

# PERMISSIBLE AND IMPERMISSIBLE ARGUMENTS ON DAMAGES

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## I. INTRODUCTION

Few things are more frustrating to a trial lawyer than having a favorable verdict overturned on appeal. When the reason for the reversal is that plaintiff's counsel made an improper argument to the jury on the issue of damages -- an argument that could easily have been avoided -- the frustration level may become intolerable for both counsel and client. The purpose of this paper is to assist you in avoiding such improper arguments.

Creativity is one of the hallmarks of a good trial lawyer, and members of the plaintiff's bar take justifiable pride in the development of innovative methods of proving and arguing damages. Over the past several decades, this creativity has led plaintiffs' attorneys to use a wide variety of arguments in the effort to persuade juries to award adequate damages. Losing defendants often claim on appeal that a particular damages argument was improper. As a result, there are hundreds -- perhaps thousands -- of reported decisions in which appellate courts have considered whether a particular argument was improper; if so, whether it was prejudicial; and if so, whether the prejudicial effect of the argument was so great as to require reversal. In determining whether reversal is required, the courts have addressed such issues as whether the defendant waived the alleged impropriety by failing to make a timely objection; whether the argument was so prejudicial that reversal was warranted even though the defendant failed to preserve the issue for appeal; whether the trial judge, either in response to the defendant's objection or sua sponte, alleviated the prejudicial effect of the argument by admonishing plaintiff's counsel and giving an adequate cautionary instruction; and whether the prejudicial effect was so great that no cautionary instruction could cure it.

This paper is not a comprehensive analysis of the case law on this subject; such an analysis would be book-length, not article-length. As one court put it, "this field has been plowed so many times and in so many directions that it is difficult, if not impossible, to find a clear path...." Wasden v. Seaboard Coast Line R.R., 474 So. 2d 825 (Fla. Ct. App. 1985). The goals of this paper are more modest: first, to provide readers with the resources to determine whether a particular argument is permitted in their jurisdiction;<sup>1</sup> and, second, to review selected cases that address recurrent problems in this area.

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<sup>1</sup> Although the courts have unanimously condemned some arguments, the permissibility of others varies from state to state. The "golden rule" argument is an example of the former; the per diem method of calculating damages for pain and suffering is an example of the latter.

## II. RESEARCH TOOLS

### A. American Law Reports Annotations

Due to the popularity of certain damages arguments among plaintiffs' attorneys, there are a number of A.L.R. annotations that collect the cases dealing with those arguments. An on-point annotation may be the fastest way to determine whether the courts of a particular state have approved or disapproved a particular argument. My research has revealed the following annotations, the titles of which give some indication of the great range of arguments that plaintiff's counsel have used over the years:<sup>2</sup>

Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case, 68 A.L.R. Fed. 333 (1984).

Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering, 3 A.L.R.4th 940 (1981).

Counsel's Appeal in Civil Case to Self-Interest or Prejudice of Jurors as Taxpayers, as Ground for Mistrial, New Trial, or Reversal, 93 A.L.R.3d 556 (1979).

Propriety and Prejudicial Effect of Reference by Counsel in Civil Case to Amount of Verdict in Similar Cases, 15 A.L.R.3d 1144 (1967).

Propriety and Prejudicial Effect of Reference by Counsel in Civil Case to Result of Former Trial of Same Case, or Amount of Verdict Therein, 15 A.L.R.3d 1101 (1967)

Propriety and Prejudicial Effect of Reference by Plaintiff's Counsel in Jury Trial of Personal Injuries or Death Action, To Amount of Damages Claimed or Expected by His Client, 14 A.L.R.3d 541 (1967).

Counsel's Use, in Trial of Personal Injury or Wrongful Death Case, of Blackboard, Chart, Diagram, or Placard, Not Introduced in Evidence, Relating to Damages, 86 A.L.R.2d 239 (1962).

Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish If in the Same Position, 70 A.L.R.2d 935 (1960).

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<sup>2</sup> I have endeavored to make this list comprehensive. Nevertheless, it is certainly possible that there are other relevant annotations.

Prejudicial Effect of Counsel's Remarks, in Opening Statement in Personal Injury Action, as to Plaintiff's Family Circumstances, Number of Children, or the Like. 68 A.L.R.2d 990 (1959)

Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument, 55 A.L.R.2d 1198 (1957).

Counsel's Appeal in Civil Case to Wealth or Poverty of Litigants as Ground for Mistrial, New Trial, or Reversal, 32 A.L.R.2d 9 (1953).

#### B. **West Key Number Analysis**

The West digests place these cases under the topic "Trial," subheading "V. Arguments and Conduct of Counsel." The following are the "Trial" key numbers that should be used when consulting the West digests or conducting a WestLaw search: 108 1/2, 109, 111, 113 to 121 inclusive, 125, 128, 131 to 133.6 inclusive. Thorough research under these key numbers should reveal every case in your jurisdiction that has addressed any given argument relating to damages.

### III. **REVIEW OF SELECTED CASES**

#### A. **Per Diem Calculation of Damages for Pain and Suffering**

In a per diem argument, counsel takes a small period of time --an hour, a day, or perhaps a week; assigns a seemingly small sum as adequate compensation for the plaintiff's pain and suffering during that period; expresses the total period of time that the plaintiff will endure pain and suffering in a small unit (for example, a plaintiff with a permanent pain-producing injury whose anticipated life span is 30 years will endure 1,560 weeks, or 10,950 days, of pain and suffering); and multiplies that figure by the compensation per day (or per week or per hour) to arrive at a sum representing the total value of the pain and suffering for the entire period.

The states are hopelessly divided over the propriety of this type of argument. See Annot., 3 A.L.R.4th 940, 944-46 (1981). In states that permit the argument, the danger in using it is the practical one of overreaching. In states that do not permit it, the issue most likely to be litigated is whether a given argument did or did not amount to a prohibited per diem argument. For example, it has been held that informing the jury of the plaintiff's anticipated period of pain and suffering measured in days or weeks, and then suggesting a lump sum award for that period (rather than suggesting a figure per day or per week to be multiplied by the total number of days or weeks), is not a per diem argument. *E.g.*, Watson v. City of Chicago, 464 N.E.2d 1100, 1102-04 (Ill. Ct. App. 1984); Bender v. Burlington-Northern R.R., 654 S.W.2d 194, 200 (Mo. Ct. App. 1983). In Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W. Va. 1983), plaintiff's counsel,

beginning with years and carrying out appropriate multiplication, told the jury that the plaintiff had endured 2,600 days or 62,500 hours of past pain and suffering and would endure 18,250 days or 440,000 hours of future pain and suffering. Shortly after giving these figures, he argued that “the facts of this case, ladies and gentlemen, cry out for a multi-million dollar verdict.” *Id.* at 616. The court held that counsel’s attempt “to emphasize the [plaintiff’s] suffering by using smaller and smaller units of time is not by itself improper,” that the argument was proper because counsel did not suggest a specific value per unit of time, and that suggesting a nonspecific amount (“multi-million dollar verdict”) was proper. *Id.* The court also noted that the jury evidently was not swayed by the argument, since it returned a verdict for \$500,000.<sup>3</sup>

### B. The “Golden Rule” Argument

A “golden rule” argument is any argument that asks the jurors to award the plaintiff the same damages they would want to be awarded if they were in the plaintiff’s position. Variants include the request that the jurors put themselves in the plaintiff’s shoes, that they ask themselves what damages they would want their child or spouse to receive in such circumstances, and that they ask themselves what sum they would accept in exchange for having to endure the plaintiff’s injuries. All such arguments are forbidden by every court that has ever considered them, for the simple reason that such arguments ask the jurors to depart from a position of neutrality and to make a decision based on sympathy for the plaintiff rather than on the evidence. Annot., 68 A.L.R. Fed. 333 (1984); Annot., 70 A.L.R.2d 935 (1960).

Nevertheless, some plaintiff’s attorneys, either through an intentional creative effort to get around this proscription or through carelessness, continue to stumble into this pitfall. For example, in Loose v. Offshore Navigation, Inc., 670 F.2d 493 (5th Cir. 1982), plaintiff’s counsel told the jurors that he would not ask them to try to put themselves in the plaintiff’s position. The court held that this statement had exactly the same effect as asking the jurors to put themselves in the plaintiff’s position and was therefore a forbidden golden rule argument. *Id.* at 496. In National Car Rental System, Inc. v. Bostic, 423 So. 2d 915 (Fla. CT. App. 1982), the court held that the rhetorical question “If the shoe is on the other foot, would you wear it?” was a golden rule argument. *Id.* at 916-17.

This does not mean that every attempt to devise an argument that is similar to a golden rule argument, but does not cross the line into forbidden territory, is doomed to failure. In Allen v. Mobile Interstate Piledrivers, 475 So. 2d 530 (Ala. 1985), the plaintiff, a concrete finisher, had fallen off an improperly secured ladder

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<sup>3</sup> Courts routinely hold improper damages arguments to be harmless where the verdict is not excessive. *E.g., Waldron v. Hardwick*, 406 F.2d 86, 89-90 (7th Cir. 1969). Consequently, when a damages argument is challenged on appeal, plaintiff’s counsel should always argue that the verdict is not excessive, thus demonstrating that any impropriety in the damages argument was not prejudicial and accordingly is not grounds for reversal.

and plunged approximately 18 feet onto a cement floor. Closing argument for the plaintiff included the following (*id.* at 537):

“Let’s picture a line of people, about a dozen people standing up in front of a table and a man is sitting there and he has got a blank check there, and he tells that line of people, ‘I’m ready to write you a check’ -- they are 31 or 32 years old, they are working men and women who have to use their bodies to get the job done, and he is telling them, ‘Here is what I’m going to do, you let me drop you in a twenty-one or twenty-two foot hole on a slab of concrete--’”.

At this point defense counsel interrupted with an objection, which the trial judge overruled. The Alabama Supreme court rejected the defendant’s contention that the quoted language was a golden rule argument, reasoning as follows:

[T]he argument does not directly invite the jurors to put themselves in plaintiff’s position, but rather refers to some unspecified imaginary individuals. Defendant maintains that the “dozen people” is obviously the jury. However, the people are characterized “31 or 32 years old,...working men and women who have to use their bodies to get the job done.” We cannot assume that all of the jurors fit this description.

The argument is designed to make the jury realize that reasonable person in plaintiff’s position would not agree to being injured. We conclude that it was not reversible error because it does not invite the jurors to place themselves as individuals in plaintiff’s position.

*Id.* at 537-38 (footnote omitted). Of course, whether other courts would agree with the foregoing rationale is an open question. Nevertheless, the *Allen* case demonstrates that there are ways of getting jurors to imagine themselves in the plaintiff’s position without directly asking them to do so, and that some courts will permit such arguments.

It may be that plaintiff’s attorneys continue to test the boundaries of the permissible in this area because most appellate courts do not consider the prejudice caused by a golden rule argument to be irreparable; the trial judge can save the case by a proper admonition to the plaintiff’s counsel and an appropriate cautionary instruction to the jury. *Loose v. Offshore Navigation, Inc.*, 670 F.2d at 497. As the Alabama court put it in the *Allen* case, “[t]he reluctance of courts to find prejudicial error in this situation finds its motivation in the countervailing rule that great latitude should be given counsel in the content and scope of their closing arguments.” 475 So. 2d at 537 (internal quotation marks and citations omitted).

**C. Using Blackboard or Chart That Has Not Been Admitted Into Evidence as a Visual Aid During Damages Argument**

Most appellate courts hold that, although counsel's use of a blackboard or chart during argument on damages "is a widely accepted practice," its permissibility in any given case is not a matter of right, but is discretionary with the trial court. Louisiana-Pacific Corp. v. Mims, 453 So. 2d 211, 212 (Fla. Ct. App. 1984); accord, e.g., Cartwright v. Atlas Chemical Industries, 593 P.2d 104, 119-20 (Okl. Ct. App. 1979); see Annot., 86 A.L.R.2d 239 (1962).

A key issue in determining whether the trial court abused its discretion in allowing plaintiff's counsel to use a blackboard or chart is the duration of its exposure to the jury. See Annot., 86 A.L.R.2d AT 250-52. In the Louisiana-Pacific case, supra, the court, stating that "when the argument is concluded the chart must be promptly removed from the jury's observation," held that the trial judge had committed reversible error when he allowed the chart to remain with jury during its deliberations. 453 So. 2d at 212.

Counsel must take care that the summary of damages on the blackboard or chart does not include anything based upon facts that are not in evidence. For example, in Martin v. Zucker, 479 N.E.2d 1000 (Ill. Ct. App. 1985), the plaintiff's attorney, in listing the bills of the plaintiff's health care providers, had put question marks next to the names of the defendant physicians because they had not submitted bills to the plaintiff. Not only was there no evidence in the record as to whether the defendants had or had not submitted bills, but under Illinois law the fact that a defendant in a personal injury case has paid or offered to pay for the plaintiff's medical treatment is inadmissible. Id. at 1005. The trial judge ordered the question marks erased from the chart, and the court of appeals affirmed, commending the trial court for "avoid[ing], rather than committ[ing], prejudicial error." Id.

As Martin v. Zucker demonstrates, an alert trial judge can often save plaintiff's counsel from suffering the consequences (namely, reversal of a favorable verdict) of his or her improper use of a blackboard or chart. To give one more example, in Hiliuk v. Daponte, 473 N.Y.S.2d 567 (App. Div. 1984), the plaintiff's attorney, in an effort to demonstrate during closing argument the location of the plaintiff's fracture, actually altered a blackboard diagram that had been drawn (presumably by a medical witness) during the trial. The diagram had not even been admitted into evidence. The appellate court held that "any prejudice which may have resulted from counsel's conduct was cured by the trial court's erasure of counsel's

marking and its immediate and specific curative instructions to the jury.” Id. at 568.

**D. Addressing a Juror Individually or by Name During Closing Argument**

During voir dire, we naturally address prospective jurors by name; but the same practice during closing argument is almost universally disapproved. See Annot., 55 A.L.R.2d 1198 (1957). Fortunately, this practice generally results in reversal only when the prosecutor does it in a criminal case; in civil cases, the appellate courts are quite ready to find the error either harmless or cured by appropriate trial court action. For example, in Thaxton v. Reed, 339 S.W.2d 241 (Tex. Ct. Civ. App. 1960), plaintiff’s closing argument including the following plea to one juror: “That the plaintiff was suing these defendants for the sum of \$100,000.00 damages, and now, Mrs. Moore, you don’t think that’s too much to ask for in a case of this kind, do you?” Id. at 246. The trial judge sustained defense counsel’s objection to this remark, overruled his request for a mistrial, and admonished plaintiff’s counsel that “that was an improper statement to make to a jury.” Id. The court of appeals held that the trial court’s action had rendered the plaintiff’s improper argument “entirely harmless.” Id.

In Twait v. Olson, 432 N.E.2d 1244 (Ill. Ct.App. 1982), plaintiff’s counsel was creative enough to gain some of the benefits of connecting particular jurors to the plaintiff’s plight without crossing the forbidden line. The challenged remark came after plaintiff’s counsel had told the jury that they could rely on their own experience to determine what wages a young man like the plaintiff could be expected to earn. Counsel then said, “[w]e have a 20 year old or two, I think on this jury. We have at least one.” Id. at 1250. Counsel then proceeded to discuss possible entry-level wages for factory workers. The appellate court rejected the defendant’s claim of error based upon the singling out of one or two jurors by age category.<sup>4</sup>

Of course, it is improper to address individual jurors in an attempt to play upon their personal circumstances and fears.... We would agree that a direct reference to particular members of the jury would be improper, but we cannot say the comments here were a direct reference, or in any event, amounted to reversible error. In the context of the entire trial, these remarks could hardly be said to have prejudiced [the defendant] so plainly as to justify a new trial. Id.

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<sup>4</sup> It is not clear why the defense did not attack the whole argument as being based upon facts not in evidence.

