

REPTILE THEORY, RUNAWAY VERDICTS, AND PUNITIVE DAMAGES

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AGENDA

Discovery

Pre Trial Motions / Trial Briefs

Voir Dire

Opening

Cross

Direct (in 1st party Extra Contractual Cases)

Closing

DISCOVERY

- Question for discussion/poll:
- File a Motion to preclude PLA from asking “rules of the road” questions before depositions, or
- Let PLA ask “rules of the road” questions in depositions and use those for Motion in Limine?
 - Yes
 - No
- Prepare the Witness: most answers to these questions will start with “it depends”
- Ask P in written discovery & at deposition what P is seeking. If P refuses to answer, explain to PLA that’s fine but you’ll be moving to preclude any request for damages not disclosed including non economic damages as discovery sanction because you were not able to discover basis for the claim
- Litigation Funding: avoid broad requests, focus on existence and identity of funder first

PRE TRIAL MOTIONS / PRE TRIAL BRIEFS

- Search the listsive archives for “reptile” and “anchor”
- Check in with other people who posted on those topics to see if they got private results
- Please share Orders with the group so they get to the archive
- Move to Preclude use of “Safety Rule” questions/ “conscience of community” arguments, particularly where no Punitives were permitted
- Move to Preclude claim for any non disclosed damages

VOIR DIRE: EXPOSE THE ANCHOR AT THE OUTSET, COUNTER THE REPTILE

- In one recent trial the first thing plaintiff counsel said to the jury in voir dire was: “I am going to ask you to award my client \$4mm, if I prove that the damages are that high, will you be able to award my client such a high figure”
- Find a juror who looks to be mathematically/scientifically minded or who looks particularly/skeptical. “Ms. Smith, I saw your furrowed brow when plaintiff counsel said he intended to ask for \$4mm. Have you ever heard of a tactic some attorneys employ where they try to anchor a jury to a large dollar figure before they ever hear anything about a case?”
 - Ask follow up questions- whether other jurors have ever heard of that tactic
 - How do they feel about that tactic?
 - Do they think they might be leaning toward making defendant *disprove* the case is worth \$4mm?
 - Ask them to explain in their own words what kind of evidence they would need to hear to support such a high figure if the economic damages are (whatever figure).
 - Solicit a promise not to concede to anchor tactic
- Ask Jurors if they have ever had “the purse” experience
- **OBJECT TO VOIR DIRE!** Inappropriate to characterize size of case as “big” in voir dire; to make case about “community as a whole”
- **Countering Reptile:** vulnerable jurors (younger, less educated) responded best to responsibility and economic effects
- **Attorney Advertising:** can condition jurors towards larger awards before voir dire even begins

OPENING

Address at the outset what jury will hear about the damages and what jury will NOT hear about damages

Address with either a power point or even a low-tech dry erase board how the number P asked for in Voir Dire or Opening is massively inconsistent with what the evidence will show.

If plaintiff requests \$8 million, show what P made on average pre loss, and what P would have expected to earn in lifetime.

Point out P is requesting whatever multiplier times that **just for non economic damages.**

The law requires awards based on Facts, Not Feelings

Damages must be based on **Probabilities, Not Possibilities – cite the CJI if possible**

If It's Not Reasonably Necessary, It's Not A Reasonable Award

Damage awards are to Make A Person Whole, Not Make Them A Mega-Millionaire

Damages are to Put A Person In Their Prior Position, Not Put Them Up In A Mansion

Excessive litigation costs hurt everyone through higher prices for goods and services (CO at \$4,011 per household in 2020)

Consider addressing again that PLA is using anchoring tactic hoping jury may throw up hands and pick a number inconsistent with the evidence. Tell them again what evidence will show re damages.

CROSS

“Mind what you have learned. Save you, it can.” – Master Yoda

Use what you got in discovery from P, or Ps experts about the basis for non economic damage claims, or more likely, the lack of evidence therefore.

DIRECT

Provide an alternative, lower damage amount

- Through Claim Handlers in Extra contractual cases
- How can this be done in non EC cases?

Stipulate as to Fault

- increases perception of morality, truthfulness, and respectfulness and decreases retaliation and desire to punish
- The transgression is now viewed as inconsistent with the positive disposition of the offender
- The perceiver (i.e., the jury) now views the transgression as an anomaly, and attributes it to situational factors (“those were different times”) instead of personal factors (“those are careless people”)
- However, **insincere apologies (e.g., low damages offers), can increase desire to punish**

CLOSING

- Remind jurors they agreed to be on the lookout for evidence taken out of context
- Review examples, pull up exhibits
- Remind jurors of agreements made in VD, for example not to give in to the anchor tactic
- Help juror identify with the “wrongfully accused”
- “Why is it important that the plaintiff has the burden of proof?”
- “The law doesn’t require perfection. It requires reasonableness.”
- Talk about “business owners” instead of “companies”
- Use expressions like “dragged into court”

SUMMATION AT END OF CLOSING

Thank you all for being here today and answering our questions. Without you, our system of laws can't be enforced. The justice system is supposed to work for everyone who gets dragged into court – even unpopular defendants like large companies. The decisions made by jurors are about the facts and the law, and those laws affect how every defendant is treated, no matter who you are.

We are here because we believe our client has been wrongly accused and sued in this case, and that it is not responsible for Mr. Smith's injuries. If the plaintiffs do not prove (or has not proven) their case against my client, you could be the last line of defense for a party that's been wrongfully-accused.