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James D. Ghiardi
Marquette University Law School, james.ghiardi@marquette.edu

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ARGUMENT TO THE JURY ON DAMAGE QUESTION SHOULD BE LIMITED

By

JAMES D. GHIARDI

Milwaukee, Wisconsin

Closing arugments are recognized as an important, integral part of the civil jury trial. At all stages of this adversary proceeding, advocacy on one's position is demanded, but the philosophy which teaches

> . . . how to wring from an impressed and sympathetic jury every last nickel that can be obtained for the plaintiff, and how to build up and magnify whatever case he may have until the recovery reaches or exceeds the absolute maximum which any court can conceivably allow to stand[1]

has no place in American jurisprudence. The purpose of jury argument is to fairly comment on the evidence in the light most favorable to the client; it is not to present an unrestrained contest which plays upon the sympathies and prejudices of the jurors.

> The inherent weakness of the jury system lies precisely in these psychological factors within the jury itself. Sympathy, bias, credulity, gullibility, susceptibility to impression, to a good speech, a good display and a good show, lead all too often to the wrong verdict.[2]

Attainment of the true goal of argument to the jury is possible if argument on the damage question is reasonably restrained. Unfortunately, some existing prejudicial practices in argument are seriously undermining the impartiality of the civil jury system itself.

The objectives of the damage award are to compensate the injured party, to make him whole and to burden the tortfeasor with the loss. In ascertaining the amount of the award, the compensation theory should prevail and all evidence which relates to the loss should be permitted in order that the jury be appraised of the complete picture relating to the losses sustained so as to arrive at a fair verdict. In this light, certain rules of evidence must be re-examined. Argument to the jury on the damage question should be reasonably restrained.

Mention should also be made of practices which condition the jury to the large verdict prior to the summation. These include advance newspaper publicity of the *ad damnum* clause which alerts prospective jurors to the amount sought by the plaintiff; voir dire examinations[3] where each prospective juror is questioned concerning his feelings in awarding a large verdict, often specifying the amount in the pleadings; and, opening statements where counsel uses the blackboard to present a breakdown of the award sought prior to the introduction of any evidence.

Reasonable Restraint

After the evidence has been presented the final act of the program to prejudicially condition the juror begins—argument as to the amount of

[1] Prosser, Book Review of *Modern Trials,* 43 Cal. L. Rev. 557 (1955).

[2] *Id.* at 558.

[3] See Annot., 82 A.L.R.2d 1420 (1962) for a discussion of the propriety of inquiry on voir dire as to the amount of damages asked.

damages which plaintiff should recover. Some of the more widely used tactics[4] are as follows:

A. "Do Unto Others" or Golden Rule

In this argument the juror is asked to put himself in the shoes of the plaintiff and consider what he would expect the plaintiff to award him. There are a number of ways in which this argument is employed. Questions are worded "How much would you expect to endure plaintiff's pain and suffering?" and "What would you want your husband (wife, son, daughter) to receive if he were in plaintiff's position?" or simply "Put yourself in plaintiff's shoes." There are those who quote the biblical phrase, chapter and verse. A variation of this type of argument is to ask the selling price of a limb, an eye, or the cost to counsel of inflicting a similar injury on a juror.

Such comments are not made upon the evidence, but are solely an appeal to the sympathies and subjective interest of the jurors.[5] The weight of authority holds Golden Rule arguments to be improper.[6] Improper play on the juries' emotions should not be permitted in the trial where truth is the finding sought.

B. Ipsa dixit Argument

This type of argument involves the asserted, but unproven, statement by counsel of the value of the case. An attorney employing this argument circumvents the rule that the court will not permit expert testimony, or the testimony of the party himself, as to the value of plaintiff's pain and suffering. Counsel, as the "unsworn witness,"[7] tells the jury he has seen many personal injury cases, numerous injured plaintiffs, therefore, he should know how much this case is worth. His express purpose, of course, is to help the jury arrive at the proper figure. His motive is to have the jury rely on his estimates of the value of the case and return a verdict similar to these estimates.

Allowance of this type of argument results in counsel becoming a witness in his own case. Because of the contingent fee system, the lawyer owns a part of the case in which his valuation is being imposed on a jury often unaware of counsel's personal interest.

> When an unsworn witness urges his own financial interests to a jury under the guise of sympathetic aid to the unfortunate, the law should impose rigid restrictions upon the expression by him of suggestions and opinions. on the subject of monetary awards to be made.[8]

[4] A tactic not separately discussed is demonstrative evidence which has its place in closing arguments. However, it should be restricted to comment on the evidence, and such items as Belli's prosthesis unwrapped in closing argument and handed to each juror are clearly prejudicial tactics. For a discussion of "The Misuse of Demonstrative Evidence" see Milwid, 1961 Ins. Counsel J. 435.

[5] Griffin, "Prejudicial Elements in Plaintiff's Argument for Damages," 11 Defense L. J. 1, 4 (1962).

[6] Annot., 70 A.L.R.2d 935 (1960) "Prejudicial effect of counsel's argument in civil case, urging jurors to place themselves in the position of litigant or to allow such recovery as they would wish if in the same position."

[7] The term is the topic of Paul Ahlers' article in 1960 Ins. Counsel J. 257.

[8] Ahlers, *supra* note 7, at 260.

C. "Per diem"—"Unit of Time"—"Mathematical Formula"

The technique whereby plaintiff's counsel supplies an arbitrary figure to a unit of suffering, per year, per day, per hour, minute or second is involved here. This figure is projected from the time of the accident, multiplied by expectancy tables and results in the figure counsel asserts will be needed to compensate for pain and suffering, past, present, and future.

This type of argument is condemned by the courts as purely speculative, arbitrary and unfounded in evidence. The jury is as capable as counsel in assessing a value to pain and suffering and should not be prejudiced by an imaginative figure of the attorney. Much has been written in condemnation of this procedure.[9] The well reasoned *Botta* v. *Brunner* decision[10] sets forth the rule which should be applied—

> As has been indicated, pain and suffering have no known dimensions, mathematical or financial. There is no exact correspondence between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this reason, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation.[11]

D. Irrelevant Comparisons

Another device which has been used by ingenious plaintiff's counsel is comment by way of comparison on the amount of earnings of celebrities, such as movie personalities or baseball players, and of business executives. Comment upon our sense of values is referred to in connection with the selling price of various articles, such as paintings or prize animals.

The impropriety of this practice is obvious. Such figures have no basis in evidence, are irrelevant to the case and are clearly prejudicial to the defendant. A number of appellate courts have condemned such practice.[12] There should be universal condemnation of this technique designed solely to produce a high verdict.

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[9] Monograph-"Pain and Suffering in Dollars on a Unit-of-Times Basis" published by The Defense Research Institute, Inc. (1962); 60 A.L.R.2d 1347 (1958); 11 Defense L. J. 1 (1962). On July 12, 1965, the United States Court of Appeals, 5th Circuit, in Johnson v. Colglazier, condemned the *per diem* argument stating at p. 10 of the opinion:

> The argument in favor of the 'unit of time' agrument, that it is proper for counsel in his argument before a jury to suggest answers based upon his view of the evidence and to explain the method by which he reached his conclusion, and that it would seem that suggesting some concrete formula, although it must be admitted to be purely a suggestion, in order to give the jury some basis to arrive at its verdict is preferable to leaving it entirely at sea to fix a damage figure en masse by guesswork, *is nothing more than an attempt to mislead the jury by taking it down a back alley.* (Emphasis added).

[10] 26 N. J. 82, 138 A.2d 713 (1958).

[11] *Id.* at 720.

[12] Colfer v. Ballantyne, 89 Ariz. 408, 363 P.2d 588, 591 (1961) (Marlene Dietrich's salary); Faught v. Washam, (Mo. 1959) 329 S.W.2d 588, 601 (Stan Musial's and Ted Williams' salaries); and Phillips Petroleum Co. v. Burkett, (Tex. Civ. App. 1960) 337 S.W.2d 856, 859 (slander suit against Jack Paar).

PRESENTATION OF COMPLETE PICTURE

Under the basic theory of tort law, the injured party is entitled to be placed in the same monetary position as he was in prior to the incident which gave rise to the action. However, in assessing this position, the jury is often given a misleading and one-sided view of the loss, resulting in over compensation of the plaintiff and an unwarranted burden on the defendant.

A. Collateral Source Rule

The so-called "rule" provides that defendant cannot mitigate the amount of compensatory damages by establishing that the plaintiff did not suffer the amount of the injury alleged, if the diminution resulted from the act of a third party.[13] A number of reasons have been advanced for sustaining the rule including: defendant should not "benefit;" benefits are a necessary supplement; benefits are based on consideration; intent of donor; computation difficult; and legislation precludes mitigation.[14]

The rule has caused inconsistency with respect to insurance provisions, employment and welfare benefits, and gratuitous services. The answers to the above arguments, stated briefly are: if anyone is entitled to a windfall why not the defendant who most needs it; the rule is not the best way to solve the compensation problem; the consideration is for a contract and plaintiff should not be allowed to recover more than his bargain; the intent of the donor is not to provide a windfall for the plaintiff; computation is no more difficult than other aspects of trial which require expert testimony and tables of computation to aid the jury; and legislation should be revised as contrary to public policy where mitigation is not allowed.[15]

The collateral source rule should be replaced by a general rule which restricts damages to a compensable level. In any event, the jury should be aware of other sources which compensate the injured party.

B. Tax Aspects

The general rule is that income tax exemptions should not be taken into consideration in fixing damages in personal injury or death actions.[16] The Internal Revenue Code provides that compensatory damages are not included in gross income.[17] Courts have generally held that it is improper argument for counsel to advise the jury of this savings to plaintiff. Some reasons given include: the matter is not pertinent to the damage issue, but is a matter between the plaintiff and the taxing authority; the amount involved is too conjectural to be considered; or the consideration would be unduly complicating and confusing.

Surely the modern civil jury which has the sophistication to determine

[13] McCormick, Damages § 90 (1935).

[14] 77 Harv. L. R. 741 (1964).

[15] *Ibid.* See also, Peckinpaugh, "An Analysis of the Collateral Source Rule," 32 Ins. Counsel J. 32 (1965).

[16] 63 A.L.R.2d 1393 (1959).

[17] 26 U. S. C. A. Sec. 104.

fact questions involving complicated trade processes, or engineering standards, or accounting under business contracts, is capable, with the aid of the court, counsel and perhaps expert witnesses, of ascertaining the amount which compensates, but does not reward, plaintiff for injury. The solution would be to provide a standard jury instruction which would inform the jury as to the full picture.[18]

C. Remarriage

In wrongful death actions, counsel is ordinarily not permitted to comment upon plaintiff's remarriage or the possibility thereof in argument to the jury. The arguments advanced in support of the position are: (1) the damages are determinable as of decedent's death; and (2) mitigation would result in highly speculative recovery.[19]

The English and Michigan courts have taken the position that not only will remarriage of the plaintiff be considered, but also the possibility of remarriage.[20] This position seems more consistent with the compensation theory of damages. To allow recovery for loss of support and maintenance when there is in fact no continuing loss, provides an added windfall for plaintiff where there is no justification for seeking compensation from the defendant.

D. Future Pain and Suffering

Counsel is permitted to calculate future losses of wages and earnings as well as future pain and suffering based on plaintiff's expectancy. The award of the former losses is reduced to present value based upon the earning power of such lump sum award. However, courts have failed to reduce the latter type awards to present value,[21] hence counsel is permitted to "argue" for a value per year. Where this is allowed, the court should instruct the jury with respect to reduction of the award to present worth.[22]

Conclusion

The integrity of the courtroom must be preserved. The inherent weaknesses of the jury system must not be preyed upon to achieve over compensation of plaintiff. The role of lawyers must be restricted to *true advocacy*. Rules of evidence must allow counsel, in arguing his client's cause, to present all the facts which would mitigate, as well as enhance, the damage recovery. At all times it must be remembered that

> . . . lawyers are not hucksters nor is the courtroom a market place where pain and anguish are put on display at a demanded price.[23]

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[18] Stripp and Rowland, "The Cautionary Instruction on Income Taxes: Current Developments," 31 Ins. Counsel J. 471 (1964).

[19] 87 A.L.R.2d 252 (1963).

[20] *Ibid.*

[21] See e.g., Texas & Pacific R.R. Co. v. Buckles, (5th Cir. 1956) 232 F.2d 257; Chicago & N. W. R.R. Co. v. Candler, (8th Cir. 1922) 283 F. 881; and 60 A.L.R.2d 1347, 1352 (1958).

[22] Griffin, *supra* note 5, at 21.

[23] Ahlers, *supra* note 7, at 620.