

# **Avoiding a Mistrial in Opening and Closing Statements**

**Dr. McCartney (or How I Learned to Stop *Arguing* and Keep My Jury)**

By James K. Fireman

You filed a jury notice with your statement of claim. Maybe you feel that your case will play out better in front of a jury, or maybe you're simply confident that you will perform better in front of a jury than opposing counsel. Whatever the reasons, having gone through the steps to obtain and select your jury, you want to make sure you don't do anything to lose them.

As counsel, you will speak directly to the jury during both your opening address and your closing address. While your remarks to the jury are certainly a great opportunity to influence their decision, they also create a virtual minefield where a wrong step (okay, usually it takes at least a few wrongs steps) could lead to a reprimand by the judge in front of the jury, the discharge of the jury, or even a mistrial.

While there are certainly other ways counsel can lose a jury or have a mistrial declared, this paper focuses on what to avoid when making your opening and closing address.

Keep in mind, the trial judge is afforded a very high degree of discretion in determining whether remarks of counsel require corrective action, and if so, what the corrective action should be. As the cases which have considered these issues reveal, corrective action is usually taken only where there is irreparable prejudice as the result of numerous offences.

Thus, when considering the cases I have referred to below, please note that although I

may have only referred to one particular issue in counsel's address(es) to the jury, in virtually all cases where the Court took some form of corrective action, counsel made multiple comments in addressing the jury which the Court found inappropriate, usually for several different reasons. It is therefore reasonable to expect that many of the comments discussed below which were deemed to be objectionable by the Court, taken alone, would not lead to a mistrial or even comment by the trial judge.

## **OPENING ADDRESS**

Most of the rules pertaining to the opening address also pertain to the closing address. These rules will be discussed in a moment. However, there are a few rules directed primarily to counsel's opening address.

### **Argument**

The rule against argument can best be understood by first considering the purpose of the opening statement. In *Hall v. Schmidt*<sup>1</sup>, Justice Ferguson cited Chief Justice Berger of the United States Supreme Court, who described the of the opening statement as follows:

*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*

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<sup>1</sup> (2001), 56 O.R. (3d) 257 (S.C.J.) at para. 64

*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 its verdict.*

Counsel may be found to have used argument during the opening address when they stray from its purpose of merely presenting to the Jury the evidence that will later be proved.

This is not to say that the use of persuasion is forbidden. Indeed, counsel must present the evidence to the Jury in the most persuasive manner possible. However, what is clearly not permitted during an opening address is to explicitly suggest to the Jury the conclusion that should be drawn from the facts. As Roger Oatley explains:

*The opening statement is designed to ease the burden of the trier of fact by introducing the evidence according to a coherent framework that reduces the likelihood of confusion. Accordingly, you should refer only to the issues in the case, the evidence that you intend to adduce during the trial, and the facts that necessarily flow from that evidence. When counsel crosses the line from presenting the jury with a factual framework to telling the jury what conclusions to draw from that framework, the opening enters the realm of argument.<sup>2</sup>*

Yet another formulation of this rule was articulated by Justice Glass in *Morrison v. Greig*<sup>3</sup>:

*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.*

The recent case of *Baillargeon v. Paul Revere Life Insurance Co*<sup>4</sup> is illustrative of the circumstances in which a Court will find plaintiff's counsel to have gone beyond

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<sup>2</sup> Roger G. Oatley, *Addressing the Jury*, 2d ed. (Aurora: Canada Law Book, 2006) at 109

<sup>3</sup> (2006), 34 C.P.C. (6<sup>th</sup>) 363 (Ont. S.C.J.) at para. 9

persuasively presenting the facts and into the realm of argument. In *Baillargeon*, the defendant requested a Functional Capacity Assessment. In plaintiff counsel's opening, he referred to the results of the Assessment, which were presumably quite favourable to this client, and stated that once the results of the Assessment were received by the defendant, "you would think at that point it is a pretty simple matter". Thus, in the Court's view, the language used by counsel was too explicit an invitation for the juror's to draw a conclusion regarding the Assessment results.

### **Demonstrative Evidence**

Although admissible demonstrative evidence may be used and referred to during counsel's opening address, permission should always be sought beforehand to ensure that the evidence is admissible.<sup>5</sup>

In his recent text, Ontario Courtroom Procedure, Justice Ferguson suggests that it is advisable to request permission to use demonstrative aids during any hearing or pre-trial motion, in order to help avoid delays at trial. If permission is not sought prior to the trial, it should be sought in the absence of the Jury. However, even if permission is granted by a pre-trial judge, the trial judge has final say over the admissibility of all evidence.<sup>6</sup>

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<sup>4</sup> (2006), 81 O.R. (3d) 35 (S.C.J.) at para. 6

<sup>5</sup> *Chilton v. Bell Estate*, 1998 CarswellOnt 4843 (O.C.J. (Gen. Div.)) at para. 11

<sup>6</sup> Donald S. Ferguson, Ontario Courtroom Procedure, (Markham: LexisNexis Canada Inc., 2007) at 1057

## Discussing General Damages

In *Ivonski v. Gobin*,<sup>7</sup> the trial judge had ordered a mistrial on the basis of comments made during the plaintiff's opening address. With respect to part of the address, the trial judge held that "it was inappropriate to suggest an appropriate quantum of general damages to the Jury in opening without having addressed this issue beforehand with the trial judge in the presence of opposing counsel".

The plaintiff appealed to the Divisional Court, and relied on the earlier decision in *Roy v. Watson*<sup>8</sup>, in which a defendant's motion for a mistrial following the discussion by plaintiff's counsel of a range of damages during the opening statement was denied. In denying the motion in *Roy*, Justice Duadlin relied on s. 118 of the *Courts of Justice Act* which provides:

*In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages.*<sup>9</sup>

Nonetheless, the Divisional Court in *Ivonski* upheld the ruling of the trial judge, and distinguished *Roy* based on the cumulative effect of numerous other comments made during counsel's opening to which the trial judge also took exception.<sup>10</sup> Thus, there is some apparent conflict in the state of the law, as the Divisional Court's decision does not expressly uphold the trial judge's reasoning with respect to references to general damages

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<sup>7</sup> (2003), 123 A.C.W.S. (3d) 205 (Ont. Div. Ct.)

<sup>8</sup> (1993), 19 C.P.C. (3d) 352 (O.C.J. (Gen. Div.))

<sup>9</sup> R.S.O. 1990, c. C.43, s. 118

<sup>10</sup> *Ivonski*, *supra* note 7 at para. 7

in the opening statement. There does not appear to be any specific prohibition about discussing damages awarded for special damages, economic loss or cost of future care. In any event, counsel are well advised to seek leave from the trial judge in advance of making reference to general damages while addressing the Jury.

Additionally, when addressing the Jury, counsel may not discuss:

- the quantum of damages sought in the Statement of Claim<sup>11</sup>;
- offers to settle or payments into court<sup>12</sup>;
- that the Defendants have refused to accept any responsibility or refused to pay any compensation to the plaintiffs;<sup>13</sup> and
- how the Plaintiff will actually use any damages which are awarded<sup>14</sup>.

## **OPENING AND CLOSING ADDRESS**

Aside from the rules discussed above, there are numerous rules that limit what can be said in both the opening and the closing address. I have endeavoured to categorize these rules below, although you will find there is certainly some overlap between the categories.

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<sup>11</sup> *Barkhouse v. Vanderploet* (1976), 16 N.S.R. (2d) 445 (C.A.) at paras. 45-6

<sup>12</sup> *Ontario Rules of Civil Procedure*, Rules 49.05, 49.06

<sup>13</sup> *Ivonski*, *supra* note 7 at para. 2

<sup>14</sup> *Abdallah v. Snopek*, [2008] O.J. No. 729 (S.C.J. (Div. Ct.)) (QL). There is no restriction on how a successful plaintiff may choose to use an award of damages. As confirmed in *Abdallah*, it is improper for defence counsel to raise this as an issue with a jury. Also at issue in *Abdallah* were numerous comments made by defence counsel regarding the plaintiff's status as an immigrant, which was irrelevant to the issues in that case. Plaintiff's counsel failed to object to the offending portions of the defendant's closing address. Although there is a general rule against ordering a new trial on the basis of issues not objected to by counsel at the time, in this case, the Divisional Court found that the offending statements in defence counsel's closing address would lead to a substantial miscarriage of justice, and ordered a new trial.

## Limits on the Discussion of Evidence

The basic rule is that counsel may not refer to evidence or reveal facts which will not be, or have not been, called into evidence. This gets a bit tricky when it comes to the discussion of your opponent's evidence during an opening address.

In *Chilton v. Bell Estate*, plaintiff's counsel went into considerable detail during the opening address when describing the anticipated evidence of a liability witness. This witness was not going to be called by the plaintiff, and it was not certain that the witness would be called by the defendant. The opening by plaintiff's counsel went into detail about the evidence that this witness would give if he were to be called. This included not only details about the circumstances of the accident which gave rise to the law suit, but also to the witness' state of mind, stating that this witness was "shaking at the scene" and "must have been experiencing...horror".<sup>15</sup> Justice Donnelly impugned this portion of counsel's opening address, stating:

*Although it is permissible in defining an issue in the opening statement to identify the opponent's position, this analysis of evidence which the plaintiff would not call, and which the defence may call, exceeds that standard.*<sup>16</sup>

Thus, it appears that counsel should use a great deal of caution while addressing the jury when referring to evidence of witnesses who are not certain to be called during the trial.

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<sup>15</sup> *Chilton v. Bell Estate*, 1998 CarswellOnt 4843 (O.C.J. (Gen. Div.)), at para. 5

<sup>16</sup> *Ibid.* at para. 10

Counsel should also avoid characterizing questions they anticipate will be asked of a witness (or have been asked of a witness) by their opponent as being for the purpose of harming the plaintiff. In *Hall v. Schmidt*, plaintiff's counsel submitted in his opening that defence counsel would try to put the *Family Law Act* plaintiffs "on trial" and "minimize the special love...they felt" for the deceased. The Court held that this is tantamount to predicting professional misconduct: "Plaintiff's counsel is entitled to predict that the defence may seek to adduce evidence which will minimize the assessment of the loss but not to suggest that this is improper or malicious or irrelevant."<sup>17</sup>

### **Counsel's Personal Opinion**

Counsel is not entitled to express their own opinions, give evidence, or tell the Jury about their experience or lack of experience.<sup>18</sup> In *Brochu v. Pond*<sup>19</sup>, the plaintiff fainted in the office of her obstetrician while she was left unattended, resulting in an injured ankle. Defence counsel made the following statements in the opening address to the Jury:

- "this case is really about taking a stand against cases that are frivolous, that are undermining our health care system . . .";
- this case "is about supporting medical doctors in your community who are working hard, like Dr. Pond does, to try to service their patients as best as they can . . .";

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<sup>17</sup> *Hall, supra* note 1 at paras. 41, 43, 46

<sup>18</sup> *Ibid.* at para 35

<sup>19</sup> (2002), 62 O.R. (3d) 722 (C.A.)

- that the appellant was "blaming" and trying to "pin . . . the blame" on Dr. Pond for her injury;
- that Dr. Pond was required to continue his practice during the trial or he would "put his own patients -- obstetrical patients and ill women at risk of their health" by being required to attend at trial; and
- that Dr. Pond is "one of only two obstetrician/gynecologist[s] in Timmins".<sup>20</sup>

The Court of Appeal said the following in regards to the defendant's opening address:

*To the extent that the statements by the respondents' counsel characterized the case as one which required a response supportive of physicians in the Timmins community, and which warranted the jurors "taking a stand" against "frivolous" cases "that are undermining our health care system", they embodied the personal opinion of counsel concerning the merits of the appellant's case, and invited the jurors to act as representatives of the community at large to curtail unmeritorious malpractice suits and to protect an endangered health care system. The statement that Dr. Pond is "one of only two obstetrician/gynecologist[s]" in the Timmins area, and the suggestion that his absences from his office to attend trial would endanger the health of his patients, reinforced that invitation to the jury. Such comments were inappropriate because they appealed to the emotions and fears of the jurors and encouraged them to consider factors irrelevant to the basic issues in the case, namely, the cause of the appellant's injuries, the standard of care applicable in the circumstances, and the adequacy of the care provided to the appellant by Dr. Pond.<sup>21</sup>*

A further example can be found in the 2004 case *Burke v. Behan*<sup>22</sup>. Here, during the opening statement on the topic of damages, counsel for the plaintiffs stated:

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<sup>20</sup> *Ibid.* at para. 19

<sup>21</sup> *Ibid.* at para. 22

<sup>22</sup> (2004), 6 C.P.C. (6<sup>th</sup>) 207 (S.C.J.)

*“I think it’s fair to say from my perspective and I believe society, that the companionship between a parent and a child is fundamental. It’s fundamental to our society.”<sup>23</sup>*

In granting a motion for a mistrial, Justice Quinn found that the above comments were problematic, stating that this portion of counsel’s opening:

*...injects the personal viewpoint of counsel [and] it places in issue the irrelevant consideration of a societal tenet. The jury was not charged with the general responsibility of recognizing and protecting the value of parent-child relationships in society but, instead, it was to consider only the parent-child relationships at bar.<sup>24</sup>*

### **Putting Counsel’s Integrity in Issue**

Counsel must not put their integrity in issue. Thus, counsel should avoid making promises to the Jury, as whether or not counsel keeps this promise is irrelevant to the Jury’s task.<sup>25</sup>

It is also improper to put the credibility of opposing counsel into consideration. In *Landolfi v. Fargione*,<sup>26</sup> plaintiff’s counsel stated in his closing address that defence counsel (Mr. McCartney) “made up” evidence concerning the plaintiff’s injuries to which no medical expert had testified. He then referred to defence counsel as “Dr.” McCartney on six occasions. The Court of Appeal found these remarks to be sarcastic, and found

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<sup>23</sup> *Ibid.* at para 12

<sup>24</sup> *Ibid.* at para. 13

<sup>25</sup> *Hall, supra* note 1 at para. 57

<sup>26</sup> (2006), 79 O.R. (3d) 767 (C.A.)

them to be for the purpose of denigrating “defence counsel in the eyes of the Jury and to prejudice the Jury against defence counsel and, through him, his client.”<sup>27</sup>

### **Discussing Trial Strategy**

It is improper for counsel to tell the Jury the reasons for tactics.<sup>28</sup> In *Hall v. Schmidt*, plaintiff’s counsel made the following comments during his opening address:

*And as I was thinking last night about what I would say to you today about that loss I had two or three drafts that I was working on and I found that I couldn’t properly put in words and I became convinced that I couldn’t communicate to you as effectively about the significance of that loss as you will hear from Liz and from the family members. So I will leave it to them to tell you their story.*<sup>29</sup>

These comments above were held to be improper, not only for mentioning trial strategy, but also because counsel referred to evidence that would not be called during trial (i.e. what counsel did the night before) and discussed his feelings and opinions with the Jury. The Court held that he was therefore putting his integrity at issue.

It is also inappropriate to discuss defence counsel’s tactics. In *Ivanovski*, a mistrial was ordered, in part due to comments during plaintiff counsel’s opening that the defendant’s counsel is “quite skilled and may attempt to use smoke and mirrors.”<sup>30</sup>

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<sup>27</sup> *Ibid.* at para. 90-91

<sup>28</sup> *R. v. Smith* (1997), 120 C.C.C. (3d) 500 (Ont. C.A.) at para. 19

<sup>29</sup> *Hall*, *supra* note 1 at paras. 53-5

<sup>30</sup> *Ivonski*, *supra* note 7 at para. 2

## Blaming the Defendant for the Trial

Even when liability is not admitted in what appears to be a straightforward liability case, counsel must avoid implying that the Jury should blame the defendant for not having admitted liability, and therefore forcing a trial.<sup>31</sup> In *Spittal v. Thomas*<sup>32</sup>, plaintiff's counsel's opening address contained the following remarks:

*Primum 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 un-insured 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 Primum admit liability? No.*

...

*But, more than just the inconvenience factor, Primum'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 insureds, Primum, during a very difficult time, Primum has saw fit to make Tammy and Krystle's lives more difficult. Now, 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 Primum.*

...

*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. Primum's failure to accept Tammy and Krystle's injuries as legitimate is why we are here. By the time we leave here, in a*

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<sup>31</sup> Presumably, where a punitive damage claim is being advanced, this prohibition would not apply, at least when comments in counsel's address to the jury refers explicitly to the punitive damage claim.

<sup>32</sup> (2006), 82 O.R. (3d) 476 (S.C.J.)

*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.*<sup>33</sup>

Justice Glass found that it was improper to suggest that the defendant was wrong for making the plaintiffs prove their case and not to concede facts. Consequently, defence counsel's request for additional instructions in the Jury charge to correct this address was granted.<sup>34</sup>

In *Chilton v. Bell Estate*, the grounds for which mistrial was granted included the following statement by plaintiff's counsel during the opening address:

*The reason we are here today is because the defendants have refused to accept any responsibility -- any responsibility -- for this crash whatsoever.*<sup>35</sup>

Similarly, in *Hall v. Schmidt*, plaintiff's counsel improperly suggested to the Jury that several facts which remained in dispute – one of which was a central issue in the trial – were already proven facts, and further, that the Jury should blame the defendant for making the plaintiff prove these facts.<sup>36</sup>

The offending passages referred to above were all made during an opening statement.

This may not be coincidental. One possible interpretation of these cases is that these

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<sup>33</sup> *Ibid.* at paras. 4-5

<sup>34</sup> Justice Glass instructed the jury that they “are not to accept those comments as evidence. It is not proper for counsel to express a personal opinion or to make inflammatory comments in addressing the jury. Those words might leave you with the impression that Primmum has a burden of proof or disproof. That is incorrect. The plaintiffs have the burden or responsibility to prove their claims. Those words are not evidence. At the same time, you are not to punish the plaintiffs because their lawyer made the comments. Simply put, you are to ignore them.”

<sup>35</sup> *Chilton, supra* note 5 at para. 4

<sup>36</sup> *Hall, supra* note 1 at para. 22-3

statements were found to be inappropriate because they are argument – they explicitly invite the Jury to draw a conclusion from facts in dispute. Thus, if similar comments were made during a closing address, the Jury – having already heard all the evidence – would be in a position to properly weigh the merits of such comments. Nonetheless, the cases cited do not distinguish between the opening and closing statement in finding that it is inappropriate for counsel to blame the defendant for the trial.

### **Mischaracterizing the Role of the Jury**

In *Hall v. Schmidt*, the plaintiffs were advancing *Family Law Act* claims with respect to the loss of a deceased relative. Justice Ferguson found that it was improper for plaintiff’s counsel to suggest during the opening address that the role of the Jury was to value the life of the deceased, as opposed to the value of the loss of care, guidance and companionship.<sup>37</sup>

The opening address in *Hall v. Schmidt* also contained the following remarks:

*Now as I said as you are the conscience of the community you are setting standards, and I can assure you that the standard that you set in this case will be heard throughout our community. You have a unique opportunity to do what you're about to do.*<sup>38</sup>

In this case, as in others, it has been held that counsel must avoid implying that the Jury’s verdict should be made in the context of their role as representatives of the community as

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<sup>37</sup> *Ibid.* at para. 26

<sup>38</sup> *Ibid.* at para. 28

this encourages the Jury to consider factors beyond the scope of their duty to decide the issue(s) in dispute in the case at hand. In *Brochu*, the Ontario Court of Appeal held that statements made by the respondents' counsel which characterized the case as one which required a response supportive of physicians in the Timmins community, and which warranted the jurors "taking a stand" against "frivolous" cases "that are undermining our health care system",

*... invited the jurors to act as representatives of the community at large to curtail unmeritorious malpractice suits and to protect an endangered health care system...*<sup>39</sup>

Additionally, counsel must not tell jurors to put themselves in the place of one of the parties, which is deemed to be “a direct appeal to the Jury's sympathies and interests, calculated to divert them from their proper role as impartial arbiters between two adversaries”<sup>40</sup>, nor may they imply that the Jury should assess damages with a view towards deterrence<sup>41</sup> (except of course when considering punitive damages).

### **Appealing to Emotion and Irrelevant Considerations**

Statements made by counsel when addressing the Jury will be deemed inflammatory, and therefore inappropriate when such comments are held to “impede the objective

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<sup>39</sup> *Brochu*, *supra* note 19 at para. 22

<sup>40</sup> *Brophy v. Hutchinson*, [2003] B.C.J. No. 47 (C.A.) (QL) at para. 46

<sup>41</sup> *Hall*, *supra* note 1 at para. 31

consideration of the evidence by jurors, and...encourage assessment based on emotional and irrelevant considerations.”<sup>42</sup>

An early example of the Court’s disapproval of the use of such language when counsel addresses the Jury can be found in the 1953 case before the Ontario Court of Appeal, *Stewart v. Speer*.<sup>43</sup> At trial, counsel for the plaintiffs made the following statement during his closing address:

*Now you must not give this woman perfect compensation ... In the first place you cannot do it because I don't think any amount of money could. If my wife changed from the cheerful person she is to a person like Mrs. Stewart is to-day -- and I say to you if any of your wives manifested the symptoms that have been manifested to you to-day -- do you think she should not receive any less than \$10,000...*<sup>44</sup>

A new trial was ordered as to damages by the Court of Appeal. Hogg J.A. found the comments to have crossed over the line of acceptable rhetoric. He stated:

*The statement to the jury, put in the form of a question, suggesting that they would not consider money to be sufficient compensation if their wives were changed into such a person as Mrs. Stewart appeared to be, was calculated to appeal solely to the emotions of the members of the jury. The measure which the jury are asked to use in fixing the amount of damages to be awarded to Mrs. Stewart is not related to the actual injuries suffered by her or any disability occasioned thereby; it is not based upon the evidence but is a measure in which each juryman's regard and affection for his wife is the principal element. It is an appeal to the jury to fix the amount of damages upon an appraisal governed by emotion and not by reason based upon the evidence. This fact, I think, carries the address of counsel beyond the ordinary and legitimate use of rhetoric which would be allowable in counsel's address to a jury.*<sup>45</sup>

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<sup>42</sup> *Supra* note 2 at 111

<sup>43</sup> [1953], O.R. 502 (C.A.) (QL)

<sup>44</sup> *Ibid.* at 4

<sup>45</sup> *Ibid.* at 5

Thus, in *Hall v. Schmidt*, where liability had already been admitted, the court found that references to issues of liability and negligence, particularly when made immediately prior to counsel asking the Jury to consider the value of the deceased's life, "misinforms the Jury as to the nature of the trial and is inflammatory... The comments appear to be intended to encourage the Jury to make their decision on quantum with a view to punishing the defendant rather than to compensating the plaintiffs for their loss."<sup>46</sup>

### **Commenting on the Law**

Counsel may not read law from other cases to the Jury.<sup>47</sup> While counsel is permitted to speak of the legal issues, at least in general terms, they are not permitted to deal with these issues with great specificity when addressing the Jury. As Justice Ferguson explains:

*Although some reference to the legal issues is very often required to provide a proper context for the outline of the evidence, the opening should not become an occasion for detailed argument of the legal questions that will have to be answered at the end of the case.*<sup>48</sup>

Thus, while it is inappropriate for counsel to argue a disputed legal issue when addressing the Jury, it is not at all inappropriate to discuss simple, well settled legal issues which impact on the duty of the Jury, such as their role as the sole trier of the facts (including damages), and that they should not consider the ability of the defendant to pay when awarding damages.

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<sup>46</sup> *Hall, supra* note 1 at paras. 16-7

<sup>47</sup> *R. v. S. (F.)* (2000), 31 C.R. 5<sup>th</sup> 159 (Ont. C.A.) at para 31

<sup>48</sup> *Supra* note 6 at page 579

## **Mentioning Insurance Coverage**

Mentioning insurance coverage can lead to the dismissal of the Jury<sup>49</sup>. However, this is no longer automatic. The Court of Appeal in *Landolfi v. Fargione* stated:

*Given the contemporary prevalence of insurance as a commodity and the advent of compulsory automobile insurance, such references in a civil jury trial in Ontario no longer automatically trigger the discharge of the jury. Rather, the decision whether to discharge the jury in a civil case as a result of such references is a matter within the trial judge's discretion.*<sup>50</sup>

Nonetheless, the Court of Appeal in *Landolfi* held that plaintiff counsel's closing address went too far in referring to the considerable resources defence counsel had at hand to retain witnesses, that the "real defendant" had ample funds from which to satisfy defence counsel's fees, and by attacking the impartiality of the defence medical expert on the basis of his frequent retainer by insurance companies.<sup>51</sup>

## **Other Topics That Should be Avoided When Addressing the Jury**

- Reading from sources:
  - Counsel may not read from books which will not be made exhibits<sup>52</sup>, or from textbooks of law or other subjects<sup>53</sup>;
- Mentioning a juror's name<sup>54</sup>;

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<sup>49</sup> *Hellenius v. Lees*, [1971] 1 O.R. 273 at 2799-81 (C.A.), aff'd [1972] S.C.R. 165

<sup>50</sup> *Landolfi*, supra note 25 at para. 92

<sup>51</sup> *Ibid.* at para 94

<sup>52</sup> *Supra note 6* at 1622

<sup>53</sup> *Jackson v. Canadian Pacific Railway*, [1947] 2 W.W.R. 337 (Dist. Ct.) at para. 18

- Mentioning a previous trial<sup>55</sup>;
- Discussing the credibility of witnesses (except where the credibility of the witness is the main issue)<sup>56</sup>;
- Suggesting a party is acting in bad faith by hiring experienced counsel<sup>57</sup>, and
- Playing on relationship between counsel and the Jury:
  - counsel must avoid making overt suggestions that there is a bond between the Jury and counsel, to the extent that it is improper for counsel to refer to himself and the Jury as “we”.<sup>58 59</sup>

As you read through these cases, you will find that more often than not, when the court orders a remedy as a result of comments made in counsel’s address to the Jury, it is the result of several offending comments. This is not to suggest that you will be afforded one or two opportunities to run afoul of the above rules. Rather, there is considerable discretion with the trial judge to consider the context in which the offending comments were made, and then to determine whether there has been irreparable prejudice as a result. Nonetheless, even where no such prejudice is found by the trial judge, it certainly appears the appellate courts are more and more likely to step in and take action.

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<sup>54</sup> *Morton v. McCracken*, 7 B.C.L.R. (3d) 220 (C.A.) at paras. 19, 24

<sup>55</sup> *Sambasivam v. Public Prosecutor of Malaya*, [1950] A.C. 458 at 467, 469

<sup>56</sup> *Morrisson*, *supra* note 3 at para. 21

<sup>57</sup> *Carbone v. De La Rocha*, [1994] O.J. No. 4478 (O.C.J. (Gen. Div.))

<sup>58</sup> *R. v. S. (F.)* (2000), 31 C.R. 5<sup>th</sup> 159 (Ont. C.A.) – In this decision, the Court found that Crown counsel’s comments that “we would have to live with this sad result” if the accused was not convicted was “shocking”. Although this decision does not explicitly condemn counsel’s use of the use of the word “we” in referring to himself and the jurors, in *Hall v. Schmidt*, at para. 45, Justice Ferguson’s interpretation of this passage from *R v. S(F.)* is unequivocal that counsel must avoid the word “we” to refer to themselves and the jury in a criminal trial. The decision in *Hall* goes further, suggesting that it is also inappropriate for counsel to refer to himself and the jury as “we” in a civil trial as well.

<sup>59</sup> This can be contrasted with Roger Oatley’s book *Addressing the Jury*, *supra* note 2 at 235. Oatley suggests that it is good technique to use the word “we” to identify with the jury, at least in the context of direct or cross examination. He uses the example of the examination of an expert witness who is asked to explain a term to “us” as “we” are lay people.

I would highly recommend all counsel to refer to Roger Oatley's book Addressing the Jury<sup>60</sup>, Justice Ferguson's book Ontario Courtroom Procedure<sup>61</sup>, as well as the cases cited above (and in particular, the decisions in *Hall*<sup>62</sup>, *Landolfi*<sup>63</sup>, and *Morrison*<sup>64</sup>), when preparing your Jury addresses, all of which were relied upon heavily when writing this paper.

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<sup>60</sup> *Supra* note 2

<sup>61</sup> *Supra* note 6

<sup>62</sup> *Hall*, *supra* note 1

<sup>63</sup> *Landolfi*, *supra* note 25

<sup>64</sup> *Morrison*, *supra* note 3