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Trial Practice -- Damages -- Pain and Suffering -- Per Diem Argument to the Jury

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Regardless of the suggested legislation, it is submitted that the three-justice controlling opinion in the *Manning* case should not be accepted as definitive of the law in regard to the solicitor's telling prospective jurors that the State will seek the death penalty. The other three justices said that as long as North Carolina law permits capital punishment the State is entitled to seek the death penalty. The seventh member of the court expressed a similar view in his dissent in *State v. Pugh*,[39] where he stated his opposition to a holding "that counsel must not contaminate the jury with any argument as to the bearing the evidence should have on the recommendation."[40] Thus it would appear that in a case squarely presenting the question four members of the court would uphold the right of the State to ask the jury not to recommend life imprisonment and to argue on this point to some extent. Such a holding would be more in keeping with the present law that a defendant found guilty of a capital crime must die unless the jury recommends otherwise. On the other hand, the fact that in *Manning* five justices held it error for the solicitor to say that the only reason for having the trial was to put defendant to death demonstrates that, regardless of their views as to whether G.S. § 14-17 would permit the State to argue for death, a majority of the court would reverse where such argument becomes prejudicial *per se*.[41]

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Trial Practice—Damages—Pain and Suffering—Per Diem Argument to the Jury

In *Ratner v. Arrington*[1] a Florida Court of Appeals held that the trial judge in a personal injury action had not abused his discretion in allowing the use of the per diem argument as a measurement of pain and suffering damages. The plaintiff's counsel had been permitted, over objection, to use a placard in his closing argument on which were listed various elements of plaintiff's damages, including an amount for pain and suffering calculated at fifteen dollars per day for the length of his life

in the text whether defendant is allowed to waive the jury or not. However, since G.S. § 14-17 seems to contemplate but one hearing, it would appear that the adoption of the suggested system would require that G.S. § 14-17 be repealed and that it be replaced with a statute allowing the jury to recommend alternative punishments. The new murder statute could provide for double hearings, or a separate section could be enacted to accomplish the purpose.

[39] 250 N.C. at 286, 108 S.E.2d at 655.

[40] 250 N.C. at 289, 108 S.E.2d at 657.

[41] "Prejudicial *per se*" is used in the text to distinguish between the types of prejudice that the court has traditionally recognized as grounds for a new trial, and the "possibility of prejudice" suggested by the writer as inherent in the present single-hearing system of trial in capital cases.

[1] 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

expectancy. In a similar action, *Certified T. V. & Appliance Co. v. Harrington*,[2] the Virginia Supreme Court reversed the trial court and held that counsel's use of a per diem or other mathematical formula to measure pain and suffering was error, for it allowed him to invade the province of the jury and get before it that which did not appear in the evidence.

In the Virginia case the plaintiff's counsel had been allowed by the lower court to place the per diem figures for pain and suffering on a blackboard. In reversing, the Supreme Court stated that it was not improper for counsel to use figures placed upon a blackboard, provided that the figures were supported by the evidence. The great majority of jurisdictions allow the use of the blackboard to some degree in a jury argument.[3] The propriety of using this method to list damage elements depends upon whether in a particular jurisdiction counsel would be allowed to put such elements before the jury in oral argument.[4] Thus where the court does not allow graphic illustrations of per diem figures, its objection goes to the use of the mathematical formula applied to pain and suffering, and not to the blackboard or other means of illustration used.

The propriety of the per diem argument for pain and suffering damages was first litigated in 1950[5] and has been directly ruled upon in nine states. Five states have sanctioned the use of the per diem argument,[6] and four have condemned it.[7] In *Wuth v. United States*,[8] an

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

[3] Apparently, in all jurisdictions the granting or denying of permission to use a blackboard and the extent to which it may be used rests in the sound discretion of the trial court. Haycock v. Christie, 249 F.2d 501 (D.C. Cir. 1957). Upon timely objection, however, the jury should be instructed that neither the blackboard nor argument of counsel is evidence. Miller v. Loy, 101 Ohio App. 405, 140 N.E.2d 38 (1959); see 88 C.J.S. *Trial* § 177 (1955).

[4] McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958). Counsel should not allow the damage figures to remain before the jury at any time other than during argument. Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955). The court in Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956), refused to make a distinction between the use of a blackboard listing the damages prayed for and the use of a prepared chart for the same purpose. The use of a prepared chart would preclude the opposing counsel's erasing the figures and replacing them with some of his own. See generally Annot., 44 A.L.R.2d 1205 (1955) (use of a chart not in evidence relating to damages); 1 BELLI, MODERN TRIALS §§ 130, 133(2), 135 (1954).

[5] J. D. Wright & Son v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).

[6] (1) Alabama: McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958). (2) Florida: Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959). (3) Minnesota: Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1957); Flarhrerty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W.2d 633 (1958). In two cases prior to the *Boutang* case, Alstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955), and Hallada v. Great No. Ry., 244 Minn. 81, 69 N.W.2d 673 (1955), the court held that the per diem arguments could not be allowed. In *Boutang*, however, the court discussing these two cases said: "In neither case did we hold that the mathematical formula may not be used for purely illustrative purposes. In *Hallada* we merely held that the segmentation process of breaking the damage picture into fragments and then

action under the Federal Tort Claims Act, the District Court for the Eastern District of Virginia sitting without a jury refused to apply the per diem method of evaluation to pain and suffering damages. In an admiralty action[9] the Sixth Circuit Court of Appeals, however, expressly endorsed the use of the per diem formula.[10] In view of the limited number of jurisdictions which have considered the issue there would seem to be no discernible weight of authority at this time, and even the Florida court in the *Ratner* decision which allowed per diem expressed a desire not to foreclose the question.[11]

The various reasons advanced in support of the per diem argument are as follows: (1) The very absence of a fixed standard for the monetary measurement of pain and suffering is reason for allowing wide

applying to each fragment a mathematical formula whereby damages are calculated at a fixed rate per day for the entire period of the injured person's life expectancy, though illuminating, may be misleading and therefore may not be used as a yardstick for determining the reasonableness of the award for damages. This rule does not bar the use of the mathematical formula for purely illustrative purposes." *Quaere* as to the distinction between illustrative and non-illustrative use of the per diem argument. (4) Mississippi: 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957). (5) Texas: J. D. Wright & Son v. Chandler, *supra* note 5 (no objection had been made to argument at trial).

[7] Delaware: Henne v. Balick, — Del. —, 146 A.2d 394 (1959). (2) New Jersey: Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958). The court not only held that a mathematical formula argument was improper but overruled prior decisions in saying that any statements by counsel requesting a specific award or even disclosing the total amount prayed for was improper. In Henne v. Balick, *supra,* the court did not go this far and stated only that the per diem argument was improper. (3) Pennsylvania: The court has steadfastly refused to allow counsel to disclose the amount claimed or expected when damages are unliquidated. Thus this state must be included with those prohibiting the per diem argument. See Stassum v. Chapin, 234 Pa. 125, 188 Atl. 111 (1936); Bostwick v. Pittsburgh Rys., 255 Pa. 387, 100 Atl. 123 (1917); Goodhart v. Pennsylvania Ry., 177 Pa. 1, 35 Atl. 191 (1896). (4) Virginia: Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

At the time of Botta v. Brunner, *supra,* in 1958, the weight of authority was clearly in favor of allowing the per diem argument. Since that time two state courts, in Henne v. Balick, *supra,* and Certified T. V. & Appliance Co. v. Harrington, *supra,* and one federal court in Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958), have adopted the *Botta* reasoning in refusing to sanction per diem. In the two decisions allowing per diem arguments subsequent to the *Botta* decision, McLaney v. Turner, *supra* note 6, and Ratner v. Arrington, *supra,* note 6, the former was decided less than five months after *Botta* and did not mention that case in following the then existing majority reasoning.

[8] 161 F. Supp. 661 (E.D. Va. 1958).

[9] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), *cert. denied,* 352 U.S. 941 (1956), *affirming* 141 F. Supp. 388 (N.D. Ohio 1955).

[10] Admiralty courts are not bound by all the rules of evidence required in common law actions and may receive evidence which might be inadmissible in other courts. 3 BENEDICT, ADMIRALTY § 381 (6th ed. 1940). It is questionable, therefore, whether Imperial Oil, Ltd. v. Drlik, *supra* note 9, would be authority for the use of the per diem argument in common law actions.

[11] "The ultimate course of judicial opinion on the point [per diem] is not yet discernible. Recent holdings, for and against the allowance of such arguments, are not grounded on reasons of sufficient force to compel the decision either way. Therefore, in approving the practice now we do not purport to foreclose the question." Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. Dist. Ct. App. 1959).

latitude in arguing these damages,[12] and counsel should be allowed to draw all proper inferences from the evidence.[13] (2) The trier of facts should be guided by some reasonable and practical considerations, as an award for pain and suffering should not depend upon a mere guess.[14] (3) The per diem arguments are not evidence, but are merely illustrative,[15] and the jury is free to weigh the argument and pass on its credibility.[16]

Courts not allowing this argument generally have relied on the following reasons: (1) Pain and suffering have no known dimensions, and the only standard is "reasonable compensation." Thus there is no direct correlation between money and physical or mental suffering.[17] (2) Reasonable compensation for pain and suffering cannot be determined by multiplying the life expectancy by a fixed rate per day since the varieties and degrees of pain are infinite and differ among individuals, and in the same individual these will vary from day to day.[18] (3) The allowance of the argument would permit counsel to introduce factors not admissible in evidence, since no witness would be permitted to testify as to the reasonable award for pain and suffering.[19] (4) The argument is prejudicial to defendant's counsel because he must either risk its effect upon the jury or argue a lesser per diem sum. By arguing a lesser sum he fortifies his adversary's implication that the law recognizes pain and suffering as capable of being measured by a mathematical yardstick.[20]

The particular effect which the per diem argument may have upon the jury's award for pain and suffering is difficult to ascertain. Courts have stated that it leads to monstrous verdicts[21] and that it puts before the jury figures out of proportion to those which they would otherwise have in mind.[22] One of the leading exponents of the argument explains:

[12] Ratner v. Arrington, *supra* note 11.
[13] McLaney v. Turner, 267 Ala. 558, 104 So. 2d 315 (1958).
[14] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), *cert. denied*, 352 U.S. 941 (1956).
[15] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1957).
[16] J. D. Wright & Son v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).
[17] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).
[18] Henne v. Balick, — Del. —, 146 A.2d 394 (1959).
[19] Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).
[20] Botta v. Brunner, 26 N.J. 82, 138 A.2d (1958). For an interesting argument that there is a yardstick to measure pain and suffering see *Dollars-and-Sense Appraisal in F.E.L.A. Cases*, Panel Discussion at the Eighteenth Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Ass'n, November 8, 1957 in 25 TENN. L. REV. 220, 227-30 (1958). The panelist observes that the yardstick exists in practical experiences. When one pays fifty dollars to an anesthetist to be free from pain for one hour during an operation, or one similarly gives the dentist three dollars for fifteen minutes of relief, that these are cases where a human being has to put pain in one side of the scale and money in the other and weigh them.
[21] Alstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955).
[22] Henne v. Balick, — Del. —, 146 A.2d 394 (1958).

> When it [pain and suffering] is thus broken down into seconds and minutes, then a jury begins to realize the real meaning of this permanent pain and suffering of which the doctors have spoken, and that $60,000 at $5 a day, is not an excessive award. . . . Jurors must start thinking in days, minutes, and seconds and in $5, $3, and $2, so that they can multiply to the absolute figure. . . . [H]e has started thinking, and when he follows this system of multiplication he comes to a substantial figure . . . .[23]

A Florida case[24] illustrates the apparent effectiveness of per diem. A nine year old child obtained a jury verdict of 248,439 dollars which exactly coincided with counsel's demands as set out on a chart before the jury. Of the total recovery, 102,200 dollars was awarded for future pain, suffering, and inconveniences which had been calculated on the chart at five dollars per day for the duration of plaintiff's life expectancy.[25]

The North Carolina court recognizes pain and suffering as an element of damages for personal injuries,[26] but the propriety of the per diem argument has never been ruled upon. This court has refrained from laying down exacting rules as to the latitude counsel is allowed in his argument, especially in the area of damages for personal injury.[27] In *Jenkins v. North Carolina Ore Dressing Co.*[28] the court stated that the propriety of counsel's argument must ordinarily be left up to the discretion of the trial judge, and the court will not review his decretion unless it is apparent that the impropriety was gross and well calculated to prejudice the jury. The court has stated that counsel may not travel outside the record and inject facts not included in the evidence.[29] Counsel is, however, allowed to argue every phase of the law supported by the evidence and to deduce from the evidence all reasonable inferences.[30]

[23] 1 BELLI, MODERN TRIALS § 133, at 871-72 (1954).

[24] Braddock v. Seaboard Air Line Ry., 80 So. 2d 662 (Fla. 1955).

[25] An effective per diem argument is illustrated as follows: The attorney after telling the jury that they must determine what his client's pain and suffering are worth in dollars and cents says, "Let's take Pat, my client, down to the waterfront. He sees Mike, an old friend, . . . and says, 'Mike, I've got a job for you. . . . You're not going to have to work any more for the rest of your life, and the best part of this job is . . . you'll never lose it. . . . You don't have to do any work . . . . All you have to do is trade me your good back for my bad one, and I'll give you five dollars a day for the rest of your life. Do you know what five dollars a day for the rest of your life is? Why that's $60,000! Of course, I realize that you are not going to be able to do any walking, or any swimming, or driving an automobile, or be able to sit in a moving picture show; you're going to have excruciating *pain* and *suffering* with this job, thirty-one million seconds a year, and once you take it on, you'll never be able to relieve yourself of this, but you get $60,000!'" Address by Melvin M. Belli, Mississippi State Bar Ass'n Annual Meeting, June 2, 1951, in 22 MISS. L.J. 284, 319 (1951).

[26] Hargis v. Knoxville Power Co., 175 N.C. 31, 94 S.E. 702 (1917).

[27] See generally 2 MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1492 (2d ed. 1956).

[28] 65 N.C. 563 (1871).

[29] Irvin v. Southern Ry., 164 N.C. 6, 37 S.E. 955 (1913).

[30] Lamborn v. Hollingsworth, 195 N.C. 350, 142 S.E. 19 (1928).

There is no North Carolina case concerning the methods by which the jury may assess pain and suffering damages. The jury must be charged that the measure of recovery shall be a reasonable satisfaction for the actual suffering of both body and mind which is the immediate and necessary consequence of the injury.[31]

There are several factors which would seem to point toward an approval of the per diem argument by the North Carolina Supreme Court, when and if the issue is presented before it. First, it is required in North Carolina that all prospective damages be reduced to their present value,[32] and to do this accurately the jury must ascertain the present worth of a number of future installments.[33] Thus under the present value rule it would appear that the jury must in some manner allot a definite sum of money for specific periods of the plaintiff's life. Second, the North Carolina practice of reading the pleadings to the jury informs them, through the *ad damnum* clause, of the amount demanded by the plaintiff as damages. Apparently, although there is no case on this point, counsel in their final argument may relate to the jury their estimate of the total worth of plaintiff's damages for pain and suffering. The per diem argument would relate counsel's inference from the evidence as to a portion of the total worth—the per diem worth. Third, when the propriety of a trial practice is questioned on appeal, the reviewing court may take judicial notice of the customary usage of this practice in the lower courts.[34] In *Ratner v. Arrington*[35] the court took judicial notice of the customary use in Florida trial courts of

[31] Mintz v. Atlantic Coast Line R.R., 233 N.C. 607, 65 S.E.2d 120 (1951).

[32] Taylor v. J. A. Jones Constr. Co., 193 N.C. 775, 138 S.E. 129 (1927). In applying this rule with respect to pain and suffering North Carolina is against the weight of authority. See Annot., 60 A.L.R.2d 1347, 1352 (1958); Annot., 154 A.L.R. 796, 801 (1945); 23 N.C.L. REV. 46, 48 (1944).

A reason frequently quoted for refusing to permit a reduction of an award for pain and suffering to its present value appears in Chicago & N.W. Ry. v. Candler, 238 Fed. 880, 885 (8th Cir. 1922), where the court said: "At best the allowance [for pain and suffering] is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value." This same reasoning is advanced by some courts in refusing to allow the per diem argument.

[33] MCCORMICK, DAMAGES § 86 (1935). The author notes two methods of determining present value: (1) by the use of annuity tables and (2) by adding to the sum to be paid in the future interest on the same sum during the interval, dividing the result into the original sum, the quotient being the present value. The incapacity of a jury to determine present value without the use of annuity tables is apparent, unless an accountant be in their midst.

North Carolina refuses to allow the use of the annuity tables in determining present value. Poe v. Railroad, 141 N.C. 525, 54 S.E. 406 (1906). Thus it is doubtful that the jury gives any effect to the judge's present value charge.

[34] See Hanson v. Yandle, 235 N.C. 532, 70 S.E.2d 565 (1952); 31 C.J.S. *Evidence* § 49 (1942).

[35] 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

damage charts and per diem arguments for pain and suffering damages.[36] Counsel in several North Carolina trial courts today are using the per diem argument in their summation,[37] and the Supreme Court could properly take judicial notice of this practice.

It is submitted that the better rule would be to allow counsel to argue that pain and suffering damages should be calculated on a per diem basis. Forbidding the argument places a severe restriction on the right and duty of an attorney to argue every phase of his case. It denies the plaintiff the right of advocacy where the techniques of persuasion are of crucial importance to him. Should abuse of the privilege occur, either in application or in presentation, the appellate judiciary has adequate processes to prevent injustice to either party.

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[36] *Accord,* 4-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); *cf.* Haley v. Hockey, 103 N.Y.S.2d 717 (Sup. Ct. 1950).

[37] Personal observation of trials by the writer and inquiries to practicing attorneys concerning personal injury actions in North Carolina indicate that damage charts and the per diem argument are often utilized without objection from the defendant's counsel or the court.