Some taking issue with new rule on arguing damages

Amendment allows defense to rebut proposed amount

By: Pat Murphy February 25, 2022

While some litigators see the new state rule formalizing the procedures for requesting specific awards of damages as a welcome move toward consistency in trial practice, others question the very need for the rule.

The Supreme Judicial Court last December announced the adoption of Civil Rule 51(a) on closing arguments. The rule goes into effect on March 1. The amendment to the Massachusetts Rules of Civil Procedure retains the previous language of the old rule in terms of time allotted for closing arguments.

However, subsection 51(a)(2) is entirely new, establishing specific procedures for arguing damages as authorized by statute in 2014.

The rule in essence places the proponent in the position of having to decide whether to provide the opposing party advance notice of their intent to argue a particular number or, in lieu of providing notice, leaving it up to the trial judge to decide what procedures would best afford the opposing party a reasonable opportunity to rebut that number.

But the new rule imposes unfair restrictions on plaintiffs not contemplated by the Legislature when, in 2014, it enacted G.L.c. 231, §13B, according to Douglas K. Sheff, a personal injury attorney in Boston.

"It's unreasonable to force a plaintiff to divulge numbers before they've heard all the testimony, all the evidence, and the defendant's closing," Sheff says. "Maybe defense counsel makes a very good or a very bad closing that raises or lowers the value of a case. The plaintiff should be free to consider all the evidence and those arguments prior to disclosing the number."

But the amendment makes eminent sense to Boston litigator Michael J. Rossi.

"The biggest upside to the new rule is that it creates uniformity in trial practice, which should serve both plaintiffs' and defense counsel," Rossi says, whose practice includes business litigation, professional liability defense, and representing employers in discrimination and retaliation cases.

Creating uniformity?

Chapter 231, §13B, provides that in Superior Court civil actions "parties, through their counsel, may suggest a specific monetary amount for damages at trial."

Apart from expressly acknowledging the statutory right, new Rule 51(a)(2) provides "if a party suggests a specific monetary amount for damages during closing argument without having provided notice of the intent to suggest the amount to all other parties reasonably in advance of closing arguments, the court shall allow the opposing party a reasonable opportunity to address the amount to the jury."

The reporter's notes for the rule indicate that certain important procedural changes are implicit. Most notably, while the statute limits the right to argue damages to civil cases in Superior Court, the reporter's notes state that Rule 51(a)(2), which contains no such limitation, operates to extend the right to argue damages to all actions in trial courts governed by the Rules of Civil Procedure.

"The 2022 amendment to Rule 51 serves the goal of making trial practice in the District Court (and Boston Municipal Court) and the Superior Court similar," the notes state.

The reporter's notes also address the fact that the customary trial practice in state courts is that the defendant presents the closing argument first.

According to the reporter's notes, that practice becomes problematic in terms of arguing damages when the defendant is left to make a closing argument unaware of the plaintiff's

intention to suggest damages as well as the amount they might suggest.

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The reporter's notes make the case that the new rule addresses that issue in that it affords the plaintiff an opportunity to notify the defendant in advance of an intent to argue a specific amount of damages.

"An appropriate time for the plaintiff to provide notice of the amount to be suggested in a jury trial would be at the charge conference with the trial judge," the reporter's notes state. "On notice of the plaintiff's intent, the defendant, who typically closes first, may then choose to comment on the matter in closing argument."

On the other hand, when the plaintiff fails to provide notice, the new rule embodies a safeguard by requiring that the trial judge give the defendant a "reasonable opportunity" to address the plaintiff's number.

The reporter's notes make clear that the "amendment is not intended to limit the discretion of the trial judge in deciding how to provide the defendant with the opportunity to address the amount to the jury. Allowing rebuttal by the defendant after the plaintiff's closing may be an appropriate option. Allowing rebuttal would appear to be a less drastic alteration of traditional Massachusetts trial practice than requiring the plaintiff to close first."

But Sheff opposes the possibility that defense counsel be given the opportunity to argue last.

"The Legislature had every opportunity to alter the structure of trial practice and they refrained from doing so," Sheff says. "Generations of legal precedent [says] the plaintiff should have the last word at trial."

The new rule is "unnecessary" because plaintiffs' attorneys already have a strong incentive to be reasonable, argues Boston personal injury attorney Kathy Jo Cook.

"As a plaintiffs' lawyer, you really have to make sure that your number is reasonable and that you're not overreaching," Cook says. "I'm frankly less worried that my number is too low than that my number is so ridiculously high that the jury finds for the defendant or gives a really low dollar amount."

In arguing that there's a need for imposing uniformity by rule, Rossi says the actual procedures for arguing damages and rebuttal have varied according to the preferences of the presiding judge.

"Some judges have required disclosure in advance, other judges have allowed defense counsel an opportunity for rebuttal, and some judges have done neither," Rossi says. "The new rule brings some clarity to the process, which makes trials more consistent and predictable."

Woburn attorney Andrew P. Botti, who represents companies in commercial and employment disputes, says the rule introduces an element of fairness not provided in the statute.

"The court is just trying to level the playing field in terms of notice," Botti says.

Northampton personal injury attorney Mark A. Tanner agrees.

"What the court is doing is definitively resolving an issue that comes up in every personal injury case," Tanner says.

Strategic choices?

The ability to argue damages poses a range of strategic choices for plaintiffs' counsel, Sheff notes.

"Not every case is a case to give a number, but there are many cases when it is essential to do so," he says.

According to Sheff, in the catastrophic injury cases he handles in which damages run into the millions of dollars, he always submits a number to the jury.

However, he could see plaintiffs' attorneys refraining in cases in which smaller amounts are at stake.

"An attorney doesn't want to ask for a small number because he's going to get that," Sheff says.

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While the rule suggests there may be an element of strategy in terms of counsel choosing whether to provide advance notice, litigators don't view waiting until closing to propose a number as a realistic option.

On a practical level, Rossi says the rule essentially "requires" plaintiffs' counsel to disclose at the charge conference whether they intend to suggest a specific monetary amount for damages in their closings, and if so, how much.

"The rule leaves open the possibility that a plaintiff's attorney could decide at the spur of the moment to suggest a dollar amount in his or her closing, but defense counsel would then be entitled to a rebuttal," Rossi says. "The last thing a plaintiff's lawyer wants to do is to allow defense counsel to have the last word with the jury."

How much does it matter?

Eight years after the Legislature's passage of G.L.c. 231, §13B, Sheff says he hasn't changed his mind about the importance of the measure.

"We finally have a victim's right to ask for damages that are adequate and fair," he says. "We're now allowed to suggest numbers for non-economic damages."

Cook, too, says the statutory authority to suggest damages is a valuable tool.

"It's really important to be able to explain to jurors what you are thinking about the number because they don't have any idea," Cook says. "Unless you can ground your number to economic damages, [jurors] are just kind of lost."

Tanner says suggesting non-economic damages is particularly important when it comes to garden-variety auto accident cases.

"If you don't have that ability, the only numbers [jurors] really have are medical bills," he says.
Still, Tanner says he's also second-guessed himself on occasion.

"I had an experience where I asked for a number and the jury gave me exactly that number," Tanner says. "It made me wonder whether I should have asked for more."

Rossi says the change in the law has certainly changed the way plaintiffs' attorneys approach closing arguments.
"By and large, they've seized that opportunity to put a number out there," Rossi says.

When the law was originally passed, defense attorneys were concerned it would provide plaintiffs with a powerful tool for "anchoring" — the theory that putting out a number fixes that number in the minds of jurors, Rossi says.

But he adds that he's seen no studies showing whether juries respond with verdicts above, below or the same as a proposed number.

"Has this led to larger jury verdicts in Massachusetts since 2014?" Rossi says. "I have not seen any evidence on this either way."

Sheff thinks otherwise.

"The last two years we are seeing a difference [in the size of jury verdicts]," Sheff claims. "When you can ground your request, when you can tell [jurors] what pain and suffering is worth and then do a good job justifying it, they will give it to you."

But Rossi says Massachusetts tends to be a conservative jurisdiction in terms of personal injury verdicts.

"So there is some risk for plaintiffs' lawyers in suggesting a number," Rossi says. "The most important task a lawyer has at trial is to maintain his or her credibility with the jury, and it is not difficult to imagine a lawyer irritating jurors by asking for an amount of money that jurors consider to be too much."