IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

A recent California Court of Appeal vacates a $30 million verdict for inappropriately conditioning the jury with "Golden Rule" tactics as to damages. While courts seem to consistently find conditioning as to damages as a ground for new trial, the courts continue to be divided as to its applicability as to liability.

Golden Rule Crushed by Court of Appeal

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Recently, the Second District California Court of Appeal, vacated a $30 million dollar verdict in a suit against a commercial trucking company and its driver for allegedly causing the death of a 20-year-old motorist in a collision. The Court of Appeal found that plaintiffs' counsel improperly invoked the "Golden Rule" by asking jurors to imagine themselves in the shoes of the decedent motorist and by asking jurors to determine what they would want in money damages if their loved one had died in such an accident. At issue was whether there was any substantial evidence admitted to support the amount of the damages award. (*Plascencia v. Deese*, 2021 certified for publication.) The California Constitution holds that "no judgment shall be set aside or new trial granted … unless, … the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Cal Const art. VI Section 13. The Court of Appeal in *Plascencia* found just that and ordered the matter to be retried on damages only.

Over the years, these conditioning tactics have been used with tremendous success yet, rigorously challenged by the defense bar given the resulting devasting verdicts on damages. Historically, the courts have granted new trials as a bar to Golden Rule arguments as to damages. Interestingly, challenges to this trial tactic date back for centuries. In a seminal case dating back to 1934, involving a plaintiff injured by glass placed into an ice cream soda, the Fifth Circuit disavowed argument that included the question to the jury, "…would you swallow that glass and put yourself in that girl's position for a few paltry thousand dollars?" Over objection, counsel also went on to state, "[t]hat girl is entitled to her life and liberty and her happiness which the good God has given her…." He went a step further by saying, "… it will take some sum of money out of [defendant's] pocket but it will never compensate her for what she has lost and for the sorrow that she goes through and will go through with when you are off on your way enjoying your good health." " *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439, 442-443. The trial court did not rule on the objections and instead simply allowed plaintiff's counsel to continue with his argument. The jury awarded plaintiff $7,500 which was considered "very substantial" at the time. The higher court found that such statements to the jury were indeed prejudicial and thus, improper, leading to a new trial. The court did not discern whether the statements were concerning as to liability and/or damages, rather the concern was the question as to the potential influence over the jury in general in reaching its decision. When the jurors are asked to step into the shoes of the injured party, this invites them to personalize the circumstance and remove all neutrality which is in stark contrast to what they are tasked with during voir dire. It defeats the purpose of instructions to the jury to refrain from considering sympathy and bias. While there was no name for this type of strategy back in 1934, we certainly see how it has transcended over generations.

In late 2018, the Supreme Court of the United States was faced with a Petition for a Writ of Certiorari, that posed the question as to whether the solicitation of jurors to step into the shoes of the injured party was improper in determining liability in addition to damages as grounds for a new trial or whether a new trial was only proper for conditioning as to damages. In the underlying New York case, *Barrella v. Village of Freeport*, 714 F. App'x 78 (2d Cir. 2018), the Second Circuit Court ruled that Golden Rule arguments do not introduce prejudice into the adjudicative process and at a minimum, Golden Rule arguments as to liability should be decided on a case by case basis. The court found that while Golden Rule arguments were not proper as to the issue of damages, they were proper as to liability. The purpose of the Writ Of Certiorari was to seek clarification based upon the historical rulings of the D.C., Third Fourth, Sixth, and Seventh Circuits condemning the Golden Rule as to both, liability and damages, while the Second, Fifth, Tenth, and Eleventh Circuits found no fault in the practice of asking jurors to identify with plaintiffs on the issue of liability. Unfortunately, on February 19, 2019, the Supreme Court denied the Petition. (139 S. Ct 1166, *Christopher Barrella v. Village of Freeport, New York*, et al., No. 18-423.)

The recent California decision is a coup for the defense of our medical malpractice matters as to damages, however, we must continue the fight to preclude application as to liability. We have seen over the years, plaintiffs' counsel utilizing this type of conditioning of the jury as to both liability and damages, which became even more popular when a similar mode of conditioning, the Reptile Theory, came into vogue. The use of the Golden Rule and Reptile Theory have resulted in multimillion dollar verdicts in malpractice and personal injury trials. While the Golden Rule sounds in the principle of treating others as you would want to be treated, the Reptile Theory is a strategy of causing jurors to perceive the defendant's conduct as a threat to their own personal safety. In addition to the many verdicts that have been subject to the appellate process across the nation, the defense bar started its own movement by submitting pre-trial Motions in Limine, seeking an order precluding references at trial that are aimed at subconsciously creating personal sympathy and/or fear in the minds' of the jurors. We must remember to address both liability and damages in these pre-trial motions. Conditioning clearly impacts both in the face of intentional questions or statements used to elicit sympathy and fear.

As other states follow suit, similar Court of Appeal decisions will undoubtedly bolster support of the ban on The Golden Rule and Reptile Theory as to issues of liability and damages. With such assistance, this will surely dampen our opponents' enthusiasm for use of these conditioning tactics in future trials for fear of crossing the line and forfeiting multi-million dollar verdicts as occurred in this California matter.

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