GERARD MULLINS, QLD

TRIAL school

The *Opening*

This is the second in a series of articles on advocacy for young practitioners.

During my early years of practice, I would often find myself in the Magistrates Court clashing with other young lawyers on small cases about difficult issues. These were only short trials, heard in front of a magistrate over the course of a day or two, but would often involve some degree of complexity of law or fact. The fight would be about the costs of a renovation, the purchase and sale of a motor vehicle, the repair of a tractor, the fitness for purpose of certain goods sold, or the cost of landscaping work.

It was common for a magistrate at the start of a case to say to the plaintiff's lawyer: 'I don't require an opening, Mr X, if your opponent doesn't.' The plaintiff's lawyer would glance across expectantly, hoping to avoid the process of having to open their case. If the defendant's lawyer was smart and well prepared, they would not require an opening and the evidence would proceed.

After losing a couple of trials, and realising that the magistrates who decided against me sometimes didn't really understand my case, the value of the opening soon became clear. It is the first opportunity for the plaintiff's lawyer to lay down the theory and the theme of the plaintiff's case and explain the case so it is understood. It is the first – and probably the best – opportunity to persuade. In a judge trial, it is the opportunity for the plaintiff's lawyer to map out precisely what the case is about and to ensure that the judge understands the essence of the case. This is critical in any case in which there is complicated expert evidence. In almost every case that proceeds to trial there is some evidence of a medical, accounting or engineering nature. The opening is the plaintiff's opportunity, uninterrupted by the defence, to take the court through that evidence, whether it is written or oral, and explain what the evidence means.

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If at the conclusion of an opening in a judge trial, the judge fully understands the facts and theory of the plaintiff's case and the evidence through which it will be proved, the plaintiff has taken the first step to proving their case. It is for the defence to then persuade the judge that the plaintiff's perspective on the case is wrong.

This article is too short to be an instruction manual on opening a case. But what follows are a few short points that might help when you're putting together an opening in a trial before a judge sitting alone.

THE 60-SECOND VERSION

Don't forget that judges are lawyers. They like to get their heads around a problem as soon as they can. They want to understand the boundaries of a case as quickly and simply as possible. Most lawyers tend to read the headnote of a law report before proceeding to the main body of the case so they can understand the essence of what the case is about. Likewise, judges like to hear the headnote of your case to understand what it is about. At the outset, provide the judge with the key information and give them a '60-second version'.

PLEADINGS

Some lawyers drag the judges through the pleadings during the course of the opening. This can be boring and tedious. But a review of the pleadings can be helpful for at least two purposes: First, key admissions to allegations in the statement of claim should be brought to the judge's attention and referenced back to the pleadings. For example, an admission of vicarious liability (where you think there may be none) is obviously a key admission to ensure that the issue does not arise during the course of the case.

Second, the plaintiff's lawyer is entitled to refer to the defendants pleading during the opening. If you want to raise a point for which you intend to lead evidence in response, identify the allegations in the pleading and then state the evidence you intend to lead to rebut that proposition.

VISUAL AIDS

Judges are human (yes, they really are). They find it easier to understand things explained to them with the use of a diagram or picture. If you intend to use a visual aid during the course of the trial, whether it is a photograph, diagram, computer animation or model, ▶

show it to the judge when you are explaining to them what the case is about.

If, for example, the case involves complicated medical evidence and your medical expert intends to demonstrate the consequences of an accident by use of an x-ray, take the first step and explain the process to the judge yourself. This will help you understand the case and enable you to give a brief explanation in lay terms that will set the foundation for the judge to understand the expert's evidence.

Something as simple as a chronology or a timeline can help anchor critical dates in the judges mind.

NEGATIVE ASPECTS OF YOUR CASE

If your case has a negative aspect and you know that it is almost certain to come out in the evidence, don't ignore it. Deal with it in the opening. Take instructions from your client on the negative aspect, formulate your answer to the problem and address it. In some circumstances, you can raise the issue as a direct answer to something in the pleadings or other disclosed evidence.

For example, where it is alleged that there is another cause of an injury, you can refer to that passage in the pleadings and then explain why your evidence will demonstrate that the cause referred to by the defendant was not a cause of the event. If the defence allege that the plaintiff was not wearing a seatbelt (and he wasn't), you can refer to that passage in the pleadings and give the plaintiff's explanation.

Don't be frightened to face up to the negative aspects of your case. To provide the explanation at an early point in the hearing will undermine the defence case.

OVERSTATEMENT

Don't overstate the case. Don't say that you can prove something if you can't. Resist the temptation to exaggerate during the course of telling the story. If you say something and the judge notes it, and then you can't prove it, it looks like your case has not come up to proof.

DETAIL

I have read a lot of papers and textbooks on advocacy and the opening statement. I have heard many speakers at conferences talk on the same topic. Different advocates have different views on whether an opening should be detailed or in a summary format.

I think the decision depends upon the type of evidence. If you are opening evidence as to the operation of a piece of equipment, it is essential that the judge fully understands how the equipment operates and knows about its component parts. You must spend time, with the use of your visual aids, explaining in detail how it works and why the defendant was negligent in failing to properly maintain the equipment.

Conversely, if you are opening evidence about the plaintiff's employment history, a schedule with a few short comments as to why the plaintiff is no longer able to engage in these activities is more than enough to convey the essence of your case.

A FINAL WORD

Most importantly, recognise that your opening is the first chance to lay out the case for the judge. When I first came to the bar, my master was Shane Herbert QC, a prominent criminal barrister in Queensland at the time. His advice to me was to take advantage of the significant forensic advantage in being the first lawyer to rise to your feet in any case. If you can 'get the judge thinking your way', it then rests for the defence to shift the judge from that mindset. If you haven't persuaded the judge of the merits and logic of your case before you sit down after your opening, your opponent is unlikely to do anything to help you. PL