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Closing Address Gone Wrong

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Braks v. Dundeal Canada (GP) Inc.[1] was a case that involved a slip and fall injury claim. The plaintiff, Alison Braks, was exiting an elevator when she fell on the defendants' premises. This claim progressed through a 4-week jury trial up until the end of the defendants' closing submission when the jury was ultimately discharged as a result of the prejudicial impact of the defendants' closing submission.

Following the closing submission, the plaintiff brought a motion to strike the jury on the basis that "inflammatory, emotional, irrelevant and hearsay comments expressed in the defendants' closing submissions and repeated throughout the trial were egregious and incapable of repair."[2] The Honourable Justice Ramsay agreed and held that "the defendants' closing address made a fair trial all but impossible."[3] Her Honour held that defence counsel made too many "transgressions" to cure through a jury instruction.[4] As a result, the jury had to be struck to guarantee the plaintiff a fair trial.[5]

The transgressions identified by the plaintiff included improper comments by counsel, misstatements of evidence and law, an invitation to the jury to accept unproven hearsay evidence which did not comply with the rule in *Browne v. Dunn*[6], and the suggestion that a determination on the evidence could be supplanted by one's personal experiences and common sense.

It was the cumulation of these transgressions that resulted in the plaintiff establishing that justice to the parties was better served by discharging the jury. Justice Ramsay held that "…the fairness of the trial was put in jeopardy from the defendants' opening submissions to the jury, events that occurred during the trial, and culminating in numerous transgressions, which cumulatively were not capable of being cured without distracting the jury from its primary task."[7]

The purpose of a closing address is to persuade the trier of fact of the merits of one's case and "to present each party's case clearly and in a way that is of help to the Court in the performance of its duty to decide the issues before it."[8] There is a great deal of latitude for counsel to advance the client's cause fearlessly and with vigour in a closing address but this is not without

[1] 2022 ONSC 4015 [*Braks*].
[2] *Ibid* at para 8.
[3] *Ibid* at para 5.
[4] *Ibid* at para 27.
[5] *Ibid* at paras 6, 16, 27 and 127.
[6] *Browne v Dunn*, [1893] J.C.J. No. 5, (1894) 6 R. 67 [*Browne*].
[7] *Braks, supra* note 1 at para 27.
[8] *Ibid* at para 30.

limit and the jury must not be distracted from its task of deciding the case on the evidence and to ensure that neither the appearance nor the reality of trial fairness is undermined.

Before analysing where the defendants erred, Justice Ramsay reviewed what a closing address should not contain:

> …it is generally accepted that in a closing address, counsel may not give their personal opinion of the case, misstate the evidence, make remarks that appeal to the jurors' emotions, rather than their reason, or which impede the jury from an objective consideration of the evidence, and which encourage assessment based on emotion or irrelevant considerations…Remarks made to the jury must be supported by the evidence. Counsel may not misstate the evidence at trial.[9]

In the following sections, we will review some of the errors in the defendants' closing submission which resulted in the jury being discharged.

I) Misstating the Law and Evidence and Relying on Unproven Hearsay

The Court found that defence counsel misstated the law regarding contributory negligence. Counsel must always be cautious when addressing the jury regarding the principles of law, which is the Judge's responsibility. In a closing address, if counsel refers to the law it should advise the jury that they are to follow the law provided by the trial judge in the charge. Justice Ramsay held that, on its own, this error likely could have been addressed through the charge but it was compounded by many errors regarding the evidence.[10]

Counsel must properly state the evidence and only refer to admissible evidence. In *Braks*, counsel relied on an incident report, which contained hearsay statements from the plaintiff that were never put to the plaintiff during cross examination[11], thereby breaching the rule in *Browne v. Dunn*. The rule in *Browne v. Dunn* requires that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given a chance to address that evidence.[12] Yet "in her closing address, counsel for the defendant challenged the credibility of the plaintiff and invited the jury to believe the unproven hearsay evidence over that of the plaintiff's."[13]

Justice Ramsay also highlighted the fact that the defendant was advised by the Court on the "limitation on the incident report" and throughout the trial was "cautioned about the restriction of otherwise inadmissible evidence/hearsay, being admitted for the truth of the content."[14]

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[9] *Ibid* at para 36.
[10] *Ibid* at para 46.
[11] *Ibid* at paras 4 and 48.
[12] *Ibid.* at para 64.
[13] *Ibid* at para 63.
[14] *Ibid* at para 71.

While this was only one of many errors, Justice Ramsay held that it would be "all but impossible" to correct this particular error through the charge.[15]

II) Misstating Evidence and Expressing Personal Opinion

Defence counsel also made suggestions, based on personal views, regarding the nature of the plaintiff's injuries and whether they should be believed by the jury.

Significantly, counsel misdirected the jury by suggesting that the plaintiff did not report hitting her head and as a result, did not suffer a head injury, even though all of the experts, including the defendants' experts, agreed that the plaintiff had suffered a concussion and that direct impact to the head is not necessary for a person to suffer a concussion.[16] Justice Ramsay held that counsel's personal opinion was both "improper and not supported by the evidence."[17]

Counsel also misstated evidence or expressed a personal opinion on other occasions, including the following examples: providing personal opinion on the timing of the commencement of certain medical symptoms; providing personal opinion on the cause of medical symptoms; misstating the evidence of the treating neurologist; misstating that certain medical records contained no complaints from the plaintiff relating to the fall when they actually did; misstating that the plaintiff received a work promotion even though this evidence was never elicited; misstating the plaintiff's income amounts; misstating that one doctor wrote that the plaintiff's "chronic neck pain settled" despite writing "chronic neck pain settling"; misstating that the family doctor wrote that the plaintiff's concussion symptoms have resolved when instead she wrote that the plaintiff "reports" her concussion symptoms have resolved; misstating that the family doctor wrote that the plaintiff returned to work, when her notes read that there was a telephone call with the patient "regarding" returning to work; misstating that the family doctor had no specific concern from the plaintiff's visit to the neurologist, when the family doctor's evidence was that she had no specific "new" concern; and, referring to "other records" which were not in the evidence, leaving the jury to speculate.[18]

This lengthy list of remarks made by defence counsel that did not align with the evidence appears to have played a significant role in the Court's decision to discharge the jury.

III) Reliance on Inadmissible Opinion Evidence

Finally, defence counsel attempted to admit the inadmissible opinion evidence of a neurologist, Dr. Giles.[19] This was apparently an ongoing issue from the opening statement and required a ruling during the trial. The opinion evidence of Dr. Giles, who did not testify, "should not have made its way, even indirectly, into any party's opening address or the closing address."[20]

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[15] *Ibid* at para 77.
[16] *Ibid* at para 84.
[17] *Ibid* at para 83.
[18] *Ibid* at paras 83, 87-89, 93, 96, 97-100, 102-103, 110-111, 113 and 122-123.
[19] *Ibid* at para 105-107.
[20] *Ibid* at para 108.

In general, Courts are guided by the principle that clear improprieties in an opening or closing address are to be identified for the jury and coupled with an unambiguous direction to the jury that they are to be disregarded as irrelevant.[21] However, there are circumstances where the breaches are so significant that no corrective instruction to the jury can repair the damage that has been done to trial fairness. Ultimately, the Court must decide whether justice to the parties would be better served by discharging or retaining the jury.[22]

Justice Ramsay held that the cumulative effect of the offending statements in the defendants' closing address were such that a fair trial could not be had and discharged the jury as a result. There was simply no instruction that could cure the prejudice to the plaintiff. This is not surprising given the litany of errors addressed by the Court, many of which were raised during the trial and repeated in the closing address. The outcome is unfortunate for everyone involved, including the jurors who dedicated weeks of their lives to this matter, only to be discharged without reaching a verdict.

The decision serves as a reminder of what to avoid in a closing submission. Best practices for a closing submission, include preparation of the closing submission as far in advance as possible. This must include a meticulous review of transcripts (if available) and notes for accuracy to ensure the evidence is never misstated.

From there, Counsel can focus on effective advocacy with the goal of being as persuasive as possible in tying the evidence to the themes that the party has identified throughout the trial. There is nothing improper with personalizing your client (in the right type of case) or speaking with emotion to the jury as long as it is based on, and fair to, the evidence. The goal is always to be persuasive, and the delivery of counsel and language used are critical in that regard. However, the argument should never be based on the opinion of counsel or in any way unfaithful to the trial evidence.

Some practical tips for the preparation and delivery of a closing submission before a jury based on *Braks* and the author's recent trial experience are as follows:

- Begin drafting the closing submission as early as possible so you can focus on establishing the evidence required to make your argument.
- Know what the witnesses have said by taking detailed notes throughout trial.
- Be persuasive and use appropriate rhetoric, language and analogies to keep the jurors engaged. Make it clear to the jurors why the case is important to your client.
- Do not summarize all of the evidence. Focus the jurors on what is important to your client's case and highlight the witnesses and evidence that they should focus upon in their deliberations.

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[21] *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.) at para 106.
[22] *Braks, supra* note 1 at paras 23 and 130.

- Address and contextualize the other side's arguments and explain to the jurors what the other side is not seeing or understanding. Where the other side has focused on evidence of marginal relevance it is helpful to remind the jurors what the case is and is not about.
- Consider what exhibits or other demonstrative evidence should be shown to the jury during the address or should be highlighted for the jury to focus on during their deliberations. There may be many trial exhibits and it is best to focus the jurors on those that are important.
- Address the law, where necessary, but defer to the trial Judge and the charge on all issues of law; and,
- Make it clear what the case is about what you are asking the jury to decide and take the jury through the jury questions and the desired answers so there is no confusion during their deliberations.

Similar considerations and tips apply to a closing submission before a Judge alone, however in that scenario there is typically a greater focus on reviewing the law and addressing the Judge's questions and areas of concern. Counsel must still aim to be persuasive and to thoroughly review the facts and requested findings but should anticipate the concerns the Judge may have about the evidence or the law.

Whether before a jury or a Judge, Counsel should close strong. By then you and your client will have hopefully made a connection with the jurors. During those last few moments, remind the jury why the case is important to your client and why, based on the evidence, they should find for your client.