaintiff's action for damages arising from a rear end motor vehicle accident. The action proceeded to trial before a jury. The trial involved only the plaintiff's insurer, Primmum, because the defendant driver was uninsured. After plaintiff's counsel had completed his opening address, defence counsel raised an objection to the opening address and requested that the jury receive additional instructions to correct the improper opening comments.

The plaintiff's counsel said in his opening:

"Primmum has not made life easy for Tammy and Krystle. In fact, it (the company) made it difficult, and I am going to give you an example. Despite the fact that this is a straightforward rear-end accident, they have not admitted liability. Mr. Thomas, the uninsured driver, was charged with careless driving pursuant to the Highway Traffic Act. There was a thorough investigation conducted by a trained police officer. There is no information whatsoever indicating that anyone other than Mr. Thomas was at fault in this accident, but would Primmum admit liability? No."

Plaintiff's counsel went on then to ask if Primmum would admit liability and that it would not. He stated that he result will be a longer trial. Plaintiff's counsel will have to take more time with witnesses regarding liability for this accident. The investigating officer will be inconvenienced by being called. Then, counsel advance further to say:

"But, more than just the inconvenience factor, Primmum's refusal to admit liability is simply an example of how unreasonable they have been with respect to assessing this lawsuit. Instead of assisting its own insured, Primmum, during a very difficult time, Primmum has saw fit to make Tammy and Krystle's lives more difficult. Not, the failure to admit liability is interesting for another reason. As I mentioned earlier, Mr. Thomas had been noted in default. Our Rules of Civil Procedure, which no one ever wants to read unless they have to, will tell us that he is deemed to admit the truth of all allegations of fact made in the statement of claim because he never entered a defence. So, what does that mean? That means we already have an admission of liability from Mr. Thomas but not from Primmum.

Plaintiff's counsel stated towards the end of his opening address to you:

"Tammy and Krystle have done nothing wrong. They were unsuspecting motorists who were rear-ended out of nowhere by an uninsured, reckless and unlawful driver. Primmum's failure to accept Tammy and Krystle's injuries as legitimate is why we are here. By the time we leave here, in a week or so, I am going to ask that you undo Primmum's failures and compensate Tammy and Krystle fairly for this very unfortunate accident."

The court held Plaintiff's counsel's comments were improper. They reflected a personal attack on the other party to the trial and the words were inflammatory. The statements made the insurer look like an awful company that should be punished for not giving the plaintiff's money. The court held it would be hard for the jury to overlook that image that was painted at the beginning of trial. The language also failed to present the burden of proof correctly. The plaintiff did not acknowledge that the plaintiff must prove their case, instead he suggested that it is wrong for the defendant not to simply concede facts. To use innuendo that a jury should blame a defendant for making plaintiffs prove their case creates a danger that the jury may improperly let the innuendo affect their decision.

The Court held that the plaintiff's statements were enough to cause a mistrial or a release of the jury. The defendant asked simply for instructions to the jury and the plaintiff asked that the court "let sleeping dogs lie"

The court decided to draw the jury's attention to the plaintiff's counsel remarks and instruct them not to pay any attention to those words as they amounted to a personal attack, are inflammatory, and made the defendant out to be a bad company that does unfair things. The court stated those comments should not have been said but that the plaintiffs should not be punished for their lawyer's words.

The court instructed the jury that plaintiff's counsel's comments were not evidence and that it is improper for counsel to express a personal opinion or make inflammatory comments in addressing the jury. The court also said that while plaintiff's counsel's words suggested that the defendant had a burden of proof that was incorrect and that the plaintiffs have a burden to prove their claims. The court told the jury that the plaintiff's counsel's words were not evidence. At the same time, the court asked the jury not to punish the plaintiff's for their lawyer's words. Simply put, the jury was to ignore the plaintiff's counsel's comments. The judge then repeated these warnings at the end of the trial.

Conclusion

The Courts comments with respect to the opening statement in this case are important as they illustrate the purpose of the opening statement as one of previewing the evidence that will be called and not to advance argument or attacks of the opposing party. Clients' cases are better advanced and their interests better served when counsel treat the court, the parties and their colleagues respectfully and personal attacks of parties or other counsel are left out of the litigation.