Case Name:

Carleton v. Beaverton Hotel

RE: Randy Carleton, Louise Kouba, Judith Avery, Jay Carleton and Mark Carleton, and Beaverton Hotel, Robert James Davis, Re/Max Country Lakes Realty Inc., Ian Burney, Kawartha Credit Union Limited, 1194206 Ontario Inc., Donald Warner, John Doe, The Township of Brock and The Regional Municipality of Durham

[2009] O.J. No. 5325

Court File No. 23745/03

Ontario Superior Court of Justice
Whitby, Ontario

J.E. Ferguson J.

December 8, 2009.

(11 paras.)

Counsel:

Gary Neinstein and S. Koumarelas, for the Plaintiff.

Martin B. Forget and M. Hockin, for the Defendant Robert James Davis.

Robert Zochodne, for the Defendants, Re/Max Country Lakes Realty Inc. & Ian Burney.

ENDORSEMENT

1 **J.E. FERGUSON J.**:-- The plaintiff, Randy Carleton sues Robert James Davis, Ian Burney and Re/Max Country Lakes Realty Inc. for damages arising from an incident which occurred on March 28, 2003 at the Beaverton Hotel in Beaverton, Ontario. The trial proceeded with a jury on October 19, 2009.

2 Following the plaintiff's opening address to the jury on October 21, 2009, Mr. Forget, speaking on behalf of the remaining defendants, provided some 38 objections.

3 The transcription of the opening address is attached to these reasons as "Appendix A".

4 Lauwers J. very recently had this issue arise in *Trypis v. Lavigne,* [2009] O.J. No. 2089, 2009 CanLII 25321 (ON S.C.). Quoting from him: The rules applicable to opening jury addresses are set out at length in Donald S. Ferguson Ontario Court Room Procedure (2009) Appendix 16.22 at page 1641 and following. In general terms, inflammatory remarks are not permitted, nor is argument in an opening jury address. In *Brochu v. Pond* 2002 CanLII 20883 (ON C.A.), (2002), 62 O.R. (3d) 722 of (C.A.) Cronk J.A. set out some of the purposes for these rules:

> 15 Some restrictions apply to both openings and closing addresses. For example, the expression by counsel of personal opinions, beliefs or feelings regarding the merits of a case has no place in either an opening or a closing address to a jury. That restraint is designed to prevent lawyers from putting their own credibility and reputations in issue, and to avoid any indirect invitation to a jury to decide a case based on information or opinion not established in the evidence. (Internal citations omitted).
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> 16 Similarly, comments to a jury which impede the objective consideration of the evidence by jurors, and which encourage assessment based on emotion or irrelevant considerations, are objectionable at any time. Such comments are "inflammatory", in a sense that they appeal to the emotions of the jurors and invite prohibited reasoning. If left unchecked, inflammatory comments can undermine both the appearance and the reality of trial fairness. (Internal citations omitted).

5 Ferguson J. states in *Hall v. Schmidt* [2001] O.J. No. 4274 at paragraph 64:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching its verdict."

6 The task in reviewing a jury opening is to determine whether the rules have been offended, how serious the prejudice is to the other party, and what should be done in respect of each individual challenged statement and all of them cumulatively (*Trypis v. Lavigne*, 2009 CanLII 25321 (ON S.C.).

7 James K. Fireman is the author of an article in "The Litigator", April of 2009, titled "Avoiding a Mistrial in Opening and Closing Statements". He provides a helpful summary of the law on the opening address. The do's and don'ts with possible application with respect to this address include:

(i) in dealing with the use of argument, it is not appropriate to explicitly suggest to the jury the conclusion that should be drawn from the facts;
(ii) when referring to evidence of witnesses who are not certain to be called during the trial, counsel should use a great deal of caution;
(iii) counsel are not permitted to express their own opinions or give evidence;
(iv) counsel must not put their integrity in issue or the credibility of opposing counsel into consideration;
(v) statements made must not appeal to emotion and irrelevant considerations;
(vi) insurance coverage is not to be addressed;

8 My areas of concern with this particular opening include the following:

(i) "and soon after the collapse of the rear wall, Mr. Burney took advantage of the lack of money of Mr. Davis and the insurance company refused the claim." - **this was an improper reference to insurance.**
(ii) "and the skull is like, a pretty thin material there, like a squish. He has a skull - teeth are being spit out. The ambulance comes ... boy he must have had some skull because he's still alive." - **this is an expression of counsel's opinion and the description of the injury appeals to emotion.**
(iii) "He's a working stiff. He knows nothing else. - he had an excellent reputation in that area, and that's why the local municipality recommended him to both Mr. Davis and Mr. Burney." - **this is an expression of counsel's opinion, a statement appealing to emotion and a comment by counsel on the plaintiff's credibility.**
(iv) "Now throughout this trial and I guess during the cross-examination, you'll hear - you'll see videotapes. The defence has spent a small fortune, videotaping Randy Carleton ... - and they got them working. And guess what? He said he was working. He never sat down and died." - **these comments put credibility of opposing counsel into issue and suggest that video surveillance is not a proper tool to be used in litigation.**
(v) "Now his evidence is - will be that, where are the documents? Where are the contracts? Where are these? But as a result of this accident, he has severe memory problems. Brain damage is irreversible. The brains inside your head are like Jell-O and when you get hit, they shake around and there's serious damage - frontal lobe damage and other areas to the base of the skull." - **this is an expression of counsel's evidence. Further, counsel is trying to rehabilitate his client's case regarding the documentation issue.**
(vi) "we'll get the experts here, they are some of the finest experts in Ontario or Canada. Dr. William Geisler, who is a brain stem injury expert. Dr. Perrin, who - you heard about all the witnesses - the jurors

the other day, when they asked "do you know any of these doctors?" ... That juror said "I know Dr. Perrin. A great doctor. He saved my wife's life." - **not appropriate for counsel to express opinion, particularly about their own experts.**

(vii) "If this was a motor vehicle accident, members of the jury, because of his Glasgow coma scale, and it's not a motor vehicle accident. But under the legislation they have categories of severity of injury, and this would be called, his injury would be called catastrophic. And indeed it is a catastrophic injury." - **it is inappropriate to refer to motor vehicle legislation. Counsel is also giving his opinion and evidence that this is a catastrophic injury.**

(viii) " - he was divorced from his wife in 1998 or 1999. His wife used to do his books and records. It was a bad divorce. He caught her, what's the word - philandering - a serial philanderer. It devastated him. It was a bad divorce and he just finally settled about a year or two age." - **this is an expression of counsel's opinion. Counsel is appealing to emotion and is attempting to raise sympathy for the plaintiff.**

(ix) "... he didn't keep books and records, didn't file income tax returns. Much to be made - much will be made about it ... do you remember Mulroney had problems with the Schreiber inquiry ... so I kept this heading from the Globe and Mail ... So if the poor Mr. Mulroney, the Prime Minister of Canada, is a poor record, what do you expect from a guy who didn't finish grade 8". - **the analogy to our previous Prime Minister is inappropriate.**

(x) "By the way, Randy has never stiffed a worker in his life. Anyone who works for him is paid that day for his day's wages. Never stiffed a person. I spoke to several of the people who work for him. When he works for him, they are paid. They've got families. His concern is that they have families, mortgages, rent." - **these were comments made in an attempt to raise sympathy for the plaintiff. It is also an expression of counsel's opinion.**

9 Counsel's opening is so replete with inflammatory language that even at this early stage I fear the defendants will be denied the right to a fair trial based on admissible evidence, not on sympathy or prejudice. The prejudice, in my view, cannot be remedied by a caution or by limiting instruction to the jury. The appropriate remedy in this case is to discharge the jury, declare a mistrial and order a new trial to commence as soon as practical before a new jury.

10 It would have been impossible to reverse the prejudice to the defendant by means of a jury instruction. I am not satisfied the prejudice can be remedied under these circumstances. In my view a mistrial was the only appropriate remedy. While some of the improper content could have been made the subject of an adequate corrective instruction and would not justify a mistrial, the cumulative effect of all the improper content required a mistrial.

11 Counsel for Robert Davis has moved for thrown away trial costs. Counsel for the plaintiffs submitted that he is entitled to costs for the defence's failed motion to strike the economic loss claim. Submissions on costs have been deferred.

J.E. FERGUSON J.

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