Hastings Law Journal

Volume 18 | Issue 3 Article 13

1-1967

Per Diem Damages: The Controversy Continues

Maurice R. Jourdane

applied in California law can at times be irreconcilable, and will rectify the situation in such a way as to retain the integrity of section 1151 while limiting the exception to those situations wherein it serves a worthwhile judicial function.

*Malcolm E. McLorg**

* Member, Third Year Class.

PER DIEM DAMAGES: THE CONTROVERSY CONTINUES

In 1951, the renowned San Francisco lawyer, Melvin Belli, promulgated his thesis on converting pain and suffering into dollars and cents by a means which has come to be known as the *per diem* method of computing damages.[1] Basically, the *per diem* method consists of dividing the plaintiff's life into components of time and determining damages on a period to period basis.[2] The manner in which the argument is used is best described in the words of Mr. Belli himself:

> This is the key: you must break up the life expectancy into finite detailed periods of time. You must take these small periods of time, seconds and minutes, and determine in dollars and cents what each period is worth.
>
> You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, and year after year You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you achieved your result [3]

This innovation in jury argument created a storm of controversy which has yet to subside.[4] The reasons given for the existence of the controversy are numerous. Yet when carefully examined, one invariably stands out; the *per diem* argument results in larger awards.

The Controversy

For over one hundred years, the measure of damages for pain and suffering has been "fair and reasonable" compensation.[5] It is agreed by both the advocates and the assailants of the *per diem* argument that this is the proper standard on

---

[1] Belli, *Demonstrative Evidence and the Adequate Award*, 22 Miss. L.J. 284 (1951); see Morris, *An Audio-visual Study of Pain and Suffering in Dollars-on-a-Unit-of-Time Basis From June 2, 1951*, 14 DEFENSE L.J. 129 (1965).

[2] Belli, *supra* note 1, at 318.

[3] *Ibid.*

[4] For an extensive list of articles written on both sides of the argument, see Beagle v. Vasold, 65 A.C. 161, 170, 53 Cal. Rptr. 129, 133, 417 P.2d 673, 677 (1966).

[5] See, *e.g.*, Armsworth v. South Eastern Ry. 11 Jur. 758 (Surry Summer Assizes, Croyden 1847); Stocton v. Frey, 4 Gill 406, 424, 45 Am. Dec. 138, 144 (Md. 1846) (dictum).

which the jury should base its judgment;[6] but here their agreement comes to an end. The advocates contend that the *per diem* formula is merely a means to assist the jury in attaining the 'fair and reasonable'[7] award, while the assailants retort that it effectually abolishes the "fair and reasonable" criteria.[8]

As might be expected in light of this divergence of opinion, there are strong arguments on both sides. Those who oppose the *per diem* formula contend that it is used to mislead the jury by creating an illusion of certainty,[9] which can very easily result in excessive awards through shrewd manipulation of the unit of time employed by the plaintiff's counsel.[10] For example, if counsel successfully argues that the plaintiff's pain is worth a penny a minute for his thirty year life expectancy, the award will be about 158,000 dollars. However, were he to argue for a penny a second, the same plaintiff would receive about 9,500,000 dollars. The proponents of the *per diem* argument, on the other hand, contend that the purpose of the argument is to give the jurors a more explicit comprehension of the plaintiff's pain and suffering.[11] They feel that the traditional criteria used to determine compensation provides little assistance to the jury and that pain and suffering may be more meaningful when measured in short periods of time. They further argue that if the award is excessive, it can be reduced by the trial court or reversed by the appellate court.[12]

Another argument which is frequently employed by the opponents of the formula is that compensation for pain and suffering cannot be calculated mathematically.[13] They contend that there is no yardstick by which pain can accurately be measured. Furthermore, when such calculations are attempted, no allowance is made for the gradual elimination of pain, or for the accomodation to pain.[14] More important, they do not allow for the variations in pain between individ-

[6] *Compare* Caylor v. Atchison, T. & S.F Ry., 190 Kan. 261, 277, 374 P.2d 53, 64 (1962) (dissenting opinion), *with* Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

[7] See, *e.g.*, Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); 4-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).

[8] See, *e.g.*, Caylor v. Atchison, T. & S.F Ry., 190 Kan. 261, 374 P.2d 53 (1962); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[9] Franco v. Fujimoto, 47 Hawaii 408, 420, 390 P.2d 740, 748 (1964); Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961) (dissenting opinion); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 513-14, 15 Cal. Rptr. 161, 170-71, 364 P.2d 337, 346-47 (1961) (dissenting opinion).

[10] See Ahlstrom v. Minneapolis, St. P. & S. Ste. M. R.R., 244 Minn. 1, 30, 68 N.W.2d 873, 891 (1955); Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 514, 15 Cal. Rptr. 161, 171, 364 P.2d 337, 347 (1961) (dissenting opinion).

[11] Beagle v. Vasold, 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966); Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960); see 12 RUTGERS L. REV. 522 (1958); 1962 TRIAL LAW. GUIDE 69.

[12] *E.g.*, Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); see, 60 MICH. L. REV. 612 (1962); 28 U. CINC. L. REV. 138 (1959).

[13] Franco v. Fujimoto, 47 Hawaii 408, 390 P.2d 740 (1964); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[14] Caylor v. Atchison, T. & S.F Ry., 190 Kan. 261, 374 P.2d 53 (1962); Botta v. Brunner, *supra* note 13.

uals;[15] it is a commonly known fact that no two persons bear the same sensitivity to pain. For these reasons, the decision as to the amount of money which will reasonably compensate the plaintiff for the pain he has suffered has been traditionally left to the common sense of the jurors, and any suggestion as to how they should compute such compensation is an intrusion into their domain.[16] To this, the proponents reply that plaintiff's counsel no more invades the domain of the jury by suggesting that it measure damages on a *per diem* basis than he does by suggesting that it find the defendant negligent.[17] It is further argued that it is the historic role of the advocate to seek to persuade the jurors to accept the logic and reasoning of his position, and suggesting that they use the *per diem* formula to compute damages does no more than that.[18]

A third argument by those who oppose the use of the *per diem* formula is that any amount of money proposed by the plaintiff's counsel during the *per diem* argument is neither based on facts in evidence nor inferable therefrom.[19] However, the jurors will mistakenly assume that the suggested amounts are evidence, and the speculative figures, although inadmissible as evidence, will thereby be implanted in their minds.[20] Diametrically opposed to this view is that of the proponents. They feel that the amount of compensation is inferable from the evidence, and since counsel is allowed to argue all reasonable inferences, he should not be precluded from arguing compensation.[21] As to the possibility that the argument will be mistaken as evidence, they feel that this can be prevented through proper instructions.[22]

Beagle v. Vasold

The latest development in the *per diem* conflict is seen in the recent California decision, *Beagle v. Vasold*.[23] Prior to the *Beagle* decision, of thirty two jurisdictions having passed on the issue, twenty one permitted an attorney to use the argument, while eleven had ruled against it.[24] California had not squarely met the problem.[25] However, in *Beagle*, the California Supreme Court, with considerable forthrightness, aligned itself with the majority. Justice Mosk, speaking for the court, vigorously attacked the leading case representing the minority view,

---

[15] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Certified T.V & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

[16] *E.g.*, Botta v. Brunner, *supra* note 15.

[17] *E.g.*, Beagle v. Vasold, 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966).

[18] Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961); see 12 RUTGERS L. REV. 522 (1958); 1962 TRIAL LAW. GUIDE 69.

[19] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Certified T.V & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

[20] Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Ahlstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959).

[21] Crum v. Steel City Transp. Inc., 146 W Va. 421, 458, 122 S.E.2d 18, 38 (1961) (dissenting opinion); see 12 RUTGERS L. REV. 522 (1958).

[22] See 38 CHI.-KENT L. REV. 62 (1960); 12 DE PAUL L. REV. 317, 322 (1963).

[23] 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966).

[24] See Beagle v. Vasold, 65 A.C. 161, 168-70, 53 Cal. Rptr. 129, 132-33, 417 P.2d 673, 676-77 (1966).

[25] *But see* Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 512, 15 Cal. Rptr. 161, 170, 364 P.2d 337, 346 (1961) (dissenting opinion).

Botta v. Brunner,[26] in which the Supreme Court of New Jersey held that counsel for the plaintiff could not argue damages on a *per diem* basis. The *Botta* court felt that any amount of money counsel suggested would not be founded upon facts in evidence nor would it be inferable therefrom.[27] *Beagle* attacks this conclusion on the grounds that counsel is permitted to discuss all reasonable inferences,[28] and therefore:

> if the jury from what it sees and hears at the trial must *infer* that a certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument.[28a]

The court apparently takes as axiomatic the proposition that the amount of compensation awarded by the jury is an inference. It would seem, however, that this conclusion is open to doubt.

The California Evidence Code defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[29] This language has been interpreted to mean that an inference can be drawn only from facts, that it must be reasonably and logically drawn and that it may not be based on supposition, conjecture, or guesswork.[30]

In any given case, the only proven fact from which an inference can be drawn as to the compensation to be awarded is that the plaintiff has and/or will suffer X intensity of pain for Y amount of time. However, to determine compensation, the jury must know not only the intensity and duration of pain, but also the value of pain at the proven level of intensity. Since no one can know the value in dollars and cents of any given intensity of pain, the judge cannot give the jury a standard to follow, nor may any witness express his opinion on the matter.[31] Thus the value of pain, which is essential to the computation of compensation, must be arrived at solely by speculation.

Since an inference must be drawn from the facts in evidence, and cannot be based on supposition, and since the jury's determination of compensation is based on supposition as to the value of pain, the determination is apparently not an inference. As one authority on damages said, "Transplanting pain and anguish into dollars can, at best, be only an arbitrary allowance "[32]

[26] 26 N.J. 82, 138 A.2d 713 (1958).

[27] *Id.* at 100, 138 A.2d at 723.

[28] Beagle v. Vasold, 65 A.C. 161, 172, 53 Cal. Rptr. 129, 134, 417 P.2d 673, 678 (1966).

[28a] *Ibid.* (Emphasis added.)

[29] CAL. EVIDENCE CODE § 600(b). It should be noted that when *Beagle* was decided, the Evidence Code was not yet in effect. However, Evidence Code § 600 is almost identical to Code of Civil Procedure §§ 1958, 1960, which were in effect when Beagle was decided.

[30] Cothran v. Town Council, 209 Cal. App. 2d 647, 26 Cal. Rptr. 319 (1962); Towt v. Pope, 168 Cal. App. 2d 520, 336 P.2d 276 (1959).

[31] Little Rock, M.R. & T. Ry. v. Haynes, 47 Ark. 497, 1 S.W 774 (1886); DeWald v. Ingle, 31 Wash. 616, 72 Pac. 469 (1903); Beagle v. Vasold, 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966) (dicta). See MCCORMICK, DAMAGES § 88, at 318 (1935); WIGMORE, EVIDENCE § 1944, at 55-56 (3d ed. 1940).

[32] MCCORMICK, DAMAGES § 88, at 318-19 (1935).

Since the amount of money which will fairly compensate the plaintiff for his pain and suffering does not appear to be an inference from the evidence, it seems only logical that counsel should be precluded from arguing not only *per diem* damages, but also total damages. However, California has consistently permitted argument of the latter.[33] The *Beagle* court felt that it would be paradoxical to prevent the plaintiff's counsel from arguing *per diem* damages and at the same time allow him to argue total damages.[34] This would be true were it not for the inherent danger in the *per diem* argument, not present in the argument on total damages.

The danger in the *per diem* argument lies in the illusion of certainty it creates.[35] It is not difficult to see why the argument is deceiving. Generally, people (including members of a jury) have become accustomed to using formulas they do not understand. For example, the average person cannot explain why the area of a circle is arrived at by multiplying the radius times itself times 3.14, but with full confidence in the correctness of the result, he uses the formula $A = Pi\ (R^2)$ And similarly when counsel presents the jury with a mathematical formula which appears to be valid, they are likely to utilize it. This is especially true when the formula makes the solution of an almost insurmountable problem a matter of simple mathematics, just as algebraic and geometric formulas simplify even the most complex mathematical problems.

It is conceded that if the formula were valid, it would unquestionably be of great value to the jury. However, it is not valid. To use the formula, some amount must be chosen for each period, whether it is a second or a year. Since there is no basis in human experience for testing the reasonableness of the amount decided upon, almost any amount will seem reasonable on its face. For example, is ten dollars, fifty dollars, or one hundred dollars a day reasonable compensation for permanent paralysis? If ten dollars per day is used for a person with a life expectancy of thirty years, an award of about 110,000 dollars is reached. If one hundred dollars per day is used, the award is slightly less than 1,100,000 dollars. While neither ten dollars nor one hundred dollars a day seems unreasonable on its face, the difference in the totals is almost a million dollars. Thus, the misleading nature of the formula is evident.

The court in *Beagle* was little bothered by the fact that the formula could be misleading.[36] Two reasons were given for this apparent lack of concern. First, the compensation awarded by the jury must be reasonable.[37] If it is not, it can be reduced or overruled by either the trial or appellate court.[38] This seems to be somewhat unsatisfactory reasoning. While it is true that the award can be modified or set aside, this can only be done if it is "so grossly disproportionate to any

---

[33] Beagle v. Vasold, 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966); Ritzman v. Mills, 102 Cal. App. 464, 283 Pac. 88 (1929); Sangumetti v. Moore Dry Dock Co., 36 Cal. 2d 812, 842, 228 P.2d 557, 575 (1951) (dissenting opinion).

[34] Beagle v. Vasold, 65 A.C. 161, 172, 53 Cal. Rptr. 129, 134, 417 P.2d 673, 678 (1966).

[35] See dissenting opinion of Traynor, C.J., in Beagle v. Vasold, *id.* at 179, 53 Cal. Rptr. at 139, 417 P.2d at 683.

[36] See Beagle v. Vasold, *id.* at 175, 53 Cal. Rptr. at 136, 417 P.2d at 680.

[37] *Ibid.*

[38] *Ibid.*

reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion or prejudice."[39] As a result, some awards which appear to be excessive will likely stand.[40] Secondly, the *Beagle* court said that there are meaningful safeguards to prevent the jury from being misled.[41] These safeguards include self-restraint by the plaintiff's counsel so as to avoid taxing the credulity of the jury, argument by the defense, and the court's instructions.[42] The effectiveness of these "safeguards" is questionable. Since the formula is misleading in that almost any amount per period seems reasonable, plaintiff's counsel can use almost any amount without taxing the credulity of the jury. Furthermore, when counsel is allowed to show the jury a method of easily converting pain and suffering into dollars and cents, it strains human nature a little too far to say that the jury will forget this easy but deceiving solution when admonished by the judge or defendant's counsel.

The *Beagle* court not only dismissed the fact that the formula can be misleading, but apparently believed that such a method of computing damages is beneficial.[43] It was said that the concept of pain and suffering becomes more meaningful and that it is easier to grasp the "worth" of pain when it is measured in short periods of time.[44] It was also said that the *per diem* formula provides a more explicit "comprehension and humanization of the plaintiff's predicament ..."[45] If this reasoning is carried to its logical conclusion, it would seem that the ideal method of arriving at just compensation would be achieved through a suggestion by counsel that the jurors place themselves in the plaintiff's shoes and determine what they would charge to undergo pain equivalent to that which the plaintiff has undergone, *e.g.*, to decide what the pain and suffering would be "worth" to them. How better than to put himself in the shoes of the plaintiff could each juror grasp the "worth" of the plaintiff's pain and suffering and comprehend his "predicament"? However, it is universally held that such a suggestion is inadmissible because it is prejudicial.[46]

The Defense's Dilemma: What Can Be Done?

Although it seems evident that the *per diem* argument is misleading rather than beneficial, it is now permitted in California. This being so, what defenses, if any, are available to lessen its detrimental effect on the defendant's case?

---

[39] Johnston v. Long, 30 Cal. 2d 54, 76, 181 P.2d 645, 650 (1947); see Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 508, 15 Cal. Rptr. 161, 167, 364 P.2d 337, 343 (1961).

[40] See, *e.g.*, Seffert v. Los Angeles Transit Lines, *supra* note 39. In the trial court the *per diem* argument had been used. Plaintiff had asked for and had been awarded $187,903.75 as compensation for an injured foot. On appeal, reduction was denied because the trial court has great discretion in this area.

[41] Beagle v. Vasold, 65 A.C. 161, 176, 53 Cal. Rptr. 129, 136-37, 417 P.2d 673, 680-81 (1966).

[42] *Id.* at 176, 53 Cal. Rptr. at 137, 417 P.2d at 681.

[43] *Ibid.*

[44] *Ibid.*

[45] *Id.* at 177, 53 Cal. Rptr. at 137, 417 P.2d at 681.

[46] *E.g.*, Copeland v. Johnson, 63 Ill. App. 2d 361, 211 N.E.2d 387 (1965); Jackson v. Southwestern Public Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960); Roth v. Jelden, 80 S.D. 40, 118 N.W.2d 20 (1962). See 88 C.J.S. *Trial* §§ 169, 191 (1955).

The conclusion is inescapable that the defendant is faced with the dilemma of either rebutting an argument not based on evidence, or ignoring the argument and risking the consequences. If he ignores the argument, there is the danger of the jury concluding that he is tacitly accepting it. If he rebuts the argument, he has the alternative of either attacking the amount suggested for each period, and thereby further confusing the jury,[47] or attacking the validity of the formula as a method of computing damages.

One who attacks the credibility of the formula will have no trouble finding material to support his cause.[48] Many of the reasons given by the courts which have refused to permit the use of the formula will be helpful. For example, the attorney can impress upon the jury that it is their duty to arrive at the amount of compensation by applying their knowledge of the value of money to the facts in evidence, and that what they have been told by the plaintiff's counsel is not evidence but is pure conjecture based upon his biased interests.[49] The jury could be reminded that pain is not constant, but varies from day to day, and any system which says it is worth the same amount each day cannot be valid.[50]

One argument which may prove itself moderately successful in casting doubt on the validity of the formula is the so-called T.V Argument.[51] Counsel uses the *per diem* method to compute the cost of a television set. He first suggests the value of T.V per hour. By comparing it with the cost of a movie, fifty cents an hour seems quite reasonable. He then multiplies this figure by the number of hours the television is watched per day. Four seems like a conservative estimate. Continuing, he multiplies the number of hours the television is watched a day by the number of days it is watched a year; perhaps 300. Finally, he multiplies that figure by the number of years the television set lasts; five would be minimal. The result is that when measured on a *per diem* basis, the cost of a television set should be 3,000 dollars, yet a new color set only costs about 500 dollars. This clearly shows that although each component seems reasonable, the total reached is unreasonable, and therefore the formula is faulty.

Finally, the attorney can request that the jury be given an instruction outlining the criteria on which they are to base their decision. The following is a proposed instruction:

> One of the most difficult tasks imposed upon you as the jury is to determine the amount of money the plaintiff is to be awarded as compensation for his pain and suffering. No method is available by which the plaintiff's damage can be objectively evaluated; and for this reason, no witness has been allowed to express his subjective opinion on the matter. I wish to impress upon you that any figures or means of arriving at compensation, suggested by either counsel for the plaintiff or counsel for the defendent, are not evidence, but are merely their opinion as representatives of their client's interests. You as jurors know the nature

---

[47] See Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961).

[48] For an extensive list of articles and cases attacking the validity of the *per diem* formula, see Beagle v. Vasold, 65 A.C. 161, 170, 53 Cal. Rptr. 129, 133, 417 P.2d 673, 677 (1965).

[49] See, *e.g.*, Caylor v. Atchison, T. & S.F Ry., 190 Kan. 261, 374 P.2d 53 (1962).

[50] See, Crum v. Steel City Transp., Inc., 146 W Va. 421, 122 S.E.2d 18 (1961), 15 VAND. L. REV. 1303 (1962).

[51] See LaBrum, *The Best Defense Is A Good Offense*, 30 INS. COUNSEL J. 124, 128-29 (1963); 33 So. CAL. L. REV. 214 (1960).