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HEADLINE: Trial Advocacy, The Opening Statement in the Herniated Disc Case

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BODY:

Although at one time, the law recognized a herniated disc for what it was--a significant and debilitating injury, today, with the statutory threshold requirements of [Insurance Law §5102](#), the plaintiff is faced with a difficult task.

The plaintiff must convince a jury of the "seriousness" of this type of injury. Given the time restrictions on voir dire, the first real opportunity to explain the nature of this type of injury is through a thoughtful and detailed opening statement on the anatomical features of the herniated disc and the debilitating physical limitations resulting from such an injury.

Righteousness of Cause

The opening statement is a critical juncture in the case. It sets the stage for impressing the jury of the righteousness of your client's cause. Start with an introduction that encapsulates the entire case in just a few seconds:

On Sept. 14th, 2002, Paula Plaintiff knew she had been rear-ended. What she didn't know at that time was that her spinal column would be permanently damaged. What she didn't know at that time is that she would sustain herniated discs. And what she didn't know and couldn't possibly have known is that those herniated discs would affect not just her spine but her whole body. What Paula now knows is that one day she will require surgery for those herniated discs. What she now knows is that she will require a life-time of physical therapy for those spinal injuries. And what she now knows is that her life will never, ever, be the same. Through no fault of her own, Paula has suffered injuries that have changed her life, injuries that will remain with her for the rest of her life.

The next thing you have to do is introduce your client, as well as the defendants. Toward that end, you must humanize your client and, to the extent possible, dehumanize the defendants. Let the jury know who your client is and, more importantly, who she was before the incident that compromised her health:

You know by now that I represent Paula Plaintiff. She is the plaintiff--the one bringing the lawsuit. Permit me to tell you a little bit about her, because to first understand how the injuries have affected the woman, you must first understand the woman.

Then tell the jury what she was like before the accident that changed her life: her enjoyment of physical activity, exercise and time spent with her family. Describe her children's reliance on her, how she strove to achieve success in her vocation through education and hard work. Explain how her relationships with her husband, her children and her coworkers have forever changed:

Paula worked hard to get where she was in life. Since she was a little girl, she wanted one thing, and one thing only: to become a nurse. And she worked hard to reach that end. While still in high school she worked at a local community hospital as a candy striper, assisting patients with their needs. She got good grades in high school so that she could get into a top nursing program in college. After graduating with a college degree, she received post-graduate degrees in nursing and finally became a Registered Nurse. She has taken care of patients for the last 10 years, and enjoys her job.

Prior to this incident, she was able to work 12-hour shifts and provide for her household. Although she was proud of her status as a registered nurse, she bore no greater title than that of "mom." Unfortunately, because of this accident and the resulting injuries to her spinal column, she is limited in what she can do for her children. She cannot play with them as she once did, do their laundry or even help them with their homework.

Deal With Case Weaknesses

While it is important to generally describe the injuries to your client in a manner that promotes your cause, you must also deal with the weaknesses in your case and portray them in a light most favorable to your client. Common weaknesses such as the failure to wear a seatbelt, a low-speed impact, minor damage to the vehicles or a failure to seek immediate medical treatment, must be addressed during the plaintiff's opening in anticipation of the defendant's opening:

Paula was helping to transport a stroke patient from one hospital to another at the time of this incident. She was sitting in the front passenger seat of the ambulance without her seatbelt. But because of her concern for her patient in the backseat, she was facing toward the rear, clearly not bracing for an accident. So although the defendants will testify that the impact was low velocity--and you'll see the damage to the vehicles was minor--Paula was in a very awkward position. Her neck was turned partially to the side and rear. The impact--which was in the specific compartment where she was sitting--caused her neck to twist and compress from side to side.

Because it was a side impact, a seatbelt would not have helped her. That is because she was sitting right next to the door and the force of the truck actually came into her body. No seatbelt would have prevented her injuries--particularly her injuries caused by the forces of extension and flexion. Moreover, because of her concern with her patient in the backseat, Paula was not braced for the accident. Paula was right at the center of impact and couldn't possibly have seen it coming. A police officer got to the scene almost immediately and asked if anyone was hurt. Although Paula was injured, she refused an ambulance and refused medical treatment at the scene. She told the police officer she was fine--for two reasons. The first was, she thought she was fine, just shaken up. For Paula, because of the accident and her injury, her adrenaline had kicked in: the body's natural fight-or-flight response. When someone is injured, the body secretes epinephrine or adrenaline, which allows a person to carry on until they are in a position of relative safety. So Paula told the officer she did not need an ambulance. Second, and more importantly, there wasn't a chance Paula the nurse would ever leave that patient behind. She wanted to ensure that her patient safely arrived at the hospital that could care for her. And she did just that.

When she finally went home, despite the fact that she was hurting, she did not go to her doctor, although obviously as a nurse, she had easy access to medical treatment. Her next order of business was to take care of her two little girls who had arrived home from school. She took Advil and carried on with her obligations as a mother. The last thing she wanted to do was worry her children. Unfortunately, things got worse for her overnight. Paula couldn't sleep. She had difficulty moving. The pain, which had originally been localized to her neck, started radiating or traveling down her arm into the fingers of her right hand.

Outline the Injuries

In any opening statement involving physical injuries it is imperative that you outline the injuries in great detail. That being said, however, you should never overstate them. To be able to properly explain your client's injuries you have to explain the relevant anatomy to the jury:

To understand what these herniated discs are you first have to understand the anatomy, so bear with me while I go through it briefly. As I said earlier, Paula has injured portions of her spinal column. The spinal column protects the spinal cord which is an extension of the brain. Just as the brain is protected by the skull, the spinal cord, which is the nerve center of the body, is protected by the spinal column which consists of bone, known as vertebral bodies. The spinal column consists of three areas: the neck or cervical spine; the mid-back, which has 12 ribs attached to it, known as the thoracic or dorsal spine; and the low back known as the lumbar spine or lumbosacral spine. Paula suffered a herniated disc at two places, the cervical spine and the lumbar spine, known as the C6-C7 level and the L5-S1 level. The neck has seven cervical vertebral bodies, the thoracic spine has 12 vertebral bodies and the lumbar spine has five vertebral bodies. These vertebral bodies are hard, and are actually bones. Just as the spinal cord needs to be protected by the vertebral bodies of the spinal column, the vertebral bodies are protected by the discs. In between each bone or vertebral body is a substance known as a disc. And those discs actually act as shock absorbers for the vertebral bodies. The discs are what give us the ability to jump, flex and bend. They act as cushions for the bone, so without those discs we would have bone constantly rubbing on

bone which would cause great pain, bone spurring and arthritis.

These discs consist essentially of two major parts. The outer shell known as the annulus fibrosis or more simply as the annulus. The inner portion is known as the nucleus pulposus, or the nucleus. The outer shell, the annulus, is the hard portion. It is not as hard as bone, but much harder than skin or muscle. It is a cartilaginous substance like the cartilage in our noses or knees. It is actually known as fibrocartilage

The inner substance or the nucleus is made primarily of water and is soft or gelatinous. It is that portion of the disc that provides the cushioning or shock absorption qualities.

So to visualize a disc it may be a good idea to picture a stale jelly donut. The crusty part of the donut is the annulus fibrosis and the jelly on the inside is the nucleus pulposus.

Now that you have laid out the general anatomy, tie it in with your client and demonstrate the actual injury itself by going through the medical explanation of a herniated disc:

The word herniated is derived from the word hernia, meaning a portion of the body is displaced to an area where it should not be. A herniated disc takes place when the nucleus pulposus breaks through the outer layer known as the annulus fibrosis.

It is not enough to describe a herniated disc. You have to explain to the jury why it is painful and physically debilitating:

Now let me tell you why this disc herniation is causing Paula tremendous pain. The annulus itself has nerve fibers in it. This is causing Paula localized neck pain, just from the tear in the annulus itself. But what makes matters worse, is that the disc is herniated posteriorly and laterally, or toward the back and to the side. The implications for Paula are devastating. Because the disc is sticking out laterally, it is impinging on or touching a nerve root which emanates from the spinal cord posteriorly to the disc and comes through a hole on the side of the vertebral body known as the neural foramen. Because the disc is herniated at the level of C6-C7, it is causing pain down a specific nerve root or dermatome pattern that goes from Paula's neck behind her shoulders down her arm and into her thumb, middle and index fingers. This injury doesn't just affect her neck, but her shoulder, arm and fingers as well. She is not just in horrible pain but has limited use of her right arm and difficulty with the fine motor coordination needed for using her fingers or grasping objects.

Functioning Outside of Work

It is a good idea to explain all the things your client can no longer do because of her injuries. Do not just focus on her inability to work, but be concerned with her inability to function outside of work as well:

Obviously, based on these injuries, Paula cannot lift patients any more in a hospital setting. She cannot turn them over. She can neither stand for too long or sit for very long. She even has difficulty placing intravenous lines because she has lost the dexterity needed in her right hand to perform this task. She cannot write nursing notes effectively in the hospital chart for the same reason. Her days of working as a nurse are numbered.

But Paula's inability to work is the smallest part of the case. What is far worse for her, is how her injuries affect her role as a wife and mother. She can no longer engage in relations with her husband. She can no longer lift her children. She cannot shoot baskets with them, skate with them, or throw a ball with them. Even sedentary activities like cards, chess and board games are out because Paula can't sit for more than a few minutes at a time. Her life has been dramatically altered and will never, ever, be the same.

Additionally, never finish your opening statement before dealing effectively with the problem areas of your case, especially with the things the defense will try to use to their advantage. Explain away the weaknesses. For example, describe the reasons your client failed to seek medical treatment right away, demonstrate why a low-speed impact caused these injuries, and show how a seatbelt would not have helped prevent her injuries.

At End of the Case

Finally, when concluding your opening statement be clear in what you will be asking the jury to do at the end of the case, without asking for a specific number:

At the end of the case I will have the opportunity to speak to you again during summation. At that time, I will remind you that the defendants caused her herniated cervical disc, they caused her herniated lumbar disc, they caused the pain in her right arm and left leg and that their actions affected not just her neck and back, but her whole life, and I will ask you for a verdict on her behalf. I am going to ask for 100 percent justice: nothing more; and nothing less.

Key to Victory

An opening statement is a key to a victory a trial. Use it as an opportunity to humanize your client, dehumanize the defendants, and outline the relevant anatomy and specific injuries your client suffered. Demonstrate how those injuries have changed your client's life and affected even the lives of her family members. Be careful to deal with the negative aspects of your case and explain them away as effectively as possible. Do not use notes. Look the jury in their eyes, address them directly and impress them with the righteousness of your case.