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Per Diem Arguments in Personal Injury Cases

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PER DIEM ARGUMENTS IN PERSONAL INJURY CASES

I. INTRODUCTION

The basis for allowing monetary compensation for pain and suffering is that the injured party should be compensated to the extent that money operates to bring feelings of satisfaction to offset physical suffering.[1] As the law stands today it is agreed that something can be recovered for pain and suffering but that there is yet no yardstick by which this intangible can be converted into dollars and cents.[2] If we are seeking some magic formula for the computation of damages, valid in each and every case, we are doomed to disappointment. The courts are of the opinion that such damages are incapable of any exact mathematical computation, and that the amount awarded is within sole discretion of the trier.[3] About all the jury can be told is to award plaintiff a sum that will reasonably compensate him for his pain and suffering.

While in agreement that the question of compensation for pain and suffering rests ultimately with the jury, the courts are divided as to the right of counsel to comment on the amount of these damages. The courts are also divided on the issue whether or not the counsel should be allowed to suggest to the jury various modes or formulae which might aid in awarding plaintiff fair and reasonable compensation for his pain and suffering.

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1. McCORMICK, DAMAGES § 88 (1935).
2. Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944); Haycook v. Christie, 249 F.2d 501 (D.C. Cir. 1957).
3. McCORMICK, DAMAGES § 88 (1935); see Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206, 209 (1903) in which the court said: "It is true that there is no gauge furnished by the law for measuring such damages, and that it is, to a great extent, sentimental. But there is an element of sentiment in all damages,—even in the possession and use of money itself,—for a given amount of money may be of far more value to one person than to another. While all those considerations tend to prevent the assessment of damages in any case from being absolutely adequate or measured with exactness and understanding, they will not prevent the approximate measurement, and must be submitted to the best judgment of the jury."

II. PER DIEM ARGUMENTS

Per diem arguments constitute one technique of trial court advocacy. It is a device whereby the counsel, in his closing argument to the jury, suggests that the jurors apply a fixed monetary figure per day, per month or per year and multiply this figure by the number of days, months or years plaintiff is expected to live.[4]

The most common method applied by counsels in arguing per diem is well illustrated by the chart set fourth below. This chart was introduced by plaintiff's attorney in a personal injury case where the infant plaintiff sought to recover damages for the loss of his leg.[5]

" 'Mike' Braddock

Age 9	Expectancy 56 years
Pain and suffering to Date 395 Days	
Experience of accident	$5,000
Hospital 3-24—4-5-52	1,200
First 30 days at home	300
To date 353 days	700
Inability to Lead Normal Life	
3-24—5-31-52 crutches	340
6-1—10-31-52 pylon	459
11-1-52 to date articificial limb	348
Humiliation and Embarrassment	1,915
	$10,262
20,440 days	Future 56 years
Medical	
Checkup by doctor once a year	$ 440
Artificial legs	3,600
Repairs and Maintenance	2,640
Stump Socks	985
Extra pants, shoes, socks	4,400

4. See, **e.g.**, Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Affett v. Milwaukee & Suburban Transp Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

5. Seaboard Air Line R.R. v. Braddock, 96 So. 2d 127, 129 (Fla. 1957), **cert. denied**, 355 U.S. 892 (1957).

Limb adjustment every 2 weeks	2,912
	$14,977
Pain and suffering, 20,440 days	20,440
Humiliation and Embarrassment, 20,440 days	40,880
Inability to Lead Normal Life, 20,440 days	40,880
Loss of Earning Capacity, 5500 x 55 per cent x 56	121,000
Total	$248,439

While a small minority of jurisdictions forbids counsel the use of per diem arguments and even forbids him to disclose the jury the amount sued for,[6] a substantial number of courts have sanctioned the right of counsel to employ such demonstrative means in order to gain a more adequate award for the plaintiff.[7] Although the Supreme Court of Minnesota permitted counsel the application of per diem, the court has limited the use of such method by saying that it was to be used purely for "illustrative" purposes.[8] In its recent controversial decision of *King v. Railway Express Agency,*[9] the Supreme Court of North Dakota has apparently sided with the minority rule in absolutely forbidding the counsel to argue per diem. A closer examination of the case seems to reveal, however, that this court might allow such methods if they are used only as illustration.[10]

Opponents of the method argue that to permit plaintiff's

6. Cooley v. Crispino, 21 Conn. Supp. 150, 147 A.2d 497 (1958); Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Goodhart v. Pennsylvania R.R., 177 Pa. 1, 35 Atl. 191 (1896).

7. Ratner v. Arrington, 111 So. 2d 82 (Fla. App. 1959); Corkery v. Greenberg, 114 N.W.2d 327 (Iowa 1962); Louisville & Nashville R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Johnson v. Brown, 345 P.2d 754 (Nev. 1959); J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1940).

8. Flaherty v. Minneapolis & St. Louis Ry., 251 Minn. 345, 87 N.W.2d 633 (1958).

9. 107 N.W.2d 509 (N.D. 1961).

10. **Id.** at 517. "Had counsel for the plaintiff merely suggested to the jury that a method by which they might determine damages for pain and suffering was by first determining what such pain and suffering was worth per day, per week, per month, or per year and then told the jury to multiply such sums by the number of days, weeks, months, or years that the jury found, from the evidence, that plaintiff would suffer such pain and suffering, such argument would have been permissible."

counsel to suggest and argue to the jury an amount to be allowed for pain and suffering calculated on a fixed basis allows him to get before the jurors what does not appear in the evidence.[11] Verdicts should be based, they argue, on deductions drawn by the jury from the evidence presented and not the mere adoption of calculations submitted by counsel. The majority of the courts point out that even in the absence of any evidence as to monetary amounts, if the record shows that the plaintiff has suffered and will continue to suffer pain and embarrassment, counsel has the right to state to the jury what he thinks would constitute proper damages.[12] Because of the very absence of a yardstick to measure such damages, the counsel should be allowed full latitude in order to bring out all proper inferences which are reasonable in view of the evidence regarding plaintiff's past and probable future suffering.[13]

A second argument against the use of the per diem formula is that the estimates of the counsel may tend to instill in the minds of the jurors impressions not founded on the evidence.[14] Although this argument may be valid in certain instances,[15] the danger that the jury will obsequiously follow the suggestions of plaintiff's counsel may substantially be diminished if proper instructions are given by the trial judge.[16] Under our adversary system the defense attorney has wide latitude to counteract any overinfluence exercised by opposing counsel on the jury.

Courts rejecting the per diem argument often base their prohibitory rule on the proposition that such technique constitutes an invasion of the province of the jury who are alone to determine what is to be a fair and reasonable compensation.[17] It has been asserted that amounts cal-

11. King v. Railway Express Agency, 107 N.W.2d 509 (N.D. 1961); Stassun v. Chapin, 324 Pa. 125, 188 Atl. 111 (1936).
12. Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957).
13. Ratner v. Arrington, 111 So. 2d 82 (Fla. App. 1959); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1962).
14. Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).
15. See, **e.g.**, Seaboard Air Lines R.R. v. Braddock, 96 So. 2d 127 (Fla. 1957), **cert. denied**, 353 U.S. 892 (1957) where the amount of the verdict was exactly the same as what was asked by plaintiff's counsel in his per diem argument.
16. The court said in Johnson v. Kinney, 232 Iowa 1016, 1027, 7 N.W.2d 188, 194 (1942), "The trial court has a broad discretion in passing on the propriety of argument to the jury, with which we will not interfere except in a clear case of abuse of that discretion."
17. Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

culated on a mathematical basis would displace the jury's concept of what is a fair and reasonable amount to be awarded for such damages in the light of the common knowledge and experience possessed by the triers of the facts.[18] It is because the very nature of pain and suffering defies exact admeasurement in monetary terms, that the majority of the courts allow the counsel to suggest a practical method of reasoning which the jurors may employ to aid them in making a reasonable and fair estimate.[19] As one court stated: "In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air."[20]

It has been argued that permitting the use of per diem argument by the court puts the defendant in the position of having to rebut an argument which has no basis in the evidence.[21] If defendant's counsel attempts to argue a lower per diem figure, he has, in effect, admitted his client's liability and renders the impression to the jury that his only aim is to diminish the amount of the verdict against his client. It must be noted that defendant's negligence will be adjudged by the jury upon the evidence introduced during the trial and such determination is unlikely to be influenced by arguments for or against a monetary award. In arguing a lower per diem basis, on the other hand, counsel for the defendant could either cast doubt upon the validity of such method by skillful illustration and criticism or advance arguments to keep the evaluation of the damages reasonable and objective.[22] He may also assert why a lower per diem figure should be used, as well as point out to the jury that the plaintiff's estimate may contain overlapping items such as pain and suffering, disability, inability to lead a normal life, humiliation and embarrassment.[23] Finally, counsel for the defendant may introduce the use

18. Certified T.V. and Appliance Co. v. Harrington, 109 S.E.2d 126 (Va. 1959).
19. Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961).
20. Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, 11 (6th Cir. 1956).
21. Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959).
22. See Note, 61 W. Va. L. Rev. 302 (1959).
23. See Seaboard Air Line R.R. v. Braddock, 96 So. 2d 127 (Fla. 1957) (dissent), **cert denied**, 355 U.S. 892 (1957).

of a sliding-scale per diem evaluation which would tend to keep the figure in proportion to the possibly diminishing suffering.[24]

These arguments appear to be sufficiently convincing for the majority of the jurisdictions to allow the use of per diem arguments and entrust the trial court to curb its abuses and to properly instruct the jury as to the illustrative nature of such technique of advocacy.[25]

A small minority, however, has steadfastly refused to grant the right to the counsel to employ such demonstrative means in his attempt to gain a more adequate award for the plaintiff. In an apparent over-concern for the integrity of the jury, some of these courts have gone so far as to forbid counsel to divulge to the jury the amount contained in the *ad damnum* clause.[26] The rationale of this doctrinarian attitude is somewhat elusive as the pleadings are part of the public record and as such are open for inspection by the jurors.[27]

It has been mentioned before that the Minnesota courts have restricted the application of blackboards, charts, placards and oral suggestions of a mathematicl formula for purely "illustrative" purposes.[28] This vague term apparently refers to a restriction of per diem arguments whereby the counsel may make a suggestion of a mathematical formula to the jurors in order to aid them in reaching an award, but he may not mention a fixed monetary amount as basis for such calculations. Recognizing that per diem arguments are never evidence but only illustration and suggestion, such curtailment of counsel's right by the court seems to be rather tenuous.

> "To prohibit counsel from arguing money damages is to curtail his partisan function and to deny the plaintiff the benefits of advocacy where persuasive techniques are of most crucial importance

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24. For an illustration of a sliding-scale per diem evaluation, see Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956).
25. See note 7 **supra.**
26. See note 6 **supra.** See also Jimmy's Cab, Inc. v. Isennock, 225 Md. 1, 169 A.2d 425 (1961) where mentioning the amount contained in the **ad damnum** clause did not constitute reversible error if jury were instructed by the court not to consider it as evidence.
27. See Jimmy's Cab, Inc. v. Osennock, 225 Md. 1, 169 A.2d 425 (1961).
28. See note 8 **supra.**

> to him. . . . The plaintiff sues for money. The defendant defends against an award of money. The jury is limited to expressing its findings in terms of money. . . . It must retire to the jury room *in vacuo* on this essential of the case where the unmentionable and magical conversion from broken bones to hard cash may then take place."[29]

III. BOTTA V. BRUNNER: AN ANALYSIS

There have been only a few courts dealing with the problem of per diem arguments and mathematical formulae in evaluating pain and suffering which have failed to cite the famed *Botta v. Brunner*[30] case since decided by the Supreme Court of New Jersey in 1958. The decision has received a maze of criticism by legal writers[31] and from the bench,[32] and has aptly been referred to as a "blot on the judicial concept of this country."[33] A somewhat extensive analysis of the case is believed to be merited not only because it is still regarded as a landmark case in this field of the law, but also to illustrate the unfortunate role of judicial misinterpretation of pre-existing case law in formulating a new doctrine.

The facts of the case are as follows: The plaintiff brought an action to recover for personal injuries sustained in an automobile accident. In his closing argument to the jury, plaintiff's counsel suggested that in computing damages for pain and suffering the number of hours that plaintiff suffered might be multiplied by a dollar amount per hour. The trial court, sustaining objection to the propriety of this argument, was overruled by the Appellate Division.[34] This court held that such argument was within the permitted scope of counsel's persuasion and that the charge below, warning of weight to be placed upon this type of argument, was adequate to correct any potential prejudicing of the jury. The Supreme Court of New Jersey reversed the decision on this issue; and held not only that a mathe-

29. Note, 12 Rutgers L. Rev. 522 (1958).
30. 26 N.J. 82, 138 A.2d 713 (1958).
31. See, **e.g.,** Note, 19 Ohio St. L.J. 780 (1958); Note, 12 Rutgers L. Rev. 522 (1958); Note, 36 Dicta 373 (1959). **But see** 61 W. Va. L. Rev. 302 (1959).
32. See, **e.g.,** Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Johnson v. Brown, 345 P.2d 754 (Nev. 1959).
33. TRIAL AND TORT TRENDS—BELLI SEMINAR, 195 (1961).
34. Botta v. Brunner, 42 N.J. Super. 95, 126 A.2d 32 (1956).

matical formula is an improper suggestion to the jury, but that any statements by counsel demanding a specific award or disclosing the amount sued for will constitute error.

In announcing its prohibitory doctrine the court cited a number of cases from different jurisdictions to support its stand. However, none of the cases, excepting the Pennsylvania decisions,[35] could be adjudged as proper authority to substantiate the *Botta* rule. Concededly, Pennsylvania has followed a stern and unyielding course in forbidding plaintiff's counsel to disclose the amount contained in the *ad damnum* clause to the jury, let alone to use per diem arguments.[36] It would appear that the remaining cases were either improperly cited, or had no bearing upon the issue in question. A brief analysis of the more relevant cases cited in the opinion of the court will illustrate its judicial confusion.

The New York[37] and the Georgia decisions,[38] cited by the New Jersey court, had little to do with counsel's right to argue a mathematical formula for pain and suffering, but both cases dealt with instructions to the jury. The rule of the Georgia case leaves little doubt to the validity of this proposition:

> "It was improper in this case for the court to charge the jury the manner in which they should reduce to its persent cash value the damages as to any future pain and suffering and the permanent injuries sustained by the plaintiff."[39]

Other cases cited by the court dealt not with the right itself but with the abuse of an implied right to argue mathematical formulae before the jury. A Kentucky case, cited in *Botta v. Brunner,* held:

> "If it is proper for counsel who represents plaintiff to argue the amount of damages, likewise it is proper for defense counsel to do so. Whatever may

35. Stassun v. Chapin, 324 Pa. 125, 188 Atl. 111 (1936); Goodhart v. Pennsylvania R.R., 177 Pa. 1, 35 Atl. 191 (1896).
36. **Ibid.**
37. Wersebe v. Broadway & S.A.R.R., 1 Misc. 472, 21 N.Y.S. 637 (1893).
38. Louisville and N.R.R. v. Bean, 174 S. E. 209 (Ga. 1934).
39. **Id.** at 211.

> be the rule in other jurisdictions, this court is committed to one that counsel may within reasonable limits argue to the jury the amount of damages it should return when that argument is based upon the extent of the injuries the evidence shows the plaintiff has suffered."[40]

Clearly this court is not denying the right of counsel to argue per diem damages for personal injuries, but quite the opposite. By the very act of restricting the right, the court implicitly endorsed it. The same logic was present in two other cases cited from the jurisdictions of Texas[41] and Massachussets.[42]

The three federal cases[43] cited by the court apparently endorse the holding of *Botta v. Brunner,* but since these cases were dealing with the turn of the century feud over "subjective" versus "objective" damages, they should have no application here.

As one examines subsequent decisions by this same New Jersey court,[44] one is inclined to suspect a note of uncertainty, even perhaps remorse for the *Botta* decision. It is only hoped that this court will reverse its relentless stand in the near future whereby it would return the counsel the right to advocate his client's cause through the most appropriate means.

IV. CONCLUSION

The underlying fear that juries will be too liberal in an area of compensation which has no definable limit will not be dispelled by denying counsel the use of methods which cause the jury to think in terms of true compensation rather than to guess at an arbitrary figure. Keeping the award in proportion to the suffering should be, in part, the function of the counsel for defense.

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40. Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637, 639 (1944).
41. Warren Petroleum Corp. v. Pyeatt, 275 S.W.2d 216 (Tex. 1955).
42. Gardner v. State Taxi Inc., 336 Mass. 28, 142 N.E.2d 586 (1957).
43. Union Pac. R.R. v. Field, 137 Fed. 14 (8th Cir. 1905); Alabama G.S.R.R. v. Carroll, 84 Fed. 772 (5th Cir. 1898); St. Louis & S.F. Ry. v. Farr, 56 Fed. 994 (8th Cir. 1893).
44. See Carlucci v. Stickman, 50 N.J. Super. 96, 141 A.2d 68 (1958); Paradossi v. Reinheur Bros. Oil Co., Inc., 53 N.J. Super. 41, 146 A.2d 515 (1958); Matthews v. Nelson, 57 N.J. Super. 515, 155 A.2d 111 (1959); Cross v. Lamb, 60 N.J. Super. 53, 158 A.2d 359 (1960).

Finally, there is no basis in law or logic to ask the jury to arrive at a verdict by a blind guess. The blindness of justice is symbolic to her impartiality — not her judgment. It is against common sense to ask a jury "to embark in a rudderless vessel on an unchartered sea."

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