

SJC DEBATES A TORT LAWYER'S PLEA

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Frederic N. Halstrom was urging jurors to do right by his client, a man left severely brain-damaged after his bicycle slammed into an open gate. Halstrom asked jurors to make the company that owned the gate - and allowed it, he argued, to swing open into his client's path - pay for all that the 34-year-old man had lost.

Halstrom didn't ask jurors for a specific amount of money because lawyers in Massachusetts, unlike many other states, are prohibited from suggesting a price tag for their client's pain and suffering. But in his closing argument, Halstrom mentioned the immense salaries earned by baseball players. The Middlesex County jury returned a \$14.3 million verdict, the largest in Massachusetts in 2001 and one of the biggest ever in the state. Now, as Congress debates whether to rein in large jury awards, the state's highest court is considering whether Halstrom stepped over the line by inflaming the passions of jurors.

When the case was argued before the Supreme Judicial Court earlier this month, one justice said Halström's conduct "borders on the egregious." A lower court judge had upheld the verdict, but notified the state agency that disciplines lawyers of Halström's actions. That complaint was eventually dismissed.

Halstrom insists that since he didn't mention dollar figures, he didn't flout the law.

But the SJC's decision in the case is likely to further define how far lawyers in Massachusetts can go in trying to coax money out of juries.

"This is certainly a piece to the tort reform puzzle," said David L. Yas, editor of Massachusetts Lawyers Weekly, which tallies the state's top jury verdicts each year. "The defense lawyers and the insurance industry is constantly cautioning us against frivolous lawsuits and runaway verdicts. Allowing the attorneys to get in there and argue a specific number is something they would argue can artificially inflate jury [awards]."

Massachusetts's juries rarely award the eye-popping awards that drive the argument for limiting damages in civil cases. Plaintiffs' lawyers blame a host of factors: Yankee frugality, restrictions on lawyers questioning potential jurors, and restrictions on seeking punitive damages designed to punish a defendant.

In Massachusetts, lawyers cannot ask juries for specific amounts of money for pain and suffering. But they can, as Halstrom did, discuss concrete costs incurred by a defendant, such as medical bills or lost income.

"The jury is asked to express its findings in monetary terms," said David R. Bikofsky, president of the Massachusetts Academy of Trial Attorneys. "But under our system in Massachusetts, they're precluded from hearing anything about money."

As the SJC considers Halström's case, tort reform is being addressed at the ballot box, in state legislatures, and in national politics. On Saturday, Texas voters narrowly approved a constitutional amendment that would cap pain and suffering awards at \$750,000. And in North Carolina, state senators are scheduled this week to debate whether to limit such damages in many cases to \$250,000.

The issue has also infused the presidential campaign, focusing on North Carolina Senator John Edwards, who helped defeat tort reform in the US Senate last year. As an attorney in North Carolina known for his emotional appeals to juries, Edwards won multimillion-dollar awards, including \$23 million in his last trial in 1997.

The case the SJC is currently considering echoes a 1989 case heard by the court that also involved Halstrom. In that earlier case, Halstrom had won a \$6.3 million verdict for his client, William Harlow, a man who hit the back of his head and neck when he slipped while working. Halstrom successfully argued that Harlow was left a quadriplegic because of the negligence of the doctor who initially examined him.

Halstrom had used specific numbers in his closing argument, mentioning that baseball players were paid \$1.4 million; that famous paintings often sold for \$5 million; that a minute of advertising during the Super Bowl cost several hundred thousand dollars. Although the SJC upheld the verdict in a split decision, the justices called his closing argument improper.

The case before the SJC involves Jeffrey Gath, 34, who was riding his bicycle home from work on a Friday afternoon in 1998 when a gust of wind flung open an unlatched chain-link gate near the Lowell property of M/A-Com Inc. When Gath crashed into the gate, he was knocked from his bicycle and hit the pavement face first.

Gath, a mildly retarded kitchen worker and custodian who earned \$15,000 a year, was severely brain-damaged after the accident. He now requires round-the-clock care and lives at Tewksbury State Hospital.

Gath's family sued M/A-Com in Middlesex Superior Court, claiming that the electronics company was negligent by leaving the gate unlatched. The company's lawyers argued that there was no evidence workers knew the gate was open.

In Halström's closing argument, he repeatedly used the phrase "body count" and mentioned airline crashes. He reminded jurors that Gath's parents wanted to bring him home, but an expert had testified that his future nursing costs could total \$16 million.

While Halstrom told jurors that he wasn't allowed to ask them for a specific dollar amount, he alluded to professional athletes' multimillion-dollar salaries. "They pay baseball players, pitchers, I won't mention any amount," Halstrom said. "That is the amount of money we deal with in today's society."

Defense lawyers objected to Halström's closing comments and Superior Court Judge Timothy S. Hillman instructed jurors to ignore them. M/A-Com's lawyers appealed to Hillman after the \$14.3 million verdict, arguing that they deserved a new trial because Halström's comments inflamed jurors.

Hillman declined to retry the case, saying Halström's tactics did not affect the verdict. But, the judge excoriated Halstrom, calling his closing argument "unprofessional" and "over the line."

Gath's lawyers also contend that the gate was removed after his father filed suit, depriving them of important evidence. Another part of the appeal before the SJC centers on whether the trial judge correctly ruled that the company was negligent in getting rid of the gate.

At the oral arguments before the SJC, some justices suggested they, too, were displeased with Halström's closing argument. Justice John M. Greaney told Richard J. Shea, one of M/A-Com's lawyers, "I think your best shot at getting this tipped is the plaintiff's closing argument and other conduct of the trial, which quite frankly borders on the egregious."

Justice Martha B. Sosman, however, said the verdict didn't seem excessive, given the "catastrophic nature" of Gath's injuries. Later, the justices grilled Halstrom about his remarks.

Halstrom told the justices that he mentioned baseball players' paychecks only to spur jurors to contemplate broader values. "We're asking the jury to think: What is the value of money in today's society?" he said.