PART II

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

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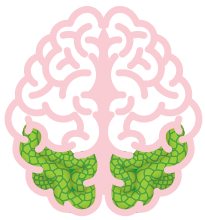

Editor's Note: this is the final segment of the authors' "Reptile Theory" article, continued from the November-December 2019 Municipal Lawyer.

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.

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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 . . . .").