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The Punitive 'Failure To Take Responsibility' Trope Must Be Entirely Policed Out of Tort Actions for Compensatory Damages

In this article the author's focus on the most insidious and all-too-prevalent improper summation trope: the plaintiff's attack based on the defendant's purported "failure to take responsibility."

By **Timothy R. Capowski, Jonathan P. Shaub, Joseph J. Belgane and Jennifer A. Graw** | November 13, 2020 at 01:00 PM

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Over the past two decades summations[i] in personal injury actions have veered off the rails into something far removed from their proper role and purpose.[ii] Unsurprisingly, this has coincided with the progressive rise in excessive and nuclear verdicts that unnecessarily clog our courts with litigation and unnecessarily raise the cost of living for our citizenry.[iii] While we previously discussed a number of the offending tactics[iv], in this article we focus on the most insidious and all-too-prevalent improper summation trope: the plaintiff's attack based on the defendant's purported "failure to take responsibility."

A Proper Tort Litigant's Summation: Fair Comment on the Evidence

A summation is intended to afford litigants a final chance to comment to the jury on the evidence presented during the trial proceedings. This right, however, is not completely unfettered and is bounded by several core tenets. "Counsel is restricted to the law in the case, the evidence adduced from the witnesses, the exhibits admitted into evidence, and the inferences reasonably deductible from the testimony and exhibits."[v] "The purpose of closing argument is to help the jury understand the issues in a case by applying the evidence to the law applicable to the case. Attorneys … must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence. Moreover, closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response … rather than the logical analysis of the evidence in light of the applicable law."[vi] Distilled to their essence, these rules collectively limit the parties to the right to offer fair comment on the evidence.[vii]

The scope of modern summation, however, has expanded well beyond "fair comment" and is light years removed from "comment on the evidence"; it is now precisely about eliciting "an emotional response" from the jury that in turn triggers an award that is all but punitive in name. Even worse, this phenomenon is so commonplace that trial courts routinely ignore it[viii], defense counsel do not object, and juries render excessive verdicts based primarily, if not entirely, on emotion and a desire to punish—but without any of the Constitutional safeguards that accompany awards for punitive damages.[ix] As a consequence, our system is processing a tort claim with the goal of awarding just compensation for personal injuries in a manner, and to a result, that bears no resemblance to its stated goal.

The outsized awards generated through this perversion of summations are fueling a vicious cycle that threatens to overwhelm the judicial system and State. Since the bulk of claims settle based in large part on predictors of what will transpire at a trial and stand on appeal, unchecked summations even contribute to higher settlements as plaintiff's attorneys are keenly aware of their nearly unfettered ability to manufacture higher awards through improper summation comments. Larger jury awards and higher settlement payments also skew prospective plaintiffs' perceptions as to the value of their potential claim, leading to more litigation. Larger verdicts, higher settlements, and burgeoning claims equate to larger premiums and higher costs that are passed along to all businesses and citizens. This is a model that can no longer be tolerated in the face of a New York economy devastated by COVID-19.

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The Most Insidious and All-Too-Prevalent Improper Summation Trope

The "failure to take responsibility" is perhaps the most insidious of the improper summation comments. This is the adjunct to the equally-improper "send a message"[x] punitive invocation, and is improper in both the liability *and* damages phases of tort litigation for compensatory damages. This attack often takes the shape of criticizing a defendant for having the "audacity" to defend itself, to urge a lower award than plaintiff seeks, to contest liability or damages in any respect, and to adduce evidence of a plaintiff's exaggeration, malingering, litigiousness or pre-existing conditions. Every iteration of this litigation-type trope directed at an opposing party or opposing counsel is improper.[xi]

We start with some helpful queries to demonstrate.

As to the tort liability phase: what does a defendant's "failure to accept responsibility" have to do with a jury's ability to determine whether or not a defendant was negligent and whether defendant's negligence proximately caused the plaintiff's injury? Is seeking apportionment of fault against a third party a "failure to take responsibility"? Is a defense based on a plaintiff's comparative fault, or sole proximate cause, or that plaintiff is testifying falsely, a "failure to take responsibility"? The answers are: nothing, no, and no.

Conversely, wouldn't a defendant's acceptance of responsibility obviate the need for a liability trial? And doesn't a defendant possess a constitutionally-protected right to contest its liability in a court of law? Thus, isn't criticism of a defendant for presenting a defense criticism of a defendant for exercising its constitutional right? The answers are: yes, yes, and yes. There can be no serious debate but that the "failure to accept responsibility" trope is improper and should invalidate any verdict in favor of the plaintiff on liability.

As to the tort damages phase, what does a defendant's "failure to take responsibility" have to do with a jury's ability to determine just compensation for the plaintiff's personal injuries? Should a plaintiff's compensatory award be larger when issued against a defaulting defendant than an appearing defendant, since a defaulting defendant clearly cannot be seen as taking responsibility? Can a defendant's position or defense supporting a lower award than a plaintiff is claiming be fairly characterized as a "failure to take responsibility"? Is a defendant's defense of itself—in and of itself—a "failure to take responsibility"? Is a plaintiff somehow entitled to a formal apology, or a statement of acceptance of responsibility, from a defendant held liable for that plaintiff's injury, and will such an apology or stated remorse reduce the just compensation plaintiff is entitled to?**[xii]** Are a defendant's "motives" in defending itself relevant in the slightest to a jury's determination of just compensation?**[xiii]** Is a defense based on medical testimony or findings that a plaintiff is malingering or exaggerating their injury, or otherwise testifying falsely, a "failure to take responsibility"? The answers are: nothing, no, no, no, no, no, and no.

Accordingly, since it is not remotely "fair comment on the evidence", and is utilized only to improperly elicit an emotional response from jurors, this type of commentary has no place at jury selection, opening statements, trial or summation, and should similarly result in a mistrial.

United States Tort Decisional Law Is Unanimously Critical of This Trope

Case law around the entire country unanimously confirms the impropriety of permitting a plaintiff to attack or chastise a tort defendant for its failure to accept or take responsibility. See *Whittenburg v. Werner Enters.*, 561 F.3d 1122, 1129-30 (10th Cir. 2009) (citations omitted) (counsel's remark that defendants "spent vast sums of money to avoid responsibility … serves no proper purpose, and for time out of mind [] has been the basis for appellate courts ordering new trials"); *Scheirman v. Picerno*, No. 2012-CV-2561, 2015 Colo. Dist. LEXIS 1266, at *20 (D.C. Col. April 19, 2015) ("arguing that the reason that the case is at trial is because Defendants failed or have refused to accept responsibility for their actions is improper argument"); *Burkert v. Holcomb Bus Serv.*, No. A-0874-13T2, 2015 N.J. Super. LEXIS 1095, at *22 (N.J. Super. Ct. May 13, 2015) ("Both in opening and in closing, plaintiff's counsel repeatedly suggested defendant wrongfully 'refused to take responsibility' … Defendant, as well as plaintiff, has a right to air its position before an impartial factfinder for determination. The exercise of that right must not be portrayed as offensive or warranting punishment."); *R. J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 681 (Fla. 1st DCA 2017) (citations omitted) ("A plaintiff may not suggest to the jury that a defendant is somehow acting improperly by defending itself at trial or that a defendant should be punished for contesting damages"); *Homeowners Choice Prop. & Cas. Ins. Co. v. Kuwas*, 251 So. 3d 181, 187 (Fla. 4th DCA 2018) (same); *Ball v. Dewey*, No. 223122, 2002 Mich. App. LEXIS 1018, at *37, 39 (Mich. App. Ct., 2002) (failure to take responsibility argument in both opening and closing were "troubling and reflect poorly on plaintiff's counsel"); *Devereax v. Brummett*, No. C048950, 2006

Cal. App. Unpub. LEXIS 10594, at *10-11 (3d App. Dist. Cal. 2006) (telling the jury that defendants failed to take responsibility did not serve the proper purpose of an opening statement).

Accordingly, plaintiffs should refrain from utilizing this trope, trial courts should sua sponte warn against it, chastise counsel and strike such comments**[xiv]**, defense counsel should preemptively warn against it, object and move for a mistrial on the basis of such comments, and appellate courts should firmly police this indefensible tactic out of summations once and for all.

Endnotes:

[i] These same observations apply to the trial presentation overall, but more starkly and overwhelmingly to summations.

[ii] See Timothy R. Capowski, John F. Watkins, and Jonathan P. Shaub, "**Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts (https://www.law.com/newyorklawjournal/2020/07/13/ahead-to-the-past-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts/)**," NYLJ (July 13, 2020).

[iii] See Timothy R. Capowski & Jonathan P. Shaub, "**Improper Summation Anchoring Is Turning the New York Court System on its Head and Contributing to the Demise of New York State (https://www.law.com/newyorklawjournal/2020/04/28/improper-summation-anchoring-is-turning-the-new-york-court-system-on-its-head-and-contributing-to-the-demise-of-new-york-state/)**," NYLJ (April 28, 2020); Timothy R. Capowski & John F. Watkins, "**CPLR 5501(c) Review In the Age of Summation 'Anchoring' Abuse (https://www.law.com/newyorklawjournal/2019/06/26/cplr-5501c-review-in-the-age-of-summation-anchoring-abuse/)**," NYLJ (June 26, 2019).

[iv] (1) "send a message attacks; (2) "hired gun" attacks; (3) "big corporation" or corporate animus attacks; (4) attorney "vouching" for the credibility of their witnesses or the bad intentions of the adversary; (5) "golden rule" tropes; (6) HDTD ("how dare they defend") attacks; (7) "dream team" attacks; (8) unit of time tactics; (9) improper anchoring; (10) "reptile theory"-based attacks, (11) "failure to take responsibility" attacks, and others. See fn. ii, supra.

We encourage defendants to preemptively and contemporaneously object to, and move for a mistrial from, all such attacks in *every* civil tort trial to start course-correcting the skewed dynamic currently present in virtually every summation associated with an excessive or nuclear verdict. Our articles also contain the applicable appellate decisional law for ease of reference to provide to the trial courts. See fn ii, supra; Timothy R. Capowski, John F. Watkins, and Jonathan P. Shaub, "**Ahead to the Past (Part 2 of 3): The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts: Currently Existing Tools For The New York Bench And Bar To Repair The Broken System For Determining Just Compensation**

(https://www.law.com/newyorklawjournal/2020/07/20/ahead-to-the-past-part-ii-of-iii-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts-currently-existing-tools-for-the-new-york-bench-and-bar-to-repair-the/)," NYLJ (July 20, 2020).

[v] Jabob Stein, Closing Arguments, §1:14 (2d ed. 2005).

[vi] *Murphy v. Int'l Robotic Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000) (quotations and citations omitted).

[vii] "Argument which has no relevance to issues in a case and which is a transparent attempt to appeal to jurors' emotions is clearly misconduct." *Du Jardin v. City of Oxnard*, 38 Cal App 4th 174, 179-80, 45 Cal Rptr. 2d 48, 51 (1995).

[viii] "'The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference. It is his duty in the executive control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished. It was the duty of the trial court to stop argument and require counsel to proceed in an orderly and lawyer-like manner.'" *Pesek v. Univ. Neurologists Assn.*, 87 Ohio St 3d 495, 501, 721 NE2d 1011, 1016-17, 2000-Ohio-483 (2000) (citation omitted).

[ix] For decisions emphasizing the stark difference between punitive and compensatory damages: See *Ross v. Louise Wise Servs.*, 8 N.Y.3d 478, 489 (2007); *Krohn v. New York City Police Dept.*, 2 N.Y.3d 329 (2004); *Sharapata v. Islip*, 56 N.Y.2d 332 (1982); *Walker v. Sheldon*, 10 N.Y.2d 401 (1961).

[x] *Halftown v. Triple D Leasing*, 89 A.D.2d 794, 794 (4th Dept. 1982) (ordering new trial based on improper summation "send a message" remark to the jury on the basis that the comment "invit[ed] the jury to award punitive damages although such were not involved in the pleadings" and resulted in excessive compensatory award); see also *Norton v. Nguyen*, 49 A.D.3d 927, 930 (3d Dept. 2008) ("it is inappropriate to refer to the jury as the 'conscience of the community'").

[xi] "To imply or argue that the mere act of defending oneself, or the mere act of bringing suit, is reprehensible serves no proper purpose." *Godfrey v. CSAA Fire & Cas. Ins. Co.*, No. CIV-19-00329-JD, 2020 US Dist LEXIS 37368, at *23-24 (WD Okla. March 4, 2020), quoting *Whittenburg v. Werner Enters.*, 561 F.3d 1122, 1130 (10th Cir. 2009).

[xii] The answer to this is obvious. Nevertheless, one court presiding over a damages-only trial where this trope was used specifically found that it had deprived the defendant of a fair trial, and emphasized that "[t]he purposes of damages here was to compensate, not to make the defendant care, 'take responsibility,' or say it was sorry." *Intramed v. Guider*, 93 So. 3d 503, 507 (Fla. 4th DCA 2012) ("The closing argument shifted the focus of the case from compensating the plaintiff to punishing the defendant. **** Counsel's arguments improperly suggested that the defendant should be punished for contesting damages at trial and that its defense of the claim

in court was improper. See *Carnival Corp. v. Pajares*, 972 So. 2d 973, 977-78 (Fla. 3d DCA 2007)); *State Farm Mut. Auto. Ins. Co. v. Revuelta*, 901 So. 2d 377, 380 (Fla. 3d DCA 2005); *Chin v. Caiaffa*, 42 So. 3d 300, 309 (Fla. 3d DCA 2010); *Health First v. Cataldo*, 92 So. 3d 859, 37 Fla. L. Weekly D1551, D1554 (Fla. 5th DCA June 29, 2012). The closing argument was designed to inflame the emotions of the jury rather than prompt a 'logical analysis of the evidence in light of the applicable law.' *Murphy v. Int'l Robotic Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000).").

[xiii] "Personal attacks on the character or motives of the adverse party, his counsel or his witnesses are misconduct." *Stone v. Foster*, 106 Cal. App. 3d 334, 164 Cal. Rptr. 901, 913 (Ct. App. 1980) (citations omitted); see *HRC Guam Co. v. Bayview II, L.L.C.*, 2017 Guam 25, ¶ 103 (2017).

[xiv] Pesek, supra.

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