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NO SINGLE DECISION in recent years has had wider repercussions nor greater impact upon trial advocacy than the decision in *Botta v. Brunner*.[1] It is probable that within the next few years every state jurisdiction will review the philosophy of the *Botta* case, and come to a conclusion that will control the method of final argument, in each state, on all the intangible elements of damages.

The *Botta* decision arose from the trial of a minor lawsuit, involving routine and limited injuries. Plaintiff's counsel in summation began a line of argument asking that his client's pain be valued at a suggested dollar rate per day. The trial court stopped this argument on defense objection, for reasons not specified in the high court opinion. Plaintiff won a small verdict, and appealed on the grounds of inadequacy. The appellate court held that it was an abuse of discretion to forbid the per diem argument. The Supreme Court of New Jersey sustained the reversal because of other errors in the trial, but handed down an advisory opinion imposing severe limits on the style and content of final argument. New Jersey adopted in toto the Pennsylvania practice under which it is misconduct to mention the amount of the prayer, or to send the petition to the jury, or to suggest any figure as being the value of the whole case. The court further held, for reasons analyzed later herein, that it was improper for counsel to suggest any value for pain and suffering, or to compute compensation for human misery upon an hourly, daily, or annual basis.

The *Botta* decision was hailed as the pinnacle of enlightened reason by the majority segment of the defense bar. It has been castigated by the plaintiff's bar as an artificial and unjust barrier to adequate compensation. About half of the state Supreme Courts have now handed down decisions on the extent to which the *Botta* doctrine will be imposed upon the future trial practice in the state involved. There has been no uniform trend. Some

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1 26 N. J. 82, 138 A. 2d 713 (1958).

states have adopted *Botta* in its entirety. Others have permitted argument on the total amount demanded, but restrict the method of arriving at the total by prohibiting a mathematical calculation of values per day, per week, or per year. The majority of states rejecting *Botta* have still retained a broad discretionary power in the trial court to keep the argument within the bounds of the evidence.

The balance sheet of decisions up to the present writing puts thirteen states on the *Botta* side of the ledger. Delaware early adopted *Botta* in *Henne v. Ballick.*[2] Virginia followed in *Certified T. V. & Appliance Co. v. Harrington,*[3] but later modified the doctrine to permit counsel to argue the total ad damnum in closing, and to state the total prayer in opening.[4] Missouri approved the doctrine in *Faught v. Washam,*[5] but limited it in *Goldstein v. Fendelman,*[6] where it was said that counsel could suggest the total value he claimed would be fair for the injuries. Wisconsin prohibited mathematical computations of damages for pain and suffering in *Affet v. Milwaukee & Suburban Transport Co.*[7] Connecticut should be counted in the *Botta* camp.[8]

Pennsylvania has long followed the rule that no specific amount can ever be mentioned to the jury, and furnished the basis for the New Jersey court's decision as noted above.[9] West Virginia accepted the *Botta* per diem restrictions in *Crum v. Ward.*[10] North Dakota followed in *King v. Railway Express.*[11]

In the past year New Hampshire, South Carolina, Kansas and Illinois have adopted the *Botta* restrictions against arguing specific amounts for specific units of time that pain was endured.[12]

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[2] 51 Del. 369, 146 A. 2d 394 (1958).

[3] 201 Va. 109, 109 S. E. 2d 126 (1959).

[4] Phillips v. Fulgham, 203 Va. 543, 125 S. E. 2d 835 (1962).

[5] 329 S. W. 2d 588 (Mo. 1959).

[6] 336 S. W. 2d 661 (Mo. 1961).

[7] 11 Wis. 2d 604, 106 N. W. 2d 274 (1960).

[8] Gorczyca v. N. Y., N. H. and H. R. Co., 141 Conn. 701, 109 A. 2d 589 (1954); also see, Cooley v. Crispino, 21 Conn. Sup. 150, 147 A. 2d 497 (1958).

[9] Stassum v. Chapin, 324 Pa. 125, 188 A. 111 (1936); Herb v. Hallowell, 304 Pa. 128, 154 A. 582 (1931).

[10] 122 S. E. 2d 18 (W. Va. 1961).

[11] 107 N. W. 2d 509 (N. D. 1961).

[12] Duguay v. Gelinas, 182 A. 2d 451 (N. H. 1962); Harper v. Bolton, 239 S. C. 541, 124 S. E. 2d 54 (1962); Caylor v. Atchison, T. & S. F. Ry. Co., 374 P. 2d 53 (Kan. 1962); Carey v. Manicke, 24 Ill. 2d 390, 182 N. E. 2d 206 (1962).

The states which have rejected the philosophy of *Botta v. Brunner* have held, in general, that counsel may suggest a valuation for pain and suffering for illustrative purposes, but the defense is entitled to an instruction that such amounts are only counsel's suggestions and in no way binding upon the jury. The argument may be controlled by the court, in its discretion, if it is not based upon the evidence. In order to support an argument for daily compensation there must be some evidence of daily pain or daily disability. Within these limits Minnesota has rejected the *Botta* principles in *Flaherty v. Minneapolis & St. Louis R. Co.*[13] Nevada rejected the doctrine in *Johnson v. Brown,*[14] and Washington rejected it in *Jones v. Hogan.*[15]

Florida is aligned against *Botta.*[16] Texas described the *Botta* restriction as the "by guess and by golly" rule in a colorful opinion in *Texas & N. O. R. Co. v. Flowers.*[17] Indiana is counted against *Botta.*[18] Alabama has permitted the calculation of unit damages for pain both before and after *Botta.*[19] Kentucky ruled both before and after *Botta* that counsel could argue value without artificial restrictions.[20] Mississippi also passed on the question in advance of *Botta,* and has not changed its rejection of the rule.[21] The same observation would apply to New York, which permitted mathematical calculations in *Haley v. Hockey.*[22]

Haycock v. Christie,[23] and *Evening Star Newspaper Co. v. Gray,*[24] determined the rule for the District of Columbia, rejecting *Botta.* Utah permits per diem arguments,[25] and so does

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[13] 251 Minn. 345, 87 N. W. 2d 633 (1958).

[14] 75 Nev. 437, 345 P. 2d 754 (1959).

[15] 56 Wash. 2d 902, 351 P. 2d 153 (1960).

[16] Seaboard Airline R. Co. v. Braddock, 96 So. 2d 127 (Fla. 1957); Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. App. 1959).

[17] 336 S. W. 2d 907 (Tex. Civ. App. 1960).

[18] Kindler v. Edwards, 126 Ind. App. 261, 130 N. E. 2d 491 (1955); Evansville City Coach Lines v. Atherton, 179 N. E. 2d 293 (Ind. App. 1962).

[19] Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1957); McLancy v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958).

[20] Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S. W. 2d 637 (1944); Louisville & N. R. Co. v. Mattingly, 339 S. W. 2d 155 (Ky. 1960).

[21] Four County Elec. Power Assoc. v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957).

[22] 199 Misc. 512, 103 N. Y. S. 2d 717 (Sup. Ct. 1950).

[23] 249 F. 2d 501 (D. C. 1957).

[24] 179 A. 2d 377 (D. C. 1962).

[25] Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P. 2d 575 (1960).

Louisiana.[26] Oklahoma ruled on the question in 1960, going anti-*Botta*.[27] Michigan examined the doctrine in 1961, and rejected it as spurious.[28]

In the past year Maryland, Iowa and Montana have all reviewed the conflicting arguments and have aligned themselves with the majority view in opposition to the *Botta* restraints.[29] Ohio has dicta both ways, in *Miller v. Loy*,[30] and in *Hall v. Booth*.[31] The leading case in the Sixth Circuit originated in Ohio, and rejected *Botta*.[32]

So much for the tally of the cases. What are the merits of the arguments given in support of *Botta*? One argument advanced was that pain has no market price, and no standard of value, so that the suggestion of a value gives "loose rein to sympathy and caprice." The concept that pain has no trading mart is a threadbare truism, but the jury is required to assess a value, and counsel's historical function has been to argue all the issues which the jury is called upon to decide. The Texas court, in the *Flowers* case, gave a pungent answer to this argument, saying:

> 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 guess and by golly." [33]

Another argument advanced in the *Botta* opinion is that no expert witness could be permitted to put a valuation or price upon pain, from which it is supposed to follow that no argument on valuation can be made, for want of evidence. This line of reasoning is based upon the fallacious assumption that final argument deals only with record evidence. Thoughtful reflection will demonstrate that a great part of any argument deals with abstract concepts as to which no evidence is introduced, nor can be introduced.

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[26] Little v. Hughes, 136 So. 2d 448 (La. App. 1961).

[27] Mo., K. T. R. R. v. Jones, 354 P. 2d 415 (Okla. 1960).

[28] Yates v. Went, 363 Mich. 311, 109 N. W. 2d 828 (1961).

[29] Eastern Shore Public Service Co. v. Corbett, 227 Md. 411, 180 A. 2d 681 (1962); Corkery v. Greenberg, 114 N. W. 2d 327, (Iowa 1962); Wyant v. Dunn, 368 P. 2d 917 (Mont. 1962).

[30] 101 Ohio App. 405, 140 N. E. 2d 38 (1956).

[31] 178 N. E. 2d 619 (Ohio App. 1961).

[32] McKinley v. Penna. R. Co., 288 F. 2d 262 (6th Cir., Ohio 1961).

[33] *Supra* n. 17 at 916.

Let us analyze the familiar argument of the defense that recovery should be denied because of contributory negligence. The entire concept is an abstraction. Negligence is the failure to exercise the degree of care which would ordinarily be exercised by the ordinarily and reasonably prudent person under like circumstances. No trial court would permit a sociologist, anthropologist, or psychologist to testify just what a mythical prudent person would be expected to do under the given circumstances. The jury determines what constitutes "ordinary prudence" in light of its experience, but from time immemorial trial counsel have been allowed to suggest what an ordinarily careful man would do under the facts in evidence.

The same observation applies to the concept of proximate cause. The difference between direct cause and remote cause, between intervening and superseding cause, between efficient producing cause and mere condition, are differences in abstract concepts. The fact that expert witnesses do not testify as to causal relation between negligent conduct and later impact does not put the matter beyond the bounds of argument.

In the same way, trial advocates are permitted to argue the weight of the evidence, and the credibility of witnesses, even though the issue of the preponderance of evidence involves the abstract concept of quality of the evidence, and credibility is not scientifically tested.

A further argument made in support of the *Botta* rule is that pain and suffering cannot be calculated by a "mathematical formula." It unduly dignifies simple addition or primary multiplication to call it a "mathematical formula." It is beyond dispute that if a plaintiff had been treated by eight different physicians, who had submitted eight different bills, the jury would be expected to add the eight bills in order to obtain the total medical expense. We would suppose that counsel could add the eight bills on a blackboard to arrive at the total figure during argument, and could ask the jury to include the total figure in the verdict. The damage item of lost wages is usually proved by establishing the monthly salary or wage the victim had earned, and multiplying this figure by the number of months of work lost by reason of injury. This kind of mathematical formula, loss per month times total months of loss, is conceded to be proper. Obviously, then, there can be no valid objection to the use of multiplication and addition *per se*. The objection to

the use of any arithmetic in calculating the value of pain must be based on the proposition that pain has no ascertainable price, and therefore can have no value per annum, and therefore no value can be multiplied by a number representing the length of time the suffering will endure. The only uncertainty in the formula relates to the value assigned as fair compensation for pain. The length of time that the pain has endured, or will endure, can be established to the requisite degree of probability. Medical evidence that the disability is a painful one, that it is permanent and incurable and will continue to cause suffering as the years go by, coupled with proof of his expectancy of life, will establish the multipliers for future suffering.

A further point is made, in the New Jersey opinion, that individuals vary so greatly in susceptibility to pain and in capacity to withstand it that it would be "futile to undertake to attach a price tag to each level or plateau . . . "

This sounds more like an argument that suffering should not be compensated at all than a reason for restricting argument as to the fair extent of compensation. It is the theory of damages that full compensation should be given for all the pain wrongfully inflicted. Ten days of great pain should receive more in damage award than one day, and ten years of misery should be compensated at a greater value than five years. In order to produce a fair and just assessment of damages, the jury must come to some determination as to the intensity of the suffering and its duration, and must put a price in dollars upon it.

The value per day or per month may well be difficult to fix. It is no answer to the problem, however, to say that since it cannot be fixed with certainty it cannot be discussed at all. The jury must arrive at the value, and should not be deprived of the help it can get from full discussion by both sides. The court says that the "only permissible argument" respecting pain and distress "is that the amount of the award shall furnish fair and reasonable compensation." We would assume that the same rule would apply to defense counsel. This would mean that each side's argument would be limited to a simple statement that the jury ought to determine reasonable compensation in an amount that is reasonable.

A thorough debate on the issue of valuation is more likely to result in an intelligent appraisal than an unaided, unilluminated guess. It is true that pain, humiliation, disfigurement and

the other terrifying consequences of major injury cannot be precisely measured in ergs, or volts, or grams, but this lack of precision does not destroy the right of recovery, and there is no valid reason why it should destroy the right of argument. Juries have demonstrated for centuries that they possess the intelligence, and the wealth of common experience and judgment, to deal with intangibles. For example, where a young girl is badly disfigured by permanent scarring, the jury may consider what effect this will probably have on prospects for marriage.[34] In such a case no evidence can be produced as to whether the mutilating scars will prevent marriage or not, and no evidence can be produced as to the value of a future marriage or loss of marriage prospects. The damage is difficult to estimate, but this does not make it "speculative" in the eyes of the law. In the same way, damages for the "mental" torts—assault, slander, alienation, seduction, and false imprisonment—are uncertain and indefinite in amount, but juries are expected to find values in dollars to compensate for the emotional disturbance such torts involve. If damages can be given for this kind of distress of body and distress of mind, then the law can hardly say that the valuation problems are too speculative and fanciful to be talked about out loud.

There is no rule that final argument must be confined to the evidence, as *Botta* contends. The true rule is that final argument must be confined to the issues, but in the task of persuasion counsel may argue the evidence, all inferences which the evidence supports, all deductions which reason can fairly draw from the facts, and the common knowledge and experience of mankind.

There is a well established rule that counsel cannot assert as *facts* matters which have not been proved, or which have been excluded. It would follow that counsel could not argue any valuation concept for pain and suffering if there is no evidence in the record of any pain, and no evidence of any physical injury that produced suffering. Where, on the other hand, the record abounds with proof of torment, the issue of reasonable compensation for that torment is one that can and should be argued at the highest level of ability of the trial lawyer.

We would suggest that the true rationale of the *Botta* decision is the one hinted at, and quickly disclaimed in the following unusual paragraph from that opinion:

[34] Smith v. Pitts & W. R. Co., 90 F. 783 (C. C. N. D. Ohio 1898).

> May counsel, therefore, by argument, which in effect becomes testimony, suggest that such a basis is a proper one for a jury to employ? We think not. 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. But that is a subject with which we cannot now concern ourselves.[35]

The court here makes the dark and brooding prediction that the per diem argument is too effective to be endured, that it will lead to such exorbitant verdicts that the insurance industry cannot bear the burden, that insurance rates will be priced out of the market, and that a cheaper accident compensation plan will then be instituted. This is, in effect, a pronouncement that effective advocacy must be condemned simply because it is effective. It is, in reality, a stinging condemnation of the defense bar, for it assumes that defense counsel are so inept and unimaginative that they cannot devise an effective counter-argument. The New Jersey court implies as much when it says that justice cannot be administered fairly in the trial of this type of case if plaintiff's counsel is permitted to suggest a per diem valuation, because defense counsel's suggestion of a lower value would fortify the implication that pain could be evaluated on such a basis.

The short answer to this specious reasoning is that there is no magic in the per diem argument. It is no better than the persuasive ability of the advocate who makes it, and no stronger than the evidence which supports it. The per diem argument should be anticipated by the defense and blocked in the evidence. It will be a rare case, indeed, where pain must be endured every day. The defense is not powerless to prove, in most cases, that the pain is subject to exacerbation and remission, that the victim will learn to live with his disability and avoid the types of activity which produce a painful response, and that drugs and treatment will alleviate the intensity of the suffering. If more effort is made by the defense to establish that the pain will not be suffered per diem, then the per diem argument will be properly prohibited as unsupported by the proofs.

If it appears from the proofs that pain will be suffered per diem, then justice demands that it be compensated per diem.

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[35] Botta v. Brunner, *supra* n. 1 at 723.

The rate of compensation is not to be derived from plaintiff's counsel alone. The defense can argue its concept of just and reasonable recompense, and use the weapon of ridicule if plaintiff's suggestions are extravagant. It would be a sad commentary on the skill of the defense bar if the learned counsel for the utilities, railroads and insurance companies could not devise other counter-arguments to meet the thrust of per diem evaluation. There is no statistical evidence that this type of argument is so powerful in its appeal that it paralyzes reason and produces, with the magic of a talisman, unconscionable verdicts. Large verdicts come really from great injuries—not from great claims.

Such statistical evidence as exists on this subject would indicate that the *Botta* rule is designed to produce injustice. In the University of Chicago jury experiments, a tape recorded identical transcript was furnished to several juries. Some were asked to compute the compensation for each element of damages separately, and return the separate calculations. Other juries were asked to evaluate all the elements of damages in one lump sum. Professor Kalven, writing of these experiments, reported that the totals of the separately calculated elements of damage produced a larger sum than the single lump sum calculation.[36] The round, lump sum figure does not produce full and fair compensation. It tends to yield a verdict which discounts the value of each part of the whole. There is compelling force in the dissent in the *Caylor* case where the Kansas judge says:

> The concept of totality pronounced by the majority opinion has no counterpart in the world of human affairs. * * * No judge's salary is computed or paid in a lifetime lump, and there are no lifetime meals, lifetime drinks, no lifetime haircuts, nor anything else * * * . This court's logic would now force jurors to value steak by the herd, cars by the fleet, and pain by the life. Forcing jurors to think in a language they never heard of cannot be designed or expected to produce just results.
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> There is absolutely no justification for a rule which singles out one type of damage in one type of case and says that it alone is not the proper subject of adversary argument. Logic declares that stifling of discussion and analysis will not lead to intelligent verdicts.[37]

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[36] Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L. J. 158 (1958).

[37] Caylor v. Atchison, *supra* n. 12 at 64.

The vice of *Botta v. Brunner* is two-fold: first, it defames the jury system by assuming that our present juries are so emotion-ridden, unreasoning and unintelligent that they will be mesmerized into exorbitant verdicts by the device of the per diem argument; second, it degrades the adversary system of trial advocacy by assuming that this one type of argument on this one element of damages is so effective that it will transform every plaintiff's lawyer into a peerless giant of unmatched persuasive power, and render every defense advocate a silent and ineffective shadow.

There is no health in a rule of trial procedure based upon judicial fear that an automobile accident compensation plan must be prevented by an artificial restraint upon final argument designed to keep verdicts low and the insurance industry profitable. The whole purpose of a jury trial is to arrive at a just verdict in the settlement of a dispute between private citizens. Assuming that there is liability and injury, then a just verdict requires fair compensation for the injury inflicted. If the evidence shows that the pain was extraordinarily severe for a certain number of days, and then diminished to a lower level, fair compensation would require more money for the bad pain and less money for the moderate level. If the evidence shows that there is distress every day, then some allowance should be made for every day, even though it might be computed on a monthly or yearly basis. If the evidence shows that the pain varies in intensity, a fair average can be struck. The mental process of averaging daily pain is no different from the averaging of earnings, on a monthly or yearly basis, for a worker in a fluctuating or seasonal industry. A just verdict should include compensation for every element of damages proved. Pain and suffering, disfigurement, mortification, worry and anxiety, and the other intangibles that flow from a crippling injury constitute a major element of the total damage picture. Jurors know what money is, and what money values are. Jurors know what pain is, and what it does. The comparison between pain and money, to give recompense to the victim for his hurt, is made by juries in every case. If they are wise enough to discuss it in the jury room among themselves, they should be wise enough to evaluate conflicting arguments between contending counsel.

The trial of a jury case is an adversary proceeding, in which it is the duty of plaintiff's counsel to advance his client's cause

by the most vigorous and persuasive advocacy he can command. It is the duty of defense counsel, in like manner, to defend his client's interests by the most skillful persuasion he can bring to the issues, both in answering plaintiff's arguments and in developing affirmative arguments of his own. Long experience has shown that only a few restrictions on final argument are needed to safeguard fair and just results. Counsel cannot testify himself to facts not in evidence, counsel cannot vilify without cause, or inflame bigotry and prejudice, and counsel cannot appeal to the jury to ignore the law charged by the court, or to disregard the court's rulings on law or evidence. Within these general rules of fair advocacy, liberal freedom of speech has long been allowed. *American Jurisprudence* states:

> There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, arraign the conduct of parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.[38]

The language used in a very early Ohio case states it perfectly. In closing argument, "his illustrations may be as various as the resources of his genius, and his argument as full and profound as his learning can make it." [39] In short, counsel may quote Shakespeare, even though the text is not in evidence.

Faith in the wisdom of the common law jury, and belief in the value of the adversary system, must lead eventually to the abolition of the fallacious restraints imposed by the *Botta* rule.

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[38] 53 Am. Jur., Trials § 463.

[39] Southard v. Morris, 14 Ohio N. P. (n. s.) 465 (1913).