IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moore v. Kyba,*
2011 BCSC 1422

Date: 20111021
Docket: 09-2701
Registry: Victoria

Between:

Wayne Moore

Plaintiff

And

Daryl Kyba

Defendant

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the plaintiff:	R. Lambert
Counsel for the defendant:	M.F. O'Meara
Place and Date of Hearing:	Victoria, B.C. September 26, 2011
Place and Date of Judgment:	Victoria, B.C. October 21, 2011

[1] At the start of the trial, counsel for the plaintiff advised me that he wished to open with a Power Point presentation. Counsel for the defendant objected, arguing that there had been at least two trial management conferences in this matter and that the issue of a Power Point presentation should have been addressed at the trial management conferences; that the presentation itself had been given to him late and he had had little opportunity to review it; that the version that he had reviewed had references to evidence that were not in evidence and reference to expert reports which are challenged. He argued as well that the presentation usurped the court's role on the law and anticipated what the defendant would say at trial. It described experts with qualifications, even though they were not yet qualified. It provided estimates of cost of care. It referred to the "voice" of the jury which is pandering to their emotions.

[2] Counsel for the plaintiff advised me that he had used similar Power Point presentations in the past, based on a ruling of Mr. Justice Macaulay. He said that counsel for the defendant had had the benefit of the weekend to review the proposed Power Point presentation.

[3] I refused to permit use of the Power Point presentation and advised counsel that I would give reasons at a later date. These are those reasons.

[4] In *Brophy v. Hutchinson*, 2003 BCCA 21, the British Columbia Court of Appeal sets out the principles which apply to an opening statement.

> [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.

[5] The court continues:

> [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). Against this general background, I will consider the objections the plaintiff now makes to the defendant's opening address.

[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.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown