

PER DIEM MEASUREMENT OF PAIN AND SUFFERING AS PREJUDICIAL ARGUMENT

Botta v. Brunner,

26 N.J. 82, 138 A.2d 713 (1958)

In action for injuries suffered in an automobile collision, counsel for plaintiff, during summation, urged the jury to consider as a basis for computing pain and suffering the following per diem formula: "How much can you give for pain and suffering? Would 50 cents an hour be too high for that kind of suffering?" The trial court considered the argument as misconduct, whereas the appellate division sanctioned the practice. In the state supreme court the majority disapproved of any argument by counsel including a suggestion of a per diem worth and expressly overruled previous New Jersey decisions permitting counsel to comment on the total sum prayed (the ad damnum clause).¹

The majority of the courts which have considered the propriety of the per diem suggestion, in accord with the instant case, emphasize the subjective nature of pain and suffering and find in the per diem figure an erroneous attempt to measure pain by establishing an arithmetical scale.² Calling upon the jury to first arrive at a per diem worth and then through the employment of mortality tables to account for plaintiff's life expectancy is thought to further compound the possible error in the initial per diem figure. In addition, any attempt to equate compensation for pain and suffering with fixed levels or plateaus of suffering fails to recognize that the "threshold of pain" differs widely among individuals.³ When changes must be incorporated into the formula to cover possible future reductions in degree of pain, the jury's task becomes more complicated and the possibility of error is increased even further.⁴

The majority of courts and the instant case further disapprove of

¹ *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958).

² *Gorczyca v. New York, New Haven & Hartford R.R.*, 141 Conn. 701, 109 A.2d 589 (1954); *Bostwick v. Pittsburgh Rys.*, 255 Pa. 387, 100 Atl. 123 (1917). See *Bartlebaugh v. Pennsylvania R.R.*, 51 Ohio L. Abs. 161, 78 N.E.2d 410 (App. Ct.), *modified*, 150 Ohio St. 387 (1948). No reported Ohio decision has been found that is authority for counsels' right to employ a per diem type argument. While on the one hand the Ohio courts have said that the determination of the value of pain and suffering is a question within the sole province of the jury, *Barnett v. Hills*, 50 Ohio L. Abs. 208, 79 N.E.2d 691, (App. Ct. 1947); on the other, a rather wide latitude is accorded counsel during argument, subject only to the supervisory discretion of the trial judge. *Miller v. Loy*, 101 Ohio App. 405, 140 N.E.2d 38 (1956).

³ *Herb v. Hollowell*, 304 Pa. 128, 154 Atl. 582 (1931).

⁴ *Braddock v. Seaboard Airline R.R.*, 80 So. 2d 662 (Fla. 1955). The weight of authority is against reduction of pain and suffering to present worth. See Annot. 28 A.L.R. 1174 (1922).

the per diem suggestion as an inference by counsel lacking a sufficient basis in the evidence. This suggestion takes the place of evidence in the mind's eye of the jury, and admonitions by the court not to consider the per diem argument as evidence fail to erase all prejudicial effect.⁵ This objection is considered even more appropriate when per diem computations set forth on a blackboard are constantly referred to by counsel during the course of trial.⁶

The instant case also detects in the employment of a per diem argument by one or both counsel a prejudicial effect on defendant counsel's right to equal opportunity to offer proof and submit arguments thereon. Following plaintiff counsel's suggestion of a per diem worth, defendant counsel is placed in the awkward position of attempting to rebut an argument finding no basis in the evidence. By adopting a similar per diem argument, he fortifies his adversary's implication that the law recognizes pain and suffering as capable of being evaluated on a per diem basis.

Opinions contra to the instant case, in general accord with the "Belli approach,"⁷ see nothing prejudicial in the per diem formula.⁸ Where the court instructs the jury not to consider counsel's statements as evidence, these suggestions or computations displayed on the black-

⁵ *Ahlstrom v. Minneapolis, St. Paul & Sault Ste. Marie Co.*, 244 Minn. 1, 68 N.W.2d 873 (1955). *But see Boutang v. Twin City Motor Bus Co.*, 248 Minn. 240, 80 N.W.2d 30 (1956), where blackboard computations of pain and suffering allowed for "illustrative purposes only."

⁶ *Kindler v. Edwards*, 126 Ind. App. 261, 130 N.E.2d 491 (1955), per diem argument sanctioned but blackboard use and view by jury restricted to period of argument only.

⁷ Melvin M. Belli Sr., ardent advocate of per diem argument, author of: *THE USE OF DEMONSTRATIVE EVIDENCE IN ACHIEVING THE MORE ADEQUATE AWARD*, from an address before the Miss. State Bar Assoc. (June 2, 1951); *THE MORE ADEQUATE AWARD* (Feb. 1952); *MODERN TRIALS* (1954).

⁸ Jurisdictions sanctioning per diem arguments: *Clark v. Hudson*, 265 Ala. 630, 93 So. 2d 138 (1956); *Kindler v. Edwards*, *supra* note 6; *Aetna Oil Co. v. Metcalf*, 298 Ky. 706, 183 S.W.2d 637 (1944); *Boutang v. Twin City Motor Bus Co.*, *supra* note 5; *Four-County Elec. Power Ass'n v. Clardy*, 221 Miss. 403, 73 So. 2d 144 (1954); *J. D. Wright & Son Truck Line v. Chandler*, 231 S.W.2d 786 (Tex. Civ. App. 1950). *But see Warren Petroleum Corp. v. Pyeatt*, 275 S.W.2d 216 (Tex. Civ. App. 1955). A per diem type of argument was employed by plaintiff's counsel in *Bartlebaugh v. Pennsylvania R.R.*, Civil No. 170627, C.P. Franklin City; *aff'd*, 51 Ohio L. Abs. 161, 78 N.E.2d 410 (App. Ct.); *modified*, 150 Ohio St. 387 (1948). After a discussion of the degree of suffering counsel commented, "You have got to reduce that [suffering], not to its present worth but to dollars and cents. This is real pain, it will continue for the remainder of his life. Would you say that \$75,000. would be too much?" [Record p. 855]. Following a run down of the nature of the mental suffering and humiliation counsel said, "Would you say that \$500. a year for that humiliation and mental suffering would be too much? That would be \$22,000. based on forty-four years." [Record p. 858]. The above arguments were assigned as error and on appeal the appellate court stated, "A rather wide latitude is allowed counsel in argument. . . . Counsel for the plaintiff may have exceeded the bounds of propriety, but we do not find the

board are thought not to impress the jury unduly.⁹ A jury is more likely to make a realistic appraisal of the pain and suffering if shown its continuing nature—thus the breakdown per hour, per day, per year.¹⁰ Counsel's suggestions are simply comments on pain and suffering already shown by competent evidence, and the jury is in a position to pass on its credibility.¹¹ Since plaintiffs with like injuries suffer according to their sensitivity to pain, counsel has a right to include in his argument per diem comments peculiar to the nature of plaintiff's suffering.¹²

Unless the court has made a prior determination that the per diem argument is an improper inference or erroneous as an attempt to compute the price of pain, the contention that defendant counsel is prejudiced by the per diem suggestions of his adversary, is, on its own merits, questionable. What barrier exists to prevent defendant counsel from employing a like but lower per diem argument of his own? Plaintiff counsel by affirming a per diem figure that reaches an alarming sum may even be "hoist with his own petard" by the skillful ridicule of his opponent. In permanent disability cases, where normal physical and psychological adaptation is foreseeable, defendant counsel, by introducing a sliding-scale per diem formula to approximate the expected decrease in pain, may even be considered at some advantage.

The argument that the evidence fails to provide a foundation for the per diem suggestion is similarly unconvincing. All concede that the jury must observe, weigh and then ultimately equate the evidence of pain with a monetary sum; but this same evidence is said not to contain a basis for an inference by counsel of a total or per diem worth. While the instant case in this respect consistently condemns both the comment on total worth and the per diem suggestion, courts permitting the former but not the latter are placed in the untenable position of asserting that the evidence required to relate the pain to a total money value is somehow different from that required to relate the suffering to a portion of the total money value—the per diem worth. It is not that the evidence will not sustain the per diem inference; the infirmity of the suggestion lies on the *type* of inference being made. Thus the court flatly denies the existence of any human ability to equate accurately suffering with a

remarks of counsel to be so highly prejudicial as to call for a mistrial. The record does not show an objection at the time the remark was made and no request was made of the court to disregard it." The result of the case in the Ohio Supreme Court is inconclusive. After finding that the trial court used an improper standard for measuring future loss of earnings (the only assignment of error considered), the court ordered a remittitur of \$75,000. from the award of \$225,000.

⁹ Four-County Elec. Power Ass'n v. Clardy, *supra* note 8; J. D. Wright & Son Truck Line v. Chandler, *supra* note 8.

¹⁰ BELLI, THE USE OF DEMONSTRATIVE EVIDENCE IN ACHIEVING THE MORE ADEQUATE AWARD, *supra* note 7, at 35.

¹¹ J. D. Wright and Son Truck Line v. Chandler, *supra* note 8. Cf. Standard Sanitary Mfg. Co. v. Brian's Adm'r, 224 Ky. 419, 6 S.W.2d 491 (1928).

¹² Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944).

per diem worth. In light of the counsel's right to argue from the evidence to any conclusion which the jury is free to reach, the lack of objective preciseness in an area of admitted uncertainty would seem not to condemn unless the resultant award is unacceptable as well. The instant case's characterization of the per diem suggestion as a "fanciful standard" really establishes as the major premise of the court's entire argument the value judgment that the per diem argument leads to an overcompensation for pain and suffering. Where the court asserts the belief that the jury must remain "uninfluenced" by the per diem comments of counsel the focus of the court's attention is really directed at the effect on the total award and not the questionable issues of evidence and prejudice.

The apparent misdirection in evaluating the procedural propriety of the per diem suggestion mirrors the larger problem of adopting some limiting or determining standard for the appraisal of pain and suffering awards. Lacking a definitive standard, the difficulty in control and direction of the jury award for pain and suffering creates a hesitancy on the part of the courts to accept procedural devices which have even a probability of increasing the amount of the award. The adoption of make-weight arguments to sustain what is in the first instance a value judgment doesn't import any rational predictability into the law and in the light of an eventual solution is a step backwards.

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