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Per Diem Argument of Pain and Suffering Damages

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DAMAGES AWARDED FOR A TORT are generally held to be that amount which will compensate the injured party for the harm suffered. Pain and suffering have no market value and it has frequently been held that there is no fixed rule or standard whereby damages for them can be measured. Pain and suffering are not capable of being exactly measured by an equivalent in money, and the question in any given case is not what it would cost to hire someone to undergo the pain alleged to have been suffered, but what should be allowed to the plaintiff in addition to the other items of damages, in consideration of suffering necessarily endured.[1]

It is obvious that pain and suffering are inherent elements in almost any bodily injury, but the problem facing plaintiff's counsel is to bring to the realization of the jury its extent in a particular case. At trial various types of demonstrative evidence are used to effect this end. In recent years attorneys have used the "mathematical formula" (or "per diem") technique in their final arguments to the jury as another means of obtaining "adequate" personal injury awards.

Use of the "Per Diem" Argument

As there is no fixed standard for measuring damages for pain and suffering, some jurisdictions now allow the use of the mathematical formula by plaintiff's counsel. A good example of a typical "per diem" argument is set forth in a recent California case.[2] In this case plaintiff's counsel used a mathematical formula for the computation of the proposed award for pain and suffering, based on 660 days (from time of accident to time of trial) at $100 per day, and 34 years (remainder of plaintiff's life) at $2,000 per year. The verdict of the jury was rendered for

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1 Goodhart v. Pennsylvania R.R., 177 Pa. 1, 35 A. 191, 55 Am. St. Rep. 705 (1896). See, Oleck, Cases on Damages, c. 21 (1962); Comment, Damages—Pain and Suffering—Use of a Mathematical Formula, 60 Mich. L. R. (5) 612 (Mar. 1962).

2 Seffert v. Los Angeles Transit Lines, 15 Cal. Rptr. 161, 364 P. 2d 337 (Cal. Sup., 1961).

$134,000, the amount asked for in the "per diem" argument. On appeal the court sustained the jury's verdict, holding that mere use of the "per diem" argument is not grounds for reversal without a showing of passion and prejudice.

The propriety of allowing the trier of the facts to resort to a mathematical basis or formula in estimating damages for pain and suffering was upheld in an admiralty case in Federal Court.[3] Here a District Judge awarded $20,400 for pain and suffering, computed on the basis of $100 per day for the first month, $50 per day for the second month, $20 per day for the next four months, and $100 per month for the balance of plaintiff's life expectancy, discounted to present value. It was held on appeal that although the method used was a novel one, it did not invalidate the award, as it was not an arbitrary or unreasonable approach to ascertaining an award for pain and suffering, and because computations in such manner do not constitute error as a matter of law.

A Mississippi court allowed the use of a chart, by plaintiff's counsel, on which was presented a computation of plaintiff's damages showing a figure of $5 per day for pain and suffering. At trial no testimony as to a monetary figure regarding pain and suffering was offered in evidence. On appeal the court said that the fact of pain and suffering had been given in evidence, and that it was permissible for counsel in his final argument to suggest the amount into which the jury might convert it in damages, even without testimony directly, during trial, as to the amount of monetary compensation.[4]

Courts which sanction the use of the "per diem" (or, mathematical) argument to a jury in personal injury actions give many reasons for allowing its use. In *Ratner v. Arrington*,[5] one of the leading cases on this issue, the court set forth the following reasons for permitting the use of the "per diem" argument:

(1) That it is necessary that the jury be guided by some reasonable and practical considerations;

(2) That a trier of the facts should not be required to determine the matter in abstract, and relegated to a blind guess;

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[3] Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4 (6 Cir. 1956), cert. den. 352 U. S. 941.

[4] Four-County Elec. P. Assn. v. Clardy, 221 Miss. 403, 73 So. 2d 144, 44 A. L. R. 2d 1191 (1954).

[5] 111 So. 2d 82, 89 (Fla. App., 1959).

(3) That the very absence of a yardstick makes the contention that counsel's suggestions of amounts mislead the jury a questionable one;

(4) The argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing, because the jury must, by that or some other reasoning process, estimate and allow an amount appropriately tailored to the particular evidence in that case as to the pain and suffering or other such element of damages;

(5) That a suggestion by counsel that evidence as to pain and suffering justifies allowance of a certain amount, in total or by per diem figures, does no more than present one method of reasoning which the trier of the facts may employ to aid him in making a reasonable and sane estimate;

(6) That such per diem arguments are not evidence and are used only as illustration and suggestion;

(7) That the claimed danger of such suggestion being mistaken for evidence is an exaggeration, and such danger, if present, can be dispelled by the court's charge; and

(8) That when counsel for one side has made such argument the opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which damages are sought.

In an address to the Mississippi Bar, Melvin M. Belli, a strong advocate of the use of the "per diem" argument, discussed its necessity as an appropriate means of enabling counsel to obtain an adequate award.[6] He pointed out that in a personal injury action the claimant's attorney must not only prove liability, but must also show the jury what an adequate award would be for his client in terms of dollars and cents. This latter requires more than seeking a verdict for a specific amount.

To demonstrate the use of the "per diem" argument, Mr. Belli pointed out that an adequate award for a man with a thirty-year life expectancy who will endure pain and suffering constantly for the rest of his life may be $225,000. To convince a jury that a plaintiff is entitled to this sum, Mr. Belli stated: "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

[6] Belli, Demonstrative Evidence and the Adequate Award, 22 Miss. L. J. 284 (1951).

cents and then multiply your absolute figure to show how you have achieved your result approaching adequacy at $225,000." [7]

Jurisdictions which have ruled upon the "per diem" argument and upheld its use include Alabama,[8] Florida,[9] Kentucky,[10] Indiana,[11] Louisiana,[12] Michigan,[13] Minnesota,[14] Mississippi,[15] Nevada,[16] Texas,[17] Utah[18] and Washington.[19] Federal courts also have been decisive in upholding the propriety of the use of the "per diem" argument.[20]

Rejection of the "Per Diem" Argument

Courts which condemn the formula technique in arguing damages to a jury base their reasoning on the fact that there is no fixed basis or mathematical rule which will serve as an accurate guide for the establishment of damage awards in personal injury actions. These courts also reason that there is no measure by which the amount of pain and suffering endured by a particular individual can be calculated. As a consequence, these jurisdictions have declared that the measure of damages for personal injury is "reasonable compensation." The determination of reasonable compensation is a question solely for the jury.

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[7] Id. at 318.

[8] Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956); McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958).

[9] Braddock v. Seaboard Air Line R.R., 80 So. 2d 662 (Fla. App., 1955); Ratner v. Arrington, *supra* n. 5.

[10] Louisville and Nashville R.R. v. Mattingly, 339 S. W. 2d 155 (Ky., 1960).

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

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

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

[14] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N. W. 2d 30 (1956). Allowed use of "per diem" formula for illustration only; no time or unit amounts can be used.

[15] Four-County Elec. P. Assn. v. Clardy, *supra* n. 4; Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957).

[16] Johnson v. Brown, 75 Nev. 437, 345 P. 2d 754 (1959).

[17] J. D. Wright and Son Truck Line v. Chandler, 231 S. W. 2d 786 (Tex. Civ. App., 1959); Continental Bus System, Inc. v. Toombs, 325 S. W. 2d 153 (Tex. Civ. App., 1959).

[18] Olsen v. Preferred Risk Mutual Insurance Co., 11 Utah 2d 23, 354 P. 2d 575 (1960). Use of "per diem" argument is discretionary with trial court with instructions that it is not evidence nor a substitute therefor.

[19] Jones v. Hogan, 56 Wash. 2d 23, 351 P. 2d 153 (1960).

[20] Imperial Oil, Ltd. v. Drlik, *supra* n. 3; Bowers v. Pennsylvania R. R., 182 F. Supp. 756, 281 F. 2d 953 (D. C., Del., 1960); Haycock v. Christie, 101 U. S. App. D. C. 409, 249 F. 2d 501 (1957).

In rejecting the argument, these courts also hold that there is no evidentiary basis for converting pain and suffering into monetary terms. They take the view that allowing the "per diem" argument amounts to allowing the attorney for the plaintiff to give testimony and to express opinions on matters not disclosed by the evidence at trial.

A leading case among those rejecting use of the argument is *Botta v. Brunner*.[21] In this case the New Jersey Supreme Court, in upholding the trial court's curtailment of the "per diem" argument by plaintiff's counsel, held that the suggestion of a specified amount per hour for the pain and suffering endured constituted an unwarranted intrusion into the domain of the jury. It is to be noted that in this case plaintiff's counsel merely posed the interrogatory to the jury of whether or not they would consider 50¢ per hour for this type of suffering to be excessive.

The jurisdictions which have rejected the "per diem" argument are Connecticut,[22] Delaware,[23] Illinois,[24] New Jersey,[25] North Dakota,[26] Virginia,[27] West Virginia[28] and Wisconsin.[29]

Some jurisdictions hold that the use of a "per diem" argument by plaintiff's counsel is error, but require that a prejudicial effect be shown in order to justify granting a new trial. These include California,[30] Kansas,[31] Missouri,[32] Ohio[33] and Oklahoma.[34]

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[21] 26 N. J. 82, 138 A. 2d 713, 60 A. L. R. 2d 1331 (1958).

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

[23] Henne v. Balick, 51 Del. 369, 146 A. 2d 394 (1958).

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

[25] Botta v. Brunner, *supra* n. 21.

[26] King v. Railway Express Agency, Inc., 107 N. W. 2d 509 (N. D., 1961).

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

[28] Crum v. Ward, 122 S. E. 2d 18 (W. Va., 1961). Held that the "per diem" argument is not based on facts nor on reasonable inferences from facts before the jury, and thus its use constitutes reversible error.

[29] Affett v. Milwaukee and Suburban Transport Corp., 11 Wis. 2d 604, 106 N. W. 2d 274 (1960).

[30] Seffert v. Los Angeles Transit Lines, *supra* n. 2.

[31] Caylor v. Atchinson, Topeka and Santa Fe Ry., 189 Kan. 210, 368 P. 2d 281 (1962).

[32] Faught v. Washam, 365 Mo. 1021, 329 S. W. 2d 588 (1959).

[33] Miller v. Loy, 101 Ohio App. 405, 140 N. E. 2d 38 (1956); Hall v. Booth, 178 N. E. 2d 619 (Ohio App., 1961).

[34] Missouri-Kansas-Texas R. R. v. Jones, 354 P. 2d 415 (Okla., 1960).

Conclusion

Use of the "per diem" argument by plaintiff's counsel is a fairly recent development in the law. Most of the decisions on this issue have been rendered since 1958. The majority of the jurisdictions which have ruled upon the point have upheld the use of this persuasive technique.

In some of the jurisdictions which have rejected the "per diem" argument, later decisions have modified the restriction upon its use. In New Jersey a 1960 decision allowed the presentation of a chart by plaintiff's counsel during his final argument to the jury. The chart showed the plaintiff's life expectancy broken down into weeks and days, but no figures were presented by unit or in total for pain and suffering.[35]

North Dakota also has rejected the argument only when it is used with unit amounts. The court, in *King v. Railway Express Agency, Inc.*[36], indicated that it would not be error to suggest that the jury determine what plaintiff's pain and suffering would be worth per day or week and then multiply this by the number of days or weeks they found from the evidence that plaintiff would suffer.

The constant battle of claimants' attorneys is for a "more adequate" award, and the value of the "per diem" argument to gain this result is easily seen. When damages for pain and suffering are broken down into a daily, weekly or monthly amount, and are multiplied by the number of days, weeks or months plaintiff is expected to suffer, the result is a much more realistic figure than a lump sum presented in argument.

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[35] Cross v. Robert E. Lamb, Inc., 60 N. J. Super. 53, 158 A. 2d 359 (1960).

[36] *Supra* n. 26.