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Practice: Use of a Perdiem Formula for Pain and Suffering in Argument to the Jury

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RECENT DECISIONS

Practice—Use of a Perdiem Formula for Pain and Suffering in Argument to the Jury—Plaintiff, a fifty year old woman, in attempting to board defendant's bus, caught her arm in the closing bus door. At the trial of the action testimony was offered to show that plaintiff had incurred $348 for medical treatment and had missed 6½ days of work. A physician testified that in addition plaintiff had a permanent injury to her arm and any use thereof would cause her pain for the duration of her life. Actuarial tables were introduced to show that plaintiff had a life expectancy of 20 years.

In the closing argument to the jury, plaintiff's counsel was permitted, over defendant's objection, to use a blackboard to display and suggest to the jury a mathematical formula for the computation of damages for future pain and suffering. Counsel calculated this at $1.50 per day for the remainder of plaintiff's life. The jury determined that there was liability and returned a verdict of $13,500. *Held:* It was error for the court to permit the suggestion of a perdiem basis for determination of a lump sum figure to compensate plaintiff for future pain and suffering. Such argument had no basis in the evidence. The question of damages for pain and suffering belongs strictly to the jury, although counsel may suggest a lump sum amount which they believe the evidence will fairly and reasonably support. *Affett v. Milwaukee & Suburban Transport Corp.*, 11 Wis. 2d 604, 106 N.W. 2d 274 (1960).

Historically, Wisconsin has held that closing arguments are to be confined to the facts in evidence or what may properly be inferred from the evidence;[1] that inflammatory remarks of counsel which tend to influence the jury's thinking are prejudicial;[2] and that any mathematical approach to the subject of damages for pain and suffering is objectionable.[3] But the question of use of a mathematical formula to calculate future pain and suffering had never before presented itself in Wisconsin.

From an analysis of this area of the law it appears that the distinction between oral and graphic means of employing the device of a formula is largely superficial. It is the suggestion of a formula to

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[1] Brown v. Swineford, 44 Wis. 282 (1878).

[2] Taylor v. Chicago & Northwestern Rwy., 103 Wis. 27, 79 N.W. 17 (1899) wherein counsel argued: ". . . no amount of money could place her back where she was before receiving the injuries complained of, . . . that if this courtroom was filled with gold, that could not and would not pay it. . . ."

[3] Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940), but *cf.*, Otto v. Milwaukee Northern Rwy. Co., 148 Wis. 54, 134 N.W. 157 (1912); Wasicek v. M. Carpenter Baking Co., 179 Wis. 274, 191 N.W. 503 (1923); and Blaisdell v. Allstate Insurance Co., 1 Wis. 2d 19, 82 N.W. 2d 886 (1957), in all of which the Supreme Court indulged in mathematical computations to calculate proper jury awards for past pain and suffering.

which objection is generally made although visualizing the formula may tend to make a slightly stronger impression on the juror.

The first known instance of a blackboard or chart being used to display items of damages was in 1950,[4] the same year in which an oral per-diem suggestion for evaluating future pain and suffering was first approved.[5] The first case combining these elements was *4-County Electric Power Association v. Clardy*,[6] where counsel displayed a 5' by 4' chart which listed plaintiff's age, life expectancy, loss of future earnings and future pain and suffering calculated at $5 per day for the rest of his life. The jury awarded $75,000 to plaintiff. The Supreme Court of Mississippi said the use of the chart in opening and closing arguments was proper:

> All of the figures on the chart, except those with reference to pain, suffering and mental anguish, were supported by some evidence in the record. . . . [Plaintiff's Counsel] would have a right to state orally and in detail what damages he expected to prove and he would have the right to take a pencil, list those items of damages, and show that sheet of paper to the jury in the opening statements and arguments.[7]

Two justices dissented on this issue, stating that the determination of damages for pain and suffering was a matter exclusively within the province of the jury.

Since 1954, several states have adopted the attitude of the Mississippi Court and allowed the visual display of a per-diem formula in the closing arguments, with various limitations being placed on this rule. In *Ratner v. Arrington*,[8] the Florida Supreme Court noted that there was a split of authority on the question and cautiously decided to leave the propriety of this type of argument to the discretion of the trial judge. Other courts have permitted the display of a per-diem formula to determine pain and suffering for illustrative purposes only;[9] in another court it was dependent on the circum-

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[4] Kimbell v. Noel, 228 S.W. 2d 980 (Tex. 1950). The court noted that the display had little if any effect on the jury since they awarded less than one-half the amount urged by counsel on the blackboard, a highly dubious conclusion at best.

[5] J. D. Wright & Son Truck Line v. Chandler, 231 S.W. 2d 786 (Tex. 1950). In one isolated earlier case, Bullock v. Chester & Darby Telford Road Co., 270 Pa. 295, 113 Atl. 379 (1921), counsel attempted to use a per-diem basis for loss of future earnings but apparently did too fine a job of advocacy and found his argument condemned when the jury came in with an award identical to the amount he had suggested.

[6] 221 Miss. 403, 73 So. 2d 144 (1954).

[7] *Id.* at 151.

[8] 111 So. 2d 82 (Fla. 1959).

[9] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W. 2d 30 (1956). This appears to be too fine a line of distinction to be workable.

stances of the case.[10] In another instance, a display was admissible when the award on its face was not excessive.[11]

All courts do seem to agree on at least two points: that no expert testimony can be offered on the question of what will constitute reasonable compensation for future pain and suffering;[12] and that the calculations, diagrams, and words placed on a blackboard are not to be given the weight of evidence by the jury.[13] Most courts require an instruction by the trial judge to this effect, although it is highly dubious that such an instruction has its desired effect on the jury.

In 1958, the New Jersey Supreme Court handed down the now famous "Botta rule,"[14] which has been cited ever since as the leading authority opposed to use of formulae for calculating pain and suffering. The *Botta* case differs from the *Affet* case in that no blackboard or other graphic device was used and a formula was only suggested for *past* pain and suffering. Still, it represents the most exhaustive resume of cases in the general area.

Since the *Botta* decision, several courts have dealt with the problem, as indeed, it has become common procedure for counsel whose client has a permanent discomfort, to employ a formula in his argument wherever the trial judge will permit it. So far as can be ascertained, five states, including Wisconsin, have since adopted generally the views expressed in *Botta*,[15] and five states have held contra to that decision.[16] A few states which had earlier permitted the use of a per-diem formula have reaffirmed their positions since the *Botta* case.[17]

Proponents of both points of view have advanced many reasons for espousing their cause. Those in favor of use of a formula argue

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[10] Jones v. Hogan, — Wash —. 351 P. 2d 153 (1960). The court here said, "We neither approve nor disapprove of the argument [for or against formulae] in general. Each case must depend upon its own circumstances." 351 P. 2d at 159.

[11] Braddock v. Seaboard Airline Rwy. Co., 80 So. 2d 662 (Fla. 1955). This "end justifies the means" attitude seems to be the converse of the Wisconsin position as set forth in the *Affett* case, i.e., that the per-diem argument is *per se* improper, because it has no basis in the evidence, regardless of the size of the verdict.

[12] McCormick, Evidence, 26 (1954).

[13] 88 C.J.S. *Trial* §375 (1955).

[14] After Botta v. Brunner, 26 N.J. 82, 138 A. 2d 713 (1958).

[15] In addition to the *Affett* case, see: Certified T.V. and Appliance Co. v. Harrington, 201 Va. 109, 109 S.E. 2d 126 (1959); Cooley v. Crispino, 21 Conn. Sup. 150, 147 A. 2d 497 (1958); Henne v. Balick, 51 Del. 369, 146 A. 2d 394 (1958); Faught v. Washam, 329 S.W. 2d 588 (Mo. 1959).

[16] Olsen v. Preferred Risk Mutual Ins. Co., 11 Utah 2d 23, 354 P. 2d 575 (1960); Jones v. Hogan — Wash —, 351 P. 2d 153 (1960); Johnson v. Brown, — Nev. —, 345 P. 2d 754 (1959); McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Louisville & Nashville Railroad Co. v. Mattingly, 339 S.W. 2d 155 (Ky. 1960).

[17] Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959), Continental Bus System v. Toombs, 325 S.W. 2d 153 (Texas, 1959).

that "the primary purpose of argument by counsel is to enlighten the jury."[18] Although admitting that the argument is not evidence in itself, they state that a juror is unable to ascertain properly for himself what such a nebulous item as future pain and suffering is worth and that he needs some guideposts (i.e., formulae) to assist him in arriving at a fair award. They insist that in so suggesting a formula they are merely drawing reasonable inferences from the testimony.[19]

Other arguments advanced by plaintiffs' attorneys are that the trial judge can, in his instructions to the jury, dispell any exaggerated ideas they may have acquired by pointing out to them that the suggested formula is not in the evidence, and that defendant's counsel is also free to use a formula to calculate his suggested allowance for pain and suffering.[20] Also it has been argued that the trial judge may still offer a remittitur or new trial if he considers the award excessive, basing such considerations on the evidence.

Arguments against the formula are based largely on the fact that the jury is to make its determination while considering only the evidence and that to allow an attorney to suggest a method of arriving at an amount to be awarded is the equivalent of the attorney giving testimony. There is no evidentiary basis for converting pain and suffering to a monetary amount since no witness, expert or otherwise, can ever express his subjective opinion of its value.[21] Justice Hallows, in the *Affett* case, submits that it is for the jury to determine damages for pain and suffering after considering the "nature, intensity and extent as disclosed by the evidence."[22] The Justice also points out that a suggestion of a formula by plaintiff's counsel emasculates the role of the jury whose function is to arrive at the amount of compensatory damages in light of its own knowl-

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[18] 88 C.J.S. *Trial* §169 (1955).

[19] The position is eloquently stated in the Ratner decision: "In so holding [that the use of the formula is proper] we give due regard to the proposition that 'pain and suffering have no market price'. 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." Ratner v. Arrington, *supra* note 8, at 89.

[20] In one situation, outlined in 6 DEFENSE L. J. 142 (1959), Counsel for defendant was able to turn the tables on the plaintiff by use of mathematics. He illustrated to the jury how the sum demanded by plaintiff, if invested conservatively at 4% return, would yield plaintiff an annual income for life in excess of his normal earnings and the principal would remain intact and go to his heirs.

[21] 7 WIGMORE EVIDENCE §1944 (3rd ed. 1940).

[22] Affett v. Milwaukee & Suburban Transport Corp., 11 Wis. 2d 604, 609, 106 N.W. 2d 274, 277.

edge and experience as to the nature of pain and suffering and the value of money.[23]

Perhaps there is no more lucid example of just how far a formula can go to influence the jury to rely on it than the case of *Seaboard Airline Railroad Co. v. Braddock*.[24] There the jury returned a verdict in the amount of $248,439, the exact dollar amount as computed by the plaintiff's counsel on a placard displayed to the jury during his closing argument.[25]

As has been stated, the Wisconsin position has long been that the court cannot suggest any dollar amount or range of figures to the jury to be awarded plaintiff for his pain and suffering;[26] the idea being that such suggestions are neither evidence nor proper inferences from the evidence. It would appear from the cases that this limitation also applied to counsel.[27] The Wisconsin Court, in the *Affett* decision, purports to uphold this position. Yet, a new standard may have been established.

> Counsel for both the plaintiff and the defendant may make an argumentative suggestion in summation from the evidence of a *lump sum dollar amount* for pain and suffering which they believe the evidence will fairly and reasonably support. Counsel may not argue such amount was arrived at or explained by a mathematical formula or on a per-day, per-month, or on any other time-segment basis.[28] [Emphasis added.]

With this statement the court clearly establishes the limits within which counsel must contain his arguments. He may tell the jury that he feels the evidence warrants an award of $10,000 for future discomfort to his client, but he cannot state how he arrived at this figure.[29] This distinction is easily made, but the rub occurs when the reason for the rule is understood. Counsel cannot suggest an amount to be allowed for one day or one hour of pain

[23] *Id.* at 613, 106 N.W. 2d at 279.

[24] 96 So. 2d 127 (Fla. 1957). The lower court, however, was reversed on the question of damages when the Florida Supreme Court noted the identicalness of the award and amount requested and the fact that there were several overlapping items in the chart shown to the jury.

[25] It is this probable impact on the jury which prompted the New Jersey 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, *supra* note 14, at 723.

[26] Otto v. Milwaukee Northern Rwy. Co., 148 Wis. 54, 134 N.W. 157 (1912).

[27] Larson v. Hanson, 207 Wis. 485, 242 N.W. 184 (1932).

[28] Affett v. Milwaukee & Suburban Transport Corp., *supra* note 22, at 614, 106 N.W. 2d at 280 (1960).

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

because there is nothing in the evidence to support this figure. Surely there is no greater basis in the evidence for supporting a suggested amount to be allowed for pain over a longer time segment than the life expectancy of the plaintiff.

The only manner in which one can justify this anomaly is by recognition of the simple fact that juries do appear to return higher, often excessive, verdicts in cases where suggestion of a per-diem formula is permitted than in those cases where no such suggestion was employed.[30] Viewed in this light, the distinction gains at least practical validity, but the failure of the court to present its case in that vein leaves doubt as to whether the distinction was intended and if it will survive. In any event, it is now clear that a suggested award, couched in non-inflammatory terms, is permissible. While the *Affett* decision is technically a defeat for plaintiff's counsel in Wisconsin, it may have given them more leeway than they legally enjoyed in the past.

LOUIS W. STAUDENMAIER, JR.

Constitutional Law — Congressional Investigations — First Amendment Limitations on the Power to Punish for Contempt for Refusing to Answer before a Congressional Committee: The petitioner was summoned to testify before a committee of the House Committee on Un-American Activities at a hearing in Atlanta, Georgia. The subcommittee was investigating Communist colonization and infiltration of industry in the South. After being sworn in and stating his name, the petitioner refused to answer any further questions on the ground that his rights under the First Amendment would thereby be violated. As a result of his refusal to answer the subcommittee, he was convicted for contempt of Congress and this conviction was affirmed by the Court of Appeals. The Supreme Court of the United States granted certiorari and upheld the conviction. The basis of the decision was that the First Amendment claims raised by the petitioner were identical to those advanced in the *Barenblatt*[1] decision and upon the authority of that case could not prevail. *Wilkinson v. United States,* ——U.S.——, 5 L. Edd. 2d 633 (1961).[2]

[30] The National Association of Claimant's Compensation Attorneys recognizes this distinction and has filed Amicus Curiae briefs in several recent cases, including the *Affett* case, involving the question of use of a formula.

[1] Barenblatt v. United States, 360 U. S. 109 (1959).

[2] The specific question that Wilkinson was convicted for refusing to answer was: "Mr. Wilkinson, are you now a member of the Communist Party?" Wilkinson v. United States, — U.S. —, 5L. Ed. 2d 633, 639 (1961). The conviction was assaulted from several different directions before the Supreme Court: 1) the subcommittee was without authority to interrogate him, because their purpose was to investigate opposition to the committee and to harass and expose him, 2) the question under inquiry by the subcommittee, which he refused to answer, was not pertinent to the investigation, 3) the