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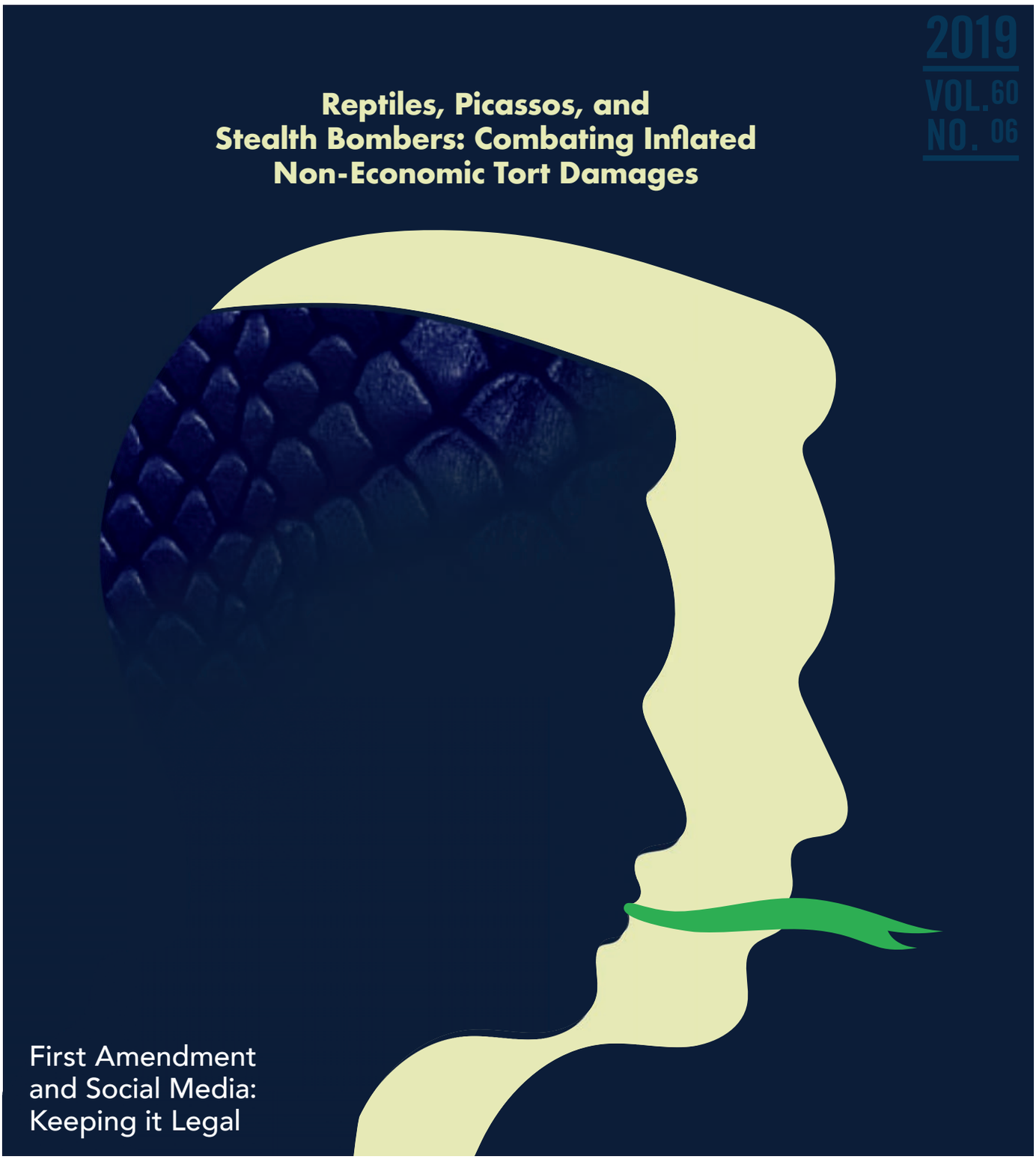
Reptiles, Picassos, and Stealth Bombers: Combating Inflated Non-Economic Tort Damages



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Reptiles, Picassos, and Stealth Bombers: Combating Inflated Non-Economic Tort Damages

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Introduction

Across the country, lawyers defending personal-injury actions have noticed that damage awards are increasing, particularly for non-economic damages such as pain and suffering. Some of the awards are staggering. It is getting more difficult to assess litigation risk and to determine reserves. Lawyers defending municipalities are particularly vulnerable because plaintiffs view municipalities as "deep pockets." As the old adage goes: "You only get more, if you ask for more." Lawyers suing municipalities ask for more.

Higher damage awards have a snowball effect, because traditional news sources and social media publicize big verdicts. Lay-persons who've heard about big awards become more amenable to viewing big numbers as reasonable when they end up in the jury box. But they rarely hear the full story—for example, that the big verdict was reduced by settlement or post-judgment motion or that it was reversed on appeal. Big verdicts get publicized, not the reductions. So, stopping the snowball effect requires preventing big verdicts in the first place. Defense attorneys must combat aggressive tactics that plaintiffs' attorneys are using to increase non-economic awards. Some have specific names, such as the "Reptile Theory." Others are nameless but pop up everywhere as plaintiffs' attorneys share their tricks of the trade.

This article will focus on some common tactics used to inflate non-economic awards, including the "Reptile Theory." There is no one answer as to why non-economic damage awards are increasing. The biggest reason may simply be that plaintiffs are asking for much bigger numbers today. Unless the jurisdiction where the lawsuit is pending legislatively caps non-economic damages or restricts plaintiffs' attorneys from proposing non-economic damages numbers to juries, defendants are largely at the mercy of the jury and the trial court's discretion. Defendants play with fire if they focus solely on liability and avoid addressing non-economic damages. Defense attorneys should ask trial judges to bar objectionable arguments and should argue to the jury that plaintiff's non-economic damage numbers are unreasonable. The goal is to corral non-economic damage awards within the realm of what a municipal client considers reasonable. But it is also to ensure defense counsel has preserved the record for post-judgment motions and appeal, in case things do not go as planned.

The latter purpose is of particular importance to us. Our firm is a boutique appellate firm in California that represents municipalities and other clients across the country. Appellate attorneys cannot create published authority limiting or admonishing the use of aggressive tactics if the issues are not raised and preserved in the trial court. Appellate courts frequently find "waiver" in this area. And even when they find error, they often find that the errors are not sufficiently harmful or that the damage amounts are not sufficiently excessive to require reversal. So, don't assume an appellate court can or will fix any problems. Trial is the front line in the war against runaway non-economic damage awards.

The Problem: Non-Economic Damages Standards Are Amorphous, Permitting Inflated Requests.

The fundamental problem with non-economic damages, such as awards for pain and suffering, is that no precise formula exists to measure them. Although the exact standards for determining non-economic damages differ from jurisdiction to jurisdiction, the standards have one thing in common: They are amorphous. Some states have protected defendants by imposing legislative caps on non-economic losses in certain cases. *See, e.g.,* Alaska Stat. Ann. § 09.17.010 (West 2017). But in every state, the jury instructions usually provide the jury with no real standard for non-economic damages. The lack of any formula lets plaintiffs' counsel be more aggressive in pushing for inflated awards, particularly where no legislative cap exists.

In Georgia, for example, the model jury instruction for "pain and suffering" and "mental" damages specifies, in part, that:

- "Pain and suffering is a legal item of damages. *The measure is the enlightened conscience of fair and impartial jurors.* Questions of whether, how much, and how long the plaintiff has suffered or will suffer *are for you to decide*.";
- "Pain and suffering includes mental suffering, but mental suffering is not a legal item of damage unless there is physical suffering also."; and
- "In evaluating the plaintiff's pain and suffering, *you may consider the following factors*, if proven: interference with normal living; interference with enjoyment of life; loss of capacity to labor and earn money; impairment of bodily health and vigor; fear of extent of injury; shock of impact; actual pain and suffering, past and future; mental anguish, past and future; and the extent to which the plaintiff must limit activities."

Georgia Suggested Pattern Jury Instructions Civil 66.501 (emphasis added).[1]

Instead of referring to the "enlightened conscience of fair and impartial jurors," other jurisdictions use terms like "reasonable," "common sense," "just and fair" and "your good judgment" or "sound discretion." For example:

Alabama: "There is *no legal rule or yardstick* that tells you how much money to award for physical pain (and mental anguish). The amount you decide to award is *up to you*, but it must be *fair and reasonable, based on sound judgment*, and proved by the evidence. In deciding the amount of the award, you may consider, among other things, the nature, severity, and length of time (name of plaintiff) had physical pain (and mental anguish)." 1 Ala. Pattern Jury Instr. Civ. 11.10 (3d ed) (emphasis added).

Alaska: "The law does *not establish a definite standard* for deciding the amount of compensation for non-economic losses, and the law does not require that any witness testify as to the dollar value of non-economic losses. You must exercise your *reasonable judgment* to decide a *fair amount* in light of the evidence and your experience." AK Pattern Jury Instr.- Civ. 20.06 (emphasis added).

California: "*No fixed standard exists* for deciding the amount of these non-economic damages. You must use your judgment to decide *a reasonable amount* based on the evidence and *your common sense*." Judicial Council of California Civil Jury Instructions 3905A (emphasis added). Plaintiff can recover for past and future "physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/ humiliation/ emotional distress" and any other damages allowed by the trial court. *Id.*

Colorado: "Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your *best judgment* based on the evidence." Colo. Jury Instr., Civil 5:6 (emphasis added).

Connecticut: "A plaintiff who is injured by the negligence of another is entitled to be compensated for all physical pain and suffering, mental and emotional suffering, loss of the ability to enjoy life's pleasures, and permanent impairment or loss of function that (he/she) proves by a fair preponderance of the evidence to have been proximately caused by the defendant's negligence. As far as money can compensate the plaintiff for such injuries and their consequences, *you must award a fair, just, and reasonable sum*. You *simply have to use your own good judgment* in awarding damages in this category. You should consider the nature and duration of any pain and suffering that you find." Conn. Judicial Branch Civil Jury Instr. 3.4-1 (emphasis added).

Delaware: "The law *does not prescribe any definite standard* by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness should have expressed an opinion about the amount of damages that would compensate for such injury. Your award should *be just and reasonable in light of the evidence and reasonably sufficient* to compensate [plaintiff's name] fully and adequately." Del. P.J.I. Civ. § 22.1 (2000) (emphasis added).

Hawai'i: "Plaintiff(s) is/are not required to present evidence of the monetary value of his/her/their pain or emotional distress. It is only necessary that plaintiff(s) prove the nature, extent and effect of his/her/their injury, pain, and emotional distress. It is for you, the jury, to determine the monetary value of such pain or emotional distress *using your own judgment, common sense and experience*." HI R. Civ. Jury Instr. 8.10 (emphasis added); *see* HI R. Civ. Jury Instr. 8.8.

Kansas: "If you find plaintiff suffered an injury or injuries and more than minimal discomfort as a result of the occurrence, then you must compensate the plaintiff for plaintiff's

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pain and suffering. There is no unit value and *no mathematical formula* the court can give you for determining items such as pain, suffering, disability, and mental anguish. You must establish an amount that will *fairly and adequately* compensate the plaintiff. *This amount rests within your sound discretion*." Pattern Inst. Kan. Civil 171.02 (emphasis added).

New York: You must award plaintiff "a sum of money which will *justly and fairly compensate* (him, her)" for pain and suffering, and the jury "[i]n determining the amount. . . may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life" and " [l]oss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life." N.Y. Pattern Jury Instr.-Civil 2:280 (emphasis added).

Ohio: "You cannot consider as evidence the suggestion of counsel that you use a unit value or mathematical formula to compensate for pain and suffering or disability. There is *no recognized unit value* for pain and suffering or disability. Deciding compensation for pain and suffering or disability *is solely your responsibility*." 1 CV Ohio Jury Instructions 207.23 (emphasis added).

Tennessee: "*No definite standard or method of calculation is prescribed* by law by which to fix reasonable compensation for pain and suffering, permanent injury, disfigurement, and loss of enjoyment of life. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering, loss of enjoyment of life, and/or permanent injury, you *shall exercise your authority with calm and reasonable judgment* and the damages you fix shall be *just and reasonable* in light of the evidence." 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 14.01 (2018 ed.) (emphasis added).

Washington: "The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be *governed by your own judgment, by the evidence in the case, and by these instructions*." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 30.01.01 (7th ed.) (emphasis added).

With respect to wrongful death actions, some jurisdictions prohibit a decedent's survivors in a wrongful death action from recovering for their own personal anguish. *See, e.g.,* N.Y Pattern Jury Instr.- Civil 2:320. But other jurisdictions permit such recovery, again based upon amorphous standards that provide little guidance and often specify inherently-duplicative categories of potential loss.[2]

Such amorphous standards give plaintiffs' attorneys the freedom to ask for virtually any number they want, provided the nature of the plaintiff's injuries provides a basis for claiming the number makes sense.

THE REPTILE THEORY.

What is the Reptile Theory?

In 2009, jury consultant David Ball and plaintiff's attorney Don C. Keenan published a book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*. The book is based on a theory by neuroscientist Paul MacLean that people are driven by the "reptilian" portion of their brains. Don C. Keenan and David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution* 13 (2009) (hereinafter, *Reptile Manual*). This portion of the brain is referred to as "reptilian" because its function is identical to the brain of reptiles, in that it houses basic life functions, such as breathing, balance, hunger, and the fundamental life force: survival. *Id*. at 13, 17.[3]

Relying on MacLean's theory about the reptile brain, the authors of the *Reptile Manual* advocate appealing to the jurors' "reptile brain"—in other words, basic survival instinct. The idea is that, once triggered, the jurors' "reptile brains" will take over their higher-order thinking and compel them to reach a result that best protects the safety of their community. The authors explain that plaintiffs' counsel should couch the defendant's conduct in terms of the perceived threat to the community's safety. Thus, every case should be approached using an "umbrella rule" focusing on community safety: "A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients]." *Id*. at 55 (emphasis omitted, bracketed language in original).

The Reptile Manual argues that plaintiffs' counsel should use this "umbrella rule" to trump the standard of care that would otherwise govern the defendant's conduct. *Id*. at 62. The professional "must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger." *Id*. at p. 63. Regardless of the legal standard of choosing reasonably among acceptable alternatives, the professional must adopt the "safest available choice." *Id*.

As the authors of the *Reptile Manual* explain: "The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows -demands! -only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, *no matter how many 'experts' say it's okay, always violates the legal standard of care*." *Id*. at 62 (emphasis in original).

By focusing on community safety, the Reptile Theory seeks to influence jury verdicts by appealing to the self-interest of jurors. "Justice is . . . an *excuse* - a feel-good rationale -for people to protect themselves and their families." *Id*. at 44 (emphasis in original). The Reptile Theory avoids the merits of the plaintiff's claim by appealing to the jurors' personal interest in their own safety and that of their community, with the plaintiff's claims being merely

a placeholder for deep-seated, even subconscious, fears that jurors harbor about themselves and their families: "Show the Reptile that a good verdict for you facilitates her survival." *Id*. at 45.

The authors of the *Reptile Manual* urge that the key is to "[b]roaden" the case and "go beyond your specific kind of defendant." *Id*. at 56 (emphasis omitted). Rather than focus on whether the defendant's conduct actually caused injury to the plaintiff, the Reptile Theory asks whether the defendant's conduct "represents a *community* danger." *Id*. at 31 (emphasis added). To move the focus away from the actual plaintiff, the Reptile Theory asks not how the defendant harmed that plaintiff, but instead how much harm the defendant could have caused some other plaintiff: "The valid measure is the *maximum* harm the act *could* have caused." *Id*. at 33 (emphasis in original). As the authors of the manual emphasize: "There are no small cases. Only small lawyers." *Id*. at 225 (emphasis omitted). The actual facts of the case are secondary: What matters is "*[h]ow much harm could it cause in other kinds of situations?*" *Id*. at 34 (italics in original, boldface omitted.)

The Reptile Theory applies to both discovery and trial. The *Reptile Manual* tells lawyers what to do at every step of a case, including questions to ask during depositions or voir dire, and what to say in opening statements and closing arguments. The goal is to get the defense witness to agree during discovery and at trial that safety is a top priority or the only relevant factor and that the defendant acted unsafely. The plaintiff's attorney will ask the following types of questions in discovery:

> "Safety is a top priority at your company, right?"
> "A company must never needlessly endanger its employees, correct?"
> "A company is never allowed to remove a necessary safety measure, correct?"
> "A driver is never allowed to needlessly endanger the public, right?"
> "You'd agree with me that ensuring patient safety is your top clinical priority, right?"
> "Violating a safety rule is never prudent, correct?"

At trial, the plaintiff's attorney will try to elicit witness testimony that the defendant acted unsafely and violated safety rules. The attorney will bring the theme home in closing argument, by emphasizing that the jury must protect the community. Here are some exemplar closing arguments from Vermont and California lawsuits:

> "And we've heard that the risks here are not just risks to Michael Hemond. The risk when it comes to a utility company following basic safety rules, following good engineering design practices and making sound and rational decisions, that's a risk to everybody in society who lives and works and walks to school or drives to work where there are power lines and power equipment. It's an important principle that protects everybody, not just Mike, though Mike happens to be the Plaintiff in this case."

Hemond v. Frontier Commc'ns of America, Inc., 123 A.3d 1176 (Vt. 2015), $22.5 million verdict, emphasis added.

> "You are the voice, *you are the conscience of this community*. You are going to speak on *behalf of all the citizens* in Riverside County and in particular Coachella Valley. You are going to make a decision *what is right and what is wrong*. What is acceptable, what is not acceptable. *What is safe, and what is not safe*. You are going to announce it in a loud, clear public voice, and that is going to be the way it is."

Regalado v. Callaghan, 207 Cal. Rptr. 3d 712 (Ct. App. 2016) [Riverside County, California]–($6.5 million verdict, $6 million in non-economic damages) (emphasis added).

> "Now, the decision about *the safety of this community* and whether or not *they can get away with violating the law* and letting somebody – someone getting hurt on their property and get to go on as business as usual, it's up to you."

Norman v. Newport Channel Inn, No. 30-2100-00423312, 2011 WL 8609721 (Cal. Mar. 22, 2011) [Orange County, California] ($38 million verdict) (emphasis added).

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Nadia Sarkis GMSR after working at a multi-sector private equity firm, advising its portfolio companies regarding employment and privacy issues, in addition to overseeing all litigation. Her in-house work gave Nadia a client's perspective on litigation, including the role of business dynamics in decision making.

Before her work in-house, Nadia practiced at a major national law firm and a litigation boutique, trying multiple jury cases to verdict. Nadia is well versed in all stages of litigation, and her trial experience makes her a far more effective appellate advocate. Nadia started her legal career with two appellate clerkships, for Ferdinand F. Fernandez of the United States Court of Appeals and for Chief Justice Mary Mullarkey of the Colorado Supreme Court. Nadia is also a Certified Information Privacy Professional ("CIPP"), a certification issued by the International Association of Privacy Professionals. She is a graduate of Northwestern University School of Law.

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Reptile tactics, whether couched as witness examination or argument, basically include:

- Anything that characterizes the defendant's conduct as a choice to violate a safety rule rather than making a mistake
- Anything that shifts the focus away from having sympathy for the plaintiff (the traditional way to try to inflate non-economic damages) toward protecting the community against the defendant's unsafe conduct.

The *Reptile Manual*'s authors state on their website, "Welcome to the Revolution" and claim that "reptile verdicts & settlements" total $7.7 billion as of July 2019. *See* Home, Reptile, https://reptilekeenanball.com/ (last visited August 5, 2019). That number must be taken with a grain of salt. Even aside from puffing, there is no way to know whether any particular verdict or settlement resulted from the Reptile Theory versus myriad others. But one thing is certain: Plaintiffs' attorneys believe the Reptile Theory increases verdict amounts.

HOW TO COMBAT THE REPTILE THEORY.

1. Discovery.

Not every case is a Reptile case. So how do you know if Reptile tactics are coming? Research your opposing counsel. Many attorneys are known in their communities as Reptile lawyers because of their frequent use of Reptile tactics. Check their closing arguments in other cases and be vigilant during discovery in your case. The mentioning of "safety" rules and issues during prior arguments or during discovery in your case is an obvious red flag.

Although many people think of the Reptile Theory as a trial tactic, its use—and probably its most dangerous use—starts in discovery. Be cautious in responding to discovery and production requests. ***And you must prepare your witnesses in advance to deal with Reptile questioning at their depositions***. A good Reptile attorney will corner adverse witnesses during their depositions into giving bad concessions about safety rules and safety violations. If your key witnesses falls victim to Reptile Theory questioning, you may have no choice but to settle. Your defense may be dead by the time you get to trial. Don't wait for trial to prepare witnesses. Yes, the attorney should object to the questions, as they will often be vague or irrelevant. But that's not a basis to prohibit the witness from answering. *So, prepare the witness in advance*:

- *To avoid overgeneralizing about safety*.

- *To avoid answering "yes" to Reptile questions*. This is a hugely important point because it fundamentally differs from standard deposition preparation. Attorneys usually prep their witnesses to simply answer "yes" or "no" and to avoid detailed response or further elaboration. But the entire point of Reptile questioning is that the deposing attorney wants the witness to simply answer "yes" to questions about safety rules and violations. And the witness's instinct will be that the answer cannot be "no." It's difficult to answer "no" to questions such as "Safety is a top priority at your company, correct?" The truth, however, is that it is an unfair question. There would be fewer horrific car crashes if we all drove cars built like tanks that went 10 miles an hour, but no one would get anywhere and there would be environmental problems. Safety issues are often nuanced, and the ultimate issue at trial is usually whether the defendant acted "reasonably," not whether the defendant took the safest route possible. The best answers to Reptile questions are responses which flag that the issue is nuanced and that a "yes" or "no" answer is inappropriate, such as:

"It depends on the circumstances"
"Every situation is different"
"Not necessarily in every situation"
"Not always"
"Sometimes that is true, but not all the time"
"It can be in certain situations"
"Safety in what regard? Can you please be more specific?"

- *To explain contrary safety issues*. For example, explain that if the company did things the way the attorney is suggesting, there actually will be more danger and less of a benefit to the rest of the community

2. Trial.

Educate the court through motions in limine and trial briefs. You need to explain to the court why using the Reptile Theory is improper. Although you'll need to rely on the law of the jurisdiction where the lawsuit is pending, most jurisdictions have case law that prohibits or restricts arguments analogous to the Reptile Theory. In particlar, rely on any case law from the applicable jurisdiction that:

- *Prohibits "Golden Rule" arguments*. A Golden Rule argument asks jurors to put themselves in the plaintiff's shoes and asks how they individually would want to be treated or what compensation they would view as appropriate had they suffered the same injuries. Almost every jurisdiction bars such arguments. *See, e.g., Granfield v. CSX Transp., Inc.,* 597 F.3d 474, 491 (1st Cir. 2010) (a "Golden Rule" argument is "'universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence'"); *Arnold v. E. Air Lines, Inc.,* 681 F.2d 186, 199 (4th Cir. 1982) ("The Golden Rule and sympathy appeals are . . . obviously improper arguments . . . . Having no legal relevance to any of the real issues, they were per se objectionable"). The Reptile Theory is a variation of a Golden Rule argument as it asks the juror to consider the impact of safety rule violations on their own families and community, instead of objectively analyzing evidence regarding the plaintiff.

- *Prohibits arguments that the jury must act as the conscience of the community. See, e.g., Johnson v. Watkins*, 803 F. Supp. 2d 561, 581 (S.D. Miss. 2011), aff'd 472 F. App'x 330 (5th Cir. 2012) ("'Conscience-of-the-community' arguments are 'impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation.'")

- *Prohibits arguments that appeal to juror self-interest and passion. Klotz v. Sears, Roebuck & Co.,* 267 F.2d 53, 54 (7th Cir. 1959) (in a products liability case wherein plaintiff lost his left eye, plaintiff's counsel argued that the jury should "'do unto others as you would have them do unto you,'" that the jury should test defendant's argument "by what defendant's counsel would 'have taken for his eye,'" and requested that the jury "give us the kind of deal that you would want to get;" such arguments were improper pleas for jury sympathy and warranted reversal and new trial.)

- *Prohibits argumentsin non-punitive damages cases to "send a message" or "teach a lesson" to the defendant or to punish the defendant for its wrongdoing. R.J. Reynolds Tobacco Co. v. Gafney,* 188 So.3d 53, 57 (Fl. Ct. App. 2016) ("'Send a message' arguments are clearly inappropriate when utilized in a way that links the 'sending of the message' to a compensatory damage award, and not to the entitlement to, or amount of, punitive damages."); *City of Orlando v. Pineiro*, 66 So.3d 1064, 1070-71 (Fl. Ct. App. 2011) (although issue was not preserved for review, cautioning against "send-a-message" arguments on retrial, where plaintiff's counsel argued: "[T] he law says that you must speak to Edwin's mother and father through your verdict. It is through this piece of paper that each and every one of you tell Mom and Dad that Edwin's life did have value . . . .")

Research current case law regarding the Reptile Theory and then cite to decisions from any jurisdictions that have rejected the Reptile Theory. The law in this area is constantly evolving, so always update your research. Currently, there are few appellate decisions. The best published decision for the defense is currently a 2016 California intermediate appellate decision, *Regalado,* 207 Cal. Rptr. 3d 712. There, the plaintiff's attorney told the jury in closing argument that "[y]ou are the conscience of this community," that you get to decide "what is safe, and what is not safe," and the jury's function was as "a matter of public policy, public safety . . . about keeping the community safe." *Id*. at 597-98. The defense attorney objected on the basis that this was a "reptile argument." *Id*. at 598. The Court of Appeal agreed that the argument was improper: "[I]n our view the remarks from [plaintiff's] counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe *were improper* . . . ." *Id*. at 599 (emphasis added).

Several district courts have rejected the Reptile Theory by granting motions in limine.[4] Some courts have viewed such motions as premature and decided to wait until specific evidence or argument is presented.[5] Even if the motion is denied, it serves to educate the trial court and gives meaning to any "Reptile Theory" objection you might make during trial.

Object, object, object. Regardless how the court rules on any motion in limine, if the plaintiff starts presenting a Reptile Theory argument at trial, you need to object or else the issue likely will be deemed waived. Attorneys don't always comply with motion in limine rulings; standing idly by while an order is violated can be treated on appeal as a waiver. And if the court agrees with your objection, you need to seek a curative admonition or request a mistrial. Also, make sure that everything is being transcribed by a court reporter or recorded electronically so that a proper record will exist for appeal.

Your objection also needs to be *timely*. In the California *Regalado* decision, for example, the Court of Appeal held that the plaintiff's Reptile closing argument was improper, but also held that the issue was waived and not a basis for reversal because defense counsel waited until a break in plaintiff's still uncompleted closing argument to voice an objection. *Regalado*, 207 Cal. Rptr. 3d at 725-26. Object immediately. Yes, many attorneys do not like objecting during closing argument. But if you've paved the way with a motion in limine or trial brief, the objection can be short and sweet. Although some jurisdictions will permit "plain error" review even if there was no objection, most will find a waiver on appeal. Don't wait.

In a clear-liability case, consider conceding liability. In cases where the municipality has no genuine defense against liability, conceding liability can undercut the Reptile Theory's potential impact. Not only does it let you exclude bad evidence, it also allows the defendant to explain to the jury that the defendant is and has always been ready and willing to pay reasonable damages and wants to pay the plaintiff reasonable damages, but the problem—the reason why the jury's help is needed—is that the plaintiff is seeking an unreasonable amount of damages. This essentially lets you flip the Reptile script: In this scenario, the danger to the community is not the municipality that admits liability and is ready and willing to pay reasonable damages; instead, it is the plaintiff's attorney who is manipulating the legal system by seeking an unreasonable amount. It is much more difficult for a jury to want to "punish" a defendant that says it is ready to pay damages but needs the jury's help to determine a reasonable amount.

Watch out for media requests. As part of Reptile Theory strategy, plaintiffs' lawyers want the jurors to believe that the case is important to their community, because they intend to ask the jury to protect the community through the damage award. One tactic is to have other plaintiffs' lawyers or friends pack the back of the courtroom during trial, so it appears that the community is interested in the outcome. Another tactic is to seek to encourage media requests to record the trial. Sometimes those requests are from a courtroom subscription service used by lawyers and students only. Oppose all media requests. And if the court allows the trial to be recorded by a subscription service not available to the public, ask the court to give the jurors an admonition that the trial is being recorde for educational purposes for lawyers and students only, and that the general public will never see it.

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JURY ANCHORING.

What is anchoring?

The amorphous nature of non-economic damages standards affords plaintiffs' attorneys significant leeway to propose large numbers to jurors. This creates the risk of anchoring jurors to large numbers.

"Numerous studies establish that the jury's damages decision is strongly affected by the number suggested by the plaintiff's attorney, independent of the strength of the actual evidence (*a psychological effect known as 'anchoring'*)." John Campbell, et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,* 101 Iowa L. Rev. 543, 545 (2016) (emphasis added). "When asked to make a judgment, decision makers take an initial starting value (i.e., the anchor) and then adjust up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction." *United States v. Rojas*, No. 06CR269 MRK, 2010 WL 5253203, at *4 (D. Conn., Dec. 13, 2010) (quoting Nancy Gertner, *Thoughts on Reasonableness* (2007) 19 Fed. Sent'g Rep. 165, 167-68).

Anchoring can have a significant effect on verdicts. The effects of plaintiffs' attorneys "anchoring" and "pre-conditioning" jurors by floating large damage numbers early in the case have been well documented and scientifically proven; studies indicate that the mentioning of large numbers tends to produce inflated verdicts based on anchoring and pre-conditioning biases, rather than the actual evidence presented at trial. Even arbitrary or extreme anchors can have large effects—for example, "[i]n one study, a request for $500,000 produced a median mock jury award of $300,000, whereas a request of $100,000, in the identical case, produced a median award of $90,000." Cass R. Sunstein, U. of Chicag Law & Economics Working Paper No. 165, 2002, available at https://chicagounbound.uchicago.edu/law_and_economics/228/ (internal citation omitted).

Studies also show that "for an anchor to have an effect, people need not be aware of its influence; that an anchor is operating even when people think that it is not; that anchors have effects even when people believe, and say they believe, that the anchor is uninformative; and that making people aware of an anchor's effect does not reduce anchoring. It follows that 'debiasing' is very difficult in this context." Cass R. Sunstein, U. of Chicago Law & Economics Working Paper No. 165, 2002, available at https://chicagounbound.uchicago.edu/ law_and_economics/228/ (internal citations omitted); *see* Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combatting the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F.L. Rev. 393, 398, 404 (2018) (anchoring affects "the starting point from which one adjusts an estimate" and "[r]esearch has shown anchoring has a strong effect on civil court jury awards"; people "genuinely do not see themselves as biased . . . [and] are unwilling or unable to recognize their bias, even when told . . . ."); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519, 522, 534 (1996) (summarizing "studies demonstrate[ing] that juror decision making is influenced by monetary anchors" and finding that "anchoring effects represent biases rather than the use of relevant information").[6]

How to combat anchoring.

1. Move in limine to bar plaintiff's counsel from mentioning damage numbers during voir dire.

Given the risk of jurors succumbing to anchoring biases, coupled with plaintiffs' attorneys ability to float huge non-economic damage numbers to the jury given the amorphous nature of the instructions the jury will receive, motions in limine by defense counsel to try to "limit[] the anchoring effect in civil court judgments" are "very well-advised." Stein & Drouin, at 419-20. Motions in limine should refer to the cognitive science that shows—overwhelmingly—that jurors are susceptible to the anchoring effect.

The risk of anchoring starts in voir dire. By putting huge numbers on the case during the voir dire questioning of prospective jurors, the jury may get anchored or pre-conditioned early on to consider a large number to the plaintiff's advantage. So, defense attorneys should try to prevent plaintiff's counsel from floating such numbers during voir dire.

The first step: Check the judge's local rules. Some judges prohibit attorneys from mentioning specific damage numbers during voir dire. Some jurisdictions also have prohibitions against counsel proposing non-economic damage numbers at trial, which obviously should apply to voir dire too.

The next step: Move in limine to prevent plaintiff's counsel from mentioning specific damage numbers during voir dire. Most jurisdictions have statutory prohibitions and case law that prohibit attorneys from trying to pre-condition prospective jurors during voir dire. Rely on such authority to ask the trial court to exercise his or her discretion to bar the damage numbers.

Use the motion in limine to educate the judges to the risk of anchoring by citing to law review articles and case commentary. You can also cite to cases from across the country where trial courts have exercised their discretion to bar plaintiffs' attorneys from mentioning specific dollar amounts during voir dire, emphasizing that such discretion should be exercised to prevent the risk of pre-conditioning and anchoring jurors to large damage verdicts. *See, e.g., Trautman v. New Rockford-Fessenden Co-op Trans. Ass'n*, 181 N.W.2d 754, 759 (N.D. 1970) (upholding trial court's discretion to deny questions to prospective jurors about the possible dollar amount of a verdict "as they may tend to influence the jury as to the size of the verdict" and create a predisposition to a high verdict); *Henthorn v. Long*, 122 S.E.2d 186, 196 (W.Va.

1961) (upholding trial court's discretion to deny voir dire questioning about possible damage amounts because the technique is "sometimes advocated as a means of inducing juries to return big verdicts"); *Paradossi v. Reinauer Bros. Oil Co.*, 146 A.2d 515, 519-21 (N.J. Super. Ct. App. Div. 1958) (question about potential verdict of $40,000 did not elicit information pertinent to jurors' qualifications, impartiality, or lack of bias).

The tension regarding voir dire questioning arises from a plaintiff's right to probe prospective jurors for bias or prejudice. Plaintiffs' attorneys often will contend that they need to ask about specific dollar amounts to ensure prospective jurors do not have an arbitrary maximum amount beyond which they won't award more damages regardless what the evidence shows. But that concern can be met without counsel floating specific numbers that can anchor and pre-condition jurors. Courts should strive to *balance* competing interests during voir dire. It is one thing for a plaintiff's attorney to ask prospective jurors if they would balk at rendering a verdict for an unspecified large amount if supported by the evidence (just as defense attorneys are free to ask whether jurors would have qualms about rendering a defense verdict if they found plaintiff was seriously injured but defendants were not at fault or plaintiff was not injured). It is quite another thing to ask prospective jurors if they would have an issue rendering a verdict for specific amounts or in specific ranges.

There are multiple ways to ferret out arbitrary damage limits without mentioning specific dollar amounts. Counsel could ask prospective jurors whether they are willing to determine damages based on the evidence and whether there is some maximum amount in their head, even without knowing the evidence, beyond which they could never go regardless what the evidence showed or what the court instructed. Or the trial court can balance the interests of both sides by etting plaintiffs' attorneys say they will be seeking "a substantial" or "very large" verdict at trial, *without mentioning specific damage numbers*.[7]

Defense counsel should also point out to the trial court that letting the plaintiff float large damage numbers during voir dire could create the risk of plaintiff using juror challenges to pre-shape the jury into one that is pre-disposed to high damage awards, an approach that could trigger a mistrial. (And if this starts happening, make sure you move for a mistrial). There is also the risk of jurors mistakenly assuming that the trial court, because it let counsel mention such numbers, agrees that those numbers fall within the ballpark of recoverable damages in the case (which is a determination the trial court would not be making until the new-trial-motion stage).

If the court denies your motion in limine and allows plaintiff's counse to mention large damage numbers during voir dire, emphasize that the jurors need to wait for the evidence and that the defendant vehemently disputes the types of numbers counsel is mentioning.

2. If your jurisdiction lets plaintiffs' attorneys propose non-economic damage numbers to jurors, move in limine to bar counsel from proposing such numbers before closing argument.

The risk of anchoring or pre-conditioning jurors by floating large damage numbers before they have heard all the evidence does not disappear once trial commences.

Check the rules for the jurisdiction where the case is pending. Some jurisdictions let plaintiffs' attorneys propose non-economic damage amounts to the jury, including offering per diem calculations as suggestions. *See, e.g., Beagle v. Vasold*, 417 P.2d 673 (Cal. 1966). Other jurisdictions prohibit counsel from making any such proposal. *See, e.g.,* 1 CV Ohio Jury Instructions 207.23 ("You cannot consider as evidence the suggestion of counsel that you use a unit value or mathematical formula to compensate for pain and suffering or disability."); *see Beagle v. Vasold,* 417 P.2d at 676-677 (listing jurisdictions that let attorneys make "per diem" arguments, those that allow it at the discretion of the trial judge, and those that prohibit it altogether); *see also Walorf v. Shuta*, 896 F.2d 723, 744 (3rd Cir. 1990) ("The question whether plaintiff's counsel may request a specific dollar amount for pain and suffering in his closing remarks is a matter governed by federal law, and we now hold that he may not make such a request").

Some jurisdictions that do not bar plaintiffs' attorneys from making per diem damages arguments recognize that the issue is for the court's discretion. *See Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 912 (2d Cir. 1997) ("[W]e favor a more flexible approach. It is best left to the discretion of the trial judge, who may either prohibit counsel from mentioning specific figures or impose reasonable limitations, including cautionary jury instructions"); Comment to Maryland State Bar Standing Committee on Pattern Jury Instructions MPJI-Cv 10:2, citing *Giant Food, Inc. v. Satterfield*, 603 A.2d 877 (Md. Ct. Spec. App. 1992) and *Mkt. Tavern, Inc. v. Bowen*, 610 A.2d 295 (Md. Ct. Spec. App. 1992). Some jurisdictions mandate that a cautionary instruction be given the jury if the argument is allowed. *Id.*

If the particular jurisdiction makes the per diem issue discretionary, defense counsel should ask the trial court to prohibit per diem damage arguments. At a minimum, they should *always request a cautionary jury instruction*. *See, e.g., Giant Food Inc. v. Satterfield*, 603 A.2d at 881 ("It is also apparent that, upon request or when the trial judge sua sponte deems it appropriate, the jury must be instructed that the per diem argument made by counsel is not evidence but is merely a method suggested by a party for the purposes of calculating damages. The jury must further be instructed that an award for pain and suffering is to be based upon the jurors' independent judgment."); *id.* at 880 (discussing accompanying jury instructions in Nevada, North Carolina, Rhode Island and Utah).[8]

But even in jurisdictions that let plaintiffs' attorneys propose per diem figures or other non-economic damages amounts to the jury, those proposals still constitute *ar-*

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Reptiles, Picassos, and Stealth Bombers: cont'd from page 21

gument, not facts. Defense counsel therefore should limit anchoring risks by moving in limine (usually combined with a voir dire motion) to bar plaintiff (and his witnesses and counsel) from mentioning any non-economic damage numbers at trial *at any time preceding closing argument*, including opening statements and the presentation of evidence.

The general rule in most jurisdictions is that the purpose of opening statements is to introduce the jurors to *the facts*, and that argument should be reserved for closing argument. Unlike economic damages figures, which typically rest on expert evidence regarding lost wages or the amount of past or future medical care, non-economic damages numbers are not "facts." Instead, an attorney's proposed non-economic numbers are merely argument. Most jurisdictions prohibit plaintiff, experts or any other witnesses from opining as to any purported amount of the plaintiff's non-economic damages, such as the plaintiff's pain and suffering. *See, e.g., Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d 571, 578 (Ct. App. 1998) ("unless and until the Legislature devises a method for computing pain and suffering damages, a plaintiff may not supply, through expert testimony or otherwise, her own formula for computing such damages"); *Beagle v. Vasold*, 417 P.2d at 675 ("no witness may express his subjective opinion on the matter").

If you can get the court to preclude plaintiff's counsel from ever proposing non-economic damages numbers to the jury, great. But at a minimum you want to limit the period during which large damage numbers are floating around in the jurors' heads by moving in limine to prevent plaintiff, his/her witnesses and his/her counsel from mentioning or proposing any non-economic number before closing argument. Limiting counsel to mentioning non-economic damages figures to closing argument substantially reduces the risk of anchoring. It prevents counsel from floating large numbers to the jury early on in the case. It also ensures that plaintiff's proposals are presented just before the defendant's closing argument, during which the defendant has the opportunity to offer lower, alternative numbers.

3. Propose alternative damage numbers.

Many defense attorneys do not like proposing damage numbers to the jury. Indeed, many were taught that discussing damage numbers is a bad idea, as it signals to the jury that you don't believe your no-liability arguments and it can be construed as a concession. That approach might have been safe in the days when plaintiffs' attorneys did not shoot for the moon on non-economic numbers. But those days are gone. The main reason that non-economic damages awards are increasing today is simply because plaintiffs' attorneys are asking for much bigger numbers. If you don't offer an alternative number—a *counter-anchor* to the plaintiff's proposals—the jury is likely to use plaintiff's numbers as an anchor for their deliberations. Coupled with the amorphous nature of the jury instructions, that can mean big trouble. If you have a very strong no-liability case, you obviously may not want to dwell on damages. The need to say more increases with the likelihood of a liability finding. There is nothing wrong with telling the jury that there is no basis to impose liability and also that the plaintiff's damages numbers defy common sense. Doing so can even reinforce to the jury the notion that the entire lawsuit is bogus.

But failing to offer a counter-anchor on non-economic damages where the plaintiff has proffered a huge number can be a disaster if the jury finds liability. If plaintiffs' counsel has proposed a huge number such as $60 million, the jury may feel as though it is acting "reasonably" and doing defendant a favor by awarding only 50%, or 25%, even though such a "discount" still produces an unreasonable number. If you, as the defense attorney, have explained that a reasonable award of non-economic damages would be in a much lower range, the jury now has a counter-anchor to consider. Not only does that mean that the jury might start with your number as a basis for its deliberations, rather than plaintiff's numbers, it also signals that you believe the plaintiff's numbers are out-of-step with reality. It can suggest that the plaintiff's attorney is trying to use the lack of a fixed mathematical formula to manipulate the jury, without you having to say so directly.

The number or range to propose as a counter-anchor is often not obvious, given the absence of any standard. Too low a number can hurt your credibility. You need to offer a number that seems reasonable in light of the plaintiff's injuries, regardless of plaintiff's proposed numbers. You might offend the jury and destroy your credibility if the plaintiff is seriously injured and you suggest only one hundred thousand dollars in non-economic damages. In contrast, if pain and suffering was undeniably extensive, bear in mind that the jury might start with your number as an anchor and move up from there. But you don't have to suggest huge numbers just because the plaintiff did. We've seen cases where the plaintiff requested non-economic damages exceeding $100 million and the defendants responded by suggesting that a few million dollars would be reasonable; although the jury came in higher than the defense number as expected, the verdict was not significantly higher, indicating that the jury rejected plaintiff's numbers as unreasonable and started with the defense number in deliberations.

The bottom line: There is no magical formula for calculating a defense number to propose as a counter-anchor. But offering no number or no response is extremely risky, unless you have an exceptionally strong arguments of no liability and no damages whatsoever. ML

EDITOR'S NOTE: The balance of this article, including segments devoted to "Aggressive Closing Arguments" and "New Trial Motions and Appeals" will appear in the January-February 2020 *Municipal Lawyer*.

Endnotes

1. The Georgia instruction for situations where there is no physical injury is equally amorphous. S*ee* Georgia Suggested Pattern Jury Instructions - Civil 66.600 (emphasis added) ("In a tort action in which the entire injury pertains to the peace, happiness, or feelings of the plaintiff, no measure of damages may be prescribed, *except the enlightened conscience of impartial jurors*. [¶]. In determining the amount of such damage, you would consider all the facts and circumstances of the case, as disclosed by the evidence, *and fix a sum as you think would be reasonable, fair, and just*.")

2. See, e.g., Judicial Council of California Civil Jury Instructions 3921 (instructing jurors to use their own judgment and common sense to decide a reasonable amount for plaintiff's loss of decedent's "love, companionship, comfort, care, assistance, protection, affection, society, moral support"; loss of sexual relations; and loss of training and guidance); Colo. Jury Instr., Civil 10:3 (plaintiff may recover for "grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff [and those the plaintiff represents] [has] [have] had to the present, and any grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress"); Maryland State Bar Standing Committee on Pattern Jury Instructions, 10:24 (surviving spouse may recover non-economic losses, including "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, attention, advice, or counsel the surviving spouse has experienced or probably will experience in the future as a result of the death"); 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 14.30 (2018 ed.) (emphasis omitted) (jury may award "[t]he reasonable value of the loss of consortium suffered by the [wife] [and][children] of the deceased," including intangible benefits such as "love, affection, attention, education, guidance, care, protection, training, companionship and cooperation [and, in the case of a spouse, sexual relations]...."]).

3. The pseudo-scientific premise of the Reptile Theory—that there is a reptilian portion of the human brain—has been debunked. See Ben Thomas, Revenge of the Lizard Brain, Guest Blog, Scientific American (Sept. 7, 2012), https://blogs.scientificamerican.com/guest-blog/revenge-of-the-lizard-brain/ (last visited August 5, 2019). Yet Reptile Theory arguments have still produced inflated verdicts.

4 See, e.g., Grisham v. Longo, No. 3:16-CV-00299-NBB-JMV, 2018 WL 4404069, at *1 (N.D. Miss., Sept. 14, 2018) (excluding testimony or any questions intended to elicit evidence regarding "golden rule" arguments, appeals to the jury as the "conscience of the community," or any other "reptile theory" arguments because such arguments prevent juries from reaching a reliable and accurate verdict); Brooks v. Caterpillar Glob. Mining America, LLC, No. 4:14CV-00022-JHM, 2017 WL 3401476, at *9 (W.D. Ky., Aug. 8, 2017) ("The motion in limine is GRANTED. Reptile Theory arguments appear to mirror the 'send the message' or conscience of the community arguments," which are "disfavored in the Sixth Circuit"); Pracht v. Saga Freight Logistics, LLC, No. 3:13-CV-529-RJC-DCK, 2015 WL 6622877, at *1 (W.D.N.C., Oct. 30, 2015) (granting defendants' motion "to prohibit any Golden Rule argument and/or Reptile Theory questions and argument"); see J.B. by and through Bullock v. Missouri Baptist Hospital of Sullivan, No. 4:16CV01394 ERW, 2018 WL 746302, at *3 (E.D. Mo., Feb. 7, 2018) (sustaining motion in limine, and plaintiff agreed not to pursue arguments in response to motion).

5. See, e.g., Jackson v. Asplundh Const. Corp., No. 4:15CV00714 ERW, 2016 WL 5941937, at *1, *5 (E.D. Mo., Oct. 13, 2016) (motion "held in abeyance": "The Court will address any objections as the evidence is introduced"); Turner v. Salem, No. 3:14-CV-289-DCK, 2016 WL 4083225, at *2–3 (W.D.N.C., July 29, 2016) ("The Court will not allow Golden Rule arguments. The Court also discourages Reptile Theory arguments, but will handle objections to statements purported to be Reptile Theory arguments as the need arises").

6. See also Don Rushing et. al., Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings. Defense Counsel Should Use A Motion in Limine to Preclude Plaintiffs' Attorneys from Using Lump Sum or Per Diem Computations to Jurors, 70 Def. Couns. J. 378, 380–381 (2003) ("This research shows that defense counsel should be concerned with the possibility that jurors will become anchored to the monetary sums suggested by plaintiffs' counsel in arguing for an award of non-economic damages, no matter how irrelevant or outrageous the suggested sum may seem."); W. Kip Viscusi, The Challenge of Punitive Damages Mathematics, 30 J. Legal Stud. 313, 329 (2001) (finding that mock jurors awarded punitive damages highly concentrated within the range suggested by plaintiffs' attorney because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested amounts]").

7. See, e.g., Haydel v. Hercules Transp., 654 So.2d 418, 426 (La. Ct. App. 1995) (held: trial court did not abuse discretion in sustaining objection to plaintiff's counsel discussing specific dollar amounts during voir dire; letting counsel inquire whether prospective jurors could award a "substantial" verdict sufficed to uncover potential prejudice); Dehn v. Otter Tail Power Co., 251 N.W.2d 404, 415 (N.D. 1977) (held: trial court properly sustained objections to plaintiff's counsel asking about specific dollar amounts but had discretion to let counsel inquire whether prospective jurors could award "large damages," a "big large, big amount of money," or an award "large in dollars"); Kern v. Uregas Serv. of W. Frankfort, Inc., 412 N.E.2d 1037, 1052 (Ill. Ct. App. 1980) (trial court "did not abuse its discre-

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Endnotes

1. Grant v. City of Syracuse, No. 5-15 cv 445 (N.D. N.Y. Nov. 17, 2017).
2. Olugbenga Ajilore, "How Civilian Review Boards Can Further Police Accountability and Improve Community Relations," *Scholars Strategy Network*, June 25, 2018 https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations.
3. Syracuse Code of Ordinances 12-184(1), (5); Syracuse CRB Bylaws, section 3 (http://www.syrgov.net/uploadedFiles/City_Hall/CRB/CRB%20by-laws%202012.pdf)
4. *Id.*
5. Syracuse Code of Ordinances, Section 12-187(3)(f)(3).
6. "Substantial evidence" means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971), (admitting report by physician in disability hearing: "despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence . . . ") *Id.*
7. "The actions of the board do not preclude action by the judicial system. *A finding or decision by the board shall not have any collateral effect upon a subsequent administrative or judicial proceeding."* Syracuse NY Code of Ordinances §12-187(3)(f)10 (emphasis added)
8. *Id.* at 1025.
9. Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007).
See e.g., Walker v. City of New York, No. 14-CV-680, 2018 U.S. Dist. LEXIS 58380, at *12-13 (E.D.N.Y. Mar. 30, 2018); Amato v. City of Saratoga Springs, 972 F. Supp. 120, 123-24 (N.D.N.Y. 1997).
11. Mineo v. City of New York, No. 09-CV-2261, 2013 U.S. Dist. LEXIS 46953, at *4-5 (E.D.N.Y. Mar. 29, 2013)"
12. Although bifurcation is discretionary, that "discretion is not unfettered" and the trial court's decision should be reversed if it abused that discretion. *Brown v. Junction Pool Commons, Inc.*, 301 F. App'x 24, 26 (2d Cir. 2008).

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26, 2018) (accord); *City of Los Angeles v. Sessions*, No. 18-7347, 2019 WL 1957966, at *4-5 (C.D. Cal. Feb. 15, 2019) (permanently enjoining notice, access, compliance, harboring, and questionnaire conditions); *City & County of San Francisco v. Sessions*, No. 18-5146, 2019 WL 1024404, at *2 (N.D. Cal. Mar. 4, 2019) (accord); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) (permanently enjoining the notice, access, and compliance conditions); *City of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 246 (S.D.N.Y. 2018) (permanently enjoining notice, access, and compliance conditions); *City of Providence v. Sessions*, No. 18-437, ECF No. 30 at 7-8 (D.R.I. June 10, 2019) (permanently enjoining notice, access, and compliance conditions).
6. *See* Chicago Decision, p. 9.
7. *See* Chicago Decision, p. 27.
8. *City of Chicago*, 888 F.3d at 293; *City of Chicago*, 321 F. Supp. 3d at 879; *City of Evanston & United States Conference of Mayors v. Sessions*, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500, at *1 (N.D. Ill. Aug. 9, 2018); *United States Conference of Mayors v. Sessions,* No. 18-2734 (7th Cir. Aug. 29, 2018) (lifting stay from injunction as to USCM members).
9. Chicago Decision, p. 26; USCM Decision, p. 13.
10. Chicago Decision, p. 31; *see also* USCM Decision, p. 24.
11. Chicago Decision, p. 32.
12. *Id.* at 35, *citing City of Chicago*, 888 F.3d at 286.
13. Chicago Decision, p. 44-46; USCM Decision, p. 28.
14. Chicago Decision, p. 44.
15. *Id.* at 46.
16. USCM Decision, p. 28.
17. *Id.* at 29.
18. The City of Los Angeles also received a nationwide injunction in its FY18 Byrne Jag litigation, but the nationwide aspect of that injunction is currently stayed pending Ninth Circuit review.

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tion in limiting plaintiffs' [voir dire] inquiries on specific sums of money" but allowing "inquiring of jurors, in a less particularized fashion, whether they had any prejudice against large verdicts"); Juarez v. Commonwealth Med. Assoc., 742 N.E.2d 386, 388 (Ill. Ct. App. 2000) (trial court properly exercised discretion in limiting plaintiff's counsel to inquiring whether potential jurors "could award 'substantial damages'"); Jones v. Parrott, 143 S.E.2d 393, 395 (Ga. Ct. App. 1965) (voir dire questions to prospective jurors about verdict size "should be phrased in general terms," not in specific dollar amounts).
8. See also Beagle v. Vasold, 417 P.2d at 681 ("the trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering" and "may also, if it deems appropriate, advise the jury it is not bound by any particular method of calculation in assessing damages for pain and suffering"; Johnson v. Brown, 345 P.2d 754, 759 (Nev. 1959) (inasmuch as a per diem argument "may be used only for illustrative purposes, the trial court should insist that it be premised . . . by an admonition that the suggestions of counsel are not to be taken as evidence but are merely the thoughts of counsel as to what would be proper damages to award for this item. It should not hesitate to limit counsel whenever it feels that the rights of the jury to determine for itself what fair and reasonable compensation for such items of damages, are being invaded, or to give such further admonition as it deems necessary.") (emphasis added); Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575, 576 (Utah 1960) (if counsel presents a mathematical per diem formula to jury for is consideration in determining damages for pain and suffering, the propriety of such argument is left to the sound discretion of the trial court with a "cautionary instruction that if permitted such presentation is but lawyer talk").

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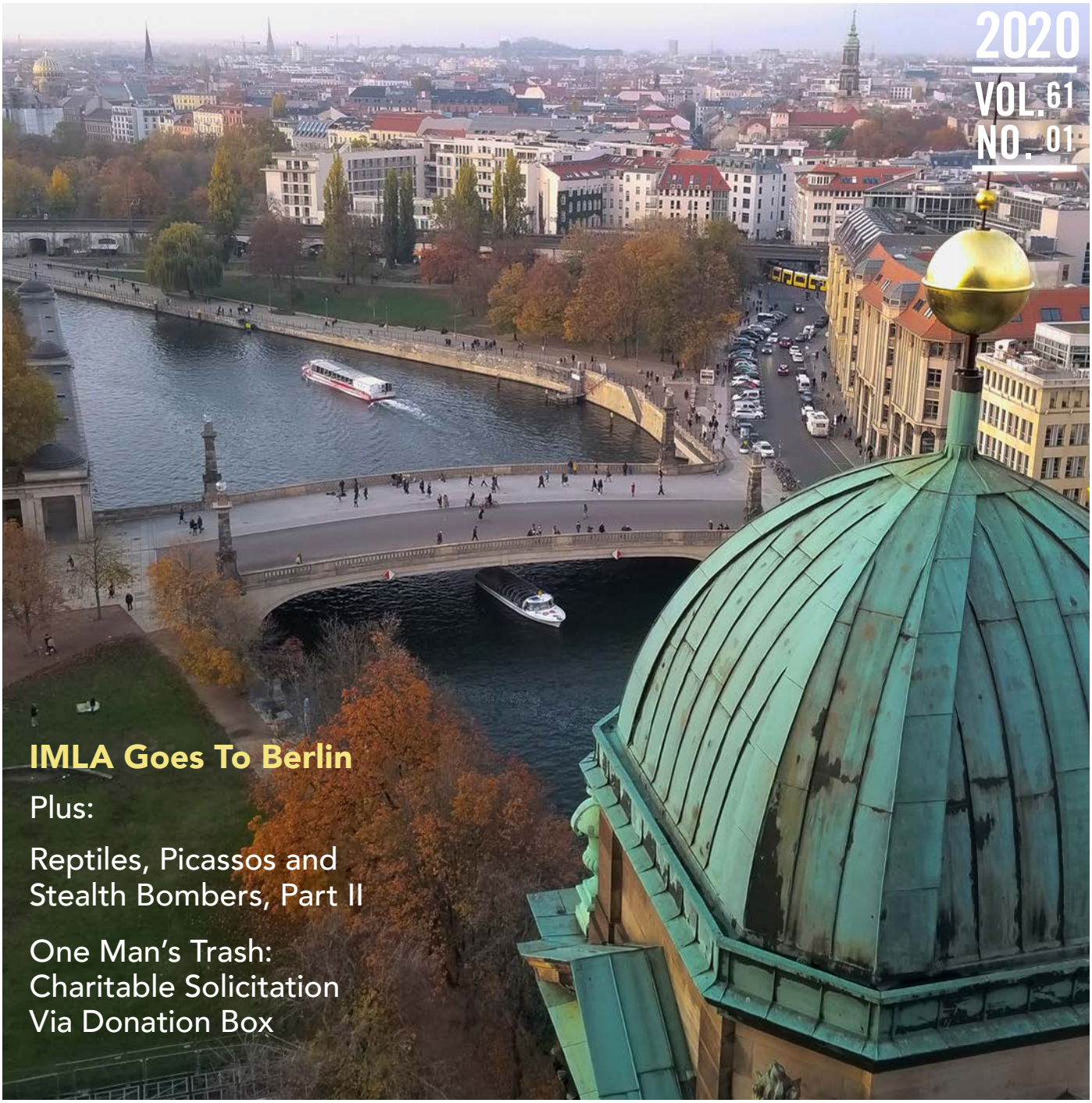

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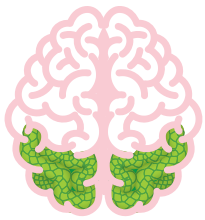

Editor's Note: this is the final segment of the authors' "Reptile Theory" article, continued from the November-December 2019 Municipal Lawyer.

IV. AGGRESSIVE CLOSING ARGUMENTS

A. What they look like

Aggressive closing arguments by plaintiff's counsel in personal-injury cases can take many shapes and forms. Some, such as Reptile Theory arguments, may need to be raised and explained to the court. Others are just flat out objectionable:

- Defendants and/or their counsel are lying or trying to deceive the jury. *See, e.g, Chin v. Caiaffa*, 42 So.3d 300, 309 (Fla. Dist. Ct. App. 2010) (new trial required because arguing that defense counsel was "'pulling a fast one,' 'hiding something,' and 'trying to pull something,' was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury," citation omitted).
- Improper credibility assertions: "You may think lawyers lie. Based on what you see on TV, that's what they do to win. But I have to tell you, I don't."
- Discussing counsel's (or opposing counsel's) personal background or impugning their character.
- "If you discount the damages the way the defendants are seeking, they will be high-fiving in the parking lot and champagne corks will be flying."
- The jury should punish the defendant or teach them a lesson.
- Golden Rule arguments.

More subtle Golden Rule arguments. Most plaintiffs' attorneys realize that saying "put yourself in the plaintiff's shoes" is a classic Golden Rule violation and will raise the court's immediate ire. But some attempt more subtle approaches that still run afoul of the Golden Rule. For example, saying "I'm not going to ask you to put yourself in plaintiff's shoes" is a Golden Rule violation because doing so has just that effect. *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496-97 (5th Cir. 1982); *Woods v. Burlington N. R.R. Co.*, 768 F.2d 1287, 1292 (11th Cir. 1985), rev'd, 480 U.S. 1 (1987). This is reminiscent of the classic experiment on thought suppression—when you instruct someone not to think of a white bear, that person will inevitably think of a white bear.

Also, any comments that implicitly invite the jury to "'become a personal partisan advocate for the injured party'" violate the Golden Rule. *Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d at 576; *see also DeJesus v. Flick*, 7 P.3d 459, 464 (Nev. 2000) *overruled on other grounds* ("[T]he fact that [counsel] did not expressly remind the jury that [plaintiff] is 'people like you' does not save him from a violation of the golden rule. He clearly asked the jurors to 'allow such recovery as they would wish if in the same position.' Moreover, [counsel's] 'testimony' during his argument, that he personally would not want to trade ten million dollars for the use of his fingers, violated the golden rule. While making this argument, he asked the jurors, 'How do you put a value on not using your fingers?' He thus invited the jury to agree that neither would they make such a trade").

Classified ad arguments. Another familiar tactic is the "classified ad" argument. The plaintiff's attorney will ask the jury to imagine how much a newspaper classified ad would have to offer for someone to agree to endure plaintiff's injuries. That is a Golden Rule violation. *See Collins v. Union Pac. R.R. Co.*, 143 Cal. Rptr. 3d 849, 861 (Ct. App. 2012) (rejecting classified ad hypothetical as

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Another tactic to inflate damages is to ask the jury to assign specific dollar amounts to each descriptive item mentioned in the applicable non-economic damages jury instructions, even though the instruction does not ask for separate awards and the items are inherently duplicative and overlapping.

Golden Rule argument); *Lougon v. Era Aviation, Inc.*, 609 So. 2d 330, 345 (La. Ct. App. 1992) (closing argument inviting jury to consider a classified ad for a job with "no regular hours; you don't have to report for work . . . all you have to do is agree to go through a helicopter crash, just like Mr. Saunier did . . . . All you have to do is agree to have those injuries and suffer with them for the rest of your life;" held: argument was improper, but denying motion for mistrial); *Faught v. Washam,* 329 S.W.2d 588, 601-602 (Mo. 1959), *overruled on other grounds, Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 20-22 (Mo. 1994) (reversing judgment based where plaintiff argued in closing: "In considering what is an adequate sum for this young man, suppose I was to meet one of you ladies on the street and I say to you, 'I want to offer you a job . . . ; one peculiar thing, if you take it you have to keep it for the rest of your life, you work seven days a week, no vacations, work daytime and night . . . here is your job—your job is to suffer [plaintiff's] disability.")

Some attorneys will ask the jury to imagine the plaintiff reading the classified ad, and claim this does not violate the Golden Rule because the attorney never told the jurors to imagine themselves doing so. It is virtually impossible, however, for jurors not to imagine themselves reading the ad. Regardless, the argument is unfair because, if the plaintiff truly suffered severe injuries, no reasonable person (including the plaintiff) would ever answer such an ad even if the "job" offered compensation equal to winning the lottery. *See Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) ('"No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages'"). The "classified ad" tactic is a patently unfair argument, yet it can have powerful impact on a jury and lead to inflated damages.

Asking the jury to assign damages amounts to each category of non-economic damages. Another tactic to inflate damages is to ask the jury to assign specific dollar amounts to *each* descriptive item mentioned in the applicable non-economic damages jury instructions, even though the instruction does not ask for separate awards and the items are inherently duplicative and overlapping. For example, the California instruction refers to plaintiff recovering for past and future "physical pain/mental suffering/loss of enjoyment of life/ disfigurement/physical impairment/ inconvenience/grief/anxiety/ humiliation/ emotional distress," Council of California Civil Jury Instructions 3905A. There is no genuine difference between "pain," "suffering," "emotional distress" and "grief," or between "love" and "affection," or between "care" and "assistance."

Nor is there any true difference in the Georgia instruction between "interference with normal living," "interference with enjoyment of life," and "the extent to which the plaintiff must limit activities"; or between "impairment of bodily health and vigor," "fear of extent of injury," "pain and suffering" and "mental anguish." *See* Georgia Suggested Pattern Jury Instructions Civil 66.501. The Connecticut instruction similarly refers to inherently overlapping items, such as "physical pain and suffering," "mental and emotional suffering," "loss of the ability to enjoy life's pleasures," and "permanent impairment or loss of function." Conn. Judicial Branch Civil Jury Instr. 3.4-1 (emphasis added); *see also* Colo. Jury Instr., Civil 6:1 ("physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life"); Del. P.J.I. Civ. § 22.1 (2000) ("In evaluating pain and suffering, you may consider its mental as well as its physical consequences. You may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments").

Yet plaintiffs' attorneys in such jurisdictions will often inflate damages by breaking out each item referenced in the jury instruction into a separate category and then blackboarding to the jury separate suggested dollar values for each, and separately for past and future damages. When you start assigning $500,000 or $1-2 million to the various items and for both past and future, the overall suggested damage number inflates quickly. It is improper to request separate awards for inherently, duplicative overlapping categories. *See, e.g., Loth v. Truck A-Way Corp*, 70 Cal. Rptr. 2d at 579 ("Because loss of enjoyment of life is simply one component of pain and suffering damages, presenting the jury with a formula for separately calculating hedonic damages created a risk of double recovery for pain and suffering and loss of enjoyment of life"). Yet plaintiffs' attorneys do it all the time.

Logically suspect analogies to economic prices. Plaintiffs' attorneys also will frequently use emotionally-powerful—but logically suspect—analogies to economic prices when

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asking for a large amount of non-economic damages. The most colorful approaches often appear in wrongful death cases in those jurisdictions that allow the plaintiffs to recover for their own personal non-economic losses caused by the decedent's absence. Here are some examples, all taken from the same closing argument, and all made while the jury was staring at large photos of a stealth bomber, a Picasso and Kobe Bryant on the courtroom screen.[9]

> <u>The Stealth Bomber</u>
> "I also want you to think, when you're thinking about valuing this loss: If we create the most expensive thing, a billion dollar B-2 bomber, as a society, even when we create the most expensive piece of machinery we possibly can, the most sophisticated, we still value human life over that $2 billion object. So if that plane is in trouble, we never say, 'Save the plane'; we say, 'Save the pilot.' Because human life is way more precious than any $2 billion object."
>
> <u>One-of-a-kind Picasso (or another painting or stamp)</u>
> "This is a Picasso painting. It sold for over a hundred million dollars. This is just paint and canvas and a talented artist. But when you think about Mr. Shanks as a human being and the testimony you heard about how kind he was, how giving he was, how loving he was, his smile, his joking, his cooking, his laugh, he was a Picasso times 10 to this family.
> So when you look at if someone loses a Picasso worth a hundred million dollars, no one would hesitate to say, 'Okay. Look. This is the harm you caused. You have to pay 100 million dollars.'
> When you are thinking about what's been taken from this family for the next 26 years, their Picasso has been taken from them, and the value of that loss is astronomical. We will all agree a billion dollars probably isn't enough to compensate for whatever's taken from this family. But you are going to have to come up with a number."
>
> <u>Salaries of famous athletes</u>
> "Kobe Bryant, he gets paid $10s, $20s, whatever. Professional players get $20, $30 million a year to dribble a ball and put it in a basket. And the team will say, 'He has that value to our team. He produces a value to our team. He's our superstar, and that's what he's worth.'
> Mr. Shanks was the Kobe Bryant to his family and to his community. You heard Mr. Wickham tell you, he strived to be half the man Mr. Shanks was. You heard how many people looked up to Mr. Shanks. You could see in the photographs how kind and loving and caring he was."

Variations of these same "value of a life" type arguments can be found in cases throughout the country.[10]

B. How to combat aggressive closing arguments.

1. Tactics before closing argument.

Use a pre-argument pocket brief to ask the court to bar the other sides' potential objectionable arguments, relying where possible on oral arguments or documented misconduct in other cases. A motion in limine is not the only mechanism to prevent a potentially objectionable argument by opposing counsel. Defense counsel can also file a pocket brief just before closing argument asking the court to bar or, at a minimum, be wary of and lookout for certain conduct. If you don't ask for and get a pre-argument ruling via your pocket brief, the only other option will be to object during plaintiff's argument the instant the issue arises. Even if the trial court defers giving an advance ruling on an issue, an objection during the opposing party's closing argument will be far simpler and more likely to be sustained if you've already educated the judge about the issue via prior motions in limine or a pre-argument pocket brief. For example, objecting that something is a Reptile argument or Golden Rule Argument is far more likely to succeed if you don't have to explain the legal and factual backdrop at that moment.

Hopefully, motions in limine will have set the stage for many pocket-brief issues, but often there will be additional issues to cover that may make little sense to raise in a motion in limine because they pertain to closing argument only (addressing Picasso painting arguments, etc.). Successful plaintiffs' attorneys often follow the same basic script from one case to the next. If a particular plaintiff's attorney presented an objectionable argument in a prior case, chances are that he or she will do so again. The same holds true for attorneys from the same law firm, as they usually have had the same training. As a result, obtain copies of closing arguments that the same attorney or same law firm has made in other personal-injury cases (defense bar organization are always a good source). Also, research and obtain copies of any trial court orders (such as new trial motions) or appellate opinions that document the same attorney's misconduct in other cases. Attach those materials to the pocket brief as basis for explaining to the court why you are concerned about certain objectionable arguments being made during the upcoming closing argument. Remind the court of any prior motion in limine rulings.

> If a particular plaintiff's attorney presented an objectionable argument in a prior case, chances are that he or she will do so again. The same holds true for attorneys from the same law firm, as they usually have had the same training. As a result, obtain copies of closing arguments that the same attorney or same law firm has made in other personal-injury cases

The pocket brief can target any problematic arguments you anticipate, including:

- No Reptile or other arguments invoking the "conscience of the community."
- No newspaper ad hypotheticals or Golden Rule arguments.
- Where there is no punitive damages claim, no "send a message," "teach a lesson" or "punish the wrongdoer" arguments that impermissibly invite punitive damages or awards based on sympathy for the plaintiff or prejudice against the defendant.
- No personal attacks on opposing parties or counsel.
- No recovery for the mental stress of having to litigate a lawsuit.
- No treating of inherently duplicative, overlapping harm formulations as separate elements requiring separate awards.
- No "value of a life" arguments or misleading references to the economic value of tangible objects, such as Picassos, Stealth bombers, or an athlete's salary.
- No saving of argument for rebuttal, thereby depriving the defendant of responding during its closing argument.

In seeking to support aggressive closing arguments, plaintiffs will cite to case law referencing a trial court's discretion to afford counsel broad latitude in closing argument. But that discretion is not unfettered. Case law prohibits certain arguments, so research the law of the applicable jurisdiction. Even if that jurisdiction's law is unclear and does not absolutely prohibit a particular argument, the scope of permissible argument will still fall within the trial court's discretion. *See, e.g., Cohen v. Yale-New Haven Hosp.,* No. 365908, 2000 WL 1337660, at *17–19 (Conn. Super. Ct., Aug. 31, 2000) (noting that "the court might well have exercised its discretion and sustained the defendant's objection to the plaintiff's [Picasso and sports salary] argument"). You won't get the court to exercise its discretion in a municipality's favor if you never ask the court to do so. Also, sometimes opposing counsel will agree not to pursue a certain argument once the issue is brought to the court's attention.

Examine the types of argument the opposing attorney has made in prior cases. Research the current case law regarding their use. If you know, for example, that a Picasso, Stealth bomber and athlete salary argument may be coming, do a search for current case law addressing the use and exclusion of such arguments. You will typically find cases on both sides of the issue.

There are cases supporting the exclusion of such arguments, in particular a line of Florida cases. *See, e.g., Fasani v. Kowalski*, 43 So.3d 805, 808-11 (Fla. Dist. Ct. App. 2010) (although defendant did not object to argument that the jury should compare plaintiff's brain to a Picasso painting, "such 'value of life' arguments are improper"); *Chin v. Caiaffa*, 42 So.3d 300, 309-10 (Fla. Dist. Ct. App. 2010) (argument "highly improper and grounds for reversal" where plaintiff asked "the jury to compare [plaintiff's] life to a Picasso painting valued at $10 million, and suggested that if this case had been about a $10 million painting, the jury 'would go back and in five minutes you would write out a $10 million check.'").[11]

You also should look for any case law from the particular jurisdiction that criticizes a plaintiff's use of economic figures to create a basis for non-economic awards, which is what the Stealth Bomber, Picasso and athlete-salary analogies are designed to do, albeit indirectly. *See, e,g., Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. at 576-77 [criticizing counsel's argument that the jury should "accept $2.3 million as the baseline value of life and to give [plaintiff] a percentage of that figure (adjusted for her age) as hedonic damages," because that figure "is based upon benchmark figures such as the amount society spends per capita on selected safety devices, or the amount employers pay to induce workers to perform high risk jobs. We perceive no meaningful relationship between those arbitrarily selected benchmark spending figures and the value of an individual person's life. Moreover, our Supreme Court has rejected the notion that pain and suffering damages may be computed by some mathematical formula."].)

Request helpful jury instructions (and use them in your subsequent argument). Although jury instructions vary among jurisdictions, most jurisdictions have model instructions that state in one form or another that:

- There is no standard or mathematical formula for determining non-economic damages.
- The arguments of the attorneys are not evidence, and the jury must base its findings only on evidence.

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- If there is no punitive damages claim, the jury can only award damages to compensate the plaintiff's injuries and cannot award damages to punish the defendant for its conduct.
- The jury should not let bias, sympathy, prejudice or public opinion influence its decision.

Also, some jurisdictions have specific model jury instructions regarding a plaintiff's proposed per diem proposals, so review the local instructions carefully.[12]

If the local jurisdiction has no specific model instruction on the plaintiff proposing per diem calculations, request a special instruction relying on case law and sample instructions from other jurisdictions. As previously discussed, case law specifically acknowledges that the jury should be instructed that (a) per diem arguments by counsel are not evidence but are merely a method suggested by a party to calculate; (b) the jury is not bound by any particular calculation method in assessing pain and suffering damages; and (c) the amount of damages claimed by a plaintiff is not evidence, and the jury's only duty is to award reasonable compensation based on the jurors' independent judgment. *See, e.g., Giant Food Inc. v. Satterfield*, 603 A.2d at 881; *Beagle v. Vasold*, 417 P.2d at 681.

You need to request and rely on model and, if necessary, special jury instructions to facilitate an argument that the jurors can and should ignore opposing counsel's aggressive arguments. Do not farm out the preparation of jury instructions to a junior lawyer who does not know the nuances of the case.

2. Tactics during closing argument.

Plaintiff's closing argument and rebuttal. The main thing for defense counsel to remember when the plaintiff is arguing is to immediately object when improper arguments are made. That is true even if the trial court previously granted your motion in limine, or sustained a prior objection made by a pocket brief or during testimony. Don't assume prior orders will be followed. Be vigilant. If an objection is sustained, you typically need to request a curative admonition or request a mistrial to preserve an error argument on appeal.

The municipality's closing argument. Obviously, the scope of the municipality's closing argument about non-economic damages will depend on the court's prior motions in limine and pocket brief rulings. But here are some general considerations:

- Offer a counter-anchor to plaintiff's proposed non-economic damages numbers. Always give a number. Failing to do so is playing with fire.
- Use the jury instructions to explain that there is no formula, and yet plaintiff's counsel is providing mechanical formulas designed to generate huge numbers. The jury should apply common sense.
- Explain that opposing counsel is using gimmicks to plant inflated figures in the jurors' heads. Again, tell the jury to rely on common sense.
- Explain that counsel is floating such huge numbers so that if the jury gives a huge discount off that number, the resulting number still will be way too large. Tell the jury not to start with plaintiff's number and discount; instead, start from scratch or use defendant's proposal and then apply common sense.
- Personalize or humanize the municipality. You need to offset any attempt by the plaintiff to make the jurors angry and seek to punish the defendant. Plaintiffs suing a municipality are at a disadvantage compared to litigating against for-profit companies. Plaintiffs' attorneys always want to portray the defendant as a bad actor that only cares about making money. Municipalities do not fit that bill, as they are non-profit entities that provide valuable services to the community. Try to subtly remind the jurors through witness testimony and argument about all the good things the municipality does, and the numerous employees. Although you obviously cannot flag the juror's potential self-interest as taxpayers, jurors will likely realize without being told that an unreasonably large verdict could reduce community services or increase taxes. Make sure municipal employees attend the trial to show they care and are taking the lawsuit seriously. If the municipality has conceded liability, emphasize that the concession demonstrates the municipality's reasonableness and shows the municipality is taking responsibility for what happened.
- Do not shy away from attacking plaintiff's proposed numbers. If the plaintiff has blackboarded separate numbers for inherently duplicative or overlapping numbers, call them out on it. Emphasize to the jury that there is no difference between "pain," "suffering," and "emotional distress," or many of the other items identified by plaintiff. Do not leave this tactic unrebutted.
- If the plaintiff has used misleading economic analogies, such as Picasso, Stealth Bomber or famous athlete salaries, point out to the jury that they have nothing to do with the issues and plaintiff's counsel is just trying to throw around huge numbers. Don't ignore the arguments if it is a big dollar case. These types of analogies can have a bigger impact on jurors than a lawyer might think. Come up with a response that demonstrates plaintiff's counsel is playing games. For example, yes, society would want the pilot of a Stealth Bomber to bail out if there is a plane failure. But that's because it would be pointless to lose both the plane and the pilot. Society would equally want a pilot to bail out of a faulty $20,000 crop duster. But that doesn't mean the pilot is "worth" $20,000. The plane's value is irrelevant.

- Take the gloves off if necessary. The single biggest reason for the increased non-economic awards is that plaintiffs' attorneys are asking for bigger numbers and are being more aggressive.

NEW TRIAL MOTIONS AND APPEALS

Unless arguments exist as to other elements of the claim, such as liability or causation, there are only two potential avenues to reduce or reverse a runaway non-economic damages award—a post-verdict motion in the trial court or an appeal. Do not assume that an appeal can fix the problem. Your best shot at reducing or reversing the verdict, and often your only realistic chance, is a new trial motion in the trial court.

Appeals are problematic for several reasons. Appellate courts will frequently refuse to reverse a non-economic damages award based upon attorney misconduct or error either because no objection was made (and thus the issue is deemed waived) or because the error is harmless or non-prejudicial when the totality of the evidence is considered.[13]

If the verdict is huge, the municipality will almost always want to pursue a new trial motion:

- Many jurisdictions *require* a defendant to raise excessive damage arguments in post-judgment motions or else the arguments will be deemed waived on appeal.
- Even where a defendant failed to object at trial, many jurisdictions will still allow the defendant to raise the issue as grounds for new trial even if the failure to object would make the issue dead on arrival at the appellate level.
- The standard of review in the trial court on a new trial motion is generally more favorable than the standard on appeal. Jurisdictions impose heightened standards at the appellate level for reversing damage awards as excessive. A typical standard is that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. In contrast, in many jurisdictions, the trial judge has far greater powers, including sitting as the equivalent of a thirteenth juror with the power to weigh evidence and witness credibility and the duty to reduce a verdict he/she finds excessive. *See, e.g., Seffert v. Los Angeles Transit Lines*, 364 P.2d at 342-343; *U.S. v. Landau,* 155 F.3d 93, 104 (2d Cir. 1998) ("trial judge considering a motion for new trial 'is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner'") (citation omitted); *Hardesty v. Serv. Merch. Co.,* 953 S.W.2d 678, 681 (Tenn. Ct. App. 1997) ("The trial court acts as thirteenth juror" and may set aside a judgment if it finds the verdict "to be either excessive or inadequate.")

In jurisdictions that let plaintiffs propose non-economic damages numbers to the jury, it is imperative that trial courts seriously exercise their duty to scrutinize non-economic damage awards and to reduce or reverse inflated awards. If your case is in a jurisdiction that gives plaintiffs broad authority to propose numbers, check the controlling Supreme Court precedent. Often it will expressly denote the important role that trial courts must play to prevent plaintiffs from using their opportunity to propose numbers to garner an inflated award.[15] Defense counsel should emphasize such language in their new trial motions. ML

Endnotes

9. The excerpts are all from a closing argument by Arash Homampour in Shanks v. Dep't of Transp., 215 Cal. Rptr. 3d 359 (Ct. App. 2017), a California case, which involved a $12.69 million jury award for a dangerous condition of property relating to a motorcyclist's death.

10. *See, e.g.,* Doe v. Doe, No. 307420, 2014 WL 6852750, at *14 (Mich. Ct. App., Dec. 4, 2014) (attorney noted a Picasso painting sold for $106.5 million, and then asked whether "[a] little girl who is made in God's image" was more valuable than a Picasso canvass [sic]"; counsel also argued that "we build bombs and we build bombers to deliver them that costs [sic] hundreds of millions of dollars to kill people. We have got inter-continental ballistic missiles that cost hundreds of millions of dollars to deliver nuclear weapons. And now I'm here in a court in America to talk about what our children are worth."); Cohen v. Yale-New Haven Hosp., No. 365908, 2000 WL 1337660, at *17–19 (Conn. Super. Ct., Aug. 31, 2000) ("I don't really want to give you a number because it's your job, but in assessing that and trying to figure out what's fair, just and reasonable, you have to look toward other things in our society, how we measure things. And I can only give you some suggestions of things you can look at, but it's totally up to you as to how you come to that number, but I'll remind you that, you know, we have Picassos hanging on walls for millions of dollars and we have ball players or baseball or football or basketball or whatever who make . . . ."); Fasani v. Kowalski, 43 So.3d 805, 808–11 (Fla. Dist. Ct. App. 2010) ("If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying $80 million to replace it. Why is it any different when it's a man's brain?"); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 286 n.10 (5th Cir. 1976) (new trial warranted where counsel argued: "You will decide what is the dollar value of the loss of a husband and a father . . . I don't believe my sixteen year old would take three million dollars for me-that may sound selfish, but he knows the value of money, but I believe he'd rather have me" and "evoked the image of deceased's children crying at graveside forlornly awaiting the return of their father.")

11. *See also* Carnival Corp. v. Pajares, 972 So.2d 973, 979 (Fla. Dist. Ct. App. 2007) ("highly improper" to ask the jury to place a monetary value

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on [plaintiff's] life by comparing a $20 million Van Gogh painting, 'created by one of the greatest artists in history,' to [plaintiff's] life, which 'was created by the greatest creator there is'"); Pub. Health Tr. of Dade Cty. v. Geter, 613 So.2d 126, 127 (Fla. Dist. Ct. App. 1993) (argument in wrongful death action that the jury "should place a monetary value on the life of the plaintiff's decedent, just as a monetary value is placed on an eighteen million dollar Boeing or an eight million dollar SCUD missile-was improper, highly inflammatory, and deprived the defendant ... of a fair trial on the issue of damages"); Goad v. Evans, 547 N.E.2d 690, 707-08 (Ill. App. Ct. 1989) (counsel's argument about the loss of expensive cars and earnings of race horses "was improper to the extent it suggested [the plaintiff's] losses were equivalent to the losses sustained by the owner of a destroyed car or were equivalent to the value of a race horse"; the jury should focus on plaintiff's losses "as a result of the death of her son ... rather than on the losses sustained by owners of destroyed automobiles or the worth of race horses."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 585 S.E.2d 557, 563-65 (Va. 2003) (circuit ground erred in failing to grant mistrial where plaintiff's counsel argued that the jury should consider what wealthy persons, like Howard Hughes or Bill Gates, would spend for medical care if they suffered plaintiff's injuries); Colfer v. Ballantyne, 363 P.2d 588, 591-92 (Ariz. 1961) (affirming the grant of a motion for new trial in a personal injury action where plaintiff's counsel stated that "[a]s to the amount of damages, I sometimes think that we lose our sense of values," referencing that Marlene Dietrich "would walk across the stage in Las Vegas in a fishnet dress" and earn $5,000 as a "56 year old grandmother" and "we have got 32 race horses in the country in which the purse exceeds $100,000"; such references were "not relevant" to plaintiff's damages).

12. *See, e.g.*, HI R. Civ. Jury Instr. 8.8 (emphasis added) ("In presenting his/her argument to you on the amount, if any, which should be awarded to plaintiff(s) as damages, the attorney for plaintiff(s) has proposed to you figures which he/she arrived at by mathematical calculations (and has shown you those figures on a chart). After first suggesting that a dollar value per hour or day or month or year be given to an item such as pain, disability, emotional distress and so forth, he/she multiplied that dollar value by a certain number of hours or days or months or years and came up with a total figure as an amount of damages for such items. Neither the chart nor what the attorney has said as to the dollar values or figures for measuring such items of damages is evidence. *The law permits this kind of argument to be made, but you must remember argument is not evidence. The law gives you no way to mathematically calculate such items of damages and leaves them to be fixed by you as your common sense and good judgment dictate, based on the nature and extent of plaintiff's(s') injuries/damages under the evidence in this case.*") (emphasis added).

13. *See, e.g.,* Doe v. Doe, No. 307420, 2014 WL 6852750, at *14 (Picasso, bomber and similar arguments: "Although plaintiff's counsel's argument was somewhat hyperbolic, no objection was made at trial and a curative instruction would have alleviated any prejudice"); Cohen v. Yale-New Haven Hosp., No. 365908, 2000 WL 1337660, at *17–19 (plaintiff's Picasso and sport salary references "even if improper, do not warrant upsetting the verdict" because they "'were not the culmination of an improper theme developed throughout the trial" nor part of a pattern of misconduct); compare Fasani v. Kowalski, 43 So.3d at 808–11 (new trial required even though appellants never objected to counsel asking the jury to compare plaintiff's "brain to a Picasso painting," given counsel's additional misconduct, including describing plaintiff as "retarded' and "asking the jury to consider how much money a reasonable person would accept to be hit in the head with a baseball bat") with Carnival Corp. v. Pajares, 972 So.2d at 979 (argument about Van Gogh painting was "highly improper" but not "fundamental error," so failure to object precluded consideration on appeal).

14. *See, e.g.,* Seffert v. Los Angeles Transit Lines, 364 P.2d at 342 ("The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court.")

15. *See, e.g.,* Beagle v. Vasold, 417 P.2d at 679 ("Even if it can be established that larger verdicts result on occasions when the 'per diem' argument is employed, it does not necessarily follow that these awards are excessive under the circumstances of the particular cases since, as pointed out hereinafter, *both the trial and the appellate courts have the power and the duty to reduce verdicts which are unreasonably large*. As was stated in one case, 'if the evil feared is excessive verdicts, then the cure ought to be directed against the product, not the practice.'") (emphasis added); *id.* at 680 ("The 'per diem' argument is only a suggestion as to one method of reaching the goal of reasonableness, not a substitute for it. If the jury's award does not meet this test, *the trial court has the duty to reduce it*, and the appellate court has the authority to review the result") (emphasis added); Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d at 576 (absent a jury instruction that counsel's per diem formula was "but lawyer talk" "the practitioner runs the risk of a more piercing and less sympathetic review on appeal as to the argument's prejudicial aspect . . . .").