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Without A Floor There is Only a Ceiling: The Benefit of the Defense Presenting Affirmative Economic Damages Testimony

I. Jury instructions on damage awards are notoriously vague and ambiguous. As a result, awards are sometimes unexpected and seemingly illogical.

"I was under the impression we'd have guidelines. I feel we were thrown in a box and had to come out with a number. (Anonymous juror quoted by Vidmar, 1995, p. 243)"

A juror serving in a North Carolina medical malpractice case expressed this sentiment. She and fellow jurors heard evidence at trial that a 28-year-old plaintiff suffered a peritoneal infection and permanent brain injury after undergoing cesarean surgery, During the trial, the jury was provided with evidence of medical bills resulting from her injury that amounted to several thousands of dollars. The defense attorney argued vehemently that the plaintiff's injuries were not caused by the defendant's actions but then said any award to which the plaintiff was entitled should be small because the hospital and doctors had already paid her medical expenses. In his charge to the jury on damages, the judge informed the group that they should consider the amount of compensation the plaintiff should have as well as an amount for the husband's claim of loss of consortium. He further cautioned them to determine an award based solely on the evidence and instructed them that the amount should be fair, just, and reasonable and not determined by sympathy. The jury deliberated for 3.5 hr, after which they returned a verdict of $850,000 along with strongly worded complaints about the ambiguity involved in their assigned task. Several members of the jury apparently felt that doing their duty "was difficult for all of us." *Precious Little Guidance*, E. Green and B. Bornstein, Psychology, Public Policy and Law Vol 6 No 3.

As we all know jury instructions are vague and usually incomprehensible to the uninitiated. Juries are told to translate the evident they have been shown into past and future economic awards along with an evaluation of past pain and suffering. Juries are told to weigh and think and use common sense. But at no time are they told how to translate all of this information into dollars and cents. Individual background and experience allow for an untamed multiple of variables which may allow jurors to use biases, prejudices, whims and caprice to come up with numbers rather than reasonably factored elements and rational calculation of damage awards.

Evidence shows that jurors misapply the jury instructions related to damages. Studies show that jurors misuse evidence in their damages calculations. Comparative negligence cases pose particular difficulties for jurors, and recent studies show that damage awards in these cases can be errant and unpredictable (Green and Bornstein, citing see Wissler, Fowler, & Saks, 2000).

Rule 51 of the Federal Rules of Civil Procedure provides for considerable discretion in the timing of jury instructions and allows the judge to instruct the jury before closing arguments, after the arguments, or both. In 1995, the Arizona Supreme Court began to require judges to give jurors both oral and written preliminary instructions that describe what the plaintiff must prove to win, the burdens of proof, and other matters that can reasonably be anticipated, including damages when applicable (Arizona Supreme Court Committee, 1999).

Critics doubt that preinstructions will improve jurors' decision-making capabilities (Sand & Reiss, 1985). They argue that such instructions will heighten the propensity for jurors to decide the outcome before hearing all of the evidence and that they will allow jurors to seek trial information that confirms their preconceptions. They also contend that preinstructions will focus all jurors on the same testimony and will decrease jurors' ability to help each other recall trial testimony. One practical matter may militate against widespread acceptance of preinstructions: Judges may prefer to hear the evidence themselves and to study the relevant law before delivering instructions to the jury.

II. Argument suggesting amounts and figures

Is a statement of damages in summation appropriate argument?

A reference by a counsel during a jury trial of a personal injury or death action to the amount of damages claimed or expected by counsel's client is not improper.
Mileski v. Long Island R. Co., 499 F.2d 1169 (2d Cir. 1974); *Rodrigue v. Hausman*, 33 Colo. App. 305 (App. 1974); *Tate by McMahon v. Colabello*, 58 NY2d 84 (1983); *Bell v. Kirby*, 226 Va. 641 (1984).

In some jurisdictions, statutes specifically permit such an argument. *Wood v. City of Bridgepor*t, 216 Conn. 604 (1990).

Particular language has, on occasion, been disapproved on the ground that it was merely speculative calculation by counsel, *Reid v. Baumgardner*, 217 Va. 769 (1977) (wherein, in a personal injury action based on an automobile collision, a statement by the plaintiff's counsel in a closing argument suggested that damages of $1,000 per year for pain and suffering for the remainder of the plaintiff's life was a reasonable amount). Various individual statements have received judicial sanction under this view. *Ouelette v. Champagne*, 296 F.2d 636 (1st Cir. 1961); *Domijan v. Harp*, 340 SW2d 728 (Mo. 1960)

Counsel in argument may suggest a lump-sum amount for total general damages and also may suggest the fragmented segments of the lump-sum amount where such segments bear

some real relation to the differences shown in the evidence, *Kometani v. Heath*, 50 Haw. 89, 431 P.2d 931 (1967).

To forbid counsel to relate such differences in amount would effectively bar counsel from the right to argue the amount of money to be awarded. *Baylor v. Tyrrell*, 177 Neb. 812 (1964) (disapproved of on other grounds by, *Larsen v. First Bank*, 245 Neb. 950 (1994).

A few courts make a distinction between reference to the ad damnum itself and reference to a lump-sum figure expected, the one being sanctioned and the other condemned. *McKeown v. Argetsinger*, 202 Minn. 595 (1938); *Affett v. Milwaukee & Suburban Transport Corp*., 11 Wis. 2d 604 (1960).

In a medical malpractice action, governed by a rule which prohibits a specific dollar demand in the ad damnum clause, counsel may argue a lump-sum figure based upon the evidence, but counsel is circumscribed by the pleadings and may not argue a figure which cannot be considered reasonable. *Braun v. Ahmed*, 127 AD2d 418 (2d Dept 1987). Thus, counsel can argue for what the evidence shows, as long as within the ad damnum. If counsel seeks to argue outside of the ad damnum, a motion to amend pleadings to assert a new ad damnum should dbe made. (Where it is permitted.)

In a few jurisdictions, the view had been taken that any reference to amount is improper, *Atene v. Lawrence*, 456 Pa. 541, 318 A.2d 695 (1974). Those views have in some cases evolved. Thus, *Graham v. Snyder* __Pa. __ (1994) states: a reference in closing argument to facts of record -- even if they tend to suggest that a verdict for a particular amount of special damages would be appropriate -- is not necessarily improper. (Citing *Rider v. York Haven Water & Power Co.,* 255 Pa. 196, at 200 (1916), which found no error in remarks of counsel where he merely called the jury's attention to the amount of damages which the evidence for plaintiff indicated he was entitled to recover.

Other state courts, although subscribing generally to the view that reference to amount is not improper, nevertheless indicate that error may result if the offending remark is made for the first time during closing argument when opposing counsel will have no opportunity for rebuttal. *Shaw v. Terminal R. R. Ass'n of St. Louis*, 344 SW2d 32 (Mo. 1961).

However, the mere itemization of damages by the plaintiff's counsel in the closing summation did not constitute an improper new matter where the pleadings claimed damages and the plaintiff had introduced evidence as to damages. *Pinckard v. Dunnavant*, 281 Ala. 533, 206 So. 2d 340 (1968).

The weight of authority appears to recognize that it is not improper for counsel in a civil action to refer during argument to the amount of damages sought or expected by counsel. *Mosser v. Fruehauf Corp*., 940 F.2d 77 (4th Cir. 1991); *Schwarz v. Waterbury Public Market, Inc.,* 6 Conn. App. 429 (1986); *Arnold v. Boise Cascade Corp*., 259 Mont. 259 (1993); *Lovenguth v. D'Angelo*, 258 NJ Super. 6 (App. Div. 1992); *Wakole v. Barber*, 283 Va. 488 (2012); *Culbertson v. Montanbault*, 133 So. 2d 772 (Fla. Dist. Ct. App. 2d Dist. 1961); *Duguay v. Gelinas*, 104 NH 182 (1962); *also Mileski v. Long Island R.Co*., 499 F.2d 1169 (2d Cir. 1974) (giving the trial judge discretion to control the presentation of specific damage amounts).

In New York, the right of counsel to suggest an appropriate award to the jury is clear statutorily and by case law- (CPLR § 4016 (b) and *Tate v. Colabello*, 58 NY2d 84 (1983). However, counsel must be careful of the spin and editorial placed on a suggestion of amounts. It was held to be extremely prejudicial for defense counsel to suggest that the measure of damages was a "life savings" for the "average working fellow" or that the award should be determined by whatever was "in the other fellow's pocket." *Vassura v. Taylor*, 117 AD2d 798 (2d Dept. 1986) mot. to dismiss appeal granted 68 NY2d 642 (1986).

References to the financial status of parties are forbidden argument in closing. *Giuamara v. O'Donnell,* 96 AD2d 1049 (2d Dept. 1983); *Kenneth v. Gardner*, 36 AD2d 575 (4th Dept. 1971); *Rendo v. Schermerhorn*, 24 AD2d 773 (3 Dept. 1965).

Similarly, and expectedly, references to insurance policy coverage available to answer for damages are also strictly forbidden. *Johnson v. Lazarowitz*, 2004 N.Y. Slip Op. 00499 (2d Dept. 2004), 771 NYS2d 534; *Butigian v. Port Authority of N.Y. & N.J.*, 293 AD2d 251 (1 Dept. 2002)

Minority view-

Courts have held to the contrary, disallowing counsel's suggestion of damage amounts. The apparent rationale being that damages should be ascertained by the jury free from any influence by counsel suggesting what the amount of the award should be *Public Health Trust of Dade County v. Geter*, 613 So. 2d 126 (Fla. Dist. Ct. App. 3d Dist. 1993); *Purpura v. Public Service Elec. & Gas Co*., 53 NJ Super. 475 (App. Div. 1959); *Carothers v. Pittsburg Rys. Co*., 229 Pa. 558 (1911); *Estate of He Crow by He Crow v. Jensen*, 494 NW2d 186 (S.D. 1992); *Bennett v. 3 C Coal Co.,* 180 W Va 665 (1989); *See Quinn v. Philadelphia Rapid Transit Co*., 224 Pa. 162 (1909).

Some courts prohibit argument of a specific amount of damages for pain and suffering. *Waldorf v. Shuta*, 896 F2d 723 (3d Cir. 1990); *Mosser v. Fruehauf Corp*., 940 F.2d 77 (4th Cir. 1991); *Williams v. Rene*, 886 F. Supp. 1214 (DVI 1995), rev'd on other grounds, 72 F3d 1096, 34 Fed. R. Serv. 3d 106 (3d Cir. 1995); *Fetzer v. Wood*, 211 Ill. App. 3d 70 (2d Dist. 1991); *Tamplin v. Star Lumber & Supply Co*., 251 Kan. 300 (1992) (reference to statutory cap for pain and suffering improper).

III. Strategy to ensure jurors have proper guidance, and counsel has foundation for proper argument.

Empirical evidence shows that jurors must be guided in interpretation of damages, especially catastrophic economic damages. And case reviews reveals that argument by counsel intended to guide the jury and support an award, must not be speculative or sua sponte expressions of attorney opinion. There must be evidentiary support in the record for argument and the consequent judgment.

Thus, it is imperative in the catastrophic and complicated damages case to present affirmative damages testimony.

A classic case on this topic is *Texaco, Inc. v. Pennzoil Co*., 729 SW2d 768 (Tex. App. 1987). In *Texaco*, Joe Jamail, attorney for Pennzoil Co., won the largest jury verdict in history -- $10.53 billion. The flamboyant trial attorney argued that Texaco wrongfully interfered with Pennzoil's agreement to acquire Getty Oil. A number of factors contributed to the huge award, but Texaco's defense counsel was mainly faulted for failing to address the issue of damages. Throughout the four-month trial, Texaco never presented evidence to counter Pennzoil's damages claim, nor did it strongly object to the numbers presented to the jury by Pennzoil's two economists. Ever since this decision, the *Texaco* case has served as a stark warning to defense counsel who fail to proffer evidence on damages.

Why should you present evidence enumerating Plaintiff's damages?

Anchoring

Anchoring is a cognitive bias which explains the human tendency to subconsciously apply a recently observed number or value to a possibly unrelated question. Nobel Prize winning psychologist Daniel Kahneman and his colleague Amos Tversky designed a famous experiment demonstrating this tendency. They rigged a 100-number wheel of fortune to stop only on 10. They spun the wheel for an audience. They repeated the spin before a different audience, but this time the wheel was rigged to stop at 65. They then asked both groups to guess how many African countries were members of the United Nations. The group that observed the wheel stopping on 10 tended to guess around 25 percent; among the group that saw the wheel stop at 65, almost all guesses were close to 45 percent. There was an undeniably significant correlation between the number each group was exposed to and the guesses made by members of each group. Many similar experiments have confirmed the phenomenon of anchoring bias.

Jury consultants have observed that anchoring bias is a powerful force in the jury room. When asked if defense counsel should present its own damages testimony at trial, Arthur H. Patterson, Ph.D., a Senior Vice President at the jury consulting firm DecisionQuest, said, "absolutely and unequivocally, otherwise the only number the jury has is from the plaintiff." In the absence of an alternate anchor provided by the defense, the plaintiff's numbers will be regarded with more weight from the jury than had the defense proffered and countered with their own damages presentation.

A juror must be exposed to your anchor as a bulwark against opposing counsel's anchor. Without an alternative calculation, the typical juror will be tethered to opposing counsel's calculations and will have nothing to weigh against it.

The proper means for placing appropriate calculation before the jury is by means of expert economic testimony. It has been statistically shown in a study of 1,000 cases reported in the May 1991 issue of the Journal of Legal Economics that the defense benefits overwhelmingly by retaining an economic expert and presenting alternative calculations to the jury. The absence of testimony from a defense economist when the plaintiff put on a damages expert resulted in awards that were, on average, four times higher than where there was testimony from both sides.

Not mounting a strong, measurable and reproducible defense on damages is especially dangerous in seeking to sustain a verdict if it has no foundation upon which the finder of fact laid its findings. Appellate courts have made it abundantly clear that the defense has an obligation to present a coherent and comprehensive damages argument, or face retrial in the event of a verdict favorable to the defense where the verdict bears no obvious relation to the evidence offered at trial.

In a Pennsylvania wrongful-death action *Schroth v. Karounos,* No. 1012 EDA 20210, Pa. Superior Court, Nov. 10, 2010 (a memorandum opinion), the defendant neglected to dispute the plaintiff's claim for $695,000 in lost household services, paving the way for a new trial on damages. At the original trial, the plaintiff's economist valued the decedent's lost earning capacity at $509,000, but also offered an alternative scenario that assumed the decedent would not work and would remain at home. Under the alternative scenario, the plaintiff economist testified that the damages for the loss of her household services would be $695,000. The defendant did not offer counter testimony nor did the defense counsel cross-examine the plaintiff's economist on the issue of household services. The defense's cross examination of the economist focused on the probability of the decedent completing college – a peripheral issue that did not adequately challenge the plaintiff's evidence.

The jury awarded $75,000 for past medical expenses under the survival claim, and nothing to the decedent's husband for lost household services under the wrongful-death claim. Plaintiffs argued to the trial court that the verdict was inadequate, and requested a new trial on damages. The trial court refused to order the new trial, and the plaintiffs appealed.

The Superior Court held that the verdict was inadequate and ordered a new trial on damages saying "[T]he jury is not free to disregard proven damages."

In a similar case, *Kiser v. Schulte,* 648 A.2d 1 (Pa. 1994), the Pennsylvania Supreme Court held that a jury verdict of $25,000 for wrongful-death and survival claims was so low as to be "shocking" and upheld an order for a new trial on damages because the defense had not offered any contrary testimony or opposing argument.

The plaintiff's expert economist in *Kiser* testified that the decedent, an 18-year-old woman, would have earned $792,352 as a high-school graduate throughout her lifetime. After adding fringe benefits and household services and subtracting personal maintenance, which he estimated would be 40 percent of income, the plaintiff's economist opined that the total damages for the claim were $571,659. The economist also proffered a second estimate, which factored in the decedent obtaining a college degree, and increased the net economic loss to a total of $756,081. In addition, under the wrongful death claim, the expert put loss of services to the Kiser family at $11,862 to $18,980.

On cross examination, at the request of defense counsel, the plaintiff's economist calculated damages assuming the decedent's earnings would be commensurate with those of a high school graduate and that the decedent would have taken some time off from the work force to raise a family, while also assuming a 70 percent maintenance rate. Under that scenario, the plaintiff's economist determined that the damages would be $232,400.

The Supreme Court concluded that though it is plausible that the $25,000 award represented an award for funeral costs and loss of services, such would be an award under the wrongful-death claim (loss to family members) and would ignore the survival claim (loss to the decedent's estate). Under the survival claim, the decedent's estate is entitled to receive her lost future earning capacity, minus personal maintenance. The Supreme Court held that even assuming the jury intended for part of the $25,000 award to go toward the survival claim, the award would be inadequate in that it would have no basis in trial testimony.

Lastly, in *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super. 2010), the Superior Court held that while cross examination of the plaintiff's economist may have placed some of the economist's assumptions in doubt, the cross examination did not adequately address the issues of the decedent's worklife expectancy or earning capacity, and therefore the award of no damages was contradictory to the evidence. The plaintiff's claims were based on economic testimony assuming the decedent would become an accountant. The only contrary testimony was cross examination by the defense focused on the fact that the decedent's eyesight was poor, an issue that the Superior Court noted, would have little impact on his earning capacity as an accountant. Cross examination on peripheral damages issues left the plaintiff's main claims "uncontroverted," and Pennsylvania law required that the jury award reasonably reflect the proven damages or be deemed inadequate. Thus, the court upheld the lower court's ruling "that the jury's award of zero damages bears no reasonable relationship to the loss actually sustained." *Rettger* was retried on the issue of damages.

IV. Conclusion

In complicated and catastrophic cases nothing can or should be left to chance. Jurors must be given anchors and a guide around which to craft judgments and verdicts. The trial record must fully support defense verdicts and there must be appropriate foundation for counsel's argument in suggestions of damages.

It is prudent to build the attorney economist team early to support a reasoned approach to managing the calculations and potential manipulation of calculations by opposing counsel and their experts.