

# Motions *in Limine* Targeted to Prevent Improper Remarks in Defense's Closing Argument

by Marisa A. Gelabert

When we are preparing for motions *in limine*, our focus is often geared towards barring case-specific opinions, evidence or legal arguments made during the direct and/or cross examination of trial witnesses. However, it is crucial that we also focus on excluding prejudicial remarks commonly made by defense attorneys about damages in voir dire, opening statement or closing argument. As we cannot un-ring a bell, filing such motions before jury selection will assist in reducing the risk that defense counsel will throw in an unnecessary remark to improperly sway the jury.

## Bar Argument That Plaintiff is Asking for a Greater Amount Than Expected

For example, defense counsel must not be permitted to argue that the plaintiff has asked for a greater amount of money than they actually expect to be awarded. To illustrate, in *Carlasare v. Wilbelmi*, defense counsel argued in closing that plaintiffs' attorneys generally ask for "five, six, seven times more than they think they are really entitled to" and that the actual figure sought is one-fifth of the figure that the plaintiff's counsel suggested.<sup>1</sup> On appeal, the court held that there was no evidence that plaintiff's counsel was only seeking one-fifth of the damages suggested nor was there any evidence to suggest that plaintiffs' counsel generally ask for more than they expect to receive.<sup>2</sup> Thus, defendant's argument was improper and should not have been permitted.<sup>3</sup>

## Bar Personal Opinions or Feelings of Plaintiff's Suggested Award

Similarly, defense counsel cannot characterize the amount of damages

sought by plaintiff as "shocking" or "excessive" to them.<sup>4</sup> It is well established that "[t]he purpose of argument by counsel is to assist the jury fairly, deliberately and impartially to arrive at the truth of the facts submitted to them for their decision."<sup>5</sup> In fact, the Illinois Supreme Court Rules of Professional Conduct provide that an attorney shall not "assert personal knowledge of facts in issues except when testifying as a witness" nor should they "state a personal opinion as to the justness of a cause."<sup>6</sup> The only purpose of defense counsel's comments regarding their view of the plaintiff's suggested award would be to inappropriately appeal to the passions of the jury.<sup>7</sup>

## Bar Argument that Plaintiff Must Prove a Precise Value for Any Element of Damages

Defense counsel likewise must not be permitted to argue that plaintiff is required to prove a certain dollar value for any element of damages. Illinois law is clear that a plaintiff need not prove and/or set forth a mathematical computation to justify a suggested award – rather, the jury will determine whether such award is appropriate.<sup>8</sup> This is especially true of non-economic damages, such as pain and suffering, loss or normal life, loss of society, grief, anguish and mental suffering, for which there is no exact computational formula.

*Salo v. Singburse* proves this point. There, a jury awarded plaintiff \$24,000 for damages sustained in a motor vehicle collision.<sup>9</sup> On cross-appeal, defense argued that the plaintiff's verdict was "excessive" given that plaintiff's medical bills were only \$3,030, the plaintiff did not receive treatment for

ten months following the collision, the injuries were soft tissue injuries, there was no testimony regarding necessary further treatment, and plaintiff was not claiming lost wages.<sup>10</sup> In upholding the verdict, the appellate court emphasized that "the very nature of personal injury cases makes it impossible to establish a precise formula to determine whether a particular award is excessive or not."<sup>11</sup> It is the sole province of the jury to consider the totality of evidence on the nature and extent of a plaintiff's injuries, including past and future medical expenses, wage loss, and any other restrictions that may be placed on a plaintiff before determining damages.<sup>12</sup> Requiring plaintiff's counsel to prove a precise number of damages and/or set forth a formula for arriving at such damages would defeat the purpose of the jury system and must not be permitted.<sup>13</sup>

This makes sense, as "[f]uture damages by their nature are always subject to some uncertainties."<sup>14</sup> Accordingly, the jury is allowed great latitude in awards for future economic damages, such as medical expenses, based upon the jurors' evaluation of the evidence regarding future care, rather than an itemized list of future expenses.<sup>15</sup> For instance, in *Martinez v. Elias*, the jury returned a verdict of \$155,000 in future medical expenses; however, the trial court granted a remittitur of \$100,000 given testimony that plaintiff's future lumbar fusion would have a surgical fee of around only \$55,000.<sup>16</sup> On appeal, the court vacated the remittitur, holding that the trial court abused its discretion by reducing the jury's award for future medical expenses "not specifically itemized."<sup>17</sup> In light of testimony from plaintiff's expert that a future sur-

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gery would include additional hospital, radiology, and therapy service charges, there was nothing to suggest that the jury's award of \$100,000 for additional charges would exceed "the necessarily flexible limits of fair and reasonable compensation."<sup>18</sup> Likewise, in *Bruntjen v. Bethalto Pizza, LLC*, the court upheld a jury verdict of \$657,000.68 in past and future medical expenses based on the totality of evidence presented on plaintiff's condition and need for future care, and despite only \$196,315.68 in past medical expenses and no precise number suggested by plaintiff's experts for anticipated future care or treatment.<sup>19</sup>

Ultimately, so long as a plaintiff has set forth sufficient facts for the jury to consider, the plaintiff is not required to prove up a precise amount that may be necessary for future expenses.<sup>20</sup> Finally, even if the plaintiff does present an expert to establish a precise figure, or range of figures, which are likely necessary for the plaintiff's anticipated future expenses, the jury is still not

bound to accept it and can award whatever it feels is fair and reasonable considering all the evidence presented.<sup>21</sup>

### **Bar Defense from Introducing Current Cost of Living Expenses as Basis for Award**

Just as there is no requirement that the plaintiff set forth a precise formula to support non-economic damages claims, the defense should be barred from introducing a formula as the basis for evaluating certain elements of damages. For instance, defense counsel must not be permitted to argue or insinuate that the jury would alleviate plaintiff's pain and suffering by covering the costs of future housing payments or buying them a new car. It is well established law that "pain and suffering have no commercial value to which a jury can refer in determining what monetary allowance should be given."<sup>22</sup> Therefore, "an impartial jury which has been properly informed by the evidence and the court's instruction will, by the exercise of its conscience and sound judgment, be better able to

determine reasonable compensation than it would if it were subjected to expressions of counsels' partisan conscience and judgment on the matter."<sup>23</sup> To suggest to the jury that the determination of a damages award should be based on arbitrary costs of daily living is not only entirely speculative, but also highly prejudicial as it risks misleading the jury into believing that a precise calculation for damages exists and produces "an illusion of certainty" rather than encouraging the jury to make its own determination.<sup>24</sup> Further still, any reference to daily living expenses would inject new evidence into the case at closing and must not be permitted.<sup>25</sup>

### **Bar Reference to Awards in Similar Cases or Settlements**

Defense counsel also must not be permitted to make any reference or comparison to the amount of previous awards or settlements in similar cases or that the plaintiff's damage award request should be tested for excessiveness against such other cases.<sup>26</sup> For the same reasons a plaintiff need not set

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forth a formula for damages, any suggestion or reference to similar case verdicts would usurp the jury's function. Damages should be assessed by a jury in each case individually, considering its unique facts and circumstances.<sup>27</sup> Whether a similar case settled for less than the number proposed by the plaintiff is irrelevant to the facts the jury must consider.<sup>28</sup>

For instance, in *Epping v. Commonwealth Edison Co.*, a jury awarded plaintiff \$13.5 million, \$9 million of which was for disability, disfigurement, and pain and suffering.<sup>29</sup> On appeal, defendants argued that \$9 million was excessive given that the award was disproportionately high compared to other cases in which injuries were similar or more severe.<sup>30</sup> Rejecting this argument, the court noted that while “[e]stablishing predictability of outcome for people similarly situated has surface attraction, [] the courts of this State have never imposed on juries a requirement of conformity in damage awards.”<sup>31</sup> Ultimately, the court affirmed the jury's award, emphasizing that the case was

“not about an injury to an arm or leg. It is about the nature and extent of injuries to a particular woman. It is about the life she is required to lead because of the defendant's negligence. We will not compare.”<sup>32</sup>

### **Bar Argument that Any Award is Similar to Lottery or Game of Chance**

Defense counsel certainly cannot argue that an award to the plaintiff would amount to winning the lottery or some other game of chance, a get-rich-quick scheme, welfare program, or the like. To illustrate, in *Principato v. Rudd*, counsel for defense stated that plaintiff's suggested award was “wrong,” while arguing “This is a Court of Law. It is not a giveaway program, it's not a welfare program.”<sup>33</sup> On appeal, the court agreed that such a statement was improper as it was merely an attempt to arouse the prejudice or passion of the jury.<sup>34</sup> Plaintiffs' verdicts are not games of chance but are based on evidence of plaintiff's damages proximately caused by defendant's negligence. An argument to the contrary infers that the

plaintiff is “lucky” to receive compensation, while minimizing the nature and extent of their damages.

### **Bar Argument that a Verdict Will Raise Insurance Rates / Burden the Public**

The defense should likewise be barred from mentioning or insinuating the effect, if any, that tort verdicts have on insurance rates or the business climate. Any such mention would merely inject irrelevant information with no probative value into a case and prejudice the plaintiff.<sup>35</sup> For instance, defense counsel must not be permitted to argue that any verdict would raise insurance rates and/or that cases like ours are responsible for high insurance premiums or place a burden on the public as a whole and/or will be responsible for a high cost of living for the public.<sup>36</sup> This type of argument has been found improper and should be barred.

For example, in *Lukich v. Angeli*, defense counsel's remarks that “[this case] is the type of thing that causes the in-

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crease in the high cost of living” were found to be prejudicial and improper.<sup>37</sup> Likewise, in *Dep’t of Public Works and Buildings v. Sun Oil Co.*, defense counsel for the state argued that they agreed the injured party should make a profit, “but should it really be at the taxpayers’ expense to give them a big profit.”<sup>38</sup> On appeal, the court held that such argument had the effect of making jurors “conscious of their personal interest in the determination of the amount of compensation,” and ultimately deprived the injured party of a fair trial.<sup>39</sup>

### **Bar Comments that Any Award is Not Taxable Income**

Defense also must be barred from stating that any verdict awarded to the plaintiff is not taxable income. The Illinois Supreme Court has long held that “the incident of taxation is not a proper factor for the jury’s consideration, imparted either by oral argument or written instruction.”<sup>40</sup> Additionally, Illinois courts have long prohibited jury instructions “as to the nontaxable nature of damages awards.”<sup>41</sup> What a plaintiff does with an award, and whether or not they are taxed, is absolutely no concern for the jury or court; thus, the only purpose of such comments would be to confuse the jury in their discussion on damages.

### **Bar Argument that an Award Would Produce a Stream of Income for Plaintiff**

Similarly, defense counsel cannot argue to the jury that the future damages they award would produce a stream of income to the plaintiff.<sup>42</sup> Arguments that a judgment would create generational wealth, or any other argument related to the possible financial condition resulting to the plaintiff and their families, are improper. The only issue for the jury to determine is the amount that would fairly, reasonably, and fully compensate the plaintiff for the life-altering, often permanent, injuries they have sustained as a result of the defen-

dant’s conduct.

Further, defendants must not be allowed to argue to the jury what the sum awarded would return if invested at a specific percent, including by an annuity.<sup>43</sup> It is improper for the defense to argue for a reduction in damages beyond the present cash value reduction already found in the Illinois Pattern Jury Instruction – and only applied to future damages for medical expenses and lost earnings, but not damages for pain and suffering, disability or disfigurement.<sup>44</sup> Suggesting the jury consider what would happen if plaintiff invested an award invites the jury to improperly reduce either sums already reduced to present cash value or sums that should not be so reduced.<sup>45</sup>

### **Bar Argument that Plaintiff’s Award is Paid from Defendant’s Assets**

Further, any mention or inference that any award to the plaintiff would have to be paid out of the defendant’s personal assets is entirely improper and must not be permitted. In *Panelle v. CTA*, counsel for defense argued, in part, “if [defendants] are going to be required to pay every claim made against our company whether we think it is justified or not . . . there isn’t enough money collected in a year that we would have to pay out in claims in a month.”<sup>46</sup> Ultimately, the trial court sustained a contemporaneous objection to these remarks and granted a new trial based on the prejudicial effect of such comments in stating “[t]here is no room in final argument for inability of the defendant to pay.”<sup>47</sup> On appeal, the Illinois Supreme Court agreed with the trial court that such remarks were improper and gave rise to inferences beyond the merits of plaintiff’s claim.<sup>48</sup>

Likewise, in *Lenz v. Julian*, counsel for defense attempted to argue that he “[did not] think that it’s fair that [defendant] for the next 50 years should have to pay.”<sup>49</sup> On appeal, the court noted that it is improper argument to suggest that the defendant is, or is not, insured against liability on a judg-

ment.<sup>50</sup> Thus, any statement regarding the defendant’s personal responsibility or lack thereof to pay a judgment was held highly prejudicial, only served to appeal to the sympathy of the jury and constituted reversible error.<sup>51</sup>

### **Bar Any Reference to the Effect of a Lawsuit on Defendants’ Personal or Professional Reputation**

Lastly, defense counsel must not be permitted to argue that the defendant’s or its employees’ professional or personal reputations are at stake as a result of this lawsuit or any adverse verdict. Such argument is reversible error, as it is designed only to appeal to the jury’s passions and sympathy.<sup>52</sup>

For instance, in *Torrez v. Raag*, defense counsel stated in closing that he was “seriously concerned, because [the defendant’s] right to practice medicine by reason of this lawsuit—.”<sup>53</sup> While the defendant’s statement was interrupted by a sustained objection, the jury later rendered a verdict in favor of the defense.<sup>54</sup> On appeal, the court granted a new trial based on the fact that defense counsel’s remark was “clearly conveyed to the jury” and, thus, “an improper element was injected into the case.”<sup>55</sup> Similarly, in *Rush v. Hamdy*, defense counsel stated in closing that “[the defendant] has his professional reputation on the line here. If he has seemed uptight or excited at times, please consider that he has a lot at stake here. His professional reputation is very important to him.”<sup>56</sup> On appeal, the court held that “the impact of a verdict against a defendant upon the defendant’s reputation is irrelevant and should not be considered by the jury.”<sup>57</sup> Moreover, defense counsel’s comments were not supported by any evidence presented at trial, but rather, were clearly an appeal to the passions and sympathy of the jury and must not have been permitted.<sup>58</sup>

### **Conclusion**

By filing these motions in limine to bar improper comments before trial,

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we can reduce the risk of unnecessarily prejudicial remarks reaching the jury before deliberations.

Remember: filing a motion in limine does not provide full protection against potential violations. Even with a granted motion, we must timely object to any improper remarks and immediately request a curative instruction.<sup>59</sup> Typically, a curative instruction suffices to cure any prejudice from an improper comment. However, “there are instances where an improper comment ‘can be so overwhelmingly prejudicial despite an objection and the trial court’s sustaining of that objection.’”<sup>60</sup> Thus, if warranted, we may need to move for mistrial and/or new trial even with a curative instruction, should such prejudicial remarks deny plaintiff a fair trial.<sup>61</sup>

### Endnotes

- <sup>1</sup> *Carlasare v. Wilhelmi*, 134 Ill. App. 3d 1, 4-5 (1st Dist. 1985).
- <sup>2</sup> *Id.* at 6-7.
- <sup>3</sup> *Id.*; see *Kallas v. Lee*, 22 Ill. App. 3d 496, 503-04 (1st Dist. 1974) (finding it was improper for defense counsel to suggest that plaintiff asked for 40 or 50 times more than what he really expect-

ed to receive); *Cancio v. White*, 297 Ill. App. 3d 422, 434 (1st Dist. 1998) (noting argument that jury should award 10% of damages suggested by plaintiff was improper).

- <sup>4</sup> *Baumgartner v. Ziessow*, 169 Ill. App. 3d 647, 659-60 (1st Dist. 1988).
- <sup>5</sup> *Hansel v. Chi. Transit Auth.*, 132 Ill. App. 2d 402, 407 (1st Dist. 1971).
- <sup>6</sup> Ill. Sup. Ct. R. Prof’l Conduct, R. 3.4(e).
- <sup>7</sup> See generally *Hansel*, 132 Ill. App. 2d at 407.
- <sup>8</sup> *Salo v. Singburse*, 181 Ill. App. 3d 641, 644-45 (5th Dist. 1989); *Northern Trust Co. v. County of Cook*, 135 Ill. App. 3d 329, 334-35 (1st Dist. 1985).
- <sup>9</sup> *Salo*, 181 Ill. App. 3d at 642.
- <sup>10</sup> *Id.* at 644.
- <sup>11</sup> *Id.* at 645.
- <sup>12</sup> *Id.* at 644-45.
- <sup>13</sup> Cf. *Caley v. Manicke*, 24 Ill. 2d 390, 393-94 (1962) (holding plaintiff’s per diem damages analysis was improper because “a formula, rather than encourage reasonable and practical consideration, would tend to discourage such consideration.”).
- <sup>14</sup> *Bruntjen v. Bethalto Pizzeria, LLC*, 2014 IL App (5th) 120245, ¶ 106.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Martinez v. Elias*, 397 Ill. App. 3d

460, 473-74 (1st Dist. 2009).

- <sup>17</sup> *Id.* at 475.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Bruntjen*, 2014 IL App (5th) 120245 at ¶ 106.
- <sup>20</sup> *Levin v. Welsh Bros. Motor Serv., Inc.*, 164 Ill. App. 3d 640, 659-60 (1st Dist. 1987).
- <sup>21</sup> *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997).
- <sup>22</sup> *Caley*, 24 Ill. 2d at 392.
- <sup>23</sup> *Id.* at 393-94.
- <sup>24</sup> *Ramirez v. City of Chi.*, 318 Ill. App. 3d 18, 27 (1st Dist. 2000).
- <sup>25</sup> *Rush v. Hamdy*, 255 Ill. App. 3d 352, 359 (4th Dist. 1993).
- <sup>26</sup> *Simmons v. Univ. of Chicago Hosp.*, 247 Ill. App. 3d 177, 191 (1st Dist. 1993); *Northern Trust Co.*, 135 Ill. App. 3d at 334-35.
- <sup>27</sup> *Simmons*, 247 Ill. App. 3d at 191.
- <sup>28</sup> Cf. *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) ¶ 89 (“[a] damages award for a personal injury must be examined in light of the particular injury involved, with humble deference to the discretion of the jury and the judgment of the trial court.” (internal quotations omitted)).
- <sup>29</sup> *Epping v. Commonwealth Edison Co.*, 315 Ill. App. 3d 1069, 1072 (1st Dist. 2000).

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<sup>30</sup> *Id.*  
<sup>31</sup> *Id.* at 1073 (internal citation omitted).  
<sup>32</sup> *Id.*  
<sup>33</sup> *Principato v. Rudd*, 102 Ill. App. 3d 362, 366 (1st Dist. 1981).  
<sup>34</sup> *Id.*  
<sup>35</sup> *Lukich v. Angeli*, 31 Ill. App. 2d 20, 30-31 (1st Dist. 1961); see also *Dep't of Public Works and Buildings v. Sun Oil Co.*, 66 Ill. App. 3d 64, 68 (5th Dist. 1978).  
<sup>36</sup> *Panelle v. CTA*, 31 Ill. 2d 560, 561-62 (1964).  
<sup>37</sup> *Lukich*, 31 Ill. App. 2d at 30-31.  
<sup>38</sup> *Dep't of Public Works and Buildings*, 66 Ill. App. 3d at 68.  
<sup>39</sup> *Id.*  
<sup>40</sup> *Klawoon v. Mitchell*, 105 Ill. 2d 450, 454 (1985).  
<sup>41</sup> *McCann v. Lisle-Woodridge Fire Prot. Dist.*, 115 Ill. App. 3d 702, 705 (2nd Dist. 1983).  
<sup>42</sup> *Schaffner v. Chi. & N.W. Transp. Co.*, 129 Ill. 2d 1, 24 (1989).  
<sup>43</sup> *Drew v. Global Freight Lines*, 197 Ill. App. 3d 1049, 1059 (1st Dist. 1990).

<sup>44</sup> *Schaffner*, 129 Ill. 2d at 24-25.  
<sup>45</sup> *See id.*  
<sup>46</sup> *Panelle*, 31 Ill. 2d at 561.  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.*  
<sup>49</sup> *Lenz v. Julian*, 276 Ill. App. 3d 66, 74-5 (2nd Dist. 1995).  
<sup>50</sup> *Id.* at 75; see *Rush*, 255 Ill. App. 3d at 361 (emphasizing “statements regarding a litigant’s insurance or financial ability to satisfy a judgment are improper.”).  
<sup>51</sup> *Id.*  
<sup>52</sup> *Rush*, 255 Ill. App. 3d at 359; *Konewko v. Advocate Health & Hosps. Corp.*, 2020 IL App (2d) 190684, ¶ 65 (reversing and granting a new trial because defendant counsel’s statements regarding the hospital’s agent’s reputation were improper appeals to the jury’s sympathy).  
<sup>53</sup> *Torrez v. Raag*, 43 Ill. App. 3d 779, 782 (2nd Dist. 1976).  
<sup>54</sup> *Id.*  
<sup>55</sup> *Id.* at 783.  
<sup>56</sup> *Rush*, 255 Ill. App. 3d at 358.

<sup>57</sup> *Id.* at 358-59.  
<sup>58</sup> *Id.* at 359-360.  
<sup>59</sup> *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 45.  
<sup>60</sup> *Sikora v. Parikh*, 2018 IL App (1st) 172473, ¶ 70 (internal citations omitted).  
<sup>61</sup> *McDonnell v. McPartlin*, 192 Ill. 2d 505, 534-35 (2000); *Rutledge v. St. Anne’s Hosp.*, 230 Ill. App. 3d 786, 795 (1st Dist. 1992).

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