

# OPENING STATEMENT IN THE TRAUMATIC BRAIN INJURY CASE

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“You only get one chance to make a first impression.”

“First impressions are lasting impressions.”

“Early impressions are hard to eradicate from the mind. When once wool has been dyed purple, who can restore it to its previous whiteness?” -St. Jerome

## **I. Introduction**

It would be difficult to overestimate the importance of opening statement in a traumatic brain injury case. From the moment jurors enter the courtroom they begin the process of establishing the frame or lens through which they will view everything else they hear and see. In jurisdictions with limited voir dire, opening statement will be the first real opportunity they have to hear the story behind the case they will soon be deciding. Opening statement is the framework by which the jurors will sort, keep or discard the testimony and other evidence presented during trial. It is imperative that the Plaintiff's opening be presented in a way that minimizes juror resistance to the key concepts they must accept for Plaintiff to prevail.

## **II. Resources**

There are numerous books available to assist with mastering opening statement and other trial techniques. I strongly encourage anyone preparing to try a traumatic brain injury case to read *Damages 3* by David Ball, *Rules of the Road* by Rick Friedman and Patrick Malone, *Polarizing the Case* by Rick Friedman and *Reptile* by Don Kenan and David Ball. Each of these books is a must read for

every Plaintiff attorney.

### **III. Preparation**

Good trial preparation should begin with the jury instructions and work backwards from there. The correct time to prepare your opening statement is after you have prepared the verdict sheet, jury instructions, closing argument, direct and cross examinations and key exhibits. That way everything in your case will point to one inescapable conclusion: the only proper verdict is a verdict for the Plaintiff. Trial preparation should begin as soon as discovery is complete.

In most cases, I write out my openings completely. I then review every word carefully. Word choices have consequences. Every statement in the opening should be evaluated based on these questions: Is the impression I am making the one I intend to make? How can what I have said be misinterpreted and misconstrued by the jurors who are inclined to be opposed to my case? Is this information really necessary for the jury to understand and decide my case? Then go back a few days later and review it again. Invariably, you will find something that does not say what you really intended to convey.

### **III. Goals of Opening**

A properly crafted opening will achieve several goals at once. It will educate the jury about the facts and concepts they need to know to decide the case. It will teach them how to do their job during the trial. It will inoculate the jury against the strongest defense arguments. It will start them thinking about the harms and losses and the proper amount of compensation to balance those harms and losses.

The opening statement must present the basic facts of the case while, at the same time, tell a good story. Everyone loves a good story. Jurors will listen better and thus absorb more of the facts they must believe for you to win if you present those facts in the form of a story. A good story will have a beginning, a middle and an end. There must be a conflict to be resolved.

Most importantly, a properly crafted opening will establish your credibility as the most reliable source of accurate information during the trial. Almost every juror in a traumatic brain injury case will have a high level of suspicion about you and your client. In the minds of jurors, many of the harms and losses arising from a brain injury are easy to fake and exaggerate. This increased level of suspicion

makes your credibility all the more important. Do NOT become an advocate or attempt to persuade early in your opening. This will only build resistance to you and your case.

#### **IV. Structure**

Good structure is essential to creating an effective opening statement. In *Damages 3*, David Ball insists that the template he provides is the only acceptable structure for an effective opening statement. It is his contention that any departure from this structure reduces Plaintiff's probability of success. The template incorporates concepts found in *Rules of the Road, Reptile* and previous editions of *Damages*. His template for the structure of an opening statement is outlined in the following paragraphs.

##### **a. Primary rule(s) the Defendant violated and the consequences**

Opening statement must begin with the rules. A good rule consists of a statement the Defendant must agree with or lose their own credibility should they deny it. The rule should not contain any accusations against the Defendant. It is a short, plain, concise statement of the Defendant's duty to the Plaintiff and the public. "A truck driver must watch the road and see what is there to be seen" is an example of a rule. List only the one or two most important rules in this part of opening.

The rule is followed by the consequences of the Defendant's conduct. In some cases I modify David's suggested format. He suggests, "If the driver does not, even for an instant, and as a result hurts someone, the driver is responsible for the harm." I am concerned this language could imply that the driver would **personally** have to pay any verdict. In cases where the Defendant is an individual or small business, I prefer, "If the driver does not, even for an instant, and as a result hurts someone, the injured person has a legal right to recover restitution equal to the amount of harm caused." I do not want jurors worrying about how the Defendant will pay a large verdict.

##### **b. Story of what the Defendant did**

A short, narrative version of the basic case facts should follow the rule and the consequences. The focus must remain on the Defendant. As that famous radio and TV detective Joe Friday said, "All we want are the facts." Keep it simple. One fact per sentence. Each sentence should move the story forward in time.

Avoid any fact not necessary for the jury to reach its decision. Use present tense. Do not advocate and do not accuse. Do not overload the jury with information.

Each statement should only contain information that could be seen or heard. Minimize references to the Plaintiff where possible. The focus must always remain on the Defendant and the Defendant's conduct.

### **c. Who we are suing and why**

Now it is safe to blame the Defendant. Explain who has been sued and why. If you have additional rules violations they can be introduced at this time. Explain how you know that the rules were violated. The jurors must understand who the Defendant is, what the Defendant's legal and moral responsibilities are and why they are responsible for the harm that they caused the Plaintiff.

### **d. Undermine Negligence Defenses**

The next section should anticipate what the Defendants will say and undermine their liability arguments. Aggressively present your own positive points rather than stating the Defendant's contention and then telling the jurors why they are wrong. Remember this is opening statement not opening argument. The jurors should hear your version of every major defense contention as to negligence. Instead of saying, "you will hear the defense tell you..." explain what you did to insure that there were no valid defenses before you brought the case to trial. "Before we brought this case to trial we had to determine, could the truck driver have seen Mary's car in the road in time to stop? So we talked to Bill Smith, the driver in the lane right beside the truck, and he confirmed Mary's car was plainly visible in plenty of time for the truck to safely stop." Do this for every defense contention.

### **e. Causation and Damages**

This section should introduce all of the harms and losses caused by the Defendant's conduct. Make sure the jury understands why they will hear this evidence. You are not telling them about these things because you want their sympathy, they must hear this evidence in order to determine the proper restitution to be paid to the Plaintiff. They must hear about the harms and losses to do their job at the end of the trial.

Then explain how the negligent acts caused the harm. Most jurors have difficulty understanding how the brain can be injured without an injury to the skull

or head. It is critical that opening statement explain the mechanism of injury. “The brain is made of millions of cells called neurons. Each neuron connects with other neurons. When the Defendant’s truck struck Mary’s car, the force of impact stretched and tore those cells. Some cells died. Connections to other cells were damaged and destroyed. Each of those cells and connections had a job to do. Now there are no cells to do that job. As a result, Mary cannot think like she used to.” Do not overload the jury with technical information. They will not remember it and being too technical may cause them to stop listening.

After explaining how the harm occurred, describe the personal consequences of the harm. That should be followed by what has been done in an attempt to fix the harm. This would include medical treatment, assistive devices, etc. Be sure to tell them about about the harms that cannot be fixed and what the Plaintiff has been left with as a result.

As you go through each harm and loss undermine defense causation and damage contentions. In a mild traumatic brain injury case, the Defendant will almost always contend that there are no objective signs of injury and will attempt to convince the jurors that the Plaintiff does not have a brain injury by emphasizing negative X-rays, MRI’s and CT scans. Tell how your evidence will show that, in fact, the Plaintiff was injured and why “objective” signs of injury are not necessary to establish that the injury is real.

#### **f. Before**

This is the time to tell the jury about the client’s life “before” and contrast it with the life the Defendant has left her with. The perspective should be that of the lay witnesses you will present to demonstrate the contrast in before and after.

#### **g. What the jury can do about it**

End with a brief explanation of what you will be asking the jury to do at the end of the trial. Where permitted, tell the jurors that they have the central role in the trial. It is up to them to hear and weigh the evidence. Make sure they understand that they are the only ones with the power to fix and balance the harms and losses against the harm caused by the Defendant. Explain the larger significance of the case and why the case is important to more than just the Plaintiff and Defendant.

### **V. Building Credibility**

With the constant negative publicity about personal injury verdicts most jurors come into court with a skeptical attitude. Many are thinking, "Those slick lawyers may have fooled the jury in that case I heard about but they're not going to fool me!" They are especially suspicious of claims involving injuries they cannot see such as a traumatic brain injury.

It is absolutely essential that the opportunity to establish and build credibility during opening be maximized. How can you do that? Talk with the jurors, not at them. Make sure you have total command of the facts. It is difficult to recover credibility when you have told the jurors something that is later proven to be wrong. Maintain consistency of theme and message throughout the trial. Build credibility by showing jurors your case is built on concepts they already believe and that Defendant cannot dispute without losing their own credibility. This may mean less emphasis on what is disputed in the case and more emphasis on areas of agreement.

Use juror decision making shortcuts such as framing, confirmation bias, motivated reasoning and hindsight bias to your advantage. Jurors pick and choose the facts they accept as true based on how well they fit their existing belief system.

Confirmation bias is the tendency for jurors to favor information that confirms their preconceptions regardless of whether the information is true. As a result, jurors accept evidence and recall information from memory selectively, and interpret it in a biased way.

Motivated reasoning is the tendency for jurors to accept what they want to believe with much more ease and much less analysis than what they do not want to believe.

For example, jurors as part of their "common knowledge" think that people who get a "concussion" will quickly recover with no significant after effects. This concept it is still the belief that most jurors bring into the courtroom. Getting jurors to accept concepts contrary to their "common knowledge" beliefs is difficult if not impossible. Juror resistance will increase if you start discussing the Plaintiff's persistent post concussive syndrome by stating, "You will hear that Mary had a concussion which has caused permanent memory impairment which prevents her from working."

The solution is to find a way to let them keep their common knowledge and

accept new “additional knowledge.” Instead say, “Dr. Smith will explain that the facts show 85% of people who have a concussion fully recover.” This is consistent with their “common knowledge.” The jurors can accept this fact without having to abandon previously held beliefs. The concept that some will have permanent problems from a “simple” concussion appears less frightening as they can immediately assume they and their loved ones will be in the majority group. You can then go on to say, “Mary was one of those unfortunate few who has not recovered completely. She has permanent memory impairment which prevents her from working.”

## **VI. Other Considerations**

Once the opening statement has been prepared reduce it to a few key words and notes. Do not read your opening statement to the jury! Make sure to maintain good eye contact with the jurors and speak directly to each one as you deliver the opening.

Know the law of your jurisdiction and how your trial judge interprets the rules on opening statements. In North Carolina judges are permitted wide discretion to limit opening statements. We once had a visiting judge issue a written memorandum summarizing his interpretation of the civil procedure rules on opening statement. The memo then went on to say that based on his interpretation of those rules opening statement in his courtroom should take no more than 3 minutes! I was scheduled to try a paraplegia case before that judge in which my client had pulled into the path of a police car answering a call at high speed without blue lights or siren. I knew that limiting opening statements to 3 minutes would hurt my case more than the Defendants’ case. I filed a written motion *in limine* that Plaintiff be allowed at least 30 minutes and stated in the motion why limiting opening to 3 minutes would be prejudicial to the Plaintiff. The Judge agreed to allow me at least 30 minutes. I might have found myself limited to a 3 minute opening in an extremely complex case had I not taken the time to learn about the judge prior to trial.

## **VII. Conclusion**

A carefully prepared and well delivered opening statement can make the difference between winning and losing a traumatic brain injury case. Make sure that the first impression the jury gets of you and your case is a good one. Remember--first impressions are lasting impressions. Bad impressions are hard to erase in the minds of jurors even with the best trial techniques.