IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Aberdeen v. Township of Langley***,
2006 BCSC 2062

Date: 20061117
Docket: M024554
Registry: Vancouver

Between:

James Aberdeen

Plaintiff

And:

**Township of Langley, Joseph Zanatta,
Ann Cassels and Ann Cassels d.b.a. Nathan Creek Nursery**

Defendants

Before: The Honourable Mr. Justice Groves and Jury

Oral Reasons for Judgment

Application to Strike the Jury No. 2

November 17, 2006

Counsel for the Plaintiff: M.J. Slater
A.C.R. Parson

Counsel for the Defendants Zanatta, A. Cassels and A. Cassels d.b.a. Nathan Creek Nursery:	R. Hungerford M. Giles
Counsel for the Defendants:	A.A. Hobkirk P. Chan
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** The plaintiff seeks with the consent of the defendants, Joseph Zanatta, Ann Cassels and Ann Cassels doing business as Nathan Creek Nursery who I will refer to as the Zanatta defendants, an order that this trial continue without a jury pursuant to Rule 41(7) of the ***Rules of Court***. Rule 41(7) reads:

> Where, by reason of the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury.

[2] I am satisfied that the Zanatta defendants qualify as a party adverse in interest.

[3] The plaintiff who now applies to essentially continue the trial without the jury is the only party which selected trial by judge and jury in this action.

[4] Prior to the commencement of the trial and for reference sake this is day 26 of the trial, the Zanatta defendants applied to strike the jury. The application was opposed by the plaintiff and the defendant, the other defendant the Township of Langley. After considering submissions, I dismissed the application to strike the jury prior to the commencement of trial on the 10th of October, 2006.

[5] The facts that give rise to this action are that the plaintiff suffered significant injuries in a bicycle accident in June of 2002, an accident which occurred within the Township of Langley. He sues the Zanatta defendants alleging that Zanatta drove and Cassels owned a vehicle which crossed the centre line while he was proceeding down a hill on 272nd Avenue in Langley on his bike.

[6] The plaintiff alleges that by the Zanatta vehicle crossing the centre line, he was required to take evasive action in the operation of his bicycle. The evasive action that he took was that he went wide around the corner and encountered gravel on the side of the road.

[7] He alleged that he took this action to avoid, of course, a potential accident which would have resulted in the plaintiff's view, by the actions of Zanatta.

[8] As indicated, the plaintiff went wide on a corner, hit some gravel and proceeded off the road up against a metal guardrail which had been installed along the road by the Township of Langley. The metal guardrail, the plaintiffs will no doubt allege, did its job and directed the plaintiff on his bicycle. Unfortunately, the metal guardrail ended and was offset by a cement no-post guardrail. A gap existed between the two guardrails, the metal and the cement guardrail. The plaintiff alleges that he was directed through the gap down a ravine the guardrails collectively were in place to cause travelers to avoid. As a result of being propelled down the ravine, the plaintiff suffered significant injuries.

[9] He is now what has been described as an incomplete quadriplegic. It is alleged that he suffers from a mild traumatic brain injury. His physical complaints in the sense of his status as an incomplete quadriplegic are not in dispute. The circumstances of him suffering from a mild traumatic brain injury is significantly in dispute.

[10] As one can surmise by such a catastrophic injury, there is a significant question of damages before the court.

[11] The Zanatta defendants, and again just going through the history of this case, deny liability completely. They say that Zanatta was essentially late on the scene and simply observed the plaintiff lose control and disappear from view. The Zanatta defendants on the liability issue point to Aberdeen as responsible for his own injuries, and they also point to the defendant Langley saying that the metal guardrail and cement guardrail combination was insufficient to protect reasonable users of the road.

[12] The Township of Langley, who I will refer to as Langley, denies liability. They point to the alleged contributory negligence of Aberdeen and the alleged negligence of the defendant, Zanatta.

[13] Essentially, all parties to this litigation have a distinct position on liability. Aberdeen says these damages were caused by a combination of Zanatta and Langley. Zanatta says that the injuries were caused by a combination of Aberdeen's contributory negligence and Langley's negligence, and Langley says that the injuries were caused as a result of the contributory negligence of Aberdeen and the actions of Zanatta.

[14] Despite this disagreement on liability on quantum the defendant Langley and the Zanatta defendants are aligned. They appear to have perhaps jointly retained experts or at least in regards to the experts called in this case thus far, which I understand to be all the experts on quantum. They are essentially a team on the issue of quantum of damages but adverse on liability.

[15] I am going through this history because I think it is significant to the next part of my reasons, which is an explanation for why this difference of opinion or difference of status and different tactics of the various defendant, all of which, of course, are legitimate, have caused this case to operate in a somewhat unique fashion and it is the unique fashion in which this case was laid out to the jury which now give rise to the current application.

[16] In most cases, of course, the defendants would open their case and call their evidence. Where there are multiple defendants they would either take turns calling their case, or they may, in fact, open at the same time and then call their cases separately.

[17] Here it seemed logical, and certainly, all parties agreed, that the opening and calling of the evidence of the defendants collectively was to be done in the following fashion: first off, it was agreed that the Zanatta defendant would open. Secondly, the Zanatta defendants would call their liability witnesses, Mr. Hungerford acting for the Zanatta defendants.

[18] Additionally all agreed that Mr. Hungerford and Mr. Hobkirk, who acts for Langley would, prior to Mr. Hobkirk formally opening Langley's case, call the evidence on quantum.

[19] The point of this was logical, and was clearly designed to allow the trial to proceed effectively time-wise.

[20] It was agreed further that the third stage of the trial would be that once the quantum witnesses were called, and once the evidence on liability of the Zanatta

defendants was called, the defendant Langley would open its case and after opening its case it would call its liability witnesses.

[21] I have been advised that in terms of the liability witnesses. there are four or potentially five witnesses to be called by Langley. The time for those witnesses was estimated to take approximately one and a half to two days.

[22] The net consequence of this agreed and apparently logical procedure in terms of presenting the case to the jury was that the Langley's opening of its case was very late in the trial. In fact, it was day 24 of the trial that Langley actually purported to open its case, it being estimated the trial would then take 26 days at most.

[23] In regards to an opening, certainly, my expectation and I believe the expectation of the applicants, the plaintiff and the Zanatta defendants was that Langley's opening would focus on the dispute that had yet to be explained to the jury, which was the dispute about liability from Langley's perspective. No doubt, there would be reference in the opening to the agreed position on quantum as there was a reference in the opening of the Zanatta defendants. One would also expect that the opening would focus on the four to five witnesses that were to be called and the position of the Langley in regards to the liability issue.

[24] There is much case law about what is generally allowable in an opening to a jury. In what I believe to be the leading case of ***Brophy v. Hutchinson*** 2003 BCCA 21 at page 206, Chief Justice Finch quoted from Halsbury's laws from England as to the purpose of an opening. He states the following:

> The object of an opening is to give the jury a general notion of what will be given in evidence. Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the court takes judicial notice.

[25] Within this framework as set out in ***Brophy***, the opening statements given by counsel are an opportunity to outline the whole story from either the plaintiff or the defendant's particular perspective without interruption. It assists the jury in understanding the evidence to be presented when used effectively. It enables counsel to begin to persuade the jury of the filters he or she has created in the opening.

[26] Generally, in an opening, counsel is permitted to persuade the jury during this address in an attempt to engage their imagination in viewing their evidence from a certain perspective. Counsel is not supposed to discuss law during an opening statement although to completely avoid doing so would be difficult. Comments on the law should be limited to framing legal issues for the jury while avoiding intricate and lengthy discussions.

[27] Counsel are expected to outline the evidence that will be given and who will testify. Counsel may say what facts the evidence will prove.

[28] What counsel can do in an opening has often been described as setting a roadmap for their case so that the jury can appreciate the significance of the evidence that is being called as it is being called.

[29] However, there are numerous limitations imposed upon counsel in delivering an opening statement. If counsel transgresses these limits, the judge can offer instructions to the jury to disregard certain aspects of the statement. Alternatively or additionally, instructions may be issued during the charge to the jury to ignore certain aspects of the opening statement. In circumstances of significant disregard of what is permissible, the judge may dismiss the jury and hear the rest of the case without a jury or can order a mistrial.

[30] Finch C.J.B.C. again in ***Brophy*** outlined the limits on counsel's opening submissions at paragraph 41. He says:

> 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.

[31] British Columbia jurisprudence, in my view, demonstrates that this is the kind of behaviour that the court will not accept from counsel in opening submissions to the jury.

[32] In the ***Brophy*** case, the plaintiff was injured when the bicycle he was riding collided with the defendant's motor vehicle. The evidence conflicted as to how the accident occurred and the nature and the extent of the plaintiff's injuries. At trial defence counsel was erroneously granted leave to make his opening remarks to the jury immediately after plaintiff's counsel. In this opening, defence counsel referred to

the plaintiff as a drug dealer who dealt drugs to support his own habits, and a high school dropout who was not gainfully employed, and further stated he was using the accident as an excuse for all that ever had gone wrong in his life.

[33] The court found the comments were irrelevant to the matters at issues before the court and were stated only to prejudice the jury. The court also found that the defence counsel was improperly attacking the credibility of both the plaintiff and his mother through the use of argumentative statements and rhetorical questions, such as “would you have anticipated the plaintiff was seeing all these doctors” which implied, of course, that the plaintiff was dishonest and exaggerating his complaint.

[34] Apart from these errors in his opening, defence counsel was also attacking the proposed experts' credibility. The court found this conduct to be argumentative and impermissible. Chief Justice Finch found that part of the problem with the errors was the collectively of them. He says:

> [T]hey could only have had a very damaging effect on the way the jury listened to and understood the evidence presented on the plaintiff's behalf. Their impact is bound to have been much greater having been heard in advance of any evidence and they would, in my view, largely have undermined any advantage the plaintiff might otherwise have had by his own counsel's opening address.

[35] In the case of ***Schram v. Osten*** 2004 BCSC 1789, Martinson J. of this court dealt with the plaintiff's counsel's improper action during the trial proceedings. However, in this case the court felt the improper submissions could be remedied through a proper instruction to the jury.

[36] In that case, slides of the plaintiff's Power Point presented during her opening stated the defendant had denied all responsibility, blamed other defendants and blamed the plaintiff. This gave the impression that the wrongdoing had been predetermined. It mischaracterized the evidence instead of clearly stating it was merely the plaintiff's suggestion of what it expected the witnesses to say.

[37] By stating that the defendant was not taking responsibility for their actions, plaintiff's counsel improperly indicated that the defendant had not accepted his share of responsibility and thereby incorrectly reversed the burden of proof.

[38] In the case of ***Melgarejo-Gomez v. Sidhu*** 2002 BCCA 19, Braidwood J.A. speaking for the court of appeal dealt with the situation in which plaintiff's counsel used words such as "I think," "I believe," I accept," and I submit." The court found that the use of these words pits the credibility of one counsel against the credibility of the other. So that if the jury were more impressed with counsel for the plaintiff, it would prejudice the respondent and vice versa.

[39] In addition to those B.C. authorities, counsel for the plaintiff relies on a recent decision of the Ontario Supreme Court of justice in the case of ***Morrison v. Greig***, [2006] O.J. No. 4154.

[40] In that case, Glass, J. states the following in paragraph 10:

> 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.

[41] In paragraph 14 and 15, Glass, J. comments on the inappropriateness of calling upon the jury to speculate and to make conclusions prior to hearing all the evidence. In paragraph 15, the court opines:

> That should not be raised until the end of the trial when closing argument is given to the jury after evidence has been presented to the jury. That is the time of the trial when a jury has the opportunity to assess evidence.

[42] This case in summary goes through a circumstance where on numerous occasions the court found counsel in an opening called on the jury to draw conclusions prior to all the evidence being called essentially called on them to speculate as to motive.

[43] ***Morrison*** is also of note in that it discusses at length the potential remedies available in the event counsel in an opening steps significantly over the line.

[44] The first consideration must be, as noted in ***Morrison***, and I agree, is can the error be corrected and how. Glass, J. comments on this in paragraph 28 where he says:

> It appears to me that the errors in Mr. Shulgan's opening jury address cannot be corrected by further instructions from the trial judge because the errors would be doubly accentuated in such a review. The potential prejudice to the Plaintiffs would not be overcome, but rather would be enhanced by repeating the errors. The closing argument with a spin on evidence that was not before the jury along with personal opinion of counsel is improper.

[45] Further in paragraph 32, Glass J. talks about the possibility of recalling the jury asking them to simply ignore in entirety the opening of the offending counsel:

> If I were to have recalled the jury with instructions to ignore counsel's opening address without going into detail of the impugned sections, it would create a negative cloud over the defence so that there would be a concern of creating a prejudicial impact on the defence. I do not think anything could be done to return the parties to such a position with instructions from the trial judge.

[46] That being said, and this case providing guidance, I now turn to what happened here. As indicated, it was my expectation, and certainly, it appears from submissions counsel for the plaintiff, the expectation of counsel for the plaintiff that the opening would focus primarily on the evidence which was yet to be called. The evidence related to the liability dispute and the evidence of Langley on liability. As indicated, there were four to five witnesses potentially to be called.

[47] In anticipating such an opening, one would expect a relatively brief opening. This opening, however, was by counsel for the plaintiff's timing, which I do not doubt, at eighty minutes. It started out in a traditional way, a way which was expected, and it ended in a traditional way. But the balance of the opening can only be characterized as a closing.

[48] The balance of the opening analyzed the evidence already called. On liability, counsel for Langley explained to the jury the difficulties he sees in the plaintiff's evidence, the difficulties related to uncertainty as to speed of the vehicle and about the significance of warning signs and potentially speed reduction signs. Counsel for Langley called on the jury to draw a conclusion on the evidence. His submissions were replete with "it is submitted" or "it will be submitted."

[49] Essentially, an argument was put forward about the ultimate issue of liability, and an argument was put forward prior to Langley calling any evidence.

[50] Counsel additionally made submissions and arguments about the evidence of Mr. Lisman and Mr. Godfrey, experts who had provided opinions, one for the plaintiff and one for the Zanatta defendants, on the status of the guardrail.

[51] Counsel for Langley employed the use of rhetoric and argument to analyze that evidence of Lisman and Godfrey, but also to analyze the evidence of the Zanatta defendants and the evidence of Mr. Aberdeen, and of his chief witness as to the liability issue Mr. McGee.

[52] Counsel for Langley asked the jury, prior to all evidence being in, prior to the plaintiff exercising his right as a plaintiff, to close his case first, to draw conclusions about key determinations that the jury would have to make. He requested of the jury, essentially, to conclude that Mr. Aberdeen was traveling too quickly, that he conducted himself without due regard to his own safety.

[53] It is true that you may in opening state your position, but you are not in opening entitled to formulate an argument as to why it is your position pointing to evidence already led as to why that is so.

[54] Back to the words in ***Brophy***. Chief Justice Finch found that in ***Brophy*** the errors viewed collectively could only have had a very damaging effect on the way the jury listened to and understood the evidence of the plaintiff. It is equally true in this case that the words of the counsel for Langley in their opening collectively can only be viewed as having a very damaging effect on the way the jury will listen to and appreciate the closing arguments and the position of the plaintiff.

[55] As in the case of ***Melgarejo-Gomez v. Sidhu*** counsel for the Township of Langley's use of the words "I think," "I submit," "I will be submitting." This choice of language pits the credibility of one counsel against the credibility of the other so that if the jury were more impressed with Mr. Hobkirk, it would no doubt prejudice Mr. Slater's client.

[56] I have concluded that it is abundantly clear that counsel for Langley has crossed well over the line of what is permissible in an opening. It is not an excuse to say that the court or opposing counsel should have interrupted. There is a long-established practice that you interrupt an opening or closing of an opponent at your peril. In the somewhat collegial way in which law is practiced in this province it is viewed as a tremendous interruption, disadvantage and inappropriate action to interrupt a counsel in their opening or closing.

[57] I further agree with the plaintiff that it is only after the consideration of the collective breaches of appropriateness in the opening that was presented by Langley that the full effect of the prejudice of the opening could, in fact, be considered.

[58] In my view, the plaintiffs, and to a lesser degree, the Zanatta defendants, have been significantly prejudiced by Langley's opening. One must bear in mind we were at the 24th day of trial. We are now at the 26th day of the trial. The jury on day 25 was only brought into the courtroom for a few minutes to be sent away for the day while this application was argued. The last thing on their minds for almost two days has the inappropriate closing disguised as an opening of Langley. They will

now, if allowed to continue, hear a short amount of evidence, a day and a half to two days, and then get into the actual closing.

[59] The plaintiff will effectively be forced to close after Langley's first closing. I have seriously considered whether it would be appropriate for me to refuse to permit Langley to close on anything other than liability, and I have determined that I cannot make that order.

[60] As such, after the plaintiff closes, Langley will be essentially offered an opportunity if the jury remains to close to the jury for a second time.

[61] In light of where this opening is in the course of this trial, in light of the fact that the opening of Langley which I characterize as a closing, and the actual closing of Langley will no doubt happen within less than a week's time, it is in my view extremely prejudicial to the plaintiff for this to be allowed to happen. It deprives the plaintiff of a significant right in our trial system, the right for the plaintiff to put its case first to the trier of fact. That is significant because the burden of proof clearly lies on the plaintiff.

[62] Remedies include the following: I can tell the jury to completely ignore the opening of the Township of Langley and hope that solves the problem; I can tell the jury to ignore the breaches, and I can specify what those are and explain to them why they cannot consider those or I can proceed as directed and requested under Rule 41(7), or I can declare a mistrial.

[63] In my view, there is far too much at stake for all parties to declare a mistrial at this stage in the game. I am also convinced, as was Glass J. in ***Morrison***, that telling the jury to completely ignore what I characterized here as a closing disguised as an opening would create potential prejudice by the jury against Mr. Hobkirk and his client.

[64] Again, as found in ***Morrison***, to make specific references to errors which are numerous could have the exact opposite effect of what is intended. It could serve to emphasize the breaches and re-emphasize the points made in the opening which were inappropriate.

[65] I have reluctantly concluded that in order to overcome the significant prejudice resulting from the defendant Langley's opening it is necessary to strike the jury and to proceed as permitted under Rule 41(7) on a continuation of the trial as a judge alone.

"The Honourable Mr. Justice Groves"