2017 WL 6040174 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Suffolk County

Meaghan **FITZPATRICK**,
v.
WENDY'S OLD FASHIONED **HAMBURGERS** OF NEW YORK, INC. & another.*

No. 1384CV03045.
July 7, 2017.

***1** * JBS Souderton, Inc.

Memorandum of Decision and Order on Defendants' Motion for a Mistrial

Heidi E. Brieger, Judge.

Plaintiff Meaghan **Fitzpatrick** ("**Fitzpatrick**") filed the instant action to recover damages for personal injuries sustained when she bit into a fragment of bone contained in a **hamburger** she purchased from Defendants **Wendy's Old** Fashion **Hamburgers** of New York, Inc. ("**Wendy's**") and JBS Souderton, Inc. ("JBS") (collectively, the "Defendants"). The case was tried to a jury beginning on September 21, 2016 (Brieger, J., presiding). After Plaintiff's counsel's closing argument, Defendants moved for a mistrial. This court reserved decision and sent the matter to the jury, which concluded that Defendants' breach of the implied warranty of merchantability was a substantial contributing cause of **Fitzpatrick's** injuries and awarded her $105,005.64 in damages. The matter is now before the court on Defendants' motion for a mistrial based upon remarks in the closing argument made by **Fitzpatrick's** counsel.[2] After a hearing and careful consideration of the parties' submissions, and for the reasons set forth below, Defendants' Motion for a Mistrial is ***ALLOWED***.

DISCUSSION

This trial unfolded before a jury that was asked to consider whether **Fitzpatrick's** dental injuries were caused by Defendants' breach of the implied warranty of merchantability that their meat products were safe to consume.[3] During the trial, the jury heard testimony from multiple witnesses, including **Fitzpatrick** herself, as well as a number of Defendants' representatives who explained the nature of the manufacturing process beginning from wholesale beef purchase and ending with retail **hamburger** sale.

The instant motion arises from **Fitzpatrick's** counsel's closing argument, parts of which Defendants contend were unfairly prejudicial because they crossed the line from zealous advocacy to improper argument. Defendants ask the court to exercise its discretion and declare a mistrial. Such requested relief is a matter of considerable concern given the substantial resources expended in the trial of this case, including the time and effort the jurors contributed in order to reach a verdict. Defendants nonetheless contend that a mistrial is warranted because they were substantially prejudiced by Plaintiff's counsel's repeated urging to decide the case on matters other than the evidence. In particular, Defendants argue that the closing argument consisted

of multiple emotional, inflammatory and prejudicial statements; improper exhortations to the jury to deliver a message by their verdict as the "voice of the community;" requests that the jury put itself in **Fitzpatrick's** place in violation of the prohibition against use of golden rule arguments; impermissible expressions of personal opinions; and arguments based on facts that were not in evidence, which, in combination, worked to taint the jury's deliberations.

***2** While closing arguments are not evidence, as the court so instructed in the instant trial, closing arguments play an important role in conveying to the jury which inferences counsel want them to draw from the admitted evidence. "In closing argument, counsel may argue the evidence and the fair inferences which can be drawn from the evidence .... Counsel may also attempt to assist the jury in their task of analyzing, evaluating, and applying evidence. Such assistance includes suggestions by counsel as to what conclusions the jury should draw from the evidence." *Commonwealth* v. *Raymond*, 424 Mass. 382, 390 (1999) (internal citations and quotation marks omitted). The scope of proper closing argument is limited, however, to comment on facts admitted in evidence and those relevant to the issues before the jury, as well as the fair inferences drawn therefrom. See *Mason* v. *General Motors Corp.*, 397 Mass. 183, 185 (1986); *Leone*, 231 Mass. at 17-19 (scope of argument limited to evidence and reasonable inferences). [4]

Isolated inappropriate comments in a closing argument, especially where combined with appropriate curative instructions, standing alone, would not justify allowing the instant motion. *Fyffe*, 86 Mass. App. Ct. at 472. Instead, this court must consider: "(1) whether [Defendants] seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave to the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusion." *Id*. In other words, the challenged remarks must be examined against the backdrop "of the entire [closing] argument, as well as in light of the evidence at trial and any instructions," to determine whether the cumulative effect of the closing argument so permeated the jury's deliberations as to deprive Defendants of a fair trial. *Commonwealth* v. *Pontes*, 402 Mass. 311, 316 (1988), citing *Commonwealth* v. *Lamrini*, 392 Mass. 427, 432 (1984). See *Fyffe*, 86 Mass. App. Ct. at 458. The court addresses each of the Defendants' arguments regarding improper argument in turn. [5]

Improver Argument: Us versus Them

Defendants first argue that the closing argument improperly encouraged the jury to decide the case on an "us versus them" basis, thereby encouraging them to depart from neutrality and decide the case based on bias against big corporations in contravention of Mass. G. Evid., Sec. 1113(b)(3)(C). In particular, Defendants take issue with the following argument by **Fitzpatrick's** counsel:

> The customer is always right. That's what [Mr. Turcotte] said. Really? What does do the right thing mean to these companies? One of the largest fast food companies and one of the largest beef manufacturers in the world. What does that mean, do the right thing? They have not accepted one shred of responsibility. Not one. They have not learned anything from this. Have they learned that they can't serve meat with bone in it that's going to hurt somebody? No. Instead what have we heard … what we've heard for three days is a long list of excuses. One after another. Attempt to confuse things. That's what they do, these big companies. That's what they do. They take something simple and they make it all confusing.
>
> ***3** See what [Plaintiff] did not know, and what JBS and **Wendy's** did know, is that bone can get into the final burger. They have insider knowledge. They're the ones who know what goes into the meat process. … They know all that. But you know who doesn't know that? We don't know that. The average customer. The regular customer. We don't have the knowledge that they do. … And because we don't have that knowledge, we don't have the expectation. …

> It's very important ladies and gentlemen, its not what JBS reasonably expects. It's not what **Wendy's** reasonably expects. Its what we reasonably expect. Us, the average people, not them.
>
> [W]hen **Wendy's** and JBS sells all those burgers, they are more than happy to take our money. We pay for the burger. It goes to them. But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly—shame on them.

(Tr.p. 134, at ¶¶ 6-17; p. 135, at ¶¶ 3-6; p. 140, at ¶¶-13; p. 143, at ¶¶ 23-25; p. 144, at ¶¶ 1-2).

Viewed in the context of the evidence, some of Plaintiff's counsel's above-quoted remarks were properly directed toward the expectations of a reasonable consumer. Many were not. Counsel improperly sought to create a dichotomy between Defendants on one hand, and the jury and **Fitzpatrick** on the other, an "[u]s, the average people" versus "them" the big corporations dichotomy. For example, Plaintiff's counsel suggested that "they are more than happy to take our money. We pay for the burger. It goes to them. But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly — shame on them." (Tr. p. 143, at ¶¶ 23-25; p. 144, at ¶¶ 1-2). Plaintiff's counsel also argued "What does do the right thing mean to these companies? One of the largest fast food companies and one of the largest beef manufacturers in the world. … They have not accepted one shred of responsibility. Not one." (Tr. p. 140, at ¶¶ 1-5). Not only do these arguments have very little, if any, bearing on the ultimate issue before the jury, but there can be no doubt that Plaintiff's counsel intended to stain the corporate character of Defendants by conveying to the jury that this case was about the Plaintiff, an average person, like them, who was pitted against large, wealthy corporations, both of which were devoid of sympathy or conscience and concerned only with the bottom line.

Such an inappropriate invitation to the jury to act on passion and prejudice against large corporations was improper. See *London*, 231 Mass. at 485-486. See also *Leone*, 363 Mass. at 17. The court gave no contemporaneous curative instruction, but included in the jury charge a caution that: "[y]our job is not to make any distinctions or hold any sympathies or prejudices based on whether a party is a big company or a small company or a buyer or a seller," (Tr. p. 157, at ¶¶ 14-19). Upon reflection and review of the entire record, a stronger and more focused instruction was warranted here to overcome the cumulative effect of the "us versus them" narrative recurring throughout the closing argument. See, e.g., *Commonwealth* v. *Kelly*, 417 Mass. 266, 271 (1994) (curative instructions should be specifically focused on the error); *Commonwealth* v. *Ward*, 28 Mass. App. Ct. 292, 296–297 (1990) ("[T]o counteract [] poisonous effect," curative instructions must be directed against the improper comments). Cf. *London*, 231 Mass. at 486 (distinguishing general instruction with specific instruction to disregard argument).

Improper Argument: Voice of the Community

***4** Defendants next complain that Plaintiff's counsel improperly suggested that the jury decide the case as "the voice of the community" to "send a message" beyond the courtroom in contravention of Mass. G. Evid., Sec. 1113(B)(3)(C). Defendants contend that in so doing, Plaintiff's counsel overstepped the bounds of permissible argument by appealing to the jury's generalized community safety concerns. Plaintiff's counsel repeatedly asked the jury whether the "safety rules" at issue were "important in our community," and "if those are important, you need to speak to that and your verdict needs to speak to that. You're verdict will speak volumes echoing outside of this Courthouse." (Tr. p. 144, at ¶¶ 3-7). Specifically, Defendants object to the following argument:

> Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that. Your verdict will speak volumes echoing outside of this Courthouse. If these rules are not important, if its okay for them to serve burger with bone and someone gets hurt once in a while, and if they get injured, too bad for them. Then you know what? Give these guys a pass. Give them a pass. … They will not take responsibility and you know what? They think you're

> going to give them a pass. They do. … [Plaintiff] is entitled to be compensated for her harm. As I said, you have the power. You're the jury. You're the boss. … You are the voice of the community.

(Tr. p. 144, at ¶¶ 3-12).

The use of "conscience of the community" arguments is permissible so long as it is not specifically designed to inflame the jury. Compare *Commonwealth* v. *Fitzmeyer*, 414 Mass. 540, 546–547 (1993) (proper to argue that jury is "community's collective conscience" in assessing whether the killing had occurred with extreme atrocity or cruelty); *Commonwealth* v. *Lawrence*, 404 Mass. 378, 391–393 (1989) (when jury had to assess whether killing occurred with extreme atrocity and cruelty it "did speak as representative of the community's conscience"), with *Commonwealth* v. *Smith*, 413 Mass. 275, 282 n.6 (1992) (improper to urge jury that as "conscience of the community" it had a duty to convict in the case). Similarly, there is support for Plaintiff's claim that so-called "send a message" arguments are not *per se* impermissible. See *Clifton* v. *Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 624 (2005) ("A proper punitive damage award in this case would be a sufficient amount to send a clear message to the MBTA's management of condemnation for its reprehensible behavior and of warning ...."); *Smith* v. *Kmart Corp.*, 177 F.3d 19, 25 (1st Cir. 1999) (intimating that counsel's argument that jury "send a message about the unsafe conditions that caused the accident" may be proper in the context of punitive damages).

Plaintiff's counsel's arguments here though are reasonably interpreted as prejudicial pleas intentionally delivered to arouse in the jury a sense of duty to safeguard the community and to send a message — and a punitive message at that — that the community will not tolerate Defendants' conduct. [9] Counsel's argument identifying the jury as the "voice of the community" was joined with his entreaty to return a verdict for Plaintiff so to send a message not just to Defendants, but also to similarly situated corporations insofar as Plaintiff's verdict would then "echo outside of this Courthouse." [10]

Improper Argument: Golden Rule

***5** The above arguments were followed by what Defendants contend were improper "golden rule" arguments in contravention of Mass. G. Evid., Sec. 1113(b)(3)(D) asking the jury "to put themselves 'in the shoes' of [**Fitzpatrick**], or otherwise [urge the jury] to identify with [**Fitzpatrick**]." *Commonwealth* v. *Bizanowicz*, 459 Mass. 400, 420 (2011), citing *Commonwealth* v. *Thomas*, 400 Mass. 676, 684 (1987). In particular:

> And this may be the kind of case that triggers something for you a month from now or a year from now. You might be eating a burger. Maybe you'll read an article that someone else got hurt by a food product. Or you'll be telling your wife or your husband about the case. That somebody ate a burger and they did not expect to get hurt. And that safety rules were violated and that you helped to make a wrong right. You made it right and you held them responsible and accountable. And when you—when that something triggers, when that happens to you, because it will happen, you'll think back to today when we left Suffolk Superior Courthouse and I want you to be proud and say we did the right thing. We did the right thing.
>
> (Tr. p. 147, at ¶¶ 7-20).

These arguments are universally prohibited because they infect the jury's objectivity by "encourag[ing] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Forrestal* v. *Magendantz*, 848 F.2d 303, 309 (1st Cir.1988) (internal quotation marks omitted). Here, **Fitzpatrick's** counsel expressly invited the jury to put themselves in her shoes, urging them to imagine the effect her case will have on them in the future, perhaps when "[they] are eating a burger." The argument implicitly urged the jury to identify with **Fitzpatrick**, and therefore, were

impermissible. [11] The court gave no contemporaneous instruction, and a review of the court's charge to the jury shows that it contained no instruction addressed particularly to these statements.

Improper Argument: Personal Opinion

Defendants also challenge the portions of the closing argument urging the jury to draw inferences unsupported by the record and injecting counsel's personal opinion and beliefs into the jury's deliberation in contravention of Mass. G. Evid., 1113(b)(3)(B). The jury heard testimony that JBS sold **hamburger** meat for more than sixty million burgers and but there had never been a complaint of injury. Plaintiff's Counsel argued that, "[w]hen a product hurts somebody, the company always says, oh, that never happened before .... [I]f you add up all the people that are hurt by things that hardly ever hurt anyone, that adds up to a lot of dangerous things. And sooner or later the danger is going to claim a victim." (Tr. p. 143, at ¶¶ 12-16). Plaintiff's counsel also argued "[s]ixty million burgers, I don't know if that's true or not." (*Id*. at ¶ 20). Defendants also claim that Plaintiff's counsel impermissibly injected his personal opinions into the closing argument, citing to counsel's frequent use of the first person pronoun. For example, Plaintiff's counsel argued that "you'll think back to today when we left Suffolk Superior Courthouse and I want you to be proud and say we did the right thing. We did the right thing." (Tr. p. 147, at ¶¶ 18-20).

***6** These arguments impermissibly urged the jury to infer that this was not the first time a consumer was injured by a bone fragment in Defendants' burgers in contravention of the trial evidence. The court did not give an immediate curative instruction and its instructions during the jury charge were insufficient to correct any misapprehension arising from these statements.

So-Called "Reptile" Litigation Tactics

Finally, Defendants argue that Plaintiff's counsel relied upon the so-called "reptile approach" during his closing argument. [12] The central tenant underlying the so-called reptile approach is the "Triune Brain" theory espoused by neuroscientist Paul MacLean in the 1960s, [13] theorizing that there are three discrete parts to the brain reflecting the stages of evolution: a reptilian complex at the core of the brain (primitive and survival-based), a paleomammalian complex located in the mid-brain (focused on emotion, reproduction, and parenting), and a neomammalian complex at the top (capable of language, logic, and planning).

Applying this theory to courtroom tactics requires a lawyer to trigger a juror's fear of danger to the community as a result of a defendant's conduct. Using words to communicate this fear of danger is accomplished by constructing a narrative using words like "rules", "threat," "community standards" and "community protection." The next step is to demonstrate that the jury has the power to improve community safety by rendering a verdict, to "send a message" and reduce or eliminate the dangerous conduct. The thesis is that once danger is suggested, the cure is fair compensation for the plaintiff to diminish the danger within a community.

Defendants here argue that Plaintiff's counsel drew from these theories in his closing argument, in particular his focus on future community safety concerns, safety rules, and the need to send a message with a verdict for **Fitzpatrick**. In several instances, the closing arguments tracked — nearly verbatim — the Manual For The Plaintiff's Revolution. For example, Plaintiff's counsel argued:

> When a product hurts somebody, the company always says, oh, *that never happened before.* The safety rule says that the company must make food safe. *And the law says that if they did not make safe food and you reasonably expect it, we reasonably expect it to be safe, they're responsible. Because if you add up all the people that are hurt by things that hardly ever hurt anyone, that adds up to a lot of dangerous things.* And sooner or later the danger is going to claim a victim.

(Tr. p. 143, at ¶¶ 12-16). The Manual Of The Plaintiff's Revolution says:

> When the dangerous design of one of those things hurts someone, even though the company knew there was danger they say '*But it never hurt anyone before*,' or 'it hardly ever hurts someone!' *The safety rule and the law says that whether it ever hurt anyone or not, if the manufacturer knew it could injure, the company was required to fix it. Because if you add up all the people who are hurt by different products that 'hardly ever hurt anyone,' they add up to a major danger every day to every member of the public.*

***7** See Reptile: The 2009 Manual of the Plaintiff's Revolution, at pp. 71-72 (emphasis added).

Plaintiff's counsel also argued:

> Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? *If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that.* Your verdict will speak volumes echoing outside of this Courthouse. If these rules are not important, if its okay for them to serve burger with bone and someone gets hurt once in a while, and if they get injured, too bad for them. Then you know what? *Give these guys a pass.* Give them a pass. … They will not take responsibility and you know what? They think you're going to give them a pass. They do. … [Plaintiff] is entitled to be compensated for her harm. As I said, you have the power. You're the jury. You're the boss. … You are the voice of the community.

(Tr. P. 144, at ¶¶ 3-12). The Manual of the Plaintiff's Revolution suggests:

> *If you think its okay to break these safety rules, then say* so–which you can do by just allowing less than the full amount of compensation. If you think its not okay to break the safety rules and endanger the community, then say so–which you can do simply by deciding on full compensation....*If they get a pass on this, what do you think they will get a pass on next time.*

See Reptile: The 2009 Manual of the Plaintiff's Revolution, at pp. 148-149 (emphasis added).

The court concludes that in the context of the admitted evidence in this case, such arguments were improper. The white lines bounding permissible closing argument as set out in the Massachusetts Guide to Evidence, Section 1113, are designed to protect the adversarial system and prevent its abuse by advocates — for either party — from exacting a "win" at the expense of justice. [14] Courts in other states have addressed motions in limine seeking to exclude use of reptile tactics at trial. See *Tillotson* v. *Barragan*, 2016 WL 4162300 (Utah Dist. Ct.); *Upton* v. *Northwest Arkansas Hospitals, LLC*, 2012 WL 12055084 (Ark. Cir. Ct.); *Scheirman* v. *Picerno*, 2015 WL 4993845 (Colo. Dist. Ct.): *Albright* v. *Antles*, 2016 WL 7174563 (Wash. Super. Ct.); *Colman* v. *Home Depot U.S.A., Inc.*, No. 1:15-CV-21555-UU, 2016 WL 4543119 (S.D. Fla. Feb. 9, 2016); *Bunch* v. *Pac. Cycle, Inc.*, No. 4:13-CV-0036-HLM, 2015 WL 11622952 (N.D. Ga. Apr. 27, 2015); *Sifuentes* v. *Savannah at Riverside Condominiums Assoc. Inc.*, 2015 WL 12803937 (Fla. Cir. Ct.). Recently, this court, Wilson, J., ordered a new trial arising from plaintiff's counsel's impermissible use of reptile tactics in *Wahlstrom* v. *LAZ Parking Ltd., LLC*,. In that decision, the court highlighted the fact that all parties are at risk from use of these tactics:

I am aware of the immense efforts devoted to the trial of this case by all counsel. I am aware that fourteen jurors took weeks away from their families, their jobs, and their ordinary pursuits to hear evidence and ultimately to issue a verdict. I am acutely aware of how difficult it was for Plaintiff to relive the rape as she described it on the stand. For these reasons and others, it is with great regret that I issue this ruling.

***8** *Wahlstrom*, 2016 WL 3919503, at *12. Indeed, all counsel benefit from the wisdom of the court in *Fyffe*:

> [W]e do not view favorably any attempt 'to play fast and loose' with our judicial system. Too often a lawyer loses sight of his primary responsibility as an officer of the court. While he must provide 'zealous

> advocacy' for his client's cause, we encourage this only as a means of achieving the court's ultimate goal, which is finding the truth. Deceptions, misrepresentations, or falsities can only frustrate that goal and will not be tolerated within our judicial system.

Fyffe, 86 Mass. App. Ct. at 475, quoting *Polansky* v. *CNA Ins. Co.*, 852 F.2d 626, 632 (1st Cir. 1988). [15]

Fitzpatrick's counsel's response is two-fold: first, the jury is the voice of the community, and therefore it was appropriate for counsel to make arguments addressed to the jury in that role. Moreover, counsel's arguments were not intended to suggest that the jury should punish Defendants, but instead to suggest that the jury should hold the Defendants accountable — one of the goals of tort law. **Fitzpatrick's** counsel also argues that his closing arguments were intended simply to imply that a reasonable consumer would not expect to find bone fragments in her **hamburger**, so the focus of the argument was directed to the two corporate Defendants in this case, not to corporations in general. [16] The court is not persuaded by these arguments.

While there is undoubtedly — and properly — some measure of emotion raised by way of closing argument — and effective advocacy — in almost every trial, it is essential to our legal system that jury verdicts are the consummation of application of law to the facts and do not arise from sympathy, passion, prejudice or any other arbitrary emotional factor. See *London* v. *Bay State St. Rv. Co.*, 231 Mass. 480, 485 (1919); *Commonwealth* v. *Haas*, 373 Mass. 545, 557 (1977). To that end, the court may, in the exercise of sound discretion, declare a mistrial where it appears from examination of the record that any counsel's closing argument interjected purely emotional, inflammatory, or prejudicial elements into the jury's deliberation to such a degree that is "likely to affect the justice of the verdict." [17] *Abramian* v. *President & Fellows of Harvard College*, 432 Mass. 107, 120 (2000), quoting *Curley* v. *Boston Herald-Traveler Corp.*, 314 Mass. 31, 31-32 (1943). See also *Hess* v. *Boston Elevated Ry.*, 304 Mass. 535, 541 (1939): *Fyffe* v. *Massachusetts Bay Transp. Auth.*, 86 Mass. App. Ct. 457, 475 (2014) (ordering new trial because of over-reaching closing argument). [18] Counsel have an obligation to play the game within the white lines and according to the rules. [19] Here, in reviewing the totality of the closing argument and the evidence presented at trial, the court concludes that Plaintiff's counsel did not do so, and the prejudicial aspects of the closing argument likely influenced the jury's verdict, thereby depriving the Defendant of a fair trial. Allowance of Defendants' motion is thus the fair resolution of the issue before the court. *Birbiglia*, 427 Mass. at 88-89.

ORDER

9** For the foregoing reasons, it is hereby ***ORDERED that Defendants' Motion for a Mistrial is ***ALLOWED***.

<<signature>>

Heidi E. Brieger

Justice of the **Superior Court**

Dated at Boston, Massachusetts, this 7th day of July, 2017.

Footnotes

2 The instant motion is a motion for mistrial and is not a motion for relief from judgment under Mass. R. Civ. P. 59 or a motion for a new trial under Mass, R. Civ. P. 60. See *Commonwealth* v. *Brangan*, 475 Mass. 143, 147-48 (2016) (reserving decision on motion for mistrial and allowing a case to proceed to the jury does not automatically transform a motion for mistrial into a motion for post-judgment relief).

3 To prove her claim for breach of warranty under G. L. c. 106, § 2–314, Plaintiff was required to prove that (1) her burger contained an injury-causing object, i.e., the bone fragment, for which Defendants were the source; and (2) a consumer would not reasonably have expected to find the bone fragment therein. See *Webster* v. *Blue Ship Tea Room, Inc.*, 347 Mass. 421, 423–427 (1964); *Phillips* v. *West Springfield*, 405 Mass. 411, 412–413 (1989).

4 Massachusetts Guide To Evidence, Section 1113 characterizes permissible argument as follows:
Closing argument must be based on the evidence and the fair inferences from the evidence. It may contain enthusiastic rhetoric, strong advocacy, and excusable hyperbole.... In civil actions, in the **Superior Court**, parties, through their counsel may suggest a specific monetary amount for damages at trial.

5 Defendants also argue that counsel improperly asked the jury in closing argument to consider a range of damages in violation of G.L. c. 231 § 13B. The court has found no authority for Defendants suggestion that arguing a "specific" amount for damages (contemplated by the plain language of the statute) precludes an argument for a "range" of damages. Accordingly, the court declines to grant a mistrial on that ground.

9 To the extent that Plaintiff contends that it was permissible for counsel to suggest that the jury consider the deterrent effect of a verdict for Plaintiff, the court disagrees. Plaintiff is correct insofar as she contends that "[t]he underpinnings of common law tort liability," are "compensation and deterrence," *Glenn* v. *Aiken*, 409 Mass. 699, 707 (1991), and that Massachusetts products liability law is based, in part, on the underlying "policy of holding accountable those whose defective products cause injuries." *Cosme* v. *Whitin Mach. Works*, 417 Mass. 643, 648 (1994). The issue here though is that the only damages issue are compensatory damages, which "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001), while punitive damages serve a broader function; they are appropriate "where a defendant's conduct warrants condemnation and *deterrence.*" *Bain* v. *Springfield*, 424 Mass. 758, 767 (1997) (emphasis added). Insofar as punitive damages were not at issue here, Plaintiff's counsel improperly suggested that the jury consider the reprehensibility of Defendants' conduct and punish Defendants with their verdict. Although the court's charge to the jury clarified that damages, "are assessed for the purpose of compensating an injured party for losses sustained," and not "to punish the Defendants," (Tr. p. 167, at ¶¶ 19-20), the court did not give a contemporaneous instruction that the jury disregard Plaintiff's counsel's improper arguments. The court's jury charge, when considered against the entire context of Plaintiff's counsel's repeated impassioned and prejudicial pleas, was likely insufficient to correct any misapprehension created by these arguments.

10 Plaintiff's counsel's reliance on the Massachusetts Trial Court Orientation Video to authorize his "voice of the community" argument is surely misplaced. The jury is in our system of justice is the voice of the community insofar as its function is to determine – based on the law as instructed and the facts before it – whether Defendants were liable for breach of the implied warranty of merchantability. A careful review of Plaintiff's counsel's arguments support the conclusion that this was not the message conveyed by the closing argument.

11 The argument also – without evidence – suggested that "safety rules were violated."

12 The so-called "reptile revolution," described in the book *Reptile: The 2009 Manual of the Plaintiff's Revolution*, (the "Manual of the Plaintiff's Revolution") is promoted as a guide for attorneys seeking favorable verdicts. See generally, Alex Craigie, *Preparing Your Witness for a "Reptile" Deposition. At Counsel Table* (2013); Ken Broda-Bahm. *Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution* (2013); Stephanie West Allen, Jeffrey M. Schwartz, and Diane Wyzga, *Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles is a Bad Idea* (2010).

13 See Reptile: The 2009 Manual of the Plaintiff's Revolution, at p. 13.

14 At the hearing in this matter, Plaintiff's counsel argued that he – like all lawyers – just want to "win." His desire to "win" at trial was manifest when he pumped his fist – in front of the jury – as the Assistant Clerk read the verdict.

15 During oral arguments on the instant motion, Plaintiff's counsel suggested that any failure to police the white lines in his closing argument is to be borne by this court. Whereas "[t]he judge ought to be always the guiding spirit and the controlling mind at atrial." *Goldman* v. *Ashkins*, 266 Mass. 374, 380 (1929), guarding against improper argument, as courts must, *O'Neill* v. *Ross*, 250 Mass. 92, 95-97 (1924), does not authorize counsel to engage in improper argument in reliance on the court to give a curative instruction. *Birbiglia* v. *Saint Vincent Hosp., Inc.*, 427 Mass. 80, 88-89 (1998). See also Mass. R. Prof. Cond. 3.4(e).

16 To the extent that Plaintiff's counsel argues that he simply responded to Defendants' improper closing arguments, this argument is unavailing. Not only did Plaintiff's counsel fail to object to any portion of Defendants' closing argument, but it is well-settled that counsel is not permitted to "'fight fire with fire,' and exceed the normally proper limits of argument because [opposing] counsel made an improper, excessive argument" first. *Commonwealth* v. *Kozec*, 399 Mass. 514, 519(1987).

17 An order allowing a motion for mistrial is not appealable. *Brangan*, 475 Mass. at 146-48.

18 See also, *Forrestal* v. *Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988) (quotation marks omitted), suggesting that the court examine the closing argument in the context of the evidence at trial, taking into account, "the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case [], and the verdict itself," to determine whether the cumulative effect of Plaintiff's counsel's closing arguments so permeated the jury's deliberations as to deprive Defendants of a fair trial.

19 Judge Learned Hand Michael Herz, "*Do Justice!": Variations Of A Thrice-told Tale*, 82 VA. L. REV. 111, 111 (1996), quoting Learned Hand, *A Personal Confession, in the Spirit of Liberty*, 302, 306-307 (Irving Dillard ed., 3d.).

End of Document