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Damages - Personal Injuries - Per Diem Argument to Be Allowed

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to the decision of the World Court will not set a precedent to be followed by other nations against whom decisions are rendered. It is almost too obvious to warrant mention that if it became a practice for countries to threaten or take retalliatory action against countries who have judges on the court or counsel arguing before the court, it's efficacy would be sharply curtailed. The judicial objectivity of the court could rapidly give way to politically inspired decisions designed to curry favor with one of the parties to a dispute. Under the present set-up there is little which can be done to prevent this type of action and it can only be hoped that other countries accepting the jurisdiction of the court will avoid using political pressures to influence the court or to retalliate for unfavorable decisions.[9]

DAMAGES – PERSONAL INJURIES – PER DIEM ARGUMENT TO BE ALLOWED

In an action for damages for bodily injuries, the trial court refused to allow plaintiff's counsel to suggest a per diem argument to the jury on the elements of past and future pain and suffering. On appeal, seeking a reversal and remand for a new trial on the issue of damages only, *Held:* Inasmuch as both the total amount claimed and the plaintiff's life expectancy may be argued in Colorado, so also may counsel illustrate the mathematical process of computing the gross amount sought for pain and suffering by reducing it to the units by which it is endured, *i.e.*, segments of time. *Newbury v. Vogel*, 15 Colo. Bar Ass'n. Adv. Sh. 11 (1963).

The propriety of using a per diem or time segment theory in counsel's closing argument was of first impression in the principal case, although it has been the subject of decision and discussion in

9 Keeping in mind Thailand's reaction to this decision the recent suggestion that World Court judges should be made world citizens rather than citizens of individual countries assumes new meaning and it is possible that in the future this will be the most desirable step to take to avoid the perils to the efficacy of the court seen by the author as a result of actions such as those taken by Thailand. The world citizenship proposal has been advanced in a preliminary draft plan for changes in the International Court of Justice submitted by Eberhard P. Deutsch to the American Bar Association Committee on Peace and Law Through United Nations.

numerous other jurisdictions.[1] The authorities appear to be divided among (1) those who hold the argument is proper;[2] (2) those who declare it to be a matter within the discretion of the trial court;[3] and (3) those who refuse to allow it.[4]

Pennsylvania has stood opposed to any argument equating dollars with pain and suffering since 1891.[5] Most of the jurisdictions, however, which have refused to allow use of the per diem argument rely on recent decisions in which the courts have held that such arguments have no foundation in evidence and invade the province of the jury.[6]

Those in opposition have also stressed that defendant's counsel, in attempting to mitigate such evaluations, necessarily lends support to plaintiff's implication that pain and suffering may be given a precise value[7] and that intensity of pain must vary.[8] It is urged that such arguments would lead to "monstrous" verdicts,[9] would mislead the jury,[10] and might, if reduced to a logical conclusion, result in evaluating pain and suffering at a "penny per heartbeat," or the like.[11] There are at least nine jurisdictions which categorically refuse to allow per diem argument on these and other grounds.[12]

Those jurisdictions which have either held the argument to be proper, or to be within the discretion of the trial court, rely heavily on *Ratner v. Arrington*,[13] a 1959 Florida case, in which the court rhetorically asked why, if it is proper to argue for a given total, is it not likewise proper to illustrate how the plaintiff arrived at that figure.

Of those jurisdictions which have considered the point, at least eleven have left it within the discretion of the trial court,[14] and at least the same number have simply allowed it, albeit with some

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1 Annot., 60 A.L.R.2d 1347 (1958, Supp. 1960, 1962, 1963).

2 Newbury v. Vogel, 15 Colo. Bar Ass'n Adv. Sh. 11 (1963); Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961), later overruled in Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962); Southern Indiana Gas & Electric Co. v. Bone, 180 N.E.2d 375 (Ind. 1962); Corkery v. Greenberg, 114 N.W.2d 327 (Iowa 1962); Eastern Shore Public Service Co. v. Corbett, 227 Md. 411, 177 A.2d 701 (1962), *aff'd*, 180 A.2d 681 (Md. 1962); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Hernandez v. Baucum, 344 S.W.2d 498 (Tex. 1961); 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); Evening Star Newspaper Co. v. Gray, 179 A.2d 377 (D.D.C. 1962).

3 McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Louisville & Nashville R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Little v. Hughes, 136 So. 2d 448 (La. 1961); Flaherty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W.2d 633 (1958); 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Hall v. Booth, 178 N.E.2d 619 (Ohio 1961); J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. 1950); Crum v. Ward, 122 S.E.2d 18 (W. Va. 1961).

4 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962); Ahlstrom v. Minneapolis, St. Paul & S. Ste. M. R.R., 244 Minn. 1, 68 N.W.2d 873 (1955); Goldstein v Fendelman, 336 S.W.2d 661 (Mo. 1960); Chamberlain v. Palmer Lumber, 104 N.H. 221, 183 A.2d 906 (1962); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Stassun v. Chapin, 324 Pa. 127, 188 Atl. 111 (1936); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Armstead v. Holbert, 122 S.E.2d 43 (W. Va. 1961); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 106 N.W.2d 274 (1960).

5 Stassun v. Chapin, 324 Pa. 127, 188 Atl. 111 (1936).

6 Chamberlain v. Palmer Lumber, Inc., 104 N.H. 221, 183 A.2d 906 (1962); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

7 Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

8 Ahlstrom v. Minneapolis, St. Paul & S. Ste. M. R.R., 244 Minn. 1, 68 N.W.2d 873 (1955); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 106 N.W.2d 274 (1960).

9 Ahlstrom v. Minneapolis, St. Paul & S. Ste. M. R.R., 244 Minn. 1, 68 N.W.2d 873 (1955).

10 *Ibid.*; See also Chamberlain v. Palmer Lumber, 104 N.H. 221, 183 A.2d 906 (1962).

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

12 See note 4 *supra*.

13 Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959).

14 See note 3 *supra*.

qualifications.[15] Both of these groups have pointed out that juries might spontaneously strike upon the method, and that counsel should therefore not be prohibited from suggesting it.[16] They also note that the very lack of any standard of value argues for latitude in discussions of pain and suffering as elements of damages,[17] and that argument in mitigation may be made without implying an admission of liability, for as defendants must now attempt to mitigate the plaintiff's lump-sum claim, the need to mitigate component claims will impose no undue hardships.[18] It has even been noted that juries are likely to regard such arguments as "lawyer talk," and that as courts customarily instruct that such arguments are not to be considered as evidence, excessive verdicts will not necessarily follow.[19]

It may be seen that of the thirty-one jurisdictions here considered, two-thirds of these will, under some circumstances at least, allow the per diem argument, usually requiring the trial court to caution the jury as to the weight to be given the argument.[20] These courts have allowed counsel to break the time segments down to units of weeks,[21] days,[22] or even hours.[23] Nor has the per diem illustration been restricted to closing argument, *e.g.*, Mississippi allows it to be used in counsel's opening statement.[24]

Colorado counsel have for many years used the per diem method of argument as to the elements of past and future pain and suffering, and it is significant that the principal case represents the first time that it has been deemed a subject fit for appellate review. Here, as in the law of contracts, silence would seem to have been acceptance of its propriety, at least as being within the discretion of the trial court. Colorado has now moved in the direction of several of her sister states[25] in removing it from the realm of the trial court's discretion and giving it categorical approval. This is an enlightened view, appreciating the argument for what it is, merely a course of reasoning as is any other argument on the elements of pain and suffering.

It will be of interest to note the effect of the principal case, as Colorado is not presently considered a "high verdict state,"[26] and in some quarters is even regarded as being somewhat penurious. The Colorado plaintiff is now guaranteed the opportunity to argue and illustrate his process of evaluating pain and suffering, unfettered by judicial apron-strings.

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15 See note 2 *supra*.
16 Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. 1959).
17 Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961); Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
18 Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961).
19 Southern Indiana Gas & Electric Co. v. Bone, 180 N.E.2d 375 (Ind. 1962); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961).
20 McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Little v. Hughes, 136 So. 2d 448 (La. 1961); Eastern Shore Public Service Co. v. Corbett, 227 Md. 411, 177 A.2d 701 (1962); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1957); 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); Evening Star Newspaper Co. v. Gray, 179 A.2d (D.D.C. 1962).
21 Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
22 See note 13 *supra*.
23 Southern Indiana Gas & Electric Co. v. Bone, 180 N.E.2d 375 (Ind. 1962); Little v. Hughes, 136 So. 2d 448 (La. 1961); Hall v. Booth, 178 N.E.2d 619 (Ohio 1961).
24 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).
25 Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. 1959).
26 6 Defense L.J. 379 (1959).