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Damages - Computation by Use of a Per Diem Formula - Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962)

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or pension plans to which he has contributed, the plaintiff actually paid out of his pocket in advance for such future benefits, and where the plaintiff has not contributed, such payments by the collateral source, usually the employer, are compensation for past services of the plaintiff.[22] Thus to permit recovery, these courts consider both pensions and insurance as something for which the plaintiff has paid over the years, with his services or the premium deductions serving as his compensatory loss.

The *Coyne* case highlights this difference in rationale among the courts and stands firmly on the compensatory theory of damages. There is an inconsistency in the decisions of these courts, upholding the compensatory theory, in that they allow full recovery in the contribution cases. Under this theory, it would seem that the plaintiff should be allowed to recover only the premiums or payments for the insurance plan or pension fund to which they contributed his out-of-pocket loss.

Benefits from a collateral source will aid either the plaintiff or the defendant. Whether the benefit given to the plaintiff was one of friendship, philanthropy, or contract, the interests of the parties and society are better served where the courts apply the collateral source doctrine and the plaintiff, to whom the gift was intended, is allowed the benefit.

[22] Poniatowski v. City of New York, 220 N.Y.S. 2d 854, 30 Misc. 2d 865 (1961); Devine v. City of Chicago, 172 Ill. App. 246 (1912).

DAMAGES–COMPUTATION BY USE OF A PER DIEM FORMULA

During the trial of a rear-end automobile accident case, plaintiff's attorney suggested to the jury that fair compensation for his client's pain and suffering could be computed by using a mathematical formula in which a given dollar value was assigned to each day of pain and suffering and then multiplied over the plaintiff's lifetime as computed on a standard mortality table. The defendant appealed the $20,000 verdict, assigning as error the use of a per diem argument for pain and suffering. The Appellate Court affirmed, holding that the per diem argument was logically suggested by the evidence and that per diem argument falls within accepted lines of advocacy. The Supreme Court reversed and ordered a new trial, ruling that although counsel might suggest a total monetary award for pain and suffering, the practice of counsel explaining to the jury a formula and suggested figures to arrive at a suggested amount of money for pain and suffering transcends the bounds of proper argument. *Caley v. Manicke*, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

Illinois lawyers have for several years introduced the per diem concept to juries at the inception of personal injury cases, consumating their advocacy with a breakdown to the minute and hour in final argument. Taught to master this technique[1] and motivated by higher verdicts, lawyers found an economic sting to this decision.[2] The strong dissent of Justice Dove in the Appellate Court and the imbroglio stirred by this issue in neighboring jurisdictions prompted the Illinois Supreme Court to grant a certificate of importance to consider whether the scope of proper jury argument permits the use of such formulae in assessing damages for pain and suffering. In a twenty-eight word sentence the court put an end to this highly successful trial technique in Illinois. The court sized up the arguments pro and con. It selected two of the most solid arguments for permission of the technique, then hacked these away in a remarkable elliptical and ambivalent apology of the jury system. "It begs the question to say that the jury needs to be guided by some reasonable and practical consideration."[3] Although the court rose above a slavish repetition, it was provided an arsenal of argument in support of its decision by recent rulings of five neighboring courts. A review of the reasoning of these courts juxtaposed with the reasons of those which have considered and decided to permit mathematical formulations in final argument will bring the issue to focus.

Elemental in trial technique is the rule that argument to the jury should be limited to the facts; that testimony should not be first delivered in the closing argument.[4] The pivot of the court's reasoning in *Botta v. Brunner*[5] is that there is no basis in the evidence for converting pain and suffering into units of money and that suggestion by counsel transcends

[1] "This is the key: You must break up the 30 year 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 with the seconds and minutes rather than at the other end of the thirty years. You cannot stand in front of a jury and say, 'Here is a man horribly injured, permanently disabled, who will suffer excruciating pain for the rest of his life, he is entitled to a verdict of $225,000!' You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years. 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 have achieved your result of an award approaching adequacy at $225,000." BELLI, THE MORE ADEQUATE AWARD (1951).

[2] The National Association of Claimant's Compensation Attorneys recognized the relation between per diem argument and larger verdicts. It has filed Amicus Curiae briefs in several of the recent cases involving the question of the use of a formula.

[3] Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d 206, 208 (1962).

[4] Insurance Co. v. Sides, 279 S.W. 2d 114 (Texas Ct. of Appeals, 1955).

[5] 26 N.J. 82, 138 A. 2d 713 (1958). The formula suggested was for *past* pain and suffering.

allowable limits of inference from the evidence.[6] The New Jersey court was consistent in its logic, for it went beyond the immediate issue to bar plaintiff's counsel from suggesting even a *total* monetary valuation for pain and suffering. In the instant case the Illinois court forbids the breakdown of pain and suffering into units of money per unit of time, but it specifies that the suggestion of a total figure, "less misleading," is not improper.[7] The resulting tangle of logic is exposed by Justice Solfisburg in his dissent.[8] Several courts have found the subjective nature of pain and suffering irreconcilable with the neat precision of arithmetical calculation.[9] The Illinois court holds pain and suffering, because it has no commercial value, is best measured by "a subjective process which is easier to comprehend than define."[10] The court warns of another pitfall—that if plaintiff's counsel may use per diem calculation, defense counsel must also be permitted to do so. This process, says the court, will only compound the confusion for the jury.[11] The court here appears to have given to the jury with one hand and taken with the other, for shortly before, in refuting the "blind guess" theory, the court said that it does not take such a "dim view" of the jury's reasoning processes. What the court is saying impliedly is that the traditional criterion for measure of pain and

[6] Justice Dove in the Illinois Appellate Court bottomed his dissent on this conviction. "[S]uch per diem argument is neither suggested by any evidence in the record nor does such an argument fall within the accepted bounds of advocacy." Caley v. Manicke, 29 Ill. App. 2d 323, 348, 173 N.E. 2d 209, 220 (1961). In reversing the Appellate Court the Illinois Supreme Court did not rely on this point.

[7] Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d 206 (1962). Statement of the total amount sued for is approved in several jurisdictions: Alabama: Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956); Missouri: Dean v. Wabash R. Co., 229 Mo. 425, 129 S.W. 953 (1910); New Hampshire: Saunders v. Boston & M.R.R., 77 N.H. 381, 92 Atl. 546 (1914); New York: Haley v. Hockey, 103 N.Y.S. 2d 717 (1950); Oklahoma: Coca Cola Bottling Co. v. Black, 186 Okl. 596, 99 P. 2d 891 (1940).

[8] Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d 206, 210 (1962). In Yates v. Wenk, 363 Mich. 311, 109 N.W. 2d 828 (1961), on the issue of a per diem formula used to compute damages for pain and suffering the court held: "The same speculative quality which exists in a lawyer's estimate of money value of a day's pain and suffering exists likewise in plaintiff's ad damnum clause and in the jury verdict to the extent that they allow for pain and suffering. Michigan permits plaintiff's claim as set forth in the ad damnum clause to be placed before the jury. . . . We see little merit in forbidding lawyers to try to help in that difficult task." The court added that the influence practices on a jury by the per diem argument of plaintiff's counsel would ordinarily be countervailed by counsel for the defense. *Id.* at 831. See also, Louisville & N. R. Co. v. Mattingly, 339 S.W. 2d 155 (Ky., 1960).

[9] Bostwick v. Pittsburgh R. Co., 255 Pa. 387, 100 Atl. 123 (1917); Gorczyca v. New York, N.H. & H. R. Co., 141 Conn. 701, 109 A. 2d 589 (1954).

[10] All courts seem to agree that no witness, expert or otherwise, may offer his opinion on the question of what constitutes reasonable compensation for future pain and suffering. McCormick, Evidence 26 (1954).

[11] Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d 206 (1962).

suffering—a fair and reasonable compensation determined by the sound discretion of the jury—is the best.[12] This conclusion must spring from a belief that if plaintiff's counsel is permitted to present a mathematical formula calculated on a daily or other fixed basis he invades the province of the jury.[13] The Illinois court disallows such formulation even for illustration. "The contention that the court's instruction would dispel their use by the jury as evidence ignores human nature."[14] This observation rings inconsistent in the same decision in which the court places its trust so firmly in the cognative prowess of the jury. The court leaves the jury to assess damages "at a sum of money which you may find and believe from the evidence will fairly, reasonably and adequately compensate him (plaintiff) for the injuries sustained." The court would concede that money never will adequately compensate for a broken head or a sightless eye. It would agree that the translation of pain and suffering into dollars and cents is most difficult. It sends the jury out, nevertheless, with only a vague outline, denying it the tools and the experience of the court to manage the evaluation. In prohibiting "counsels' partisan conscience and judgment" and opposing counsels' equally partisan rebuttal, the court, seems to pay little heed to the purpose of the litigation. The plaintiff sues for money; the defendant defends against an award of money. The jury must reduce human injury to a money "equivalent." Justice Solfisburg cautions that the very absence of an objective standard of evaluating pain and suffering should make us reluctant to circumscribe counsel in analyzing this issue.

Although trial attorneys would not argue the rule against introduction of new facts in summary, they still would point up a corollary.

> While it is the duty of the court to see to it that no advantage is obtained by improper remarks of counsel made to or in the presence of the jury, still counsel cannot be put into a straight-jacket when making their arguments, but within reasonable bounds of propriety, must be left to their own discretion.[15]

Proponents of the per diem argument contend that the primary purpose of argument by counsel is to enlighten the jury.[16] Admitting, indeed, pointing out, that the argument is not evidence in itself, they state that a juror is unable to ascertain properly what such an amorphous item as

[12] Cooley v. Crispino, 21 Conn. Supp. 150, 147 A. 2d 497 (1958).

[13] Certified T.V. and Appliance Co. v. Harington, 201 Va. 109, 109 S.E. 2d 126 (1959).

[14] In Minnesota counsel may suggest a formula as a means by which the jury may arrive at a verdict without supplying a specific time unit or per unit amount. Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W. 2d 30 (1956).

[15] Goldstein v. Smiley, 168 Ill. 438, 444, 48 N.E. 203, *affirming* 68 Ill. App. 49 (1897); Nusbaum v. Pennsylvania R. Co., 340 Ill. App. 131, 90 N.E. 2d 921 (1950).

[16] 88 C.J.S. Trial § 169 (1955).

future pain and suffering is worth; that he needs some criterion to assist him in arriving at a fair award. They assert that in suggesting a formula they are merely drawing reasonable inference from the testimony.[17]

> But the very absence of a fixed rule or standard for any monetary admeasurement of pain and suffering as an element of damages supplies a reason why counsel for the parties should be allotted, on this item of damages, their entitled latitude in argument—to comment on the evidence, its nature and effect, and to note all proper inferences which reasonably may spring from the evidence adduced.[18]

Trial lawyers question why the ordinary power of the courts to offer a remittitur or a new trial is now considered inadequate. In *Imperial Oil v. Drlik*[19] the court recognized and admitted the difficulty a jury encounters in assessing damages for pain and suffering. It held that in the determination of the amount of the award a juror 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." The court submitted that it was more concerned that justice be done, consistent with the evidence, than with the modus operandi. Further, personal injury lawyers contend that the court can make abundantly clear in instructing the jury that counsel's per diem argument is purely a suggestion and that defendant's counsel is free to use a formula to calculate his suggested allowance for pain and suffering.[20] It is better to allow a concrete formula to be presented to give the jury some basis to arrive at a verdict rather risk too high a verdict, which can be cured by remittitur, than to leave the jurors to fix a damage figure "by guess and by golly."[21] These cases recognize the lack of precision connected with assessment of damages, but just as uncertainty of damages is no bar to recovery, so impossibility of mathe-

[17] True, counsel in argument to the jury may not argue as fact that which is not in the evidence. Counsel may, however, comment on all proper inferences from the evidence and draw conclusions from the evidence based upon his own reasoning. Mc.aney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958). Within reasonable limits counsel may argue to the jury the amount of damages it should return when that argument is based on the extent of the injuries the evidence shows the plaintiff has suffered. Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W. 2d 637 (1944), *aff'd,* 300 Ky. 817, 190 S.W.2d 562 (1945). See also: 53 Am. Jur. TRIAL §§ 46–65 (1945).

[18] Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. 1959); Continental Bus Sys. v. Toombs, 325 S.W. 2d 153 (Tex. 1959).

[19] 234 F. 2d 4 (6th Cir.), *cert. denied,* 352 U.S. 941 (1956).

[20] In one situation recounted in 6 Defense L.J. 142 (1959) counsel for defendant was able to turn the tables on the plaintiff. He illustrated to the jury how the sum demanded by the plaintiff, if invested at a 4% return, would yield plaintiff an annual income for life in excess of his normal earnings and the principal would remain untouched.

[21] Texas & N.O. R.Co. v. Flowers, 336 S.W. 2d 907, 916 (Tex. Civ. App. 1960).

matical accuracy should not restrain counsel from suggesting a per diem formula.

The Illinois court's evaluation of the propriety of the per diem suggestion and the *carte blanche*[22] given the jury in *Caley* reflects in relief the overriding problem of adopting some decisive criterion for the appraisal of pain and suffering awards. Lacking a definitive standard, the difficulty in control and direction of the jury award for pain and suffering creates a hesitancy in the court to accept a procedural device which has been shown to appreciably increase the award. Confronted by cries of illogic and favoritism from plaintiffs and by the furor stirred by defendants and special interests[23] over the ever increasing money verdicts in personal injury cases, the Illinois Supreme Court made its decision with wisdom and foresight. Neither in *stare decisis* nor in cold logic is the court's distinction found, its decision justified. In *Caley* the court appears to have looked beyond the present controversy to enunciate sub rosa, a policy which will forestall and pre-empt the movement for legislative control looming in the wake of high personal injury verdicts and settlements.[24] From a practical standpoint the court's conservatism, its reliance on the jury system on which Anglo-American law has traditionally relied, is a healthy conservatism. On one hand the decision is limited in scope, leaving room for resort by attorneys to other methods of argument. On the other hand the court had recognized and avoided the spector of a legislative ukase limiting or schedulizing awards in personal injury cases.[25] Illinois lawyers, at the court's direction, have suffered a setback which will likely prove a blessing. The decision finds its great merit in protecting the exclusiveness of judicial control of the officers of the court at trial; to permit per diem argument might only enhance the possibility of straitening legislative regulation.

[22] "Jurors are as familiar with pain and suffering and with money as are counsel. We are of the opinion that an impartial jury which has been properly informed by the evidence and the court's instructions will, by the exercise of its conscience and sound judgment, be better able to determine reasonable compensation than it would if it were subjected to counsel's partisan conscience and judgment on the matter." Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d at 209.

[23] See 20 INS. COUNSEL J. 14 (1953), Article.

[24] See Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27 (1954) advocating legislative price-setting for pain and suffering.

[25] Perhaps there is no more lucid example of just how far a formula can influence a jury to rely on it than the case of Seaboard Airline R. Co. v. Braddock, 96 So. 2d 127 (Fla. 1957), where the jury returned a verdict of $248,439, the exact dollar amount as computed by the plaintiff's counsel during his closing argument. It is this probable impact on the jury which prompted the court in the *Botta* case to say: "If the day ever arrives when that type of speculation becomes accepted by the courts generally as a fair mathematical factor for use by juries, proponents of the view that motor vehicle accident injury claims should be treated on some basis similar to workmen's compensation, will have grist for their mill." Botta v. Brunner, 26 N.J. 82, 138 A.2d at 723 (1958).

Inevitably, the court's opinion will be sounded in search of admissible phrasing of a money-oriented argument. The opinion does not seem to preclude a breakdown of the alleged duration of past and future suffering into small time units and, where the evidence warrants, the introduction of life and expectancy tables.[26] A decision of this nature will generate research and an invigorating resourcefulness by those disgruntled attorneys whose interests are, for the moment, somewhat displaced. Novel and theatrical uses of demonstrative evidence will possibly ensue, fostering the "hollywood" trial which courts uniformly eschew. It would seem, however, that in the balance may be the ultimate integrity of judicial control of judicial affairs.

[26] Presumably counsel is free to use a per diem basis to calculate loss of future earnings in his final argument, provided there has been testimony as to plaintiff's past earnings and his diminished earning capacity. The prohibition in *Caley* appears to be limited to the amount demanded for pain and suffering.

EVIDENCE—DECLARATION AGAINST PENAL INTEREST EXCEPTION TO HEARSAY RULE

McGraw brought a negligence action against one Horn to recover damages for injuries that were sustained in an automobile accident. McGraw alleged she was a passenger in an automobile driven by one Smith, and that she was injured as a result of Horn's negligent operation of his automobile. At the trial a police officer was permitted to testify as to a conversation with Smith which took place in a hospital one-half hour after the accident. The officer testified that Smith told him he did not see Horn's car nor the Yield Right of Way sign. The jury returned a verdict for the defendant and the plaintiff appealed. On appeal it was urged by the plaintiff that the testimony of the officer was pure hearsay and came within no exception to the hearsay rule; that the officer's testimony did not fall within the declaration against interest exception because the statement by Smith could only have subjected Smith to penal or civil liability. The Indiana Appellate Court agreed with the contentions of the plaintiff and reversed the decision of the trial court. The Court held that to render such extrajudicial statements admissible, they must be against the pecuniary or proprietary interest of the declarant and not merely such as would subject him to criminal action or civil suit. *McGraw v. Horn*, 183 N.E. 2d 206 (Ind. 1962).

The decision of the Court recognized the well-established rule that any statement that is a narration of a past event by a person who is not a witness in the case constitutes hearsay.[1] Although the hearsay rule is deeply

[1] State v. Labbee, 134 Wash. 55, 234 Pac. 1049 (1925).