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Recent Decisions: Code Practice: Pain and Suffering: Per Injury Argument

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> to put any quantity of self-serving *ex parte* statements before the jury, by simply employing an expert to give a few days' treatment to the patient, and then putting the expert on the stand in this dual capacity of expert and attending physician.[19]

The minority view is stated in the *Ritter* case and seems to be the main reason why these courts so hold:

> The rationale of the *Kath* rule regards statements made by the patient to the physician as hearsay and in the nature of self-serving declarations. *Kath* allows testimony concerning such statements where made to a physician while undergoing treatment, but excludes the testimony where dual motivation is established. This distinction is unrealistic. If the testimony on statements made in one context is admissible then logically such testimony should also be admissible where the statements are made in the other context.
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> As long as a patient goes to a physician with the *bona fide* purpose of receiving treatment, the basic desire of a patient to get well, we believe, will generally motivate him to tell the truth and this is sufficient reason to allow the attending physician to testify about statements made to him which may touch on his history and his subjective symptoms. Cross examination and argument are available to opposing counsel as a means of testing such testimony.[20]

The Wisconsin Supreme Court in rendering this decision has done nothing more than to recognize that which it has side-stepped up to now. That is, to be able to tell the difference between when a man goes to the doctor for treatment only and when he goes for the dual purpose of treatment and testimony is for all practical purposes nearly impossible.

The court now must assume that the patient will not lie to a physician when his basic desire is to get well. This holding also means that the court relies on two checks to defeat the admission of untruthful statements: First, the belief that the physician will know if and when the patient is lying about pain or sickness, from his vast store of medical knowledge; secondly, the system of cross-examination which will glean out the inconsistencies in any testimony of a doubtful nature.[21]

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Code Practice: Pain and Suffering: Per Injury Argument: In *Doolittle v. Western States Mut. Ins. Co.*[1] the defendant's intestate collided with a vehicle in which the plaintiff, Myra Doolittle, was a

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[19] 121 Wis. at 512, 99 N.W. at 220.
[20] 24 Wis. 2d at 165, 128 N.W. 2d at 443.
[21] Felkl v. Classified Risk Ins. Corp., 24 Wis. 2d 595, 129 N.W. 2d 222 (1964); the supreme court affirmed its holdings in the *Ritter* case.
[1] 24 Wis. 2d 135, 128 N.W. 2d 403 (1964).

passenger. The trial court found the defendant 100 per cent negligent and awarded the plaintiff $45,000 for pain and suffering and personal injuries. Counsel for the plaintiff, in their initial oral argument before the jury, asked the jury several questions such as "Is blank dollars too much for plaintiff's fractured ribs?"[2] and further went on to argue the following dollar amounts:

Injury to right leg	$12,500
Injury to left arm	7,500
Injury to head and scar	8,000
Fractured ribs	10,000
Heart injury	10,000
Hammer toes	2,500
Total	$50,500

Counsel for the defendant objected to this in motions after verdict. Upon appeal the Supreme Court of Wisconsin, after briefly reviewing the decision in *Affett v. Milwaukee & Suburban Transp. Corp.*,[3] held that "where there are two or more distinct items of injury . . . it is proper for the trial court to permit argument to the jury whereby a separate sum is urged upon the jury for each of such injuries."[4]

It has always been the rule and custom in American jury trials to confine argument to the issues, but reasonable latitude has generally been accorded counsel in applying the rule.[5] Counsel may draw inferences, even if contrary to other evidence; but counsel has not been allowed to "draw inferences where there are no grounds for them in the evidence."[6]

The basis of the problem of the instant case can be found in cases dealing with suggestion of dollar value for pain and suffering on a unit of time basis in closing argument.[7] The landmark case in this area

[2] Record, p. 34; Brief for Appellant p. 102.
[3] 11 Wis. 2d 604, 106 N.W. 2d 274 (1960), 86 A.L.R. 2d 227.
[4] 24 Wis. 2d at 143, 128 N.W. 2d at 407.
[5] 53 AM. JUR. *Trial* § 463 (1945).
[6] 88 C.J.S. *Trial* § 181 (1955).
[7] Cases not permitting such argument include: Chicago & N.W. Ry. v. Candler, 283 Fed. 881 (8th Cir. 1922); Imperial Oil Ltd. v. Drlik, 234 F. 2d 4 (6th Cir. 1956); Vaughan v. Magee, 218 Fed. 630 (3d Cir. 1914); Bowers v. Pennsylvania R.R., 182 F. Supp. 756 (D.Del. 1960); Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958); Stein v. Meyer, 150 F. Supp. 365 (E.D. Pa. 1957); Seffert v. Los Angeles Transit Lines, 15 Cal. Rptr. 161, 364 P. 2d 337 (1961); Roedder v. Rowley, 28 Cal. 2d 353 (1946); Gorczyca v. New York, N. H. & H. Ry., 141 Conn. 701, 109 A. 2d 589 (1954); Cooley v. Crispino, 21 Conn. Supp. 150, 147 A. 2d 497 (1958); Henne v. Balick, 51 Del. 369, 146 A. 2d 394 (1958); Franco v. Fujimoto, 390 P. 2d 740 (Hawaii 1964); Caley v. Manicke, 24 Ill. 2d 390, 182 N.E. 2d 206 (1962); Jenson v. Elgin, J. & E. Ry., 24 Ill. 2d 383, 182 N.E. 2d 211 (1962); Caylor v. Atchison, T. & S. F. Ry., 190 Kan. 261, 374 P. 2d 53 (1962); Faught v. Washam, 329 S.W. 2d 588 (Mo. 1959); Moore v. Ready Mixed Concrete Co., 329 S.W. 2d 14 (Mo. 1959); Chamberlain v. Palmer Lumber, Inc., 104 N.H. 221, 183 A. 2d 906 (1962); Duguay v. Gelinas, 104 N.H. 182, 182 A. 2d 451 (1962); Mathis v. Atchison, T. & S.F. Ry., 61 N.M. 330, 300 P. 2d 483 (1956); King v. Railway

is *Botta v. Brunner*,[8] in which counsel for the plaintiff argued before the jury: "Would 50c an hour for that type of suffering be too high?"[9] The court there held that the sole reason for the use of a mathematical formula argument such as this was to influence the jury by bringing to their attention matters not supported by the evidence.[10]

In the Wisconsin counterpart to the *Botta* case, *Affett v. Milwaukee & Suburban Transp. Corp.*,[11] counsel for the plaintiff set forth on the blackboard figures by which counsel mathematically computed a claimed pain and suffering award by multiplying an arbitrary $1.50 per day by plaintiff's life expectancy. The court said: "The use of a mathematical formula is pure speculation by counsel which is not supported by the

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Express Agency, 107 N.W. 2d 509 (N.D. 1961); Hall v. Booth, 178 N.E. 2d 619 (Ohio 1961); Boop v. Baltimore & O. Ry., 118 Ohio App. 171, 193 N.E. 2d 714 (1963); Clark v. Essex Wire Corp., 361 Pa. 60, 63 A. 2d 35 (1949); Stassun v. Chapin, 324 Pa. 125, 188 Atl. 111 (1936); Herb v. Hallowell, 304 Pa. 128, 154 Atl. 582 (1931); Bullock v. Chester & Darby Telford Road Co., 270 Pa. 295, 113 Atl. 379 (1921); Joyce v. Smith, 269 Pa. 439, 112 Atl. 549 (1921); Ruby v. Casello, 201 A. 2d 219 (Pa. Super. 1964); Harper v. Bolton, 229 S.C. 541, 124 S.E. 2d 54 (1962); Indemnity Ins. Co. of North America v. Odom, 227 S.C. 167, 116 S.E. 2d 22 (1960); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E. 2d 126 (1959); Crum v. Ward, 122 S.E. 2d 18 (W. Va. 1961); Armstead v. Holbert, 122 S.E. 2d 43 (W. Va. 1961).

Cases permitting such argument include: Drlik v. Imperial Oil Ltd., 141 F. Supp. 388 (N.D. Ohio 1955), *aff'd*, 23 F. 2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956); Pennsylvania R.R. v. McKinley, 288 F. 2d 262 (6th Cir. 1961); Bowers v. Pennsylvania R.R., 281 F. 2d 953 (3d Cir. 1960); Evening Star Newspaper Co. v. Gray, 179 A. 2d 377 (D.D.C. 1962); Petition of Gulf Corp., 172 F. Supp. 911 (S.N.N.Y. 1959); Newbury v. Vogel, 379 P. 2d 811 (Cal. 1963); Seffert v. Los Angeles Transit Lines, 15 Cal. Rptr. 161, 364 P. 2d 337, 56 Cal. 2d 498 (1961); Braddock v. Seaboard Air Line Ry., 96 So. 2d 127 (Fla. 1957); Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Andrews v. Condosa, 97 So. 2d 43 (Fla. 1957); Seaboard Air Line Ry. v. Braddock, 80 So. 2d 662 (Fla. 1955); Evansville City Coach Lines v. Atherton, 133 Ind. App. 304, 179 N.E. 2d 293 (1962); Indiana Gas & Elec. Co. v. Bone, 180 N.E. 2d 375 (Ind. App. 1962); Corkery v. Greenberg, 114 N.W. 2d 327 (Iowa 1962); Louisville & N. R.R. v. Mattingly, 339 S.W. 2d 155 (Ky. 1960); Little v. Hughes, 136 So. 2d 448 (La. 1961); Lebow v. Reichel, 231 Md. 421, 190 A. 2d 642 (1963); Eastern Shore Pub. Serv. Co. v. Corbett, 180 A. 2d 681 (Md. 1962); Eastern Shore Pub. Serv. Co. v. Corbett, 227 Md. 411, 177 A. 2d 701 (1962); Yates v. Wenk, 363 Mich. 311, 109 N.W. 2d 828 (1961); Flaherty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W. 2d 633 (1958); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W. 2d 30 (1957); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Four County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954), 44 A.L.R. 2d 1191; Johnson v. Brown, 75 Nev. 437, 345 P. 2d 754 (1959); Missouri-Kansas-Texas R.R. v. Jones, 354 P. 2d 415 (Okla. 1960); Edwards v. Lawton, 136 S.E. 2d 708 (S.C. 1964); Continental Bus System v. Toombs, 325 S.W. 2d 153 (Tex. 1959); Mid-Tex Dev. Co. v. McJunkin, 369 S.W. 2d 788 (Tex. Civ. App. 1963); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P. 2d 575 (1960); Jones v. Hogan, 56 Wash. 2d 23, 351 P. 2d 153 (1960).

See generally 17 ARK. L. REV. 94 (1963); 11 CLEV.-MAR. L. REV. 495 (1962); 12 DEPAUL L. REV. 317 (1963); 14 U. FLA. L. REV. 189 (1962); 1962 U. ILL. L.F. 269; 11 KAN. L. REV. 170 (1963); 22 LA. L. REV. 461 (1962); 16 OKLA. L. REV. 468 (1963); 36 TEMP. L. Q. 98 (1963); 15 VAND. L. REV. 1303 (1962); 2 WASHBURN L. J. 171 (1963); Annot., 38 A.L.R. 2d 1396 (1954); Annot., 60 A.L.R. 2d 1347 (1958); Annot., 86 A.L.R. 2d 239 (1962).

[8] 26 N.J. 82, 138 A. 2d 713 (1958).

[9] 138 A. 2d at 718.

[10] *Id.* at 723.

[11] 11 Wis. 2d 604, 106 N.W. 2d 274 (1960).

evidence and presents matters that do not appear in the record."[12] The court went on to say:

> The basic reasoning behind the use of any mathematical formula is not so much to aid, or even to persuade, the jury as it is to ultimately establish a fixed standard to displace the jury's concept of what is a fair and reasonable amount to compensate for pain and suffering sustained as shown by the evidence in the light of common knowledge and experience possessed by the jury of the nature of pain and suffering and the value of money.[13]

In a later Wisconsin case, counsel argued to the jury in attempting to establish a figure on damages: "I am asking you to consider $25,000."[14] The court expressly refused to broaden the scope of the *Affett* case. "In our opinion, it is consistent with the concept of 'reasonable latitude in argument' that counsel be permitted to urge upon the jurors such figures as he considers to be fairly supported by the evidence."[15] As dicta in the case the court said that it would approve of the principle that broad latitude should be given to counsel in suggesting a lump sum to the jury, but went on to say that "it does not follow that appeals to passion may be made in connection with damages."[16]

It seems evident that if the rationale of these cases is based on the speculative element involved in argument not based on the evidence, then this trilogy of cases is totally unresolvable. Regardless of whether counsel argues for lump sum, per diem, or per injury, the amount asked for is speculative, based upon little more than counsel's fancy. It would therefore appear that the speculative element per se does not constitute an inherent evil unless the speculative element is so constituted that it loses its character of mere argument and becomes obscured by a deceptive facade of mathematical certainty. The evil of per diem argument lies in its tendency to hide its speculative basis in the intricacies of mathematical factoring, suggesting that the issue turns on the correctness of the mathematics. The jury may easily be induced thereby to divert its attention from the propriety of the unit amount suggested and simply to approve counsel's mathematics. Thus, the objection is to the "short circuiting" of the jury's normal thinking process; this is what is mean by the phrase "invading the province of the jury."

If counsel in the *Doolittle* case, rather than dividing the sum into separate amounts for each injury, would have reduced it to a definite amount for each injured cubic inch on the plaintiff's body, it is predictable that the court would have condemned the process. In terms of its effect upon jury deliberations, the argument employed in *Affett* dif-

[12] *Id.* at 612, 106 N.W. 2d at 279.
[13] *Id.* at 613, 106 N.W. 2d at 279.
[14] Halstead v. Kosnar, 18 Wis. 2d 348, 350, 118 N.W. 2d 864, 866 (1963).
[15] *Id.* at 352, 118 N.W. 2d at 866.
[16] *Ibid.*

fered only in that it was slightly more sophisticated in its selection of a basis for the computation.

What the court is trying to protect, it seems, is the jury's prerogative to use their own mental processes, not too strongly impaired by argument based on speculation beyond the record, to determine what the plaintiff is entitled to recover. Arguments which tend to "short circuit" these mental processes through the use of formulas which distract the jury stand on the same ground as passion or prejudice, and are equivolently disallowed. The court ably pointed this out in the *Affett* case when it said that the only purpose in using the mathematical formula argument was to "displace the jury's concept of what is a fair and reasonable amount to compensate for pain and suffering."[17]

The author feels that the proper distinction was made by the Illinois court in *Caley v. Manicke*,[18] which involved a fact situation similar to the *Affett* and *Botta* cases. The court there stated in relation to the monetary award of the jury for pain and suffering: "This determination like many others that a jury must make is left to its conscience and judgment. A determination reached by a speculative process which is easier to comprehend than to define and upon which just and wise men may disagree does not indicate that it is a 'blind guess.' "[19] The Illinois court also held in a case[20] similar to Wisconsin's *Halstead* case that a lump sum argument to the jury is proper. The court reaffirmed this position in the *Caley* case, saying: "[W]e consider such practice far less misleading than the argument of a mathematical formula. . . ."[21] This is essentially what the Wisconsin court has held.

LOUIS J. ANDREW, JR.

Dometic Relations: Domicile of Military Personnel: The plaintiff in *Lauterbach v. Lauterbach*[1] was a member of the United States Air Force who had been stationed in Alaska under military orders since July, 1960. Nine months previous to the bringing of a divorce action in an Alaska court, he had filed a complaint for a divorce in Pennsylvania, the state of his marriage. The defendant wife contended that by so doing, the plaintiff had shown a lack of intent to treat Alaska as his permanent residence. The Alaska statutes provide that

> no person may commence an action for divorce until he has been a resident of the state for at least one year before the commencement of the action.[2]

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[17] 11 Wis. 2d at 613, 106 N.W. 2d at 279.
[18] 24 Ill. 2d 390, 182 N.E. 2d 206 (1962).
[19] *Id.* at 393, 182 N.E. 2d at 208.
[20] Graham v. Mattoon City R.R., 234 Ill. 483, 84 N.E. 1070 (1909).
[21] Caley v. Manicke, *supra* note 18, at 394, 182 N.E. 2d at 209.
[1] 392 P. 2d 24 (Alaska 1964).
[2] ALASKA STAT. § 09.55.140 (1964).