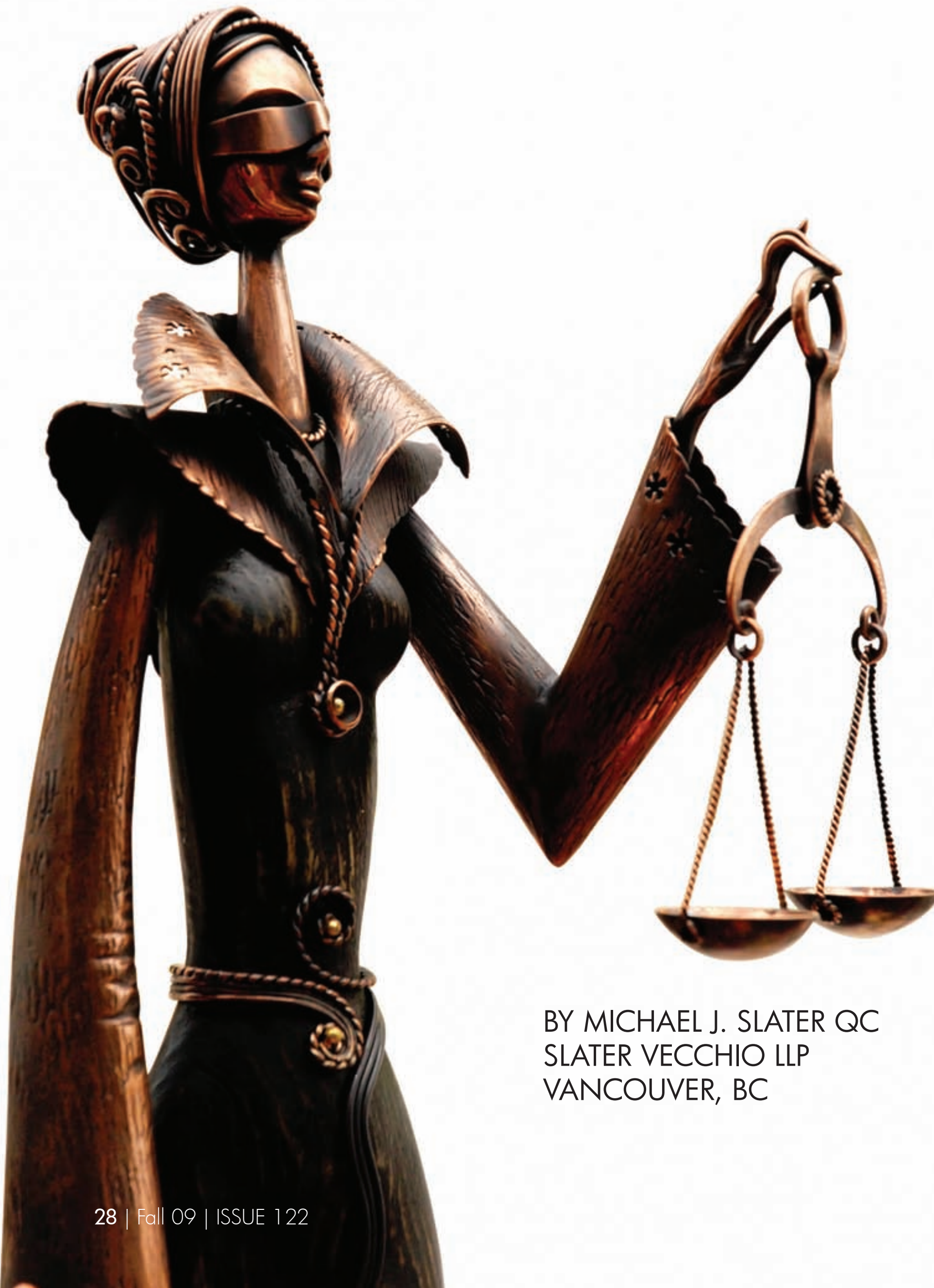
JURY OPENINGS: Persuading Without Advocating[1]



BY MICHAEL J. SLATER QC
SLATER VECCHIO LLP
VANCOUVER, BC

I. INTRODUCTION

How do you maintain the interest of the jury in the age of Google, Twitter, MySpace, and Facebook? Confucius said "Tell me and I will forget. Show me and I might remember. Involve me and I will understand". Technology and demonstrative evidence can be helpful, but by far the most effective way to involve the jury and keep their attention is to tell a story. Why? Because storytelling is encoded in our genes.[2] The reptilian or primitive part of our brain will instinctively cause jurors to sit up and pay attention if they think they are going to listen to a story. The opening is your opportunity to tell jurors the story of what your case is all about. A successful opening will involve jurors in your story and invite them to participate in how the story ends.

In jury trials in British Columbia plaintiff counsel have a significant advantage. Rule 40(53)(b) of the *Supreme Court Rules*[3] states that the plaintiff shall open first and the defence shall not open its case until the close of the plaintiff's case. This advantage should not be wasted.

The opening statement determines what jurors will consider and focus on throughout the trial. The structure of the opening and the information to include must be carefully considered. Before presenting a case to the jurors, the use of a focus group can provide insight into the beliefs and values of potential jurors, and help the lawyer structure the theme of the case to appeal to these beliefs and values. While persuasive language when addressing the jury should be used, there is a fine line between persuasive language and language that can be grounds for a mistrial. This paper includes some basic principles on how to structure your opening, how to avoid mistrials, and how to effectively use a focus group.

II. HOW TO MAKE YOUR OPENING EFFECTIVE AND PERSUASIVE

How you structure your opening and the information you choose to include will have a direct impact on the persuasiveness of the opening. How do you decide what to include in the opening? Law school didn't teach you how to do a jury opening. For many trial lawyers, jury openings became a process of trial and error.[4] Over 30 years ago I remember saying something like this in my first jury opening:

> My task now, ladies and gentleman of the jury, is to give you an outline, or a map, as it were, a preview, an overview, an advance look at what we will be presenting to you over the next 3 weeks. And by the way, please remember that nothing I say is evidence. I also want to thank you for coming and whether you decide the case our way or not, we want to thank you in advance for being attentive.

If you ever feel the need to thank the jurors, lecture them on the importance of jury service, or talk about roadmaps, go outside the courtroom and look for a large garbage container and throw up all that verbiage into the garbage where it belongs. Lawyers now have access to principles of persuasion that have been empirically confirmed by thousands of jurors.[5] *David Ball On Damages* changes everything we thought we knew about how jurors make decisions.

III. THE DAVID BALL APPROACH

Ball discovered that jurors almost never decide the case in the opening. However, by the end of the opening they have developed an almost unshakable belief as to what the trial is about. This belief influences everything that follows in the trial; what the jurors pay attention to, what they consider to be important, what they remember, ignore and use, how they weigh each argument, opinion, and piece of evidence, what they think it means, and how they deal with it in arriving at their decision.

Ball says the trial is about harms and losses, and more specifically, what is required to fix, help, and make up for the harms caused by the actions of the defendant. Jurors will pay attention to what you spend your time on so you must ensure that your opening follows a clear structure. You want to layer in one topic at a time. Do not waste the opening with information that will not be of assistance to jurors in deciding the case.

Any suggestion of advocacy must be eliminated during the opening. Why? Because insurance companies have successfully compromised the credibility of trial lawyers with jurors. They will not take your word for anything. Everything you say must be related to the evidence of a lay witness or expert.

Ball provides a six part structure for the opening that can be followed with appropriate modifications to suit your case:

A. Part 1: Rule and consequence

What do jurors want to hear first? When someone introduces you to a new game, what is the first thing you have to know before you can play? The rules. The trial is a new game for the jurors. Telling them the rules tells them how to play the game. It tells jurors what to listen to and what is important to help them make their decisions. According to Ball, your opening should begin by stating the rule the defendant broke. When presenting the rule to the jurors, do not say that the defendant broke the rule. At this point, Ball recommends that you do not mention the defendant at all. Simply state the rule, and what the consequences are for a person who breaks the rule. According to Ball, presenting the jurors with the rule helps them to relax by defining their role in the trial. While I see nothing wrong with referring to a "rule" in the opening, it may be more prudent in our more conservative jurisdiction to not actually call it a "rule". Rules can be presented to jurors without ever telling them that they are "rules". It can be implied by the way in which the rule is presented.

1. Using Civil Jury Instructions to define the Rule

Rick Friedman and Patrick Malone[6] suggest using jury instructions as the basis for presenting a rule. This makes logical sense. It is these instructions that jurors will mull over in deliberations. Therefore, the closer you define a rule to fit the instructions, the easier it will be for jurors to find in favour of your client. Friedman and Malone state:

> At the very beginning of a case you should draft a set of proposed jury instructions … Nothing focuses the mind of a trial lawyer like a set of jury instructions.[7]

Civil Jury Instructions by CLE of BC (CIVJI)[8] can be used as a tool to form a rule you present to the jurors. CIVJI can be especially useful when dealing with cases in which a rule is not expressly provided for in the case law or legislation. The following excerpt from CIVJI is an example of a complicated jury instruction on standard of care that would be the starting point for formulating a simple rule in a case where the driver of a jet ski hit a swimmer.

> **STANDARD OF CARE – ADULTS**
>
> I will now discuss with you the second element dealing with the standard of care. If [the defendant] failed to meet the standard of care expected in the circumstances, (he/she) was in breach of (his/her) duty of care to [the plaintiff]. The conduct of the defendant is not measured against perfection, but rather against the conduct of a person of ordinary prudence and intelligence in the community. A defendant is not required to exercise extraordinary caution or unusual skill or foresight. *You must decide what a reasonable and careful person would have done in the circumstances described in the evidence. If the conduct of [the defendant] fell below that standard, then, subject to what I say elsewhere, you must find [the defendant] liable in negligence*. But if you find that [the defendant] met the standard of care required of a reasonable and careful person in the circumstances, you must dismiss the action.[9]

If the rule is going to tell the jurors what to listen to it must be short, simple, and easy to remember. In the above example the rule becomes:

> *Rule: A jet ski driver must watch where he is going. If he does not and hurts someone then he must pay for the harm he causes.*

B. Part 2: The story of what the defendant did

After presenting the jurors with the rule, you should tell them the story of what the defendant did. Remember to resist the urge to advocate. This story must be told without implying any blame. How to tell the story is an important part of the Ball approach.[10]

1. Focus on the defendant

Do not introduce the plaintiff to jurors until you have finished describing the actions of the defendant. Why? Because when they enter the courtroom jurors believe their role is to decide who did something wrong. Ball found that jurors will place more emphasis on early information to assign blame. If the plaintiff is part of this early information, the plaintiff will be assigned blame. By focusing on the actions of the defendant you provide the jury with the opportunity to blame the defendant. Once jurors assign blame it is very difficult to overcome. This is what Ball refers to as "primacy of belief". It is not what the jurors hear first that is important, but what they first come to believe that will guide them in their decision making process.

2. Set the scene

You can set the scene for the story of what happened by saying "Let me take you back to...". You can now tell the story of the choices made by the defendant that eventually caused harm to the plaintiff. By stating that the defendant chose to act the way he did gives jurors a reason to cast blame on the defendant.

When describing the conduct of the defendant, use an active voice to engage the interest of the jurors. An active voice keeps jurors listening and interested in what is going to happen next. When telling the story Ball suggests that you follow these guidelines:

- **Short sentences –** clearer and easier to listen to than long convoluted sentences.
- **Present tense** – creates immediacy and will register more strongly – use "turns right", not "turned right".
- **One action per sentence** – moves story forward in time – maintains attention of jurors.
- **Avoid Exposition** – any sentence or phrase that does not move the story forward in time. Jurors pay attention to action not exposition.
- **Each sentence is important –** ensure an appropriate pause after each sentence to assist in moving the story forward one step at a time.
- **Tell jurors only what you can see or hear**. If you cannot turn a piece of information into an action done by the defendant, leave it out of the story. The defendant "looks at his cell phone" can be seen and is more memorable and believable than the "defendant failed to look at the road."
- **Point no fingers of blame** – jurors are not ready for anything adversarial. The story is what the defendant did. After the story comes the blame.
- **End of story** – the story ends with a brief reference to the harm caused by the actions of the defendant.
- **The next thing the defendant did** – include this if it advances the story, e.g., left the scene of the accident.
- **Inevitability** – when you state the rule with no accusation the jurors will not see you as an advocate but they will assume that someone broke the rule and caused the harm. When you tell them about the actions and choices made by the defendant they will assign blame to the defendant rather than to your client. Once primacy of belief is established it is very difficult to dislodge.[11]

C. Part 3: Blame (who are we suing and why?)

1. What was the negligent act or choice to omit?

This is where you explain why you are suing the defendant. A driver chooses not to keep his eyes on the road. A contractor chooses not to sand or salt the roadway. A municipality chooses to leave a gap in a protective barrier. Do not say the defendant failed to do something as jurors may forgive failures. Turn the omission into an affirmative act. If the act is not admitted then say how it is known. Refer to a witness seeing it or the opinion of an expert that it happened that way.

2. What is wrong with the negligent act? How does it foreseeably cause harm?

Tell the jury who or what says that the act is wrong. It may be a breach of a statute or the common law. If you rely on expert evidence then you must provide the jurors with a brief explanation of how your expert arrived at his opinion. It may be an authoritative text or journal or it may be a departure from generally accepted standards in a profession or industry.

3. What should the defendant have done instead? What good would that have done?

Show the jurors how easy it is for the defendant to make the right choice. For example, if a municipality has left a gap in a protective barrier which resulted in an injury to your client, it is likely to have taken steps after the accident to correct the problem. Photographs of the new barrier should be included in the opening to show what the municipality should (and could) have done. If the municipality had followed the rule it would never have chosen to leave a gap in the barrier and your client would not have been injured.

D. Part 4: Undermine the case of the defence

You should provide your side of the story for every important defence point. If you don't the defence will and the jurors will think that you were trying to hide from these points. By raising it first you can spin it your way.

The Ball approach requires that you tell the jurors that you had to consider the evidence in support of the defendant's position before coming to trial. You then tell the jurors why the explanation of the defendant is not accurate. That is why you had no choice but to come to trial.

This approach may not be ready for prime time in British Columbia. There is a more prudent approach. Tell the jurors that the position of the defence will be disclosed in the Statement of Defence.[12] For example if the defense alleges that the plaintiff was speeding or failed to wear a seat belt, you can often show a positive action that you took to investigate whether the defence contention was correct. You can point to the evidence from lay witnesses and experts that will show that your client was not speeding and was wearing a seat belt. This is not argument but simply a reference to the evidence you will be leading at trial.

E. Part 5: Damages (what are the losses and harms?)

Ball suggests that you should never expect jurors to deal with two things at once. Therefore, when discussing why the defendant is to blame there should be nothing said about the losses and harms suffered by your client. When discussing damages there should be no reference to blame. Jurors must understand that the case is not just about who did something wrong. It is also about how to best put your client into the position he would have been in if he was not injured by the actions of the defendant. At the end of your opening, jurors should have a clear idea of what injuries your client has suffered and how much money will fairly compensate your client for these injuries.

Ball organizes the damages portion of the opening into a number of categories:

- Physical damage.
- Primary consequences of the physical damage.
- Nature, extent, and duration of the pain and suffering.
- Tasks of life and work that your client could not or cannot do.

- Safety consequences of the harms.
- Before and after.
- Fixes and helps.
- Make up for.

You must describe the physical mechanism of the injury whether it is a lower back injury or damage to the brain. Use simple language. Refer to the evidence of the medical professionals as it is still too early to ask jurors to take your word for anything. Review how the injuries have affected your client. For example, if your client sustained brain damage, explain what the expert will say about frontal lobe damage and deficits in executive functioning. This is accomplished best by giving concrete examples. If your client is suffering from pain then describe the pain in a way that jurors will appreciate. Make it easy for jurors to identify with pain by creating a powerful analogy. Provide examples of how the injuries limit your client's activities. Focus on the effect on your client rather than on the specifics of the injuries. You can then move to how the injuries affect your client's ability to earn an income, to care for himself, to maintain personal relationships, and to cope with activities of daily living.

In describing how the injuries have affected your client avoid generalities of what he used to be like. It is far more powerful to get the message across with a vignette or mini-story to show the impact on your client's life. While the before and after contrast is important, Ball emphasizes that it is more effective to reverse the traditional sequence of telling the "before" first followed by the "after." First show your client in the wheelchair. Then show how active your client was before the accident.

Once the jurors have an appreciation of the harms and losses, they will need to know what can be done to help your client fix the problems. Past and future loss of income can be replaced. But how do you replace the executive functions of the brain? How do you replace loss of mobility? Future care can be discussed in the context of a "Minimum Life Care Plan." Ball advises that your expert should be instructed to prepare such a plan that provides for the "...minimum humane level of care, comfort, and safety."[13] Your expert can now explain why the plan is not extravagant and can point to all of the things not included in the plan. Jurors will realize that every dollar of the money goes to other people to pay for your client's personal care, treatment, medications, equipment, and rehabilitation.

At the conclusion of the damages section the jurors should be told that a separate area of loss not easily translated into money is non-pecuniary loss, which you tell the jurors is really just a fancy term for non money losses. This includes pain and suffering and loss of amenities of life. It is what makes life worth living. In a severe case it will include the total loss of a former lifestyle, the humiliation of having to rely on the goodwill of others for the simplest tasks of daily living, and the loss of self image. In Canada there is a limit of approximately $320,000 on non-pecuniary loss in cases of severe and devastating injuries. But there is no limit on the pecuniary heads of damage as long as there is evidence to justify the findings of the jury.

F. Part 6: Money (what do you want?)

Lawyers can be reluctant to discuss money in the opening. But Ball says you can not be afraid to talk about money. Jurors want guidance and will complain when lawyers do not specify a figure. Give them exact dollar figures but be sure to specify the only thing they are permitted to take into account is the amount of the harms and losses – nothing else.

To keep the jurors listening through to the money part of your opening, Ball says you must overcome five bad habits from law school:

- Do not use too many words to make each point.

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- Do not repeat obvious information.
- Use the active voice not the passive voice.
- Do not give speeches.
- Seek crystal clarity in expressing your points not semi-clarity.

IV. JURY MISTRIALS – WHEN THEY ARISE AND HOW TO AVOID THEM

A. The Purpose of the Opening

The purpose of the opening is stated in Halsbury's Laws of England[14] and is quoted in the oft cited case of *Brophy* v. *Hutchinson*:

> 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.[15] [emphasis added]

The purpose of openings was expanded on in *Aberdeen* v. *Langley (Township)*:

> **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. [16] [emphasis added]

If you say something inappropriate that is not consistent with the purpose of the opening, you run the risk of a mistrial application.

B. The Law

Brophy has been referred to in multiple cases including *Giang* v. *Clayton,*[17] *Schram* v. *Osten,*[18] *de Araujo* v. *Read,*[19] and *Aberdeen* v. *Langley (Township)*.[20] In addition, some limitations on what can be said in openings can be found in *McLachlan* v. *Hamon,*[21] *Martin Estate* v. *Pacific Western Airlines Ltd.,*[22] and *Melgarejo-Gomez* v. *Sidhu*.[23] The following is a list of things that can create a problem in an opening:

- Counsel should not give his/her own personal opinion of the case.
- Counsel should not mention facts which require proof which cannot be proved by evidence from his/her own witnesses, or which he/she expects to elicit on cross-examination.

- Counsel should not mention matters that are irrelevant to the case.
- Counsel should not make prejudicial remarks tending to arouse hostility, or statements that appeal to the juror's emotions, rather than their reason.
- Counsel should not comment directly on the credibility of witnesses including expert witnesses.
- Counsel should not make argument, use rhetoric, sarcasm, derision or scorn.
- Counsel should not mention personal feelings.
- Counsel should not refer to any party by their first name.
- Counsel should not treat expert reports with sarcasm.
- Counsel should not make any comments where the purpose is to prejudice the jury.
- Counsel should not make argumentative comments designed to portray a party's position as undeserving of the jury's consideration.
- In a civil trial, counsel should not portray any party or witness as a criminal or otherwise dishonest.
- Counsel's opening should not render the result of liability a concluded event (except where liability has been admitted).
- Counsel should not state that they are fairly outlining the evidence when only part of it is being focused on.
- Counsel should not state what witnesses for the opposing party will say, or what is hoped to be elicited on cross-examination.
- Counsel should not present PowerPoint slides stating what witnesses are going to say. Instead, the slides should say what witnesses are expected to say.
- Counsel should not make legal arguments.
- Counsel should not use such words as "I think," "I believe," "I accept," and "I submit."
- Counsel should not suggest that experts are trying to assist the party that hired them rather than to facilitate justice.
- Counsel should not express pride in his or her client.
- Counsel should not make references to practices of the opposing party that tend to arouse hostility.
- Counsel should not express their personal beliefs in the legitimacy of their client's injuries.

C. Examples of what should not be said

Some examples from various cases of statements of counsel that were held to be inappropriate are listed below. The reason the statement was inappropriate follows in italics. Some of the cases involve closing argument but are applicable to openings as well.[24]

1. Statements made by plaintiff's counsel

- The defendants have brought us into the courtroom because if they had accepted responsibility for their actions, we wouldn't be here.[25] *Incorrect in law and factually wrong.*
- Don't walk away from the plaintiff.[26] *Appeal to sympathy*.
- Make sure that in the future you can assure yourselves that you did right by the plaintiff.[27] *Appeal to sympathy*.
- The defendants are not taking responsibility for their actions.[28] *Puts the defendant on trial, reverses the onus of proof and is wrong in law*.
- The defendants have not accepted their share of the responsibility.[29] *Leaves the impression that there has already been a determination of liability*.
- The defendants have not accepted blame.[30] *The word "blame" is improper and inflammatory.*
- A motorcycle is mobile and dangerous and motorcycles try to gain an advantage in rush hour – it is particularly dangerous in rush hour when you drive, the vehicles and people become impatient and want to go into others' lanes.[31] *Personal opinion*.
- It is only fair that in determining the question of compensation there should be a measure of anger.[32] *Inflammatory and an appeal to sympathy*.
- We are asking for this award on behalf of the plaintiff, and the community, in the hope that this sort of thing will never happen again.[33] *Invites jury members to be punitive and appeals to sympathy*.
- The defendant broke the rules of the road by falling asleep at the wheel of his car and the defendant must pay for breaching the rules of the road.[34] *Creates an atmosphere of sympathy for the plaintiff.*
- We had to satisfy ourselves that my client's injuries are real, serious and permanent and that my client will continue to suffer real harms and losses now and into the future.[35] *Personal opinion being given as evidence, albeit inadmissible evidence, that could never be challenged.*
- The negligent defendant did who knows what degree of damage to other people like the plaintiff.[36] *Suggests that the defendant was, as a driver, a general threat to other drivers and there was no evidence anticipated to be led supporting this comment*.
- My client would much rather have had the defendant accept responsibility and we are in trial because the defendant has not done that.[37] *Not allowed when liability has been admitted because it only arouses hostility.*
- In these types of cases, defence counsel does not always take the high road.[38] *Attacks the moral tenor of the defence*.
- The defence hired investigators to spy on my client.[39] *Unless there is evidence given to show this, it only arouses hostility in the jury*.
- I am not sure what else the defence expert will say or what arguments the defence will raise to try to deny my client fair compensation.[40] *Unacceptable impugning of an officer of the court.*
- I am proud to represent my client.[41] *Personal feelings that are irrelevant to the case.*

2. Statements made by defence counsel

- The plaintiff is a drug dealer.[42] *Highly prejudicial and improper unless it can be proved through means other than cross-examination and is relevant to a matter in issue before the jury*.
- The plaintiff is a high school drop-out and is not gainfully employed.[43] *This may be relevant to the issue of damages, but this type of statement is not necessary to explain any evidence that was intended to be adduced. Because no evidence had yet to be adduced on this statement, it took on an argumentative quality portraying the plaintiff as undeserving*.
- You would have anticipated that the plaintiff would have been seeing a lot of doctors.[44] *Since this is not a comment on any evidence, it is purely argumentative and goes to the credibility of the plaintiff.*
- I feel that this expert report is garbage in and garbage out.[45] *Personal opinion and treats the expert report with sarcasm*.
- I want you to consider yourself being in the position of the defendant.[46] *What counsel wants is irrelevant, and explicitly asking jury members to put themselves in the position of a party is a direct appeal to the sympathies and interests of jury members.*
- The plaintiff is using the accident as an excuse for all things that have gone wrong in his life and as an excuse to shirk responsibilities.[47] *Implies that the accident did not cause all of the plaintiff's injuries, that the plaintiff would say that it did, and that the plaintiff*

was therefore being dishonest. This type of statement attacks the credibility of the plaintiff, is argumentative and rhetorical.

- The plaintiff is taking advantage of the Social Security system.[48] *Goes to the credibility of the plaintiff.*
- Compare the plaintiff to other people you know who have a disability.[49] *Goes to the credibility of the plaintiff.*

In order to warrant a mistrial for inappropriate statements made in opening it must be shown that the misconduct was likely to prejudice the jury, may have affected a verdict, or might reasonably be supposed to have deprived the innocent party of a fair trial.[50] That said, in an application for a mistrial by the defendants in *Schram*, Martinson J. stated:

> There is a heavy onus on the defendants to establish prejudice that cannot be remedied by the court. The question for me is whether or not the court would be able, with this particular jury, in the particular circumstances of this case, to dispel from their minds those matters that are of concern.[51]

Therefore, even if inappropriate statements are made, the jury should only be discharged if the judge feels that he or she can not remedy the effect of the statements on the minds of the jurors. The court will consider the cumulative impact of the statements when deciding whether the effect can be remedied.[52]

If opposing counsel makes inappropriate statements, make your objection to the statements and give notice of the application for a mistrial as soon as possible after the statements are made. Depending on the level of inappropriateness, an objection should not usually be made during the opening of opposing counsel, but immediately following the opening.[53] If an application for mistrial is not brought until after the trial has been completed, it may lower the chances of the mistrial application being successful.[54]

3. Where is the line?

In the case of *Aberdeen* v. *Langley (Township)*[55] I took several precautions to avoid crossing the line between being persuasive and inappropriate. I was careful to use the following approved language in the opening:

> Now let me tell you what I expect you will hear from our witnesses about what happened on June 29, 2002.

The reason I did this was to make sure I did not tell the jurors "what they will hear," or the "story of what happened to Mr. Aberdeen." Although stating the word "story" in your opening is recommended by Ball, different jurisdictions require different precautions. I wanted to avoid the possibility of a mistrial, or at least a correction from the judge. Once I used the safe conventional words I was free to take the jurors back three years and tell them what I expected the evidence would be about the events that led to the accident.

Ball, Friedman and Malone all recommend laying out the rules for the jurors, however one should be careful. It is arguable based on the British Columbia Supreme Court decision of *Joy* v. *Atkinson,*[56] that specifically stating in opening that the defendant broke a "rule" may be grounds for a mistrial. The Court of Appeal in *Joy*[57] focused on the fact that plaintiff's counsel expressed personal opinion and did not discuss whether reference to a rule is inappropriate. While I do not believe that setting out a rule is inappropriate, I would rather err on the side of the line that avoids a mistrial application. I don't believe that the Ball approach requires you to say that the defendant broke the rule. It is enough to state the rule and to then refer to the facts. In *Aberdeen*, instead of stating what the "rule" was, I simply stated that the case involved a consideration of the principle of negligence and gave two examples:

> **Driver**
> A driver of a vehicle must pay attention to where he is driving. If he drives across a solid double line and someone is hurt then the driver is responsible for the harm he causes.
> **City or Township**
> A City or Township must take reasonable care when repairing its roadways.
> If the Township does not take reasonable care and someone is hurt then the Township is responsible for the harm it causes.

While there is no mention of the word "rule," the jurors still received a simple explanation of negligence in the context of the case and I avoided running afoul of any of the authorities. The leading American authors provide very effective strategies for structuring and presenting your opening, however, when implementing these strategies you should not overlook how the law in British Columbia restricts what you can say to jurors.

V. THE IMPORTANCE OF FOCUS GROUPS

Focus groups are an excellent way to rehearse your opening in front of mock jurors and to see which themes, theories of liability, and approaches to damages are most effective. Focus groups can also provide insight into some of the defenses that jurors are likely to pick up on, either implicitly from your opening, or throughout the course of the trial. The more closely the theme of your case fits into the personal experience of the jurors, the greater the likelihood that they will understand and pay attention to your opening.

A focus group can also give you insight into what aspects of your opening are most persuasive, what aspects have a negative impact on the credibility of your client, what aspects can be further developed, and what aspects will cause jurors to lose interest.

The point of a focus group is not to figure out how to change the value or belief systems of a juror. It is an opportunity to gain feedback on your opening and fine tune it in order to strike a cord with the value and belief systems that jurors already have. After presenting your opening, encourage the members to discuss with one another their thoughts about the case. Observing these conversations can provide useful insight. Finally, ask the members of the focus group to tell you or write down answers to the following questions:

1. What do you feel and think about the case?
2. What issues do you consider to be most important?
3. Do you find any aspect of the case unbelievable?
4. Do you feel that some information is missing?
5. What evidence do you think is the most important?
6. Was there anything that you felt could be presented more clearly?
7. What alternate explanations can you think of for what happened?
8. Do you have any questions about what happened in this case? What are they?[58]

VI. CONCLUSION

How you structure your opening and the information you choose to include can have a tremendous impact on the effectiveness of your opening comments to jurors. The principles recommended by authors Ball, Friedman and Malone provide a roadmap to success. These principles will tell you what to say and how to say it. The British Columbia jurisprudence will tell you what not to say so you can avoid the misfortune of a mistrial application. Focus groups will provide useful insight into how to fine tune your opening to best coincide with the beliefs and value systems of the jurors. The defense will try to create complexity, confusion, and ambiguity. You must pre-empt the defense

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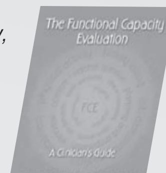

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"Setting an example is not the main means of influencing another, it is the only means."
– Albert Einstein

with a simple, concise opening statement presented through a story untainted by advocacy. While storytelling is the most effective way to introduce your case to the jurors, it is *how* you tell the story which will determine whether the story has a happy ending.

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1 I would like to thank Simon Collins for his assistance while writing this paper.
2 Ball, D., *David Ball on Damages, the Essential Update: A Plaintiff's Attorney Guide for Personal Injury and Wrongful Death Cases* (Louisville, CO: NITA, 2005); See also Perdue, J.M., *Winning With Stories* (USA: State Bar of Texas, 2006); and Friedman, R., & Malone, P., *Rules of the Road* (USA: Trial Guides LLC, 2006); Ball, D. and Keenan, D. *Reptile*: *The 2009 Manual of the Plaintiff's Revolution* (New York, New York: Balloon Press, 2009).
3 BC Reg. 221/90. The new Supreme Court Civil Rules which come into effect on July 1, 2010 adopted this provision under Rule 12-5(72(b).
4 This is made even more difficult by the law in Canada, which (1) prohibits lawyers from asking questions of potential jurors before trial, and (2) prohibits jurors from discussing what happened during the course of deliberations following the trial.
5 Ball, *supra* note 2.
6 Friedman & Malone, *supra* note 2. See difference of opinion between Friedman and Malone at p. 120. Friedman does not like to use the term "Rules" or "Rules of the Road" during the trial. He prefers to use "well recognized standards in the industry" or the "basic principles" approach. Malone says that the advantage of referring to "Rules" is that everyone knows what it means although he cautions that it has the most value when used when referring to "standards" or "basic principles."
7 *Ibid.* at 39-40.
8 Justice Wilson, R.D., Justice Garson, N.J. & Justice Hinkson, C.E., *Civil Jury Instructions*, 2d. ed. (Vancouver: CLE of BC, 2009) [CIVJI].
9 *Ibid.* at 5.1.4.
10 Ball, *supra* note 2 at 124.
11 *Ibid.* at 160-161.
12 You should only refer to allegations in the Statement of Defence that remain in issue at trial.
13 For a detailed explanation on the importance of presenting damages to the jury, and the most effective methods of doing so, see Ball, *supra* note 2 at 142-158.
14 3d ed., Vol. 3, (London: Buttersworth, 1953) at para. 103.
15 [2003] BCJ No. 47 at para. 24 (CA).
16 [2006] BCJ No. 3582 at paras. 26-29 (SC).
17 [2005] BCJ No. 163 (CA).
18 [2004] BCJ No. 2901 (SC).
19 [2004] BCJ No. 963 (CA).
20 [2006] BCJ No. 3582 (SC).
21 [2001] BCJ No. 2663 (SC).
22 [1981] BCJ No. 1214 (SC).
23 [2002] BCJ No. 55 (CA).
24 In *Cleeve* v. *Gregerson*, [2009] BCJ No. 13 at para. 49 (CA) it was stated that counsel has greater latitude in closing than in opening.
25 *Giang, supra* note 17 at para. 128.
26 *Ibid.* at para. 132.
27 *Ibid.*
28 *Schram, supra* note 18 at paras. 51-52, 54.
29 *Ibid.* at paras. 19, 55.
30 *Ibid.* at para. 58.
31 *Ibid.* at para. 31.
32 *Martin Estate, supra* note 22 at para. 6.
33 *Ibid.* at para. 6.
34 *Joy* v. *Atkinson,* [2008] BCJ No. 1127 at para. 1 (SC). This decision was appealed, and ultimately the court held that the mistrial was appropriate on the basis that counsel for the plaintiff expressed his personal belief in the legitimacy of his client's injuries. Despite this, counsel would be wise to exercise caution when describing "rules" to jurors.
35 *Joy* v. *Atkinson*, [2009] BCJ No. 1026 at para. 20 (CA).
36 *de Araujo, supra* note 16 at para.10.
37 *Ibid.* at para. 11.
38 *Ibid.* at para. 12.
39 *Ibid.* at para. 14.
40 *Ibid.* at para. 18.
41 *Giang, supra* note 17 at para. 99.
42 *Brophy, supra* note 15 at para. 42.
43 *Ibid.* at para. 43.
44 *Ibid.* at para. 44.
45 *Ibid.* at para. 45.
46 *Ibid.* at para. 46; *Martin Estate, supra* note 22 at para. 6.
47 *Brophy, supra* note 15 at 47.
48 *McLachlan, supra* note 21 at para. 6.
49 *Ibid.* at para. 14.
50 *Giang, supra* note 17 at para. 113; also supported in *Owimar* v. *Greater Vancouver Transport Authority*, [2007] BCJ No. 630 at para. 40 (CA).
51 *Schram, supra* note 18 at para. 6.
52 *Aberdeen* v. *Langley (Township)*, [2007] BCJ No. 1515 (SC), varied [2008] BCJ No. 2010 (CA) at para. 34 (SC). *Brophy, supra* note 15 at para. 48; *Giang, supra* note 17 at paras. 116-118; *de Araujo, supra* note 19 at para. 54.
53 *Giang, supra* note 17 at para. 125 citing *Brophy, supra* note 12 at paras. 49-56.
54 *Moksaleva* v. *Laurie*, [2009] BCJ No. 1150 (BCCA).
55 *Aberdeen, supra* note 52. Although a judgment was written, the case began as trial by judge and jury. The jury was dismissed after 23 days of trial and the trial continued before Groves, J. The British Columiba Court of Appeal confirmed the findings of the trial judge on liability and damages but ordered that the issue of contributory negligence of the plaintiff be re-tried.
56 *Joy, supra* note 34.
57 *Joy, supra* note 35.
58 Ball, D., *How to Do Your Own Focus Groups: A Guide for Trial Attorneys* (USA: NITA, 2001).