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# Opening Statements

by

**Alfred S. Julien**

The 1999 Cumulative Supplement to *Opening Statements* provides valuable additions to aid in the planning and execution of compelling opening statements. Note in particular the following new materials, which were contributed by some of the nation's leading trial attorneys:

- Opening statement addressing damages arising from a neck and shoulder injury, contributed by Stephen L. Waldman, Esq., of San Diego, California. See Appendix 9L.
- Opening statement in a structural defect case in which the plaintiff was struck by a falling utility pole, contributed by Phillip J. Barkett, Jr., Esq., of Sikeston, Missouri. See Appendix 9M.
- Opening statement in a personal injury and property damage case brought following repeated flooding, by Philip Faccenda. See § 14.16.
- Recent case law in which comments made during an opening statement led to disciplinary action. *Office of Disciplinary Counsel v. Breiner*, 85 Hawaii 462, 946 P.2d 32 (1999). See § 1A.04.
- Case law defining where irrelevant and inappropriate statements during an opening may deprive a defendant of a fair trial, and thus warrant the reversal of a lower court judgment and a new trial. *Krohn v. New Jersey Full*, 720 A2d 640 (NJ Super AD 1998). See § 1A.04.

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**Appendix 9L. Damages arising from neck and shoulder injury sustained in automobile accident. [New]**

This is a personal injury case. There is no dispute as to liability. The defendants admit they were at fault. This case is about the amount of damages that my client sustained as a result of a neck and left shoulder injury he suffered in the collision.

Before I go any further, I want to make sure that you understand an important concept and I want to illustrate this concept by giving you an example. If a car was driving down the street carrying a load of bricks and you negligently ran into that car, there probably would not be any damage to the bricks. You would be lucky that the car was carrying a sturdy load. However, if that same car were carrying a fragile load, such as eggs, instead of bricks, the eggs would likely break. In that case, you would be responsible for paying the full value of the eggs.

This same principle applies to people. Just because a person is more prone or susceptible to injury does not mean you get to hit them without being responsible for the consequences. That concept is the key to understanding this case.

This case is about what on the surface appears to have been an every day fender-bender traffic accident, but which had serious consequences for my client, Mr. Ornelas, simply because he was elderly and more susceptible to injury. To give you an understanding of just how significantly the injuries that Mr. Ornelas sustained in this accident have affected his life, I need to take a moment to explain to you a little bit about Mr. Ornelas, about who he is and about his life before that day.

Mr. Ornelas is now 66 years old. He will be 67 next month. He is a highly decorated war veteran. He fought in the Korean War and was injured in combat. He received the purple heart. Mr. Ornelas recovered from those war injuries and went on to obtain work, first as a laborer at General Dynamics in San Diego, digging ditches, then as a plan designer. He worked for General Dynamics for about 15 years.

For the past 36 years, Mr. Ornelas and his wife, Yolanda, have owned and operated a residential care facility for people with mental disorders, called Carmelita Residential Homes. Mr. Ornelas is one of those rare individuals who loves running homes for people with mental disorders in an effort to make them as self-sufficient as possible. His responsibilities consist not only of providing a residence for people with mental disorders, but also feeding them three meals a day, making sure that they take their medication, and providing counseling. They have 38 residents when the facility is at full capacity. As you can imagine, running these homes is a 24-hour-a-day, 7-day-a-week job. Mr. Ornelas is always on call. It's a hard job, but Mr. Ornelas has dedicated his life to it and he loves it.

Mr. Ornelas and his wife, Yolanda, have been married for 46 years. They have known each other since they were children growing up in San Diego. They have three grown children and four young grandchildren, who Mr. Ornelas

enjoys spending time with. Mr. Ornelas and his wife, as you might expect, are very close.

Another important thing you need to know about Mr. Ornelas is that he has been incredibly resilient. Mr. Ornelas is a person who encountered some pretty serious physical problems in the past, which, in addition to being shot several times in the Korean War, include diabetes, the loss of an eye, and a ruptured disc in his lower back. You will learn that Mr. Ornelas pretty remarkably overcame these physical ailments and that they didn't interfere with his ability to enjoy his life.

Unfortunately, on the morning of March 17, 1997, Mr. Ornelas' life dramatically changed as the result of an automobile collision. On the morning of March 17, 1997, Mr. Ornelas was driving his Toyota Previa van to work. He was stopped in the right hand lane on College Avenue at a stoplight. All of a sudden, and without warning, Mr. Ornelas felt a jolt from behind as his van was struck from the rear by a Mercedes driven by the defendant.

The force of the impact caused Mr. Ornelas' neck to be jerked backwards. Mr. Ornelas' neck and body were then thrown forward causing him to strike the left side of his chest against the steering wheel. At the time, Mr. Ornelas was shaken and upset about being rear-ended, but really didn't feel any immediate pain or discomfort.

There was not a lot of vehicle damage. There was just a small dent in the rear bumper of Mr. Ornelas' car. The defendant's Mercedes sustained an indentation to the left of the headlight and bumper damage. Mr. Ornelas exchanged information with the defendant and then, instead of going on to work, went home to settle down.

At first, Mr. Ornelas didn't have any significant pain. However, later in the day, he began to experience pain in his groin, the left side of his chest, under his left armpit and shoulder, and in his neck and lower back. Mr. Ornelas had experienced occasional, minor lower back pain prior to the accident, but had not experienced neck or left shoulder and arm pain before the accident. The pain got worse throughout

the day. As a result, Mr. Ornelas made an appointment to see his primary care doctor, Jeffrey Sandler.

The following day, Mr. Ornelas was examined by Dr. Sandler. Mr. Ornelas presented to Dr. Sandler with complaints of pain in his neck, left armpit and shoulder area, numbness in his left arm and tingling in his left fingers, lower back pain and groin pain. Dr. Sandler's preliminary diagnosis was that Mr. Ornelas had suffered a seatbelt injury as a result of the accident, and that Mr. Ornelas' complaints were the result of spraining injuries that he suffered in the accident. Dr. Sandler will testify that his examination and Mr. Ornelas' complaints were consistent with someone who had suffered injuries as a result of an automobile accident.

The pain that Mr. Ornelas experienced in his groin eventually did go away. However, Mr. Ornelas' neck and left shoulder pain severely worsened over time. In fact, the pain in Mr. Ornelas' left shoulder became so severe that eventually he was unable to move his left arm away from his side, from the elbow up, without experiencing excruciating pain. As a result of this severe pain, Mr. Ornelas was forced to keep his left arm in a frozen position locked at his side. The constant pain that Mr. Ornelas was experiencing in his neck and left shoulder also became more intense and was unbearable at times.

Mr. Ornelas was seen by Dr. Sandler and various specialists following the collision. The unanimous conclusion of the doctors who examined him following the accident—Jeffrey Sandler, William Davidson, his orthopedic surgeon, and Sam Assam, his neurosurgeon—was that Mr. Ornelas suffered a spraining injury to his left shoulder as a result of the accident which led to what is called adhesive capsulitis or frozen shoulder syndrome.

Adhesive capsulitis is a condition which starts off as an inflammation of the shoulder joint. The inflammation then produces a substance which causes the shoulder joint capsule to stick to the bone, making it very difficult and painful to move the shoulder. Eventually, the shoulder joint becomes tightly fastened to the bone and the shoulder becomes frozen

and immobile. This process takes place over a period of six weeks to two to three months. This is what happened to Mr. Ornelas.

You will also learn that, as a derivative result of the lack of mobility of his left arm, Mr. Ornelas' left hand eventually became discolored. This discoloration of his hand was due to the lack of use of his arm and the resulting position in which he held his left arm. You will see that his left hand is much darker than his right.

Mr. Ornelas' doctors, specifically his orthopedist, Dr. Davidson, and his primary care doctor, Dr. Sandler, will also testify that when Mr. Ornelas' neck was snapped backward and then forward when he was rear-ended by the defendants, it caused vertebrae in his cervical spine to compress against a nerve root. The irritation of the nerve root caused by this impingement causes Mr. Ornelas to experience constant severe pain which shoots down the left side of his neck to his shoulder. This condition is known as cervical radiculitis, which is what Mr. Ornelas has.

Importantly, you will also hear testimony from Mr. Ornelas' doctors that, although Mr. Ornelas was not having any neck pain or left shoulder pain before the accident, he was extremely susceptible to a neck and left shoulder injury because of arthritic changes in his neck and shoulder. You'll learn that these arthritic changes occur in everyone as you get older and make older people like Mr. Ornelas more susceptible to injury. Because of Mr. Ornelas' susceptibility to injury to his neck and left shoulder, Dr. Davidson and Dr. Sandler will testify that it didn't take a lot of force to cause the injuries that Mr. Ornelas' suffered in this accident. In a sense, Mr. Ornelas is an eggshell plaintiff.

You will also hear testimony that the frequency and intensity of the pain in Mr. Ornelas' lower back intensified following the collision.

Finally, you will hear testimony from Mr. Ornelas' orthopedic surgeon, William Davidson, that the only available treatment for Mr. Ornelas' neck and shoulder injuries is surgery. However, you will hear testimony that surgery

would be risky for Mr. Ornelas due to his age and overall health. As a result, it appears that Mr. Ornelas will have to live with the pain and disability caused by these injuries for the rest of his life.

As you can imagine, ladies and gentlemen, the physical limitations imposed on Mr. Ornelas by his frozen shoulder and the severe pain he experiences in his neck and lower back have dramatically impacted virtually every aspect of his life. Specifically, Mr. Ornelas is unable to perform or has great difficulty performing many simple every day tasks by himself, such as putting on a shirt, tying his shoes, cutting his food, and getting in and out of the bathtub. His wife or whoever is present must assist him with these things. These are things that can't be done or are very difficult to do when you have basically lost the use of your left arm. These physical limitations are embarrassing and humiliating to Mr. Ornelas and make him feel inadequate.

Mr. Ornelas' physical limitations and pain have also affected his ability to do the things that he used to do at Carmelita, such as maintenance work around the buildings, grocery shopping, and meeting with doctors to obtain patients for his facility. He simply can't put in the hours he did before the accident because of his neck and left shoulder pain.

Mr. Ornelas' relationships with his wife and family have also suffered as a result of the injuries he sustained in this accident. He is no longer able to put both arms around his wife and hug her. Additionally, for the past 46 years they have been married, Mr. Ornelas has always slept with his arms around his wife. He can't do that anymore. He also can't hold or roughhouse with his grandchildren like he used to do before the accident.

The physical limitations and pain caused by the injuries sustained in the accident have also prevented Mr. Ornelas from participating in many of the activities he used to enjoy. Mr. Ornelas enjoyed photography before the accident and owned several expensive cameras. He can no longer do photography because of the frozen shoulder. He also enjoyed

fishing on boats that he owned, but he can no longer use his boats because of his frozen shoulder.

Because of the pain, Mr. Ornelas now takes pain medication, percocet and vicodin, on a daily basis. The pain medication, however, does not completely relieve the pain and has the unfortunate side effect of making Mr. Ornelas constipated and nauseous.

Finally, the physical limitations and pain have greatly impacted Mr. Ornelas mentally and emotionally. Mr. Ornelas became very depressed as a result of the pain and the disability caused by his neck injury and frozen shoulder. For the depression, Mr. Ornelas now takes zoloft, an anti-depressant medication.

The defendants in this case, Heather Maio and LCR Products, Inc., the company that owned the Mercedes, do not dispute or deny liability. What they are going to dispute are the damages that we claim Mr. Ornelas sustained as a result of this collision. As I understand it, the defendants will attempt to claim that Mr. Ornelas' neck and left shoulder pain were pre-existing or the result of his diabetes, and that the force of the impact of the collision was minimal and could not have caused any injury to Mr. Ornelas.

With regard to the defendants' claim that the left shoulder pain was pre-existing, the defendants will point out that Mr. Ornelas complained of pain in his left shoulder in approximately July of 1992 and September of 1993, approximately four years prior to the collision. The evidence, however, will establish that the left shoulder complaints that Mr. Ornelas had four years earlier involved a different area, not the shoulder joint, and that those complaints were resolved four years ago. The evidence will further establish that Mr. Ornelas did not have any complaints about pain in his neck before the accident.

With regard to the claim that Mr. Ornelas' diabetes is the cause of his left shoulder and neck injuries, Dr. Davidson and Dr. Sandler will testify that the diabetes has nothing to do with Mr. Ornelas' neck and left shoulder complaints. Dr. Davidson is Mr. Ornelas' orthopedist. Dr. Sandler is Mr.



Ornelas' endocrinologist, the type of doctor who treats diabetes. Dr. Sandler has been the medical director of the Mercy Hospital Diabetes Center for the past ten years.

Finally, with regard to the defendants' claim that the force of the collision could not have caused any injury, Drs. Sandler and Davis will testify that whatever force Mr. Ornelas was subjected to as a result of the collision was enough to cause the spraining injuries that he suffered which led to the cervical radiculitis and the adhesive capsulitis in his left shoulder. They will testify that Mr. Ornelas was an eggshell plaintiff and was very susceptible to sustaining these types of injuries with very little force.

Ladies and gentlemen, this case is about the events of March 17, 1997. It is about how the events of that day dramatically changed my client's life. At the conclusion of this case, we are going to be asking you to compensate Mr. Ornelas for the losses that he sustained which include the medical expenses that he has incurred to date, future medical expenses, his pain and suffering, and his loss of enjoyment of life. Thank you.

—Stephen L. Waldman

**Appendix 9M. Structural defect—Falling utility pole.**  
[New]

May it please the Court, counsel for the defense. And may it please you, ladies and gentlemen of the jury. Good afternoon. At this time I have the privilege and indeed the honor here today of making an opening statement in this case on behalf of my client, Yvonne Ellis.

Ladies and gentlemen of the jury, at 5:30 p.m. on July 14th, 1993, which was a Wednesday, Yvonne Ellis was on top of the world. At least she was on top of the world as she had known it up until then. She and Marsha Ward, a co-worker, were leaving a staff meeting of their employer in Dexter, Missouri, and were traveling south on Highway 25 to Kennett, Missouri. They were riding in Ms. Ward's car.

At about 5:55 p.m. on that day, July 14, 1993, the top two-thirds of a 55-foot, 2500-pound decayed Union Electric