Effective Opening and Closing Arguments in Civil Jury Trials

June 16, 2021

10:00 a.m. – 11:00 a.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credits (General)
NY: 1.0 CLE Credits (AOP)

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Biography of Attorney John J. Nazzaro

In 2018, attorney Nazzaro left the Superior Court bench to return as a partner and litigator at the Reardon Law Firm, P.C. in New London. In 2007, Governor M. Jodi Rell appointed attorney Nazzaro to be a Superior Court Judge. In 2016, Governor Dannel Malloy re-appointed the jurist to his second term. Previously, attorney Nazzaro was the Chief Presiding Civil Judge in the Judicial District of New London and Chief Presiding Criminal Judge at G.A. 10, New London. He also served in Hartford, Tolland, Windham, New Haven and New London/Norwich where he presided over civil and criminal, family, jury, and courtside matters. As an attorney in 1995 he became Board Certified in civil law with the National Board of Trial Advocacy.

Before his appointment as a Judge, attorney Nazzaro was a Partner in the firm of RomeMcGuigan, P.C. and Reardon and Nazzaro, P.C. For several years, he managed a solo trial practice in New London. He is a former organized crime and public corruption prosecutor and was named a Super Lawyer in 2007. He is active with the American Association for Justice and the Connecticut Trial Lawyers Association. He graduated with honors from the University of Bridgeport/Quinnipiac Law School in 1984. In 1980, he received his Bachelor's in Journalism with honors from Southern Connecticut State College. Before attending law school, Mr. Nazzaro was a network radio news reporter.

In 2016, the Connecticut Law Tribune bestowed an Excellence award to the former jurist for "[O]utstanding Achievement and Professional Accomplishment." As a Judge, he authored more than four hundred decisions and has lectured on the law and appellate advocacy at Yale and the Quinnipiac School of Law. He lectures and is published on evidence and trial practice. Governor Dan Malloy appointed him to the Judicial Review Council which oversees complaints against Judges and Workers Compensation Commissioners. While a Judge, he also served on the Judicial Branch Speakers' Bureau.

Attorney Nazzaro remains active in the community. He lectures to school and civic groups on Justice, police and addiction issues. He is on the President's Council of the Mystic Aquarium. He is a member of the National and Connecticut Asian Pacific Bar Association. He was the second Asian Pacific American Judge appointed to the bench. He is nominated to the Executive Committee of the New London Chapter of the NAACP.

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Jay F. Huntington, Conway Stoughton LLC

Jay Huntington is a partner with the Hartford firm of Conway Stoughton. He began his career in California, first as a deputy district attorney prosecuting criminal cases, and then in a general practice litigation firm. Since relocating to Connecticut in 1987 his practice has focused on the defense of individuals and companies in civil cases pending in the Connecticut courts. He has represented clients in personal injury, products liability, medical negligence, trucking, defamation, breach of contract, fraud, CUTPA violations, insurance bad faith, professional negligence, wrongful death, uninsured motorist, employment, discrimination, and dram shop cases. He has tried numerous cases to jury verdicts in the states of Connecticut and California.

HUMBERT J. POLITO JR.
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Humbert (Bert) J. Polito Jr., is a principal in the law firm of Polito & Harrington, LLC in Waterford, Connecticut which firm focuses exclusively on all types of plaintiffs' personal injury litigation in Connecticut and in Rhode Island and in the tribal courts in Connecticut. Bert is a native of Cleveland, Ohio where he attended St. Ignatius High School. Bert is a graduate of the College of the Holy Cross (A.B. Religious Studies, 1978) where he was admitted to Phi Beta Kappa. Bert attended the University of Connecticut School of Law (1986) and then served as law clerk to Donald F. Shea of the Supreme Court of Rhode Island.

Throughout his career in the law, Bert has successfully tried and arbitrated cases in both Connecticut and in Rhode Island. As a result, Bert is board certified as a Civil Trial Specialist by the National Board of Trial Advocacy. Bert has also been selected for membership to the American Board of Trial Advocates and the International Academy of Trial Lawyers, which limits membership to 500 fellows from the United States. Bert has served on the Board of Governors of CTLA since 1993 and is currently a member of the Executive Committee. In June 2009, Bert was elected to serve as President of the Connecticut Trial Lawyers Association.

Bert taught high school both before and during law school and continues to be active in teaching. Bert ran the People's Law School Program in New London for several years and currently assists middle school students each year in New London prepare for annual mock trial exercises. Bert also serves as an Adjunct Professor of Law at the University of Connecticut School of Law where he has taught a semester course in Trial Advocacy since 1998.

Bert has been admitted to practice law in Connecticut since 1986 and in Rhode Island since 1987.

Bert has been named Best Lawyers' New London Area Lawyer of the Year for Plaintiffs' Personal Injury Litigation in multiple years including in 2021.

Bert is admitted to practice in all state and federal courts in Connecticut and Rhode Island and is a member of the Connecticut and Rhode Island Bar Associations, the Connecticut Trial Lawyers Association, the Rhode Island Association for Justice, the American Association for Justice and the New London County Bar Association.

Daniel J. Horgan, Horgan Law Offices

Dan Horgan is a Trial Lawyer who has practiced civil litigation for 30 years in New London Ct. He is the incoming President Elect of the CBA. He was mentored by William Davis, Dale Faulkner, Robert Reardon and C. Robert Satti- all incredible Trial Lawyers.

Effective Opening and Closing Arguments in Civil Jury Trials (2021CLC-PT03)

Agenda

Openings Statements

Humbert Polito - Plaintiff's perspective - 10 min
Jay Huntington - Defense perspective - 10 min
John Nazzaro - Judge Perspective - 10 min

Closing Arguments

Humbert Polito - Plaintiff's perspective - 10 min
Jay Huntington - Defense perspective - 10 min
John Nazzaro - Judge Perspective - 10 min

Dan Horgan - Moderator

CONWAY STOUGHTON LLC
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A SAMPLE OF CASES DISCUSSING ARGUMENTS

The following is a collection of cases which discuss claims that counsel made improper arguments during opening statements or closing arguments. This is not a comprehensive review of Connecticut case law but, instead, a sample of cases designed to give some guidance about the bounds of propriety when attorneys talk to juries.

Opening statements

A. In general.

The purpose of an opening statement: "[C]ounsel for any party shall be permitted to make a brief opening statement to the jury in jury cases, or in a court case at the discretion of the presiding judge, to apprise the trier in general terms as to the nature of the case being presented for trial. The presiding judge shall have discretion as to the latitude of the statements of counsel." *Practice Book Section 15-6*. There is no constitutional right to make an opening statement, the court retains discretion whether to allow opening statements. *State v. Ridley, 7 Conn App 503 (1986); see also, Pasiakos v. BJ's Wholesale Club Inc., 93 Conn App 641 (2006).*

United States v. Forbes, 2005 WL 8146315 Oct. 13, 2005. "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 influence the jury in reaching a verdict.'" *Id., (citation omitted).*

"Similarly, the American Bar Association's Standards for Criminal Justice state that an attorney's opening statement 'should be confined to a brief statement of the issues in the case and evidence the lawyer intends to offer which the lawyer believes in good faith will be available and admissible.' A.B.A. Standard for Crim. Just. § 4-7.4." *Id.*

B. Cases.

State v. Gerald A 183 Conn App 82 (2018). Ruled improper comments during an opening statement to explain legal concepts such as the presumption of innocence, the burden of proof, and to contrast the burden of proof beyond a reasonable doubt with the more-probable-than-not burden of proof. That discussion is appropriate for closing arguments but not opening statements.

Leigh v. Schwartz, 2016 WL 1315611 (March 7, 2016). Comments made by counsel during opening statements may open the door to the admission of otherwise inadmissible evidence.

Bligh v. Travelers Home and Marine Insurance Company, 154 Conn App 564 (2015). In an underinsured motorist lawsuit, plaintiff's counsel told the jury in closing argument that she was offended by a remark made by defense counsel during opening statements. The court sustained the defendant's objection to the comment by plaintiff's counsel. The appellate court held the objection was proper. Expression of counsel's personal opinions are improper. Personal attacks on parties and opposing counsel are improper. It is improper for counsel to make arguments that are not supported by evidence in the record.

Sabatasso v. Hogan, 91 Conn App 808 (2005). The trial court properly prohibited plaintiff's counsel from suggesting in opening statement that the plaintiff might have surgery for her injuries in the future. The plaintiff's complaint and expert witness disclosures did not contain any mention of future surgery.

Murray v. Taylor 65 Conn App 300 (2001). This case arose out of a sledding accident at the Woodbury Ski & Racket Facility. Both the plaintiff and the defense made improper statements and claims, and offered personal opinions, beginning in opening statements and continuing throughout the trial. The trial court refused to set aside a plaintiff's verdict and the case went up on appeal. The appellate court discussed the improper remarks of counsel, finding that the improper comments had minimal effect on the outcome of the trial. In reading the opinion, one might conclude the appellate court felt that there was a pox on both houses. The opinion discusses a variety of improper arguments, including the "golden rule" argument. As part of its rational for turning away some of the appellate claims about improper arguments, the appellate court noted the offended party had not objected to certain of the comments during trial.

Naughton v. Hager 29 Conn App 181 (1992). The defendant was a coin dealer and the plaintiff was a printing business. The plaintiff and defendant entered into an agreement whereby the plaintiff would print a book written by the defendant in exchange for a large number of valuable coins. The plaintiff sued the defendant for misrepresenting the value of the coins given under the deal, causing the plaintiff to receive much less in value than the defendant had represented the value to be. The defendant moved for a mistrial after the plaintiff, in his opening statement, said that the defendant had been dismissed from the American Numismatic Association for failing to respond to a complaint. Counsel also referred to the Association as "an organization that apparently oversees coin dealers and people who invest in coins and people who buy coins." Following a plaintiff's verdict, the appellate court upheld the denial of a mistrial for two reasons. First, the defendant made the tactical decision to introduce evidence concerning prior complaints against him. Second, there was ample evidence to support the jury's verdict for the plaintiff.

Closing arguments

Audibert v. Halle, 198 Conn App 472 (2020). This rear-end automobile accident case is loaded with examples of improper arguments. Among other things, defense counsel argued, "This is all about money. You couldn't see it more clearly than we see that… if someone wants to get money, and this is what it's about, … they might … say things that are going to benefit them." "She might have had it [back pain] in the past. She could have … had it and not be telling the truth about it today…" In arguing that the plaintiff did not faithfully attend physical therapy, counsel speculated that the failure to attend might have been because the plaintiff felt completely better, "That doesn't sound like someone who actually has pain and suffering." He went on to argue, "She has all the time in the world to go to physical therapy. … She didn't go to physical therapy … [s]he didn't do it, she lied to her doctor." Counsel also argued the plaintiff misled the jury. He went on to argue that when therapy was being taken it seemed to be helping, but perhaps the plaintiff stopped attending regularly after she began thinking, "I am doing better, but then she [is thinking]- you know, [about the] lawsuit… Attorney Pryor's the one that's … on the letter in January not long after this accident; so that's what's going on." Counsel also argued that the plaintiff's testimony about how the accident happened was different at trial than what the plaintiff said during her first medical visit following the accident; he went on to argue that she made up the current version of facts once she decided to pursue a lawsuit. The appellate court found these arguments improper and violating the rules of professional conduct which prohibit attorneys from, one, commenting on the veracity of a witness's testimony, two, offering personal expressions of opinion on evidence, three, referring to matters not in evidence, and four, appealing to the emotions, passions, and prejudices of jurors. Discussing the improper arguments presently before the court, the appellate court referred to other arguments previously found to be improper. Those arguments included "Calling the opposing side's arguments a combination of sleaze, slime and innuendo, and characterizing the testimony of a defendant as weasel words… or arguing that the defendants provided testimony to save their filthy money." Other examples included discussing a defendant country club's lack of insurance, and the impact on a jury's decision if one of the jurors' children had visited that country club and was injured. Further, arguing defense counsel used tactics similar to criminal defense lawyers in sexual assault cases was offered as an example of improper argument. Additional examples of improper argument include counsel misstating the law despite a court's prior ruling, or arguing that if a verdict is rendered for the plaintiff, the financial burden on the defendant town would eliminate sports in that town.

D'Angelo v. Newkirk & Whitney, 2011 WL 6413797 (Nov. 29, 2011). In this slip and fall case the trial judge denied a motion to set aside a defense verdict based on an improper argument by defense counsel. The defense lawyer argued to the jury, "As a tax payer in the State of Connecticut, I am offended that the plaintiff claims he has a 20% permanent disability when he has been receiving social security disability benefits for allegedly being totally disabled. And you should be offended, too." The court observed that the remedy for improper argument which is so inflammatory as to affect the outcome of the trial is a new trial. In denying the motion for a new trial, the court contrasted counsel's improper argument, that he or she was offended by the plaintiffs bringing a lawsuit while on social security disability benefits, to arguments made in another case which were found to warrant a new trial. In that case, plaintiff's counsel commented

on the defense attorney's appearance, the size of his firm, the position of his counsel table, and the type of clients he represented. Plaintiff's counsel, in that case, also told the jury a story about a criminal defense lawyer who tried to convince a jury that his client was innocent of a murder by taking poison that was an exhibit, drinking it, making a summation to the jury, then walking out of the courtroom to his doctors who were waiting there to pump his stomach. From that story, plaintiff's attorney argued that the defense was trying to pull a similar trick to fool the jury. These comments warranted a new trial.

Esposito v. Woo Young Chi 2010 WL 5030141 (2010). In a motor vehicle accident case, the defendant amended his answer in the middle of trial to admit one specification of negligence. The court allowed into evidence the original answer denying negligence. The plaintiff then went on to analogize the course of the pleadings to a child who hits a ball through a window, arguing there are two ways the child could handle that: do the right thing when parents get home, "Or you can lawyer up. You can start putting a spin on everything. You get your handlers to take care of it…" The lawyer then went on to argue that the defendant improperly allowed an inaccurate pleading to be filed on his behalf. Further, counsel continued that this was a pattern of an effort to escape responsibility. While close, the trial judge found these arguments were not improper, given the course of the trial, and the behavior of both plaintiff and defense counsel throughout the trial. The judge contrasted the remarks made in the case at bench to remarks made in another automobile accident case where the appellate court upheld the setting aside of the verdict. In that case, defense counsel was ordered to stop arguing that the jury should consider skid marks in determining the speed at which the vehicle was travelling. Counsel disobeyed the court's ruling, continuing to make references to skid marks. Further, he argued the plaintiff was "suit happy" and "looking for a handout," when there was no evidence to support those arguments.

Forrestt v. Koch, 122 Conn App 99 (2010). The defendant in a medical malpractice lawsuit withdrew special defenses of contributory fault following completion of evidence, before closing arguments. Defense counsel then made several references in closing argument questioning decisions the plaintiff made about his medical care, clearly implying the plaintiff was at least partly responsible for causing his injuries. Following a defense verdict, the trial court denied the plaintiff's motion to set aside the verdict. The appellate court upheld the verdict, observing that counsel did not object to the comments during closing argument and did not move for mistrial. Instead, counsel addressed the comments in rebuttal argument and requested, and received, a curative charge. Lastly, the plaintiff/appellant failed to furnish transcripts of the trial testimony so the appellate court could not weigh the relative strengths of the plaintiff's and defendant's cases in order to better gauge how prejudicial the remarks might have been.

Sturgeon v. Sturgeon, 114 Conn App 682 (2009). A carpenter was on a ladder repairing a home when the ladder kicked out and he fell. He sued the homeowner. The plaintiff alleged the homeowner was negligent because the homeowner initially held the ladder to stabilize it, but then walked away. Further, he improperly supervised the positioning of the ladder. During closing argument, defense counsel argued that the plaintiff failed to produce any expert testimony on the issue of proximate cause. The court allowed the argument over objection. The appellate court affirmed, holding the argument was proper.

Palkimas v. Lavine, 71 Conn App 537 (2002). The court held defense counsel's arguments to be improper and a violation of the code of ethics in a motor vehicle case following a low impact motor vehicle collision. Defense counsel vouched for the credibility of his client by arguing that, in a conversation outside the courtroom, the defendant said to her attorney she wanted to tell the jury how she felt about this lawsuit but he counselled her that she had to stick to the facts only, and had to tell the truth. He went on to say that she had told the truth. The appellate court held the remarks improper but not cause for a new trial, all things considered.

Tornaquindici v. Keggi 94 Conn App 828 (2006). It was improper in a medical malpractice case for plaintiff's counsel to argue the defendant doctor tried to cover up a medical mistake and that the jury should send a message to the defendant that no one is above the law. More specifically, the plaintiff argued that a well-trained, highly skilled surgeon, who realizes he made a mistake might well be tempted to keep quiet about the mistake since no other surgeon was in the operating room to call into question the surgeon's actions. The attorney then analogized the situation to instances reported in the media where "fine people, people of substance, decent people…a priest, or a business tycoon on Wall Street…" strike a pedestrian with a vehicle at night and then leave the scene of an accident. Although these comments were improper, the court ruled the plaintiff's case was so strong, the jury's verdict so reasonable, that there was no evidence the comments improperly inflamed the jury into rendering a plaintiff's verdict.

*Murray v. Taylor 65 Conn App 300 (2001); "*Golden rule" arguments are improper. A golden rule argument is one that urges jurors to put themselves in a party's place, or in a party's shoes. The argument encourages the jury to decide the case on the basis of personal interest and biases instead the evidence. The argument is akin to a request for sympathy. It was therefore improper for plaintiff's counsel to argue to a jury, "Say to yourselves, if this happened to me, what do I think is a fair and just amount of money for non-economic damages for what the boy suffered?" *S*ee also, *Nastri v. Vermillion Brothers Inc. 46 Conn Supp 285 (1998).*

Gables v. McCarthy 1994 WL 621925 (1994). In a medical negligence case, defense counsel argued to the jury that the defendant was "pilloried in the press." Counsel asked the jury to consider what their verdict for the plaintiff would do with respect to the defendant's medical career and with respect to the defendant's other patients. These were held improper as they appealed to the sympathy of the jury and commented on facts not in evidence.

DRAFT OPENING STATEMENT – FAILURE TO PLACE BOLLARDS
Submitted by: Jay Huntington

In this case, the plaintiff was a customer of a retail store. After she left the store to return to her car, she walked on a sidewalk which ran alongside, and wrapped around, the store. Cars parked in stalls abutting the sidewalk. As the plaintiff walked on the sidewalk, an out-of-control car jumped the walk, pinning the plaintiff against the wall of the store. As a result, she eventually underwent a below the knee leg amputation.

The plaintiff's theory of liability was that the sidewalk should have been lined with bollards which would have stopped the car from jumping the curb. Bollards were in place at the location to protect a gas line and also a barbeque propane tank bin. The defense would argue the store complied with all acceptable design criteria, and further, it was the reckless operation of the vehicle that caused the incident.

In this draft opening statement, and the opening and closing statements that follow, all names have been changed.

AMERICAN STORES FEELS BAD ABOUT WHAT HAPPENED TO THE PLAINTIFF AND IS SORRY THAT SHE WAS INJURED. BUT THAT DOES NOT MEAN THAT AMERICAN CAUSED THE PLAINTIFF'S INJURIES. AMERICAN IS HERE ASKING YOU TO DECIDE THAT HER CLAIM THE STORE IS RESPONSIBLE FOR HER INJURIES IS WRONG. THE EVIDENCE WILL SHOW THAT THIS ACCIDENT COULD HAVE HAPPENED AT ANY SIMILAR STORE, IT JUST HAPPENED TO BE AN AMERICAN STORE.

THE MAIN BOULEVARD STORE WAS DESIGNED AND BUILT TO COMMUNITY STANDARDS AND IS NO DIFFERENT THAN SIMILAR STORES THROUGHOUT THIS STATE. AMERICAN CONTRACTED WITH A DEVELOPER WHO BUILT THE STORE. THE DEVELOPER HIRED LOCAL ENGINEERS AND ARCHITECTS TO DESIGN THE STORE, USING AMERICAN'S MODEL PLANS AS A STARTING POINT. AMERICAN RELIED ON THE DEVELOPER, LOCAL ENGINEERS AND ARCHITECTS, CITY OFFICIALS, AND ITS OWN EXPERIENCE TO MAKE SURE THE STORE WAS REASONABLY SAFE, COMPLYING WITH ALL INDUSTRY STANDARDS, CODES, ORDINANCES, AND REGULATIONS.

ULTIMATELY YOU WILL DECIDE WHETHER AMERCIAN TOOK REASONABLE STEPS TO MAKE THE STORE REASONBLY SAFE. NOTE THE WORD REASONABLE, THE STANDARD UNDER THE LAW IS ONE OF REASONABLENESS. THE QUESTION IS NOT WHETHER AMERICAN COULD GUARANTEE THE SAFETY OF THE PLAINTIFF - THE QUESTION IS WHETHER THE STORE TOOK REASONALBE MEASURES IN THE DESIGN AND CONSTRUCTION OF THE PARKING LOT AND SIDEWALK.

YOU WILL HEAR TESTIMONY FROM ED HENRY, THE STORE MANAGER SINCE IT OPENED IN MARCH 2005. THE STORE AVERAGES 135 VISITS PER DAY SINCE OPENING, 7 DAYS PER WEEK. NOTHING LIKE THIS HAPPENED AT THIS STORE BEFORE THE DAY THE PLAINTIFF WAS HIT. AMERCIAN OFFERS THIS TESTIMONY FOR YOUR CONSIDERATION OF WHETHER THE ACCIDENT WAS FORSEEABLE.

AS THE JUDGE TOLD YOU WHEN YOU WERE INTRODUCED TO THE CASE, THE PLAINTIFFDID NOT SUE MARIE COLE. AMERICAN HAS BROUGHT HER INTO THE CASE AS AN APPORTIONMENT DEFENDANT SO THAT YOU WILL CONSIDER HER RESPONSIBILITY FOR THIS ACCIDENT. A COUPLE WEEKS BEFORE SHE STRUCK THE PLAINTIFF, MARIE COLE BROKE HER RIGHT FOOT, THE FOOT SHE USED TO

DRIVE A CAR. THE LEG WAS PUT IN A RIGID BOOT CAST FROM THE TOP OF THE TOES TO HER KNEE. SHE HAD NEVER DRIVEN HER CAR WITH THE CAST BEFORE THE DAY SHE INJURED THE PLAINTIFF. SHE DECIDED TO DRIVE USING HER LEFT FOOT TO WORK THE PEDALS. MS. COLE WENT TO AMERICAN THE DAY OF THIS INCIDENT TO BUY SOME SPLENDA. SHE WAS LEAVING THE STORE WHEN HER CAR STRUCK THE PLAINTIFF.

DIAGRAM/PICTURE

THE APPORTIONMENT DEFENDANT PUT HER CAR INTO REVERSE TO BACK OUT OF A SPACE NEAR THE FRONT OF THE STORE. WITNESSES DESCRIBED MS. COLE AS GOING VERY FAST. A VEHICLE DRIVEN BY ARLENE BOE HAPPENED TO BE PASSING TO THE REAR OF THE COLE VEHICLE. MS. COLE BACKED INTO THE BOE VEHICLE WITH SUCH FORCE THAT ONE OF THE WINDOWS IN THE BOE SUV GOT BLOWN OUT.

RATHER THAN STOP AT THAT POINT, MS. COLE PUT HER CAR BACK INTO DRIVE AND ACCELERATED RAPIDLY, JUMPING THE CURB AND HITTING THE PLAINTIFF AND A GARBAGE CAN ON THE SIDEWALK NEAR THE FRONT OF THE STORE. SIMPLY PUT, THE COLE CAR WENT OUT OF CONTROL.

MS. COLE PLEAD GUILTY TO A FELONY: RECKLESSLY CAUSING SERIOUS INJURY TO A PERSON. YOU WILL HAVE TO DECIDE IF IT WAS COLE'S OPERATION OF HER CAR THAT CAUSED THE PLAINTIFF'S INJURY, OR WHETHER AMERICAN WAS AT FAULT BECAUSE IT FAILED TO TAKE REASONABLE STEPS TO BUILD A REASONABLY SAFE STORE.

IN SUPPORT OF HER CASE, THE PLAINTIFF WILL OFFER TO YOU A RETIRED ACADEMIC FROM GEORGIA TECH NAMED PETER PEPAR. HE FOCUSED HIS TEACHING CAREER ON THE DESIGN AND MAINTENANCE OF HIGHWAYS AND ROADS. HE IS NOT LICENSED IN CONNECTICUT AND HAS NEVER DONE ANY ENGINEERING IN THIS STATE. THE EVIDENCE WILL SHOW THAT NONE OF THE COURSES HE TAUGHT ADDRESSED BOLLARDS ALONG WALKWAYS. HE HAS NEVER WRITTEN ON THE TOPIC, 'THOUGH HE'S WRITTEN A LOT ABOUT HIGHWAY DESIGN AND TRAFFIC SIGNALS.' HE HAS NO SPECIFIC TRAINING IN PARKING LOT

DESIGN. AND, IN FACT, HE HAS NEVER DESIGNED ONE. HE HAS NEVER DONE SITE ENGINEERING IN RETAIL SETTINGS.

PEPAR WILL TELL YOU THERE ARE SEVERAL RESOURCES IN THE ENGINEERING WORLD THAT SUPPORT HIS OPINIONS THAT AMERICAN SHOULD HAVE LINED THE SIDEWALK WITH BOLLARDS. BUT HE WILL THEN TURN AROUND AND ADMIT NO CODE, STANDARD, REGULATION OR TEXT INDICATES BOLLARDS ARE TO BE USED AS HE ADVOCATES. FURTHER, THE VERY RESOURCES HE RELIES UPON DO NOT CALL FOR BOLLARDS TO BE PLACED UP AND DOWN THE SIDEWALK.

IN COUNTERPOINT TO PEPAR, YOU WILL HEAR FROM FOUR PROFESSIONALS LICENSED AND PRACTICING IN THE STATE OF CONNECTICUT: JOHN SPRAT, BOB BROTHER, BRUCE FISK AND IRA SCHULTZ.

THEY WILL IN UNISON SAY THAT THE DESIGN OF THIS STORE IS TYPICAL FOR THIS TYPE OF STORE IN CONNECTICUT AND TYPICAL FOR THE SETTING IN WHICH IT IS PLACED. THE STORE MEETS ALL INDUSTRY STANDARDS FOR SAFETY.

THE SIDEWALK ALONG THE SIDE OF THE STORE HAS AN APPROXIMATE 6" CURB. THIS COMPLIES WITH BUILDING STANDARDS. IT IS DESIGNED TO SIGNAL A DRIVER WHEN TO STOP. IT IS NOT DESIGNED TO STOP AN OUT OF CONTROL VEHICLE BECAUSE THAT IS NOT THE INTENDED USE OF THE PARKING LOT. GIVEN THE CURBING, THESE FOUR WORKING PROFESSIONALS WILL TELL YOU BOLLARDS WERE NOT EXPECTED TO BE PUT UP AND DOWN THE SIDEWALK. THERE WILL BE TESTIMONY THAT EVEN HAD BOLLARDS BEEN PLACED, THE PLAINTIFF'S INJURIES MIGHT HAVE HAPPENED ANYWAY.

NOW, THE PLAINTIFF WAS INJURED SERIOUSLY WHEN MRS. COLE DROVE INTO HER. SHE UNDERWENT A BELOW THE KNEE AMPUTATION. SHE ASKS YOU TO AWARD MONEY FOR HER MEDICAL BILLS, LOST WAGES, IMPAIRMENT OF EARNING CAPACITY, AND FUTURE EXPENSES. WE DO NOT THINK YOU SHOULD REACH THE QUESTION OF WHAT FAIR AND REASONABLE DAMAGES SHOULD BE. BUT I NEED TO TALK ABOUT THE DAMAGE CLAIMS BRIEFLY ANYWAY. THERE IS NO QUESTION THE PLAINTIFF'S MEDICAL BILLS WERE NECESSARY AND

REASONABLE; THERE IS NO QUESTION SHE MISSED TIME FROM WORK AND LOST WAGES. BUT, WE ASK YOU TO EXAMINE CLOSLEY THE REMAINING CLAIMS.

MS. LUIS WORKED 15 YEARS AT AETNA BEFORE THE DATE OF HER INJURY. SHE HAD THREE DIFFERENT JOBS BUT ESSENTIALLY ALL INVOLVED DATA ENTRY. AFTER SHE RECOVERED FROM HER INJURY, TO THE POINT WHERE SHE COULD WORK, SHE RETURNED TO HER TRADITIONAL WORK AT AETNA. EVIDENCE WILL BE THAT IT IS VERY UNLIKELY SHE WOULD'VE CHANGED TO A DIFFERENT TYPE OF WORK THAN WHAT SHE DID BEFORE, AND WHAT SHE IS DOING NOW.

SHE IS ABLE TO DO ALL THE DUTIES OF HER JOB. HER PERFORMANCE APPRAISALS SINCE THE DATE OF THE INCIDENT ARE THE SAME AS BEFORE. THERE IS NO MEDICAL INFO, SPECIFIC TO MS. LUIS, INDICATING SHE WILL HAVE A SHORTENED WORK LIFE OR WILL HAVE A REDUCTION IN PAY.

SIMILARLY, YOU WILL BE ASKED TO SCRUTINIZE HER CLAIMS FOR FUTURE EXPENSES TO DETERMINE WHAT IS SUPPORTED BY MEDICAL EVIDENCE AS RESONALBY NEEDED, AND WHAT IS NOT. [INSERT SPECIFIC REFERENCES FROM MEDICAL RECORD.]

CERTAINLY, THE PLAINTIFF SUFFERED PAIN AFTER HER INJURY, INCLUDING WHAT IS KNOWN AS PHANTOM PAIN. BUT SHE WILL TESTIFY THE PAIN SHE EXPERIENCED IS BEHIND HER NOW. CHRONIC PAIN STOPPED SOMETIME BEFORE THE SUMMER OF 2010. SHE IS LEFT WITH A DISABILITY. BUT, TO HER CREDIT, YOU WILL HEAR EVIDENCE THAT THE PLAINTIFF IS COPING AS WELL AS CAN BE EXPECTED.

THE PLAINTIFF WILL ASK YOU FOR AN EXTREMELY LARGE VERDICT, BASED IN NO SMALL PART UPON THE OPINION OF HER VOCATIONAL EXPERT, RUFFLES. YOU WILL BE ASKED TO CRITICIZE HIS OPINIONS BASED ON HIS UNDERLYING ASSUMPTIONS. IN OTHER WORDS, EXAMINE WHETHER THE REASONS HE CLAIMS SUPPORT HIS OPINIONS, DO IN FACT SUPPORT HIS OPINIONS.

IN THE END, IT WAS AN UNFORTUNATE ACCIDENT THAT HAPPENED TO THE PLAINTIFF. BUT THE EVIDENCE WILL SHOW THAT IT COULD'VE HAPPENED TO ANYONE AT MANY STORES IN THE AREA, IT HAPPENED TO BE AN AMERICAN STORE. WE ARE CONFIDENT THAT AFTER YOU WEIGH THE EVIDENCE YOU WILL SEE AMERICAN WAS NOT AT FAULT FOR THE ACCIDENT- COLE'S OPERATION OF HER VEHICLE CAUSED THIS UNFORTUNATE ACCIDENT.

ON BEHALF OF AMERICAN, I WANT TO THANK YOU IN ADVANCE FOR YOUR TIME, YOUR DELIBERATIONS, AND FOR RETURNING A CORRECT VERDICT UNDER OUR LAW.

CASE SUMMARY
Submitted by: Jay Huntington

In this case a pharmacy dispensed a fertility drug, Clomiphine, instead of the prescribed medication, an antidepressant, Clomipramine. The prescription was filled incorrectly twice before the mistake was discovered. The plaintiff made a variety of complaints of both physical and psychiatric problems as a result of the mistake. Most of the plaintiff's complaints resolved over time.

The parties could not agree on a settlement figure so the case went to a jury. The pharmacy admitted liability.

OPENING STATEMENT

ATTY. HUNTINGTON: Well, good morning ladies and gentleman, I am Jay Huntington and it is my privilege and my honor to represent International in this case. You know that now that I'm telling you that for the third time in the last few days.

But, standing over here right now because I want to introduce Amanda Henry , who's sitting with me at counsel table. She's the pharmacy manager for International in the New Haven Pharmacy at the time this happened. She was involved in the filling of the prescriptions. She's now the pharmacy manager for International still in the New Britain store.

Once it was discovered that there was a mistake the plaintiff called the store to let the store know that she thought there was a problem and she spoke with Amanda.

Amanda confirmed there was a mistake and that it had happened twice. And we told you during jury selection, and I'm telling you again, International acknowledges that, has from the very beginning, and accepts responsibility.

And the question before the jury is what does that mean in terms of what would be a fair outcome in this case. We're here because we can't decide or agree on what a fair outcome should be.

We can't agree on the reasonable extent of harm that the plaintiff claimed she suffered, whether what

she claims is reasonable, and we can't agree on what you should decide should be fair compensation.

Now, as you heard you're going to have a record of three physicians in front of you and these records will help you to guide yourself to the proper decision.

And you're going to have to figure out, one of the things you're going to have to figure out is whether what the doctors say in their records matches up with what the claims are that you're going to hear from the plaintiff. And that's, as I said to you, I think that that's a fair way and a proper way for you to try to evaluate what should happen in this case.

Now, the plaintiff suffered some physical complications as a result of taking a fertility medication and that's addressed in the medical records as well. What is related and what isn't related, what may or may not be related.

And so, for example, she made some claims that her own doctors say are not related to the case.

So, for example, you're going to read in Dr. Harbison's (phonetically) record that the plaintiff complained to her that she had an early introduction, or induction, of menopause. And yet you won't see Dr. Harbison, or any other doctor, offering an opinion that that was a result of taking the Clomiphene, the fertility medication.

Similarly, you heard that she's going to claim that she suffered diarrhea as a consequence of taking the wrong medication. Dr. Gillette, or her OBGYN, wrote that that wasn't from the Clomiphene. The compliant about heart palpitations, Dr. Gillette said that that was possible. She didn't say it was probable and you'll see that some of these things were from the Clomiphene, other things were not, other things were possible.

Well, the reason why it's important to distinguish between what's possible and probable is that in a jury the judge will tell you you decide things that are probable. You make an award for what's probable not possible because you're not to speculate or guess as to what the evidence is.

Similarly, the plaintiff has her claim that she has a decreased libido. She discussed that with Dr. Gillette, the OBGYN, who suggested that she undergo some estrogen therapy to try and help the problem and she declined to do that.

Dr. Harbison, in her report that you'll have, does, indeed, write that the plaintiff is at an increased risk for ovarian cancer. But Dr. Schachter, when she saw her to clear her for her hip surgery, told the plaintiff she won't have any long-term consequences.

And she admits, the plaintiff does, that she

didn't discuss Dr. Schachter's opinion with either of the other two doctors involved in this case.

Now, it is true that International will not offer any independent or separate or additional witnesses, nor will International offer any additional evidence. At least I don't anticipate any additional documentary evidence at this point.

But, that's for two reasons. Principally because it's the plaintiff's burden to prove her claims. And International has elected to let the case proceed on the plaintiff's evidence and ask you to determine if she has, in fact, proven her case.

And the second reason is, as I said, and this has been evident from the moment you first heard about this case, International admits that it's responsible for whatever happened that's affected the plaintiff negatively.

So, in the end of the day when you're deciding the case you're going to have to determine whether her fear, that she claims, about developing cancer is reasonable. You're going to have to determine whether her other claims are reasonable and if so then you make an award, if not, then you don't make an award for those particular claims and find to be unreasonable.

And then with respect to what you find was a negative impact, what hurt her, you need to decide

what's fair compensation.

And I suggest to you that in doing that you should consider plaintiff's lifestyle, consider her activity level, consider the big picture and don't lose yourself in the forest because of the trees. If you do that I'm confident that you'll come up with a fair, just and reasonable verdict and that's all we ask you to do.

And I thank you on behalf of International for your time and attention. This is going to be a very short case but you still took time out of your lives to be here and we appreciate that.

THE COURT: Thank you Attorney Huntington.

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CLOSING ARGUMENT

ATTY. HUNTINGTON: Good morning, ladies and gentlemen. It's my opportunity to talk to you again and I appreciate the opportunity.

When you hear my remarks you're going to come to find out very quickly that we have a very different view about what the evidence has been and what this case is about. But before I go there I want to say, at the top, that International , as I said to you throughout the course of getting to this point, International admits the error was made, International takes responsibility. International regrets that what happened to the plaintiff happened to the plaintiff and regrets the bad experience that she had.

Amanda, when she found out said that, and confirmed there was a mistake, she offered to drive over another prescription and asked about the plaintiff's wellbeing. So the people at International care.

But the people at International are responsible for the effects of the mistake and only the effects of the mistake. The people are not responsible for all the other issues that the plaintiff has.

So I want to talk to you about the evidence a bit. And the first thing I want to point out, there are two things really I want to point out when you consider the evidence in this case, the first thing is you're going to hear the judge say very, several

times in the charge, the instructions to you about what the law is, that you're to base your decision based on the probabilities not possibilities. And that's going to be important when you view the evidence because some of the claims the plaintiff is making are supported by possibilities in the medical record, some are not supported at all, some are supported by probabilities. And you're only to give honor to those which are supported by probabilities.

The second thing is that you're going to hear that experts are allowed to offer expert opinions and give you opinions. And in this case the important opinions are about what's the effect of the Clomiphene, otherwise known as Clomid. Those are the opinions that come from the experts. Those opinions will come to you through the written records since the experts didn't come to court and testify. So you need to keep those two things in mind as you look at the evidence because it's one thing for the plaintiff to say this is what I think I suffered because of it. It's another thing to determine whether that's backed up in the records or not. And I'm going to run through that for you.

The other thing to bear in mind, and we talked about this in jury selection, is credibility. I think credibility is something that every juror in every case in America has to deal with, including in

this case. And as you think back on the testimony think back on it in light of human nature. And human experience in terms of what you credit and what you don't credit in coming to a decision in this case.

Now, I want to then talk to you more specifically about some of the evidence and some of the examples about what I mean when I say that certain of the plaintiff's claims are not supported by the records. And I'm not going to read a bunch of records to you right now, you'll have them, there are three main records that you'll consider. There's a one page letter from Dr. Gillette, there's a two page letter from Dr. Harbison, and there's a one page office note from Dr. Schaffner, it won't take you long to go through them yourself so I'm not going to read them all to you.

But here are some examples of what I'm talking about. First the claim that the plaintiff made to Dr. Harbison that she was forced into a chemically induced early menopause. Dr. Harbison doesn't say that was true. Dr. Harbison merely reports that's what the plaintiff said. Dr. Gillette, the OBGYN, doesn't say that was true. Dr. Schaffner, the PCP, doesn't say that was true. Not a single expert in this case has said that's true, but that's part of the plaintiff's claim.

Dr. Gillette specifically commented on the

diarrhea issue, Dr. Gillette said that's not related. Yet you've heard the plaintiffs claiming that.

The headaches, premenstrual symptoms and the heart palpitations, Dr. Gillette says those possibly were related, it doesn't say those were probably related. And I submit to you all this is important when you come to do your deliberations because the judge is going to tell you, again, you award probabilities not possibilities.

The other thing to bear in mind, and there's two ways, I suppose, of looking at it, you heard the plaintiff's prospective that all the physical symptoms cleared by March, the following March. I heard the plaintiff say on the witness stand yesterday that once she had her hip surgery in October, 2016, the physical symptoms were pretty much, in her mind, gone, so that's a much shorter period of time.

Now, I want to address the issue of fear of cancer. Another thing that you're going to have to bear in mind when you decide this case is what's reasonable and what's rational. The plaintiff has the burden of proving to you that her fear is rational and it's based in reason and that's it's reasonable. And I want you to focus on that when you do your deliberations.

First, Dr. Schaffner told the plaintiff, when

she was approaching her surgery, that her estrogen levels would go down and they did. Dr. Schaffner told the plaintiff, when she was approaching her surgery, that the surgery would be okay even though she had the higher levels of estrogen at that time, and it was.

Dr. Schaffner, who the plaintiff trusted and liked, then told the plaintiff that there would be no long-term side effects from the mistake made in issuing the wrong medication. But the plaintiff says that didn't reassure her and doesn't reassure her, is that reasonable?

And also consider that in the face of Dr. Schaffner telling the plaintiff there's going to be no long-term effects, she said, well I don't know how she would know that. One, she's a medical doctor, so that's her job. But two, and maybe more telling, the plaintiff didn't then go to Dr. Gillette, or Dr. Harbison, and ask them their opinion. You heard her say, on the witness stand, that she didn't ask any of the doctors, any of her other doctors, about Dr. Schaffner's opinion that there would be no long-term side effects. She's had three years of lab tests and ultrasounds since this happened, all normal. Her ovaries were read to be normal by the summer of 2017, yet she continues with this fear. You have to ask yourself, is it rational, is it reasonable?

Dr. Gillette wrote that letter and you've heard good chucks of it already. And I submit to you that Dr. Gillette's letter is the best evidence on the question of the increase for the risk of cancer.

But also, in that letter, Dr. Gillette writes that the remaining concern related to the exposure is that Clomiphene use is usually limited, you heard that. The reason for this is that prolonged use of fertility drugs has been shown to increase the risk of ovarian cancer. But, it's difficult to quantify this risk because infertility is also a risk for ovarian cancer.

So, Dr. Gillette is saying, at that point, that, in her opinion, the fact the plaintiff hasn't had any children, causes her also to be at an increased risk, and therefore she can't say the extent to which the Clomiphene might cause a risk.

Now you heard on the witness stand yesterday the plaintiff said well, nobody has ever diagnosed me as being infertile. Then you have to ask yourself why would the doctor put this in this record if that wasn't the doctor's perspective? It wouldn't make no sense particularly when she specifically asked, the doctor obviously is, to comment on the risk for increased cancer.

So, the doctor says twice in this letter that she can't say what the degree of risk is. And you've

heard no evidence what the degree of risk is. Is it 50 percent? If it's 50 percent you certainly would have a fear. Is it20 percent? Reasonable to have a fear, I would guess. But what if it's 1 or 2 percent chance that you're going to have the cancer? The chance is less than getting struck my lightening. Is it reasonable for you to carry this fear and to come to court and ask for compensation for this fear? That's the question you have to decide. But right now there is no evidence, at all, saying what that risk is. And the plaintiff doesn't know what that risk is either.

And remember, also, it's the plaintiff's burden to prove to you each component and each aspect of each claim.

Now, if you do credit the fear of the risk, fear of cancer claim, consider her testimony about that, she said that she does her research a couple times a month and that when she does she gets panicked. And so it's not, she didn't testify that it's a constant glowing black cloud over her head, it's when she voluntarily goes online to look up the topic and then she gets panicked. So consider that aspect of her testimony if you're going to make an award for that.

And then put the fear of cancer in context with her other issues. She admitted that she still has other psychiatric issues that she's dealing with.

But she has a history going back to 1992 and she's treated with a number of different psychiatrists for depression and anxiety. When she presented to Dr. Harbison she had symptoms including the inability to receive pleasure from any depression, she had slow thought processes, slow motor processes and she had difficulty even performing the activities of daily living. Some of those have resolved, evidently, they come and go according to Dr. Harbison's report, others have not.

And she still struggles with OCD, independent for any fear. And of course your award is only for the effects of what the Clomiphene mistake caused not the other problems in the plaintiff's life.

Now I want to talk to you about the libido claim. When the plaintiff testified at her deposition, and you heard this yesterday, I asked her, with respect to the libido do you attribute your current situation to Clomid or Clomiphene that you were given by International , that episode, or might it be something else as well? I attribute to it, yes. Have you consulted with any physicians about that? Just my OB. That's Dr. Gillette? Dr. Gillette. Did Dr. Gillette say there was anything that could be done for that? She recommended estrogen. But the claimant didn't follow that recommendation.

Now, think for a second, by that time her

estrogen levels had returned to normal because they returned to normal fairly quickly after this. Ask yourself whether Dr. Gillette would have recommended an unsafe course of therapy, if, in fact, it was unsafe. Yet the plaintiff elected not to do it.

Now consider this as well, that she linked both the timing of the onset of her decrease in libido to the onset of menopause, you can see that in Dr. Harbison's letter. There's no doctor, not a scintilla of evidence in the record that you're going to see of any doctor saying that her decrease in libido is from the Clomiphene or the effects of the Clomiphene. Particularly consider the estrogen that's been long out of her system. There's no expert testimony to support that so you should disregard it. And think about other issues that it could be, that could be affecting her libido. Her other psychiatric issues, just a natural course of life, it just changes, we all change. The older we get we all change. For some of us it's not such a good thing.

Consider also her complaints to you about her fear and her libido and put them in the context of her greater life. She has the ability and she does engage and essentially a part time job writing a book about dance and architecture every week. She makes mosaics, arts and crafts every week. She does yoga.

She and her husband are renovating their house. They've taken trips to Italy, Ireland, twice to Costa Rica, Maine in the summer.

When you consider her life it's a pretty full and fulfilling life. You have to consider that in considering the effects that the mistake had and has on the plaintiff.

Now I want to talk to you a little bit about damages and the value of money. The first thing is an observation that we all know, money is hard to make, it's hard to earn, it's harder to keep and it's harder to save. That is something from your real life experience you need to take into the jury room.

So the plaintiff asked you for $350,000.00 to $400,000.00 in damages. That's unreasonable. And here's how the plaintiff gets there, in part. There's the use of something called a per diem argument, take the component, $1,000.00 a year and multiply it by 30 years and you come up with a big number. It's the oldest sales pitch in the book. You can buy life insurance, I was online the other night, you can buy life insurance, a $500,000.00 policy for 15.53 a month, that's what it said. So you have to do your own math, that's $186.00 a year.

You can buy Bose speakers, 12 payments of $29.08, $350.00. So just bear that in mind when you're considering the number. What you've been

offered by the plaintiff is an artificial number pulled out of the air. The times numbers can be just manipulated to come up to some astronomical number, which was done here. It's not connected to reality, it's not connected to the reality of our daily lives.

How many -- how long does it take for people to earn 350 to 400 thousand dollars a year? How many years of hard work does that take? And how many people have saved that much after they pay their bills and life's necessities? That's a lot of money. It's not fair and it's not just.

Now, I'm not going to suggest to you a particular number but I am going to suggest to you some approaches that you might consider. And these approaches are designed, and I hope you'll see them this way, to relate to our real life, and I'll start with the medical bills. The medical bills were incurred in order to help the plaintiff to get better, figure out what was going on and to help the plaintiff get better. So that's solid, you can hold onto it and the measure of damages. So perhaps you use a multiplier for that and say 5 times the medical bills or 10 times the medical bills. Something like that, it's up to you. But that's one item you can hold onto and grasp and make some sense of.

Other examples of everyday things, think about how often we change carpeting in the living room just

because we've gotten tired of the color, you know, it's perfectly fine but we want a new color. Or how often we change our kitchen table and chairs just because we feel like getting something, that's not part of real life it doesn't happen that often.

So, I suggest to you that you consider these things when you try to decide what's fair, just and reasonable in this case. These concepts, bring the case to real life experience.

And the reason why I'm not going to suggest a formula or a specific number because I've already told you my view is that the plaintiff's suggestion is artificial and unreasonable, well, any number I gave you would be equally artificial and unreasonable so I'm not going to do that, that's your job. And we trust that you'll do a good job at it.

Now I want to talk about the fact that International didn't put on any evidence. That was my choice. I'm the lawyer representing International . And I elected, after looking at the plaintiff's case, to let the record speak for itself. To let the case rise and fall on the plaintiff's own evidence, which I have done and which you've heard about. And you've heard me point out some of the weaknesses in my remarks today.

International doesn't have the burden of proving anything. International doesn't have to put on any

evidence, and it didn't. International trusts that you people are competent to look at the evidence and make a fair decision. And separate the wheat from the chaff.

Now the fact that International didn't put on any evidence, didn't put on any witnesses, it doesn't mean that the case isn't important to International It most certainly is. And International , again, trusts you, as members of the community, to render a fair, just and reasonable result.

So on behalf of the people at International I want to thank you for your time, on behalf of Amanda Henry , I want to thank you for your time and your deliberations.

And, as I said, we trust you'll render the right decision. Thank you.

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Some Suggestions From a Plaintiff's Perspective: Effective Opening Statements and Closing Arguments in Personal Injury Cases

Humbert J. Polito Jr.
Polito & Harrington LLC
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Connecticut Legal Conference- June 16, 2021

Opening Statements

- Explain *why* we are here
  - What is the purpose or goal we are trying to obtain
- The importance of the plain spoken word
  - Watch your tempo and tone and avoid bullet points
- Earning Trust
  - Credibility is key
- Develop a Theme
  - Focus on the rule that was broken

Opening Statements

- Tell the story of what happened
  - Ball's: "No Advocacy"
- Liability first
  - Address damages after
- Talk about money
  - You will be asked to balance the harms and loses with money damages
- Fear
  - Address and deal with the weaknesses

Closing Arguments

- Preparation
  - Consider drafting before trial
- Proof
  - Proving what we said we would prove
- “Arm The Jurors”
  - “When someone says...” Ball’s method of anticipating arguments and providing support
- Referring To The Judge’s Charge
  - Weaving in the Judge’s instructions

Closing Arguments

- Damages
  - Talking about money
- The Verdict Form
  - Explain the form and its elements and the impact of the answers
- Rebuttal
  - Finish with a key point

References

- Many of my suggestions are derived from David Ball's thoughtful treatise:
  - David Ball on Damages 3; National Institute for Trial Advocacy (Third Edition), 2011.
- Other helpful sources:
  - Friedman & Malone, Rules of the Road (Trial Guides, 2006)
  - https://www.nita.org/
  - https://www.trialguides.com/

Opening Statement in a uninsured motorist case..... Tough Liability

Background

- I want to personally thank you for taking your time to serve on this jury.
- Ladies and Gentlemen we talked at length in individual voir dire and we chose you as jurors because we know you can be fair and reasonable in compensating Constancia Mahalias for injuries she suffered in this car **CRASH.**

- **Theme of the Case**
  - This case comes down to a driver, Mr. Melendez not paying attention as to where he was going in an area where there is a hospital nearby, a crosswalk and a school crossing zone and causes a **CRASH.**

  - Judge Vachelli will tell you that a driver of a car must exercise reasonable and proper control of his vehicle;

  - When someone doesn't pay attention or exercise reasonable and proper control when he drives a vehicle, and the car crashes into someone else and smashes her head against a windshield causing a concussion, they are negligent.

  - You will also learn that there is a law in CT that requires motorists to keep right of the Center line when passing a vehicle, CGS 14-213; if you violate that law, Judge Vachelli will tell you to find against the defendant. The evidence will show.....

- **Background – Now let me tell you about this case**
  - Now let me tell you what happened in this case. **The evidence will show**.....
  - Constancia Malahias then 21 years old
  - She has lived in Waterford, CT. Most of her life
  - She went to Williams High School locally and college studies at Embry Riddle Aeronautical University.
  - She is a hard working girl with multiple jobs.
- **MAHALIAS**
- The **Evidence will show** on April 8, 2014 at about 10:30 a.m. Constancia had never been in any accidents.

- Constancia had been coming from home in Waterford to go to her Doctor's office on Montauk Avenue an area she was very familiar with and had traveled the same route at least once a week.

- The evidence will show there is a travel lane, a bike lane and a parking lane on Montauk avenue in both directions.
- Constancia was traveling north on Montauk avenue with Lawrence and Memorial Hospital on her left on the morning of April 8, 2014.

- Contancia pulled off the majority of the road onto the bike lane and the parking lane to make a legal u-turn to park on the opposite side of the road, where her Doctor's office was located.

- Her vehicle was pulled off the majority of the travel lane and half on the bike lane and half on the parking lane to help make the legal turn safe; she has made many times

- She pulled off to look for oncoming cars, turned on her blinker and proceeded in a slow natural movement to make her legal u-turn

- The evidence will show Mr. Melendez car then Crashed into the driver side door of her vehicle around the divider line in the middle of the road, at the crosswalk at the corner of Montauk and Fair Harbor about half way into her turn.

- **MELENDEZ EVIDENCE**

- The Defense wants you to believe this was Constanicia's fault – (personalize your client- first name- distance defendant by referring to him as the defendant when appropriate.

    - The evidence will show that the D was driving an uninsured vehicle at the time of the accident
    - Defense counsel and I have stipulated to this fact and that is why the name of this case is against an insurance company (The plaintiffs insurance company) who is standing in the shoes of the D

    - The D was driving a Ford 150 loaded with scrap medal

    - Evidence will show the D was stopped at a light in front of the hospital and proceeding along Montauk with no cars in front of him between the light and the CRASH

    - Evidence will show the D rounded a turn had a straight unobstructed view of the travel lane, THE bike lane and the parking lane on the right side of the road

    - He will tell you at the time of collision he was traveling 5-7 miles per hour
        - Pay close attention to the photographs and decide whether or not that seems reasonable based upon the damage to the vehicles

    - The evidence will show when the road becomes straight on Montauk Ave, the Defendant saw Constancia's (plaintiff) vehicle start to pull out around 5-7 seconds prior to the collision

    - Evidence will also show he didn't apply his brakes until 2-3 seconds before he smashed into her car

LAW – Ladies and Gentlemen we spoke about the burden of proof in jury selection –

- His honor will tell you if Mr. Melendez failed to exercise reasonable and property control, and was inattentive while driving even if we tip the scale ever so slightly in our favor you must find for Constancia .....

HARMS AND LOSSES

- Evidence will show the impact caused Constancia's head to hit driver side of window causing the window to smash
- The evidence will show Constancia was dizzy, injured and couldn't get out of the vehicle
- She will tell you she was taken by ambulance on a stretcher, c collared and taken to the hospital.
- The evidence will show that she was put on multiple pain medications and found to have suffered a neck injury.
- She will tell you she had to treat with physical therapy for 10 visits to help with the neck pain
- She will also tell you over the next couple days she began to feel hazy, unfocused and developed progressively worsening head pain.
- The evidence will show she went back to the hospital at which time she was diagnosed with post concussion syndrome
- The evidence will show she had to miss 9 days of work as a result of this.
- The evidence will show she had episodes of vertigo and had to treat with a neurologist
- She will tell you as a result of this accident In the summer of 2014 she had a very difficult time in school as a result of her post concussion symptoms
- She had to wear sunglasses inside the classroom because the light sensitivity would bother her
- She will tell you she her teachers had to give her accommodations
- Her cognitive and neck symptoms wouldn't completely resolve until spring of 2016.
    - Ladies and Gentlemen all these harms and losses were the result of the D unreasonable actions on April 8, 2014. This pain caused her multiple visits to the doctor and head problems that affected her everyday living such as working and going to school.

We look forward to proving these allegations I just offered through the evidence. Thank you- Dan Horgan