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Jury Computation of Damages for Pain and Suffering--The Per Diem Argument

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NOTE

JURY COMPUTATION OF DAMAGES FOR PAIN AND SUFFERING—THE PER DIEM ARGUMENT

In an action for personal injuries sustained by plaintiff while attempting to board defendant's bus, plaintiff's counsel formulated the damages for pain and suffering on a per diem basis. He estimated the value of plaintiff's pain and suffering for the twenty-two months between the accident and trial at 100 dollars per day and placed that figure and total, 66,000 dollars, on a blackboard. Counsel then estimated future pain and suffering at 2,000 dollars per year for thirty-four years, plaintiff's life expectancy, which resulted in a total figure claimed as damages for pain and suffering of 134,000 dollars. Special damages, past and future, were totaled at 53,903 dollars, seventy-five cents. The jury returned a verdict for 187,903 dollars, seventy-five cents, exactly the amount plaintiff claimed, and judgment was entered thereon. The appellate court reversed, one of the grounds being that the damages were excessive.[1] The California Supreme Court in a four to three decision affirmed the judgment of the trial court, thereby approving the largest award for pain and suffering heretofore sustained in California.[2] After noting that the propriety of the "per diem argument" has not been considered in California, the court held that defendant waived any misconduct in such an argument by failing to object at trial and by using a similar argument of his own.[3] Traynor, J., in dissent, condemned the "per diem argument" as an artifice of sophistry.

There is a sharp divergence of opinion in the twenty jurisdictions which have considered the "per diem argument."[4] Seven jurisdictions have approved its use,[5] four have allowed it "for illustration only,"[6] and nine juris-

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[1] Seffert v. Los Angeles Transit Lines, 186 Cal. App. 2d —, 9 Cal. Rptr. 192 (1960).

[2] Seffert v. Los Angeles Transit Lines, 56 Cal. 2d —, 15 Cal. Rptr. 161, 364 P.2d 337 (1961).

[3] *Id.* at —, 15 Cal. Rptr. at 168, 364 P.2d at 344.

[4] 15 AM. JUR. *Damages* § 72 (1961 Supp.); 60 A.L.R. 1347 (1958).

[5] Penn. R.R. v. McKinly, 288 F.2d 262 (6th Cir. 1961) (leaves the argument to the discretion of the trial court); Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956) (Dist. Ct. sitting without a jury); McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Jensen v. Elgin, Joliet & E. Ry., 31 Ill. App. 2d 198, 175 N.E.2d 564 (1961); Louisville & N. R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1954); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Texas & N.O. R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960).

[6] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960) (trial court should instruct that the argument is lawyer's talk and not evidence); Jones v. Hogan, 56 Wash. 2d 23, 351 P.2d 153 (1960) (trial court should admonish that counsel's argument is not evidence).

dictions have condemned it absolutely.[7] A few of the reasons given for not allowing the "per diem argument" extend beyond the propriety of the per diem method itself and are concerned with the propriety of *any* mention of a monetary amount to the jury.[8] The opponents of the method argue that there is not, and cannot be, an evidentiary basis for the correlation between pain and suffering and money;[9] that such suggestions by counsel amount to testimony on matters not disclosed by the evidence;[10] and that the "per diem argument" is misleading because the jury will consider the amount suggested as evidence and thereby render an excessive verdict.[11]

If a court were to adopt this line of reasoning, it would seem inescapable that it could not consistently allow comment in terms of the total figure,[12] and yet forbid comment in terms of the per diem figure.[13] However, the fact that the only measure of damages for pain and suffering—reasonableness[14]—is imprecise, is not a good reason sui generis for excluding a statement of the amount claimed.[15] Thus, the proponents respond with the contention that the evidence must provide a foundation for the per diem suggestion, because the jury's award must be justified by the evidence of pain and suffering.[16] Further, they insist the "per diem argument" is not misleading but helpful because it provides practical guidance;[17] that the exaggerated danger of a jury's mistaking the per diem suggestion for evidence can be dispelled by appropriate instructions from the trial court,[18] and the very absence of a precise measure justifies guidance of the jury.[19]

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[7] Chicago & N. W. Ry. v. Chandler, 283 F. 881 (8th Cir. 1922); Vaughan v. Magee, 218 Fed. 630 (3d Cir. 1914); Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958) (Dist. Ct. sitting without a jury); Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Faught v. Washam, 365 Mo. 1021, 329 S.W.2d 588 (1959); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Stassum v. Chapin, 234 Pa. 125, 188 Atl. 111 (1936) (Pennsylvania has long condemned any reference to the *ad damnum* clause); Certified T.V. Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Affett v. Milwaukee & Surb. Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[8] The reasons pro and con are listed in Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959).

[9] Affett v. Milwaukee & Surb. Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[10] Faught v. Washam, 365 Mo. 1021, 329 S.W.2d 588 (1959).

[11] Ahlstrom v. Minneapolis, St. P. & S. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955).

[12] The "total figure" adverted to in this note refers exclusively to the amount of damages claimed for past and future pain and suffering, and, to counsel's statement of that amount *in toto* to the jury.

[13] See Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1955) (In addition to condemning the "per diem argument" as an "unwarranted intrusion into the domain of the jury," the court overruled prior decisions allowing the jury to be advised of the total figure claimed for pain and suffering.).

[14] McCormick, Damages § 88 (1935).

[15] 53 Am. Jur. *Trial* § 485 (1945).

[16] Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).

[17] Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956).

[18] Cases cited note 5 *supra*. "[The] argument is not evidence, and we cannot attribute to any jury in this state a lack of sufficient mentality to distinguish between the two." Jones v. Hogan, 56 Wash. 2d 23, 31, 351 P.2d 153, 159 (1960).

[19] Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. 1959).

If comment on the damages claimed is allowed in the form of a total figure, there may be no good reason for distinguishing on the ground of legal propriety, the per diem statement of the amount claimed as damages. However, in *Seffert v. Los Angeles Transit Lines*[20] such a distinction is attempted in the dissenting opinion in the form of an attack on the "per diem argument" itself. It is argued that if one took the second as the unit and awarded one cent per second, the result would be 31,536 dollars per year. "The absurdity of such a result must be apparent, yet a penny a second for pain and suffering might not sound unreasonable."[21] The apparent absurdity is possibly the result of confusing the "per diem suggestion" as a substitute for the standard of reasonableness. The per diem method is a suggestion about a manner of stating the amount *to be judged by the criterion of reasonableness*,[22] and that criterion involves consideration of the nature and extent of the injury by the jury.[23] The point remains whether or not a particular sum of money is justified by the evidence.

Another argument presented in the *Seffert* dissent is that any error in the per diem amount will be compounded in the total amount. As a practical matter, such error can occur only if both figures appear to be reasonable and are in fact unreasonable. The jury must consider both statements of the amount to be awarded, and thus the legitimate point of this argument is that the jury will have equal difficulty in determining the reasonable amount, whether it be considered in per diem or in total figures. It would be a questionable psychological assumption that the jury would make fewer mistakes in the one consideration than in the other; a decision ought not turn on such tenuous ground.

A further argument against the per diem method is that it overlooks the fact that pain and suffering vary from day to day[24]—which is itself a per diem consideration of pain and suffering. However, the per diem figure does not represent one isolated day; the very expression of the per diem figure is in terms of all the days, months, or years remaining in plaintiff's life. Considerations such as that pain and suffering will vary, are assumed in the standard of reasonableness. Thus, such considerations are equally applicable regardless of the particular mathematical expression of the amount claimed, because the criterion of reasonableness is applicable to both the per diem figure and the total figure.

It is incongruous to allow juries to award compensation in money and to forbid evaluations in money. The broad criterion of reasonableness is of such great dimension, encompassing such broad considerations, that the application of rigid rules of exclusion to these considerations seems inappropriate. Furthermore, a distinction between the propriety of allowing

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[20] Seffert v. Los Angeles Transit Lines, 56 Cal. 2d —, 15 Cal. Rptr. 161, 364 P.2d 337 (1961).

[21] *Id.* at —, 15 Cal. Rptr. at 171, 364 P.2d at 347 (dissent) (quoting from Affett v. Milwaukee & Surb. Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960)).

[22] Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1954).

[23] Roedder v. Rowley, 28 Cal. 2d 820, 822, 172 P.2d 353, 354 (1946); 15 AM. JUR. *Damages* § 72 (1945).

[24] Hallada v. Great No. Ry., 244 Minn. 81, 69 N.W.2d 673 (1955) (However, Minnesota approved the "per diem argument," in Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956)).

comment in the form of a total figure and a corresponding per diem figure is rather subtle, where a high degree of exactitude, is in either event impossible. The apparent impossiblity of supporting these refined distinctions on an emperical or analytical basis may indicate that the best assurance of obtaining reasonable results in the monetary evaluation of pain and suffering is to sanction the "per diem argument," and rely upon the restraint and common sense of the jury.

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