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Damages--The Per Diem Method of Arguing Pain and Suffering

James Truman Cooper
West Virginia University College of Law

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With the increasing judicial review of police detection methods evidenced by the search and seizure and confession cases, these problems of the undercover method of police detection probably will receive more attention. Courts again will have to balance the interest in effective law enforcement and the interest in a fair opportunity for defense for the accused. The courts now seem less likely to allow what Justice Roberts termed "the reprehensible methods" used by the undercover agents. *Sorrels v. United States*, 287 U.S. 435, 453 (1932).

Forrest Hansbury Roles

Damages—The Per Diem Method of Arguing Pain and Suffering

Ps brought an action to recover damages for injuries received in an automobile accident caused by *D's* negligence. The district court allowed *Ps'* counsel to use the per diem basis in his argument to recover damages for pain and suffering. In addition, charts were used to demonstrate the per diem computations. The judgment for *Ps* was reversed on the ground that argument designed to mislead jury into believing that proper award for pain and suffering was a matter of precise determination constituted reversible error. *Johnson v. Colglazier*, 348 F.2d 420 (5th Cir. 1965).

The basic approach of the per diem method is to break down pain and suffering into units of time. The total units are calculated from *P's* expected life span, as computed from an annuity table. In instances where *P* is not expected to incur pain and suffering for the remainder of his lifetime, computations are based upon the expected duration of discomfort.

The majority in the principal case based its opinion on *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958). The New Jersey court held that in using such argument *P's* counsel was basing figures upon mere speculation without supporting evidence. Also, New Jersey courts forbid reference by counsel to the ad damnum clause in the complaint.

West Virginia's Supreme Court of Appeals in *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961), followed the New Jersey court by holding that counsel's use of the per diem argument constituted reversible error. See 65 W. VA. L. REV. 237, 238 (1962). The controversy concerning use of the per diem method is generally

familiar to other state courts. Pro-*Botta* decisions are listed in Annot., 60 A.L.R.2d 1331, 1339-44 (1958). A list of cases favorable to the per diem method may be found in the instant case at pp. 428-29. The holding in the principal case represents the majority view of the courts today.

The *Botta* decision gives the jury no guidelines for determining damages for pain and suffering. Typically, the court instructs the jury to return a reasonable sum for pain and suffering, but gives no guidelines other than the jury's common sense and sound judgment. Phillips, *Botta in Focus*, TRIAL LAW. GUIDE 69, 78 (1962). Without any criterion to evaluate damages for pain and suffering it hardly can be said that the jury properly can weigh elemental factors in arriving at their decision.

Some advocates claim that use of per diem has led to excessive verdicts. However, it is not uncommon for appellate courts to find verdicts excessive in cases where the per diem method is not used. In the latter cases the jury's only basis for formulating their verdict is conscience and common sense. In one case a \$300,000 judgment was entered for *P*. Of this sum \$207,000 represented an award for pain and suffering. Upon appeal this sum was held excessive. *Loftin v. Wilson*, 67 So. 2d 185, 190 (Fla. 1953). A Missouri case further illustrates this problem. The jury returned a verdict for *P* in the amount of \$68,000. By remittitur the trial court reduced the verdict to \$48,000. Upon appeal this amount was further reduced to \$38,000. *Beard v. Ry. Express Agency, Inc.*, 323 S.W.2d 732, 746 (Mo. 1959). Thus, there is evidence to support the proposition that a jury working by conscience and common sense alone may return excessive verdicts.

The typical unaided juror is uncertain as to what would be a proper verdict. As reported in the article by Phillips, *supra* at 80-81, a poll was conducted of jurors to determine their reasoning in reaching a sum for pain and suffering. One juror said that he gave *P* the amount of his bills because he was not told how much *P* suffered in terms of money. Another said that he was never injured and did not know what to give. The opponents of the per diem method claim that such method leads to speculation. It is apparent that jurors would be speculating as to the worth of pain and suffering if they did not have knowledge of the compensable factors of which pain and suffering are comprised.

Anti-per diem advocates claim there is no market place for pain and suffering. The West Virginia court in following the *Botta* decision stated that there is no measure by which pain and suffering can be calculated, and any effort to attach a price tag thereto must be lost in emotion, fancy and speculation. *Crum v. Ward, supra* at 429, 123 S.E.2d at 23. This proposition was rebuffed during a panel discussion at the Eighteenth Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Association. A panelist, Mr. Francis H. Hare, states that there are situations in life when pain and suffering are put on one side of the scale and money on the other. The following illustration was used. Before modern treatments were perfected, there were very few effective anaesthetics. Thus, many people died in anguish and suffering. Today there are anaesthetics which reduce or completely counteract pain and suffering. To get the benefit of such drugs, money is required. For example, a dentist may charge \$3 for a shot of novacaine which brings temporary relief of pain. Suppose a person suffers from arthritic pain and the cost of the medicine to relieve the pain is \$10 per day. It is reasonable to assume that such pain is incurable and will torment the person for the rest of his natural life. The amount of money required to alleviate the pain over his remaining lifetime easily could be ascertained by the per diem method. Mr. Hare further stated that the courtroom was the only place where he had ever seen the fact denied that freedom from pain and suffering was worth large sums of money. 25 TENN. L. REV. 220, 227-230 (1958). Thus, one method of computing damages for pain and suffering would be to calculate in dollars that sum which is the cost of medicine or treatment to alleviate it.

The per diem method has been attacked by the argument that it is a mathematical formula which gives the jury the illusion of certainty. *Botta v. Brunner, supra*. However, a true mathematical formula is exact and subject to no variation. There is no illusion of certainty in a mathematical formula. Obviously, the per diem method is not a true mathematical formula. It does not give a specific sum of money, but serves as a valuable guideline for the jury. To say that use of per diem gives to a jury an illusion of certainty is to insult their intelligence by implying that they stupidly misconstrue an attorney's illustration as a mathematical formula. Phillips, *supra* at 83-84.

In some states, including West Virginia, counsel may discuss the total sum asked for, but may not mention processes through which the jury might reason to obtain that amount. *Johnson v. Brown*, 75 Nev. 437, 345 P.2d 754 (1959); 64 W. VA. L. REV., *supra*. The purpose of counsel's argument should be to provide a reasonable means by which the jury can arrive at a lump-sum figure. To do this effectively, counsel should be able to state either what the figure ought to be or which factors would legitimately enable the jury to fix a specified or general figure. The statement of a lump sum should be no more permissive than the statement of a sum based upon a per diem basis. The whole is equal to the sum of its parts, and frequently an analysis or synthesis of individual elements leads to a more thorough understanding of the composite whole.

Advocates of the anti-per diem method claim that because there is no evidentiary basis for converting pain and suffering into monetary terms, allowing counsel to suggest the amount of the award would transcend the evidence. 12 RUTGERS L. REV. 522 (1958). No well defined limits exist which confine an advocate in his argument. Counsel is normally allowed to draw fair and reasonable inferences from the evidence. 53 AM. JUR. *Trial* § 463 (1945). To say that a verdict must be consistent with the evidence is to indicate that such verdict must be inferable from it. Because the inference drawn by the jury results in a specific sum of money, it is evident that a lawyer should be allowed to comment on such inferences from evidence. 12 RUTGERS L. REV., *supra*. Normally, if seriously injured, *P* will testify that he endures pain each and every day at all conscious times. *D*'s counsel will attempt to narrow the time for pain and suffering, and the inevitable result is to indirectly provide proof of pain on a fixed, time-segmented basis. Phillips, *supra* at 84. This time-segmented basis for pain and suffering which has been developed from evidence is easily adaptable to the per diem method. If so, the jury would be given a reasonable guideline upon which to base their verdict.

Defense counsel have voiced wide disapproval of the per diem method. *Ratner v. Arrington*, 111 So. 2d 82, 88 (Fla. 1959). However, the defense may make advantageous use of the per diem method of computing damages for pain and suffering. The defense could thus persuade a jury that *P* is requesting an excessive sum. Phillips, *supra* at 86. Counsel is free to use any argument

based upon inferences from evidence. Thus, the art of advocacy would play its rightful part in presenting a reasonable guideline to the jury.

None of the pro-*Botta* arguments are adequate to refute the value of the per diem method of ascertaining damages for pain and suffering. The instant case held that use of the per diem approach in computing damages for pain and suffering was reversible error even though the jury's verdict was not per se excessive. Judge Brown in dissenting said, ". . . if the evil feared is excessive verdicts, then the cure ought to be directed against the product, not the practice." Excessive verdicts may be cured by a trial judge's proper use of discretion in preventing unreasonable arguments based on the per diem approach. The court's instructions to the jury should clarify the fact that the per diem argument by counsel was merely for illustrative purposes and not evidence of a sum certain. The use of the per diem method in West Virginia would be of valuable assistance to juries and would take the formulation of a verdict for pain and suffering from the realm of speculation.

James Truman Cooper

Libel and Slander—The Innocent Construction Rule

As an employee of the defendant corporation, *P* was responsible for calculating the cordage of wood shipped to the corporation mill in another city. His figures compared favorably with those of the mill for a period of five years. Suddenly, for some inexplicable reason, an unusual discrepancy persisted. As a consequence *P* was discharged. At a meeting of some corporation employees, *D* made reference to the trouble involving *P* and linked it with another problem involving inventory shortage where an employee had been dismissed under a strong suspicion of stealing. Although *D* maintained that his intent was only to charge *P* with negligence or inefficiency, witnesses who knew the facts concerning the inventory shortage inferred that *D*'s statement was an accusation that *P* was guilty of stealing pulpwood. In the slander action brought by *P* against *D* and the corporation, the trial court denied *D*'s motion for judgment notwithstanding the verdict. *Held*, affirmed. Where words allegedly slanderous may be given either an innocent or a slanderous interpretation, the jury must determine the sense in