

## **Massachusetts Rules of Civil Procedure**

### **Rule 51**

#### **Argument: Instructions to Jury**

#### **Reporter's Notes--2022**

By statute in Superior Court civil actions, "parties, through their counsel, may suggest a specific monetary amount for damages at trial." G.L. c. 231, § 13B. This language was added in 2014 to the statutory provision limiting the inclusion of a monetary amount in civil complaints. St. 2014, c. 254, § 1.

The statutory amendment allows counsel to refer to a specific monetary amount in argument. Although the statute and the rule are silent about whether evidentiary support is needed to suggest a specific monetary amount of damages, caselaw predating the statutory amendment requires such support. "The scope of proper closing argument is limited to comments on facts in evidence that are relevant to the issues and the fair inferences which can be drawn from those relevant facts." *Mason v. General Motors Corp.*, 397 Mass. 183, 192 (1986). Where a plaintiff suggests in closing a particular dollar amount of damages for noneconomic loss or injury in a personal injury case, evidentiary support may be found, for example, in testimony regarding the nature of the injury or the extent of pain and suffering experienced. Prior to the statutory authorization allowing counsel to suggest an amount of damages, the Supreme Judicial Court had stated that a closing "argument concerning money damages indulging in significant references to numerical amounts that have no basis in the record is improper." *Harlow v. Chin*,

405 Mass. 697, 704 (1989), citing *Gardner v. State Taxi, Inc.*, 336 Mass. 28, 30 (1957). See also, *Luz v. Stop & Shop, Inc. of Peabody*, 348 Mass. 198, 207-208 (1964).

Whereas the statute provides a right to argue damages only in Superior Court civil actions, Rule 51(a)(2) extends the right to argue damages to all actions in trial courts governed by the Massachusetts Rules of Civil Procedure. Unlike the statute, which limits the right to argue damage to counsel for the parties, the rule allows self-represented parties to argue damages.

To accommodate the addition of Rule 51(a)(2), the 2022 amendment changed the title of Rule 51(a) (“Argument”) and added subdivisions (a)(1) and (a)(2). Rule 51(a)(1) maintains the same language that had appeared in prior Rule 51(a) with the exception of a change in the title (“Time for Argument”). Rule 51(a)(2) is new, containing the provisions regarding arguing damages.

In light of the change in the procedural amount of damages regarding whether civil actions may proceed in the Superior Court Department or the District or Boston Municipal Court Departments (Supreme Judicial Court "Order Regarding Amount-in-Controversy Requirement Under G.L. c. 218, § 19 and G.L. c. 212, § 3," dated July 17, 2019 and effective January 1, 2020) and the resulting expected increase in the number of civil damage trials in the District Court and Boston Municipal Court, 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. See G.L. c. 218, § 19B(c), dealing with jury trials in District Court and Boston Municipal Court civil actions, which states: "Trials by juries of 6 shall proceed in accordance with the law applicable to trials by jury in the superior court..." (with an exception for the number of peremptory

challenges). Although other differences between Superior Court and District Court (and Boston Municipal Court) civil trials remain (for example, Superior Court juries are juries of twelve and District Court juries are juries of six; the requirement for issuance of findings and rulings in jury-waived cases differs, see Mass. R. Civ. P. 52(a) and (c)), this change is intended to reduce such differences.

Practice in the Massachusetts courts has been that the defendant presents closing argument first. Uncertainty may occur where a defendant makes a closing argument unaware of whether the plaintiff intends to suggest damages and unaware of the amount that may be suggested. Experience in the Superior Court under the statutory right to argue damages indicates that some defendants have asked "trial judges to require preargument (or pretrial) disclosure by the parties of any specific damages amounts the parties intend to suggest to the jury." Lauriat and Wilkins, *Massachusetts Jury Trial Benchbook* 266 (4th edition 2019) (noting that trial judges likely have broad discretion in responding to such a request and listing various options that may be exercised, such as allowing rebuttal by the defendant or changing the order of closing argument).

In light of that experience, the rule provides the plaintiff with an opportunity to notify the defendant of the plaintiff's intent to suggest a specific amount of damages "reasonably in advance of closing arguments." 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. On notice of the plaintiff's intent, the defendant, who typically closes first, may then choose to comment on the matter in closing argument.

Where the plaintiff does not provide notice of intent, or has not yet decided prior to the start of closing arguments whether to suggest an amount, the rule requires the trial judge to give the defendant "a reasonable opportunity to address the amount to the jury." 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, an option described in the Massachusetts Jury Trial Benchbook.

The 2022 amendment addresses the procedure where damages for noneconomic loss or injury may be suggested in closing argument, as set forth in G.L. c. 231, § 13B. The amendment is not intended to change existing practice, or impose any new requirements, involving arguing damages for economic loss or injury at closing argument where evidence of the amount of damages has been introduced at trial.

The rule does not deal with the issue of whether a defendant may seek in pretrial discovery information regarding whether the plaintiff intends to suggest a specific amount of damages or the amount of such damages.