Plaintiff's "Reptile Theory" Closing was Improper

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But Appeals Court Vacates Order For New Trial And Remands, Concluding That The Trial Judge Applied the Wrong Standard In Allowing A Motion for Mistrial.

This blog entry takes a detour from our usual insurance coverage topics to address an issue that is of increasing concern to insurance claim handlers, defense counsel and policyholders alike.

Plaintiffs' lawyers employing the "reptile theory" approach to litigating bodily injury cases argue to the jury that the defendant poses a danger to the community that can only be avoided by a large verdict for the plaintiff. The reptile theory derives from a neuroscientist's postulate that the human brain contains a primitive, survival-based reptilian "complex" that responds when the fear of danger is triggered.

A recent Massachusetts Appeals Court decision in a case brought by a woman who broke a tooth on a small fragment of bone in a Wendy's hamburger holds that certain arguments in plaintiff's reptile theory closing were improper, but that the trial judge applied the wrong standard when she ordered a new trial. Rather than surveying the whole case to determine whether there had been a miscarriage of justice, "it appears the judge nullified the jury's verdict and allowed a new trial as a form of sanction for counsel's closing." The Appeals Court vacated the order allowing defendants' motion for a mistrial and remanded for reconsideration.

At trial on the plaintiff's breach of warranty claim, Wendy's did not contest that there was a small (less than 3/32 of an inch) bone fragment in the hamburger, but argued that this fell within both FDA and industry standards, and that dental records showed that the plaintiff's tooth was cracked before she ate the hamburger. The plaintiff's evidence showed that after the ill-fated meal the tooth took about two years and twenty-three visits to the dentist to repair.

The trial judge allowed the case to go to the jury after a motion for mistrial. The jury deliberated for nearly as long as the trial testimony, which lasted two half days. After a $150,000 plaintiff's verdict, the defense renewed its motion for a mistrial, and the trial judge ordered a new trial. On retrial before the same judge, a new jury awarded the plaintiff $10,000. The plaintiff appealed the allowance of the motion for mistrial.

Under Massachusetts Guide to Evidence § 1113(b)(2), a closing may contain "enthusiastic rhetoric, strong advocacy, and excusable hyperbole," but may not "appeal to the jurors' emotions, passions, prejudices, or sympathies" or "ask the jurors to put themselves in the position of any person involved in the case." The Appeals Court agreed with the trial judge that the plaintiff's attorney violated this provision when he:

- Impermissibly depicted the plaintiff as part of a community of average customers that included the jurors;
- Portrayed the defendants (Wendy's and its supplier) as part of a group of big companies who try to shirk responsibility;
- Argued that the jury's verdict could protect the community from future harm; and
- Encouraged the jurors to imagine a future when they would recall how their jury service helped the community by holding the defendants accountable for their violation of safety rules.

The Appeals Court held, however, that the trial judge had applied the wrong standard when evaluating the motion for mistrial, and remanded for reconsideration under the correct standard. Instead of applying the standard for a trial judge evaluating a motion for new trial – the appropriate standard when a trial judge defers consideration of a motion for mistrial until after the jury verdict – the trial judge applied the standard an appellate court uses for evaluating an appeal on the grounds of prejudicial error. As a result, the Appeals Court concluded, the trial judge gave too much weight to the improprieties in the plaintiff's closing argument, and not enough to the question whether the jury was in fact influenced by the improprieties, failing to survey the whole case to determine whether a new trial was required to avoid a miscarriage of justice.

Among other factors, the Appeals Court noted that the trial judge did not consider that the jury deliberated for a considerable time, and that the amount of the verdict was supported by the evidence. In addition, the Appeals Court observed that the trial judge gave curative instructions, including an instruction that it was not the jury's job to send a message, deter future conduct or punish any party, and an instruction that the jury should not make distinctions or hold any prejudices based on whether a party was a big corporation. In ruling on the motion for mistrial, the Appeals Court stated, the trial judge did not explain why she concluded those instructions were inadequate to address the improper arguments.

The upshot? The Appeals Court disapproves of certain arguments central to the reptile theory, and their use may lead to curative instructions at a minimum. However, the Appeals Court's decision leans in the direction of trusting an appropriately instructed jury to separate evidence from advocacy, suggesting that a jury's verdict is likely to stand despite such improper arguments absent a showing that the jury was swayed toward a result that was not justified by the evidence.

The case is *Meaghan Fitzpatrick* v. *Wendy's Old Fashioned Hamburgers of New York, Inc*., Massachusetts Appeals Court No. 18-P-1125 (November 7, 2019)