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Damages--Propriety of Per Diem Valuation of Pain and Suffering by Counsel in Closing Argument

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such offices is the obligation of an independent contractor, such as the Illinois corporation in the principal case, then the spirit of KRS 141.120(4)(f) is defeated if merely negotiating the sales outside of Kentucky will remove them from the Commonwealth's taxing power.

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DAMAGES—PROPRIETY OF PER DIEM VALUATION OF PAIN AND SUFFERING BY COUNSEL IN CLOSING ARGUMENT—Plaintiff was injured when a box car, set in motion by the failure of a coupling device on defendant's locomotive, struck the coal car under which he was working. In an action for damages for personal injuries, the trial court ruled that the defendant was negligent as a matter of law, and submitted the issues of contributory negligence and the assessment of damages to the jury. From a verdict and judgment of $20,000 defendant appealed. The Court of Appeals held that the verdict was excessive with respect to the following items of proof: (1) the effect of a pre-existing back injury upon the plaintiff's present condition was not clearly established; (2) plaintiff was never hospitalized; (3) plaintiff had continued to perform certain occupations; and (4) proved medical expenses, including estimates of future treatment, were only $566. Pursuant to Rule 59.01 of the Kentucky Rules of Civil Procedure, a new trial was granted for the sole purpose of determining the issue of damages.[1] At the second trial, counsel was permitted to list various elements of plaintiff's damages on a blackboard in closing argument, including an amount for pain and suffering calculated at five dollars per day for the length of his life expectancy. From a verdict and judgment of $62,331 defendant appealed. *Held*: Affirmed. The court reasoned that, on the basis of the medical testimony presented at the second trial, the jury could have properly concluded that plaintiff's disability was not attributable to his pre-existing injury, but resulted solely from the negligence of the defendant.[2] In regard to the blackboard summation presented by counsel, the court reasoned that it is no more speculative to suggest daily compensation for plaintiff's pain and suffering than it would be to suggest a total amount. Further, since the jury must make a specific allocation of damages for pain and suffering, counsel should be permitted

[1] Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844 (Ky. 1958).

[2] "The evidence adduced in this respect [concerning plaintiff's pre-existing injury] on the second trial was clearly more positive and would have been sufficient to sustain the *original* verdict." (Emphasis added). Louisville & N.R.R. v. Mattingly, 339 S.W. 2d 155, 157 (Ky. 1960).

to suggest specific figures in his closing argument. *Louisville & N. R.R. v. Mattingly*, 339 S.W.2d 155 (Ky. 1960).

Although the Kentucky court has previously recognized counsel's right to jury argument on the issue of damages for pain and suffering,[3] the principal case, permitting the illustration of a mathematical computation of such damages, was one of first impression. Only six courts have sanctioned,[4] and six have condemned,[5] counsel's use of a mathematical formula in evaluating damages for pain and suffering, since the first court's approval of this procedure in 1950.[6] In view of this equally divided and somewhat limited number of jurisdictions in which the issue has been considered, there would seem to be no discernible weight of authority. The purpose of this comment is to enumerate and discuss the various arguments concerning the propriety of the per diem suggestion.

Among the reasons advanced by courts in opposition to the use of the per diem argument are the following: (1) No fixed mathematical formula exists for correlating pain and suffering with dollar values, since such elements do not admit of exact determination.[7] (2) Fair and reasonable compensation is to be determined by the jury from the evidence relating to plaintiff's injuries; estimates of

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[3] Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W. 2d 637 (1944).

[4] (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). (4) Mississippi: Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954). (5) Texas: J. D. Wright & Son v. Chandler, 231 S.W. 2d 786 (Tex. Civ. App. 1950). (6) Washington: Jones v. Hogan, 351 P.2d 153 (Wash. 1960). See Johnson v. Brown, 345 P.2d 754 (Nev. 1959) (Pursuant to Rule 51 of the Nevada Rules of Civil Procedure, the argument may be used only for the purpose of illustration under the court's strict admonition that such suggestions are not to be taken as evidence). See also 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) (an admiralty libel in which the court approved the district judge's use of the per diem formula in calculating damages for pain and suffering).

[5] (1) Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958) (action under the Federal Torts Claims Act). (2) Delaware: Henne v. Balick, 146 A.2d 394 (Del. 1958). (3) Missouri: Faught v. Washam, 329 S.W.2d 588 (Mo. 1960). (4) New Jersey: Botta v. Brunner, 26 N.J. 82, 138, A.2d 713 (1958). (5) Pennsylvania: Joyce v. Smith, 296 Pa. 439, 112 Atl. 549 (1921). (6) Virginia: Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, S.E.2d 126 (1959).

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

[7] Botta v. Brunner, 26 N.J. 82, —, 138 A.2d 713, 718-19 (1958). The court reasoned as follows:

> There is and there can be no fixed basis, table, standard or mathematical rule which will serve as an accurate index and guide to the establishment of damages awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated. No market place exists at which such malaise is bought and sold. . . . [T]he impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.

counsel tend to instill in the minds of jurors, figures not founded in the evidence. The testimony of any witness as to the value of pain and suffering is inadmissable.[8] (3) Defense counsel is prejudiced by being forced to argue that pain and suffering are worth less than claimed by his adversary, and in so doing fortifies the implication that the law recognizes the use of a mathematical yardstick.[9]

In rebuttal, those courts which have endorsed the use of the argument propose the following reasons: (1) The very absence of a fixed standard for the monetary admeasurement of damages is sufficient reason for permitting counsel to exercise wide latitude in closing argument.[10] Per diem suggestions are only illustrations[11] and may be used by the jury as one method to avoid an abstract allocation of the damages.[12] (2) The jury must assess the plaintiff's damages by *some* process, and thus the argument that the evidence fails to provide a foundation for a per diem suggestion is rejected.[13] Although expert testimony as to the value of pain and suffering would be inadmissable, a per diem suggestion is an inference properly drawn from the evidence.[14] (3) Defense counsel, by drawing his own inferences from the evidence, is free to place a lower valuation on daily compensation, and may cast doubt on the validity of the method by illustration and criticism.[15]

The various arguments previously listed will now be discussed in order. First, it is generally recognized by a majority of courts[16] and writers[17] that no fixed standard exists for accurately measuring

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[8] Faught v. Washam, 329 S.W.2d 588 (Mo. 1960).

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

[10] Ratner v. Arrington, 111 So.2d 82 (Fla. Dist. Ct. App. 1959).

[11] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W. 2d 30 (1957).

[12] Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

[13] McLaney v. Turner, 267 Ala. 558, 104 So.2d 315 (1958).

[14] Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

[15] Note, 33 So. Cal. L. Rev. 214, 218 (1960).

[16] *E.g.*, Braddock v. Seaboard Airline R.R., 80 So. 2d 662 (Fla. 1955); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E. 2d 357 (1949); Vink v. House, 336 Mich. 292, 57 N.W.2d 887 (1953); Dowly v. State, 190 Misc. 16, 68 N.Y.S. 2d 573 (1947); Clark v. Josephson, 66 N.W. 2d 539 (N.D. 1954); Denco Bus Lines, Inc. v. Hargis, 204 Okla. 339, 229 P.2d 560 (1951); National Fruit Prod. Co. v. Wagner, 185 Va. 38, 37 S.E. 2d 757 (1946); Butts v. Ward, 227 Wis. 387, 279 N.W. 6 (1938).

The Kentucky court, at least prior to the decision in the principal case, has recognized that no fixed rule exists for the measurement of damages for pain and suffering. *E.g.*, in Stanley v. Caldwell, 274 S.W.2d 383, 385 (Ky. 1954), the court stated:

> We have many times written that no rule can be laid down by which damages for pain and suffering in a personal injury case may be accurately measured. At best, what is fair and right can only be left up to the judgment and discretion of the jury. . . .

[17] McCormick, Damages 318 (1935), 1 Sedgwick, Damages § 171a (9th ed. 1912).

the damages attributable to pain and suffering. Whether counsel's request is presented to the jury as one for merely fair and reasonable compensation,[18] a total amount, or a per diem allocation for the duration of plaintiff's life expectancy, the inherent subjectivity can not be completely eliminated from the determination of such damages. The per diem argument only demands an accurate mathematical computation of the present worth of an amount reached by speculation on the part of plaintiff's counsel. Since the per diem formula contains one component based upon conjecture, the product reached by its utilization must of necessity be speculative. The error in such a rationalization is compounded by the fact that pain and suffering vary from day to day in any one individual, and the intensity may well decrease in the future.[19]

Second, although damages for pain and suffering are unliquidated and not susceptible to direct proof, the jury's award must be supported by the evidence concerning the nature and extent of plaintiff's injuries.[20] Therefore, advocates of the per diem argument reason that counsel's suggestion is merely an inference drawn from such evidence.[21] But, since no admonition or instruction by the court would completely remove the figures suggested from the minds of the jurors, the drawing of any inferences as to the value of pain and suffering should remain exclusively within the province of the jury. Clearly, if the argument is to be permitted, the court should point out the distinction between the items of proof which are based upon direct evidence and those supported only by counsel's "inference." In the principal case, for example, counsel placed the following items of plaintiff's damages on a blackboard:[22]

Pain and suffering, 360 × $5 = $1,830 per year × 25 years	$45,750.00[23]
Loss of power to earn money to date of trial	$14,000.00
Permanent impairment to earning money	$50,000.00
Medical Expenses	$ 873.00
	$110,623.00

[18] *E.g.*, the Pennsylvania court has long condemned any reference to the amount of damages for pain and suffering; counsel may only request fair and reasonable compensation. See Joyce v. Smith, 296 Pa. 439, 112 Atl. 549 (1921); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

[19] Henne v. Balick, 146 A.2d 394, 398 (Del. 1958).

[20] Roland v. Murray, 239 S.W.2d 967 (Ky. 1951); Cincinnati, N.O. & T.P. R.R. v. Nelson, 299 Ky. 19, 184 S.W.2d 108 (1944).

[21] Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954). See also 12 Rutgers L. Rev. 522 (1958).

[22] Record, p. 284.

[23] There are two obvious errors in plaintiff's calculation: (1) "360" was chosen to represent the number of days in one year, and (2) "$1,830" may only be arrived at by multiplying $5 by 366.

In this blackboard summation, no distinction was drawn between (1) proved and provable items, and (2) the item of pain and suffering, which, as a matter of law, is incapable of measurement in dollar values.

Third, counsel for defendant is required to make the first closing argument to the jury in personal injury actions.[24] To suggest a lesser sum as proper daily compensation, or to attempt to cast doubt on the validity of the method, he must anticipate the manner in which his adversary will present the issue of damages in closing argument.[25] Further, since there is no proof in the record from which he may fairly anticipate the amount to be claimed as the daily value, defense counsel might argue a figure in excess of that contemplated by his adversary. If the defense attorney refrains from making an anticipatory argument, the amount presented by counsel for the plaintiff will stand uncontroverted since there is no opportunity for testing its accuracy.

The particular effect which the per diem argument will have on jury verdicts for pain and suffering is difficult to ascertain. It has been stated that it puts before the jurors figures out of all proportion to those which they would otherwise have in mind,[26] and that the exact figure suggested by plaintiff's counsel may be adopted, producing excessive verdicts.[27] The decision in the principal case is evidence that it is possible to triple a jury award by the utilization of the argument.[28] There is no sound reason for permitting counsel to estimate plaintiff's damages for pain and suffering in any manner. Such a suggestion, even under the guise of legitimate inference, has the same effect on the jury as evidence and does not eliminate the element of speculation from the allocation of such damages. The adoption of any procedure should be predicated upon the desire to diminish the jury's speculation and to ensure the plaintiff fair and

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[24] Ky. R. Civ. P. 43.02(5).

[25] In the principal case, counsel for defendant inquired of plaintiff's attorney as to his intention to use the per diem argument. However, nothing was mentioned at that time to indicate the amount which would be suggested by plaintiff's counsel in his closing argument. Record, p. 250.

[26] Henne v. Balick, 146 A.2d 394, 398 (Del. 1958).

[27] See Braddock v. Seaboard Air Line R.R., 80 So.2d 662 (Fla. 1955), in which the court after ordering a remittitur, upheld a verdict for the plaintiff of which $102,200 was awarded for future pain and suffering. This was the exact amount set out on a chart by plaintiff's counsel in closing argument, which was calculated at five dollars per day for the length of plaintiff's life expectancy.

[28] It is interesting to note that by extracting the item labeled "Permanent impairment to earning money . . ." from the blackboard illustration, *supra* at 595, the total of the three remaining items is $60,623—a figure closely approximating the jury's verdict of $62,331. The jury would have been justified in concluding from the evidence that plaintiff had suffered no impairment to his permanent earning power. See Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155, 160 (Ky. 1960).

reasonable compensation for his pain and suffering. However, the court has abrogated the jury's privilege of basing an award upon its own knowledge and experience in favor of the speculation on the part of one having a definite pecuniary interest in the size of plaintiff's recovery.

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RIGHT TO INSPECT PUBLIC RECORDS—William Owen, who was twice charged with murder, was tried and convicted on one of the charges. A motion for a new trial was filed. At a hearing on the motion,[1] Owen requested that the members of the press be excluded so that he could make a statement in the privacy of the judge's chambers. The request was granted. In the presence of the judge, the court stenographer and counsel for the defense and Commonwealth, Owen made his statement which was taken in shorthand by the stenographer. The petitioner, a newspaper publisher, requested that it be furnished a transcribed copy of these notes for the sole purpose of disseminating the news. The judge and the stenographer refused the request. Petitioner then demanded that a writ of mandamus be issued compelling compliance with his request. *Held*: Petition dismissed. It was not determined whether the shorthand notes were public records. However, the court held that even if they were, the petitioner had no greater right to inspect them than any other member of the public. Since Kentucky has neither constitutional nor statutory provisions for the inspection of public records, the right of inspection is as it existed at common law, *i.e.*, the one claiming the right of inspection must have an interest which would enable him to maintain or defend an action for which the document or record sought could furnish evidence or necessary information.[2]

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[1] The majority opinion states that either the motion or the other charge was called. The dissent asserts that this was a hearing on the motion for a new trial. With respect to the holding, it is immaterial which case was called.

[2] By way of dictum, the court excluded certain records from this doctrine when it said:

> [I]n order to effectuate the notice-giving purpose of various recording acts such interest shall hereafter be *presumed* as to the following records:
>
> (1) Records of all papers, documents and instruments required or permitted by statute to be recorded, or noted of record, in books provided by public funds for that purpose.
>
> (2) All financial records required by statute to be kept in books so provided. (Emphasis added).

Courier-Journal & Louisville Times Co. v. Curtis, 335 S.W.2d 934, 937 (Ky. 1959). Does this mean a conclusive presumption or one that is rebuttable? If the true purpose of these records is to be effectuated, the presumption will have to be conclusive. The court should have employed more definite language.