THE USE OF DEMONSTRATIVE EVIDENCE

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There is nothing new in the principles of demonstrative evidence. The successful fisherman who mounts his trophy for display uses effective demonstrative evidence. The old Anglo-Saxon trial by ordeal was based on the faith that a supernatural agency would intervene and give demonstration of the innocence of the accused by making the water reject his person, in the ordeal by water, or by making his burned hands heal without infection, in the ordeal by fire. Long before that, Doubting Thomas had earned his name and place in history by demanding to see and feel the wounds of his Master, being unable to believe the miracle without demonstrative evidence of its truth.

Demonstrative evidence has long been used in Ohio trials. It was decided in 1897 that a photographic negative produced by Roentgen rays, showing the size and shape of a broken bone, was admissible when properly identified.[1] A Pennsylvania court as early as 1856 had said succinctly, "A look is better than a description"[2] paraphrasing the maxim of Confucius that a picture is worth ten thousand words.

Although the demonstrative techniques are not new, certainly recent years have seen much wider interest in its use, and much broader application of demonstrative tools. The legal principles have been well defined, and may be summarized quite briefly. Demonstrative evidence is admissible if it is relevant, and if its explanatory value outweighs the possible passion or prejudice it might arouse. The trial judge has a broad discretion to compare the probative value of the proffered evidence against the danger of passion, distraction, or prejudicial overemphasis, and only in the most flagrant and patent abuse of this discretion will the trial court's ruling be disturbed.

The fact that the exhibit may be gruesome or revolting is not ground for exclusion if the exhibit has probative value. In an early Minnesota case[3] the court censured counsel for even offering a preserved, amputated hand. The dismembered part was offered only to show pain and suffering, and clearly the gruesomeness of the exhibit outweighed any probative value on that issue. A different ruling was made in another amputated hand case,[4] where there was a dispute whether the plaintiff had caught his hand at the edge of the roller

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1 Tish v. Welker, 5 Ohio Dec. 725, 7 Ohio N.P. 472 (1897).

2 Fowler v. Sergeant, 1 Grant 355 (1856).

3 Evans v. Chicago, M. & St. P.R.R., 133 Minn. 293, 158 N.W. 335 (1916).

4 Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521 (1905).

on a press, or had caught it between the rollers and the stencil of the press while he was operating it. His pickled hand, in a jar, was received in evidence in this case because the preserved skin showed a streak of ink across the hand, which tended to prove it had in fact gone under the stencil.

In *John Holland Gold Pen Co. v. Juengling*,[5] where the plaintiff's hair and a portion of her scalp had been torn from her head by a revolving shaft, the court held no error occurred in receiving in evidence the scalp and hair preserved in a jar of alcohol. The defendant claimed the sole purpose of the exhibit was to excite sympathy, but the court pointed out that the exhibit was convincing evidence of the quantity and quality of the hair lost and the size and thickness of the avulsed scalp. A curious facet of this case is that the trial court had, at the defendant's insistence, required plaintiff to wear her hat upon her head as she sat in the courtroom during the trial, except for the occasion when her partially denuded head was exhibited to the jury for close inspection. The appellate court held that this ruling was a proper exercise of the discretion of the trial court, which has broad power to prevent the abuse of any demonstration.

An astute trial lawyer would have kept the plaintiff's head covered in any event. A repulsive injury, long gazed upon, loses its revolting quality and tends to become accepted. The skillful trial man will make his exhibit of the injury very brief, to preserve its impact.

The objection that a hideous injury will excite the jury's emotion is not well taken. The court in *Slattery v. Marra Bros., Inc.*,[6] pointed out that although a repulsive injury may tend to excite emotion, the very hideousness of the deformity is a substantial part of the suffering and humiliation of the victim which can not rationally be excluded in the assessment of damages.

In a recent Illinois case[7] plaintiff had suffered injuries in the pelvic area. The shapes and relationships of the bones making up the pelvic girdle are difficult to describe and hard to visualize even with clear description. Plaintiff's attorney furnished the doctor with a plastic model of a normal skeleton, which the doctor used in his testimony to illustrate normal configuration and alignment, and compared with X-rays of the plaintiff to demonstrate the displacement in the plaintiff's healed fractures. The doctor also explained, with the model, how the muscles are arranged and attached and how the weight of the upper torso is transmitted, through the pelvis, to the legs. The mechanical disadvantage suffered by plaintiff because of his deformity

[5] 2 Ohio App. 20 (1913).

[6] 186 F.2d 134 (1951).

[7] Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956).

became understandable and apparent. Defendant appealed from an adverse verdict on the ground that the skeleton was gruesome, tended only to arouse emotion, and was unnecessary to an understanding of the issues as to injury. The appellate court said "[We] weigh the explanatory value of an object against its possible emotional effect, with no flat rule that a gruesome object cannot be used." It was held that the skeletal model was useful in the enlightenment of the jury, was not overly dramatic, and had been properly used.

This case contains the key to successful use of medical models. The model should be introduced by the doctor, and used by the doctor in explaining the medical problem to the jury. The trial lawyer has the task of educating the jury in an area where their ignorance is usually profound—the basic anatomy of the human body. The lawyer ought to use the same educational tools that the medical school faculties use in the training of medical students. Medical supply houses, such as Clay-Adams Co. of New York, Denoyer-Geppert Co. of Chicago, and Medical Plastic Laboratory of Gatesville, Texas, stock an astonishing array of models of the human anatomy and its component parts. There are models not only of skeletal parts, but of all the organs, and nervous and vascular systems. Many of these models may be disarticulated, or have cut-aways to expose hidden internal structures. In addition to three-dimensional models, the medical supply houses can furnish anatomical charts and colored slides for projection.

Another source of demonstrative medical material is the medical textbook. Illustrations, cross-sectional views and diagrams, and color plates may be reproduced photographically or may be projected on a screen by use of an opaque projector. The jury will surely better understand the quality and effect of an injury if the design and function of the normal anatomy is first understood.

The injury itself is subject to demonstration in most cases. The use of X-ray negatives to show fracture lines and displacement is commonplace. Less often seen, but worthy of greater use, is the X-ray positive in which the negative is used to make a positive print. The print is much easier for the untrained eye to read, and may be enlarged to clarify fine detail lines of the original negative.

The negative itself may be greatly enlarged for ease in courtroom viewing by the use of an overhead projector with suitable magnification. The overhead projector enjoys such wide acceptance in classroom use as a teaching aid that the court should not question its value as an expository aid to the jury.

More attention is now being focussed by the trial bar on the problem of demonstrating the particular injury suffered by the plaintiff.

One visual aid that has been recently developed is the plastic model of the actual fracture. The Medical Plastic Laboratory of Gatesville, Texas, will undertake to dimension a fracture from a standard antero-posterior and lateral X-ray view, and will build a model of the fractured bone accurately portraying the characteristics of the particular break. The operating surgeon may be willing to take a model of the bone involved, cut it to duplicate the break, and then pin it or plate it with the same nails, screws, and bone plates he used on the patient. It goes without saying that this should be done in the workshop, not in the courtroom. An Illinois court reversed because surgical instruments were brought into the courtroom for a demonstration of the operative technique, the court saying: "To permit an unlimited use of such demonstrations of operative technique with surgical instruments is not conducive to a fair and impartial consideration of the proper issues presented."[8] The Missouri court, two years earlier, had reversed plaintiff's verdict for the over-zealous conduct of his counsel in compelling the defense medical expert to use a scalpel in a demonstration of the operative technique in a laminectomy.[9]

It is submitted the courts were right in those cases for the reason that the demonstrations had insufficient probative value to outweigh the dramatic appeal to emotion. Both cases involved surgery on a completely anaesthetized patient, who had suffered no conscious or remembered pain when the scalpel and other bright instruments were used. The court might rule differently in a case similar to that of the English actor who recently had his leg crushed in an elevator accident, and suffered consciously through an amputation performed by a resident with a pen-knife. If such a case were tried, then the pen-knife itself might well be admissible, together with newsreel movies of the procedure if any were taken. Where the hideous quality of the exhibit is matched by the horror suffered by the plaintiff, then the test of probative value is satisfied.

When suffering and humiliation is in issue, it would seem to be proper to demonstrate the means and agencies which produce it. It has been held in Missouri, Oklahoma, Texas and Oregon that a plaintiff may be permitted to remove an artificial eye from its socket, exhibit the empty socket, and replace the eye on the witness stand.[10] Where this is part of the plaintiff's daily routine as the result of the

[8] Winters v. Richerson, 9 Ill. App. 2d 359, 132 N.E.2d 673, 674 (1956).

[9] Taylor v. Kansas City So. Ry., 364 Mo. 693, 266 S.W.2d 732 (1954).

[10] Orscheln v. Scott, 90 Mo. App. 352, *later app.* 106 Mo. App. 583, 80 S.W. 982 (1901); Shell Petroleum Corp. v. Perrin, 179 Okla. 142, 64 P.2d 309 (1936); Bowerman v. Columbia Motor Coach Sys., 132 Ore. 106, 284 Pac. 579 (1930); Davis v. Christmas, 248 S.W. 126 (Tex. Civ. App. 1923); Panhandle & S.F. v. Jones, 105 S.W.2d 443 (Tex. Civ. App. 1937).

injury, there is no valid reason why the jury should not see the same repulsive sight the plaintiff himself is forced to observe, to gain insight into his suffering. On the same basis a plaintiff who is forced to undergo repeated catheterization should be entitled to put into evidence the urethral sound that is used. A juror who has never seen one cannot appreciate its size, nor the pain of its insertion, on mere description.

Along the same line, traction devices, head halters, cervical collars, back braces, artificial limbs and prosthetic hands may be demonstrated to the jury, and duplicates may be offered into evidence. These devices sound rather more comfortable and useful than they feel, and the measure of fair compensation for their enforced use will depend on the jury's full understanding of their discomfort and awkwardness.

The same considerations of relevancy and probative value apply to photographs. The earliest Supreme Court decision in Ohio discussing photographs is *Cincinnati H. & D. Ry. Co. v. DeOnzo*.[11] The plaintiff was an acrobatic performer, whose legs were injured in an accident. He introduced photographs of his pre-accident normal legs for the purpose of comparison with his post-accident lumpy and swollen left leg. The defense objected on the ground that the condition of the legs was a matter easily described by oral testimony, so that the picture could not aid the jury. The supreme court observed that the introduction of photographs had, even at that time, been familiar practice for years and generally acquiesced in. The court said,

> From many authorities, decisions and textbooks, and from the practice of courts in this state and elsewhere, it may be stated as a general rule that photographs are admissible in evidence when they appear to have been accurately taken, and are proven to be correct representations of a subject in controversy, which subject cannot itself be produced, or of some subject incident to it, and also of such a nature as to throw light upon the disputed point.[12]

The court further approved the admission of pictures, torn from a magazine, showing the acrobatic plaintiff performing certain acrobatic feats before his injury. The feats had been orally described, and the pictures were received because they "tended to enable the jury more clearly to understand and apply the oral evidence."

The court today would not hold to the apparent qualification that the picture of the subject is admissible when "the subject cannot itself be produced." This is a matter only of convenience, and if the subject

[11] 87 Ohio St. 109, 100 N.E. 320 (1912).

[12] *Id.* at 115.

itself would be admissible the accurate representation of it would be equally admissible.

For example, it is considered good trial practice for plaintiff to introduce a photograph of a distorted amputation stump even though the stump is fully exhibited to the jury and the picture is taken at substantially the same time. This not only preserves the jury view for the jury room, but also gives the same view to the judges of the appellate courts who possess the power of remittitur. When the appellate court weighs the amount of recovery against the gravity of the injury, the demonstration of injury for the permanent record has substantial practical value.

Colored photography poses no different problems. Its use is relatively recent, and colored photographs in the courtroom are the exception rather than the rule. Generally the ordinary black and white photograph is adequate, more convenient, less expensive, and offers far greater latitude in exposure and developing. Color is used when there is a special desire or need for color, as when proving bruises or discoloration.

> When relevant and when properly verified, it would seem that there should be no question as to their [color photographs] admissibility, for by showing the actual colors of a subject they are even a more faithful type of reproduction than black and white photographs. Color as color often has evidential value.[13]

Plaintiff often has access to exceptionally accurate and vivid colored slides when the case involves destructive injury which requires plastic surgery. It is common practice for plastic surgeons to have the medical photographer at the hospital make serial colored slides of the initial injury, the progressive operations, and the final result.

Such slides are often gruesome to view, particularly in burn injuries, but this fact does not impair admissibility if they are accurate representations and have probative value on the extent of the injury and its concomitant suffering. The Minnesota court recognized that it was possible the revolting aspects of colored photographs might transgress the bounds of acceptability but nevertheless approved the admission of photographs, in color, of the burned areas on a child's body taken three months after the injury.[14] A later case approved the use of colored photographs to show and demonstrate the condition of terribly burned areas on a six-year old child immediately following the injury.[15]

In the criminal branch of the law, it has long been standard practice for the prosecution to introduce photographs of the battered

[13] Scott, Photographic Evidence § 627 (1942).

[14] Knox v. Granite Falls, 245 Minn. 11, 72 N.W.2d 67 (1955).

[15] Johnson v. Clement F. Scully Constr. Co., 95 N.W.2d 409 (Minn. 1959).

body of the victim of an assault, rape, or murder. Their admissibility is often objected to because of the inflammatory effect of the hideous portrayal, but the objections are universally overruled where the photographs are identified as accurate representations and illustrative of verbal testimony as to the wounds or mutilation.[16] Perhaps the ultimate in this kind of camera work was used in Ohio's Sheppard murder trial, where many detailed slides of the multiple wounds of the victim were projected, in full color, expanded in size to four feet square. Such use was approved in *State v. Sheppard*.[17] It would seem that the same considerations which would make such slides admissible when life is at stake in a first degree murder trial would require admission of similar demonstrative evidence when mere property is at stake in a civil trial.

In the usual situation the still picture of injuries, whether black and white or colored, is a plaintiff's tool. The defense is not usually concerned in emphasizing injury, or preserving an accurate record of it. On the other hand the motion picture is primarily a defense weapon. It is difficult for a plaintiff to prove what he cannot do, by reason of limitation imposed by permanent injury. A motion picture of the plaintiff *not* bowling or *not* painting his house would be absurd. On the other hand, a picture of the plaintiff painting his house on a tall ladder will have great probative force if the plaintiff swears he can no longer climb a ladder.

Motion pictures, like other demonstrative evidence, must be relevant to be admissible, and relevancy depends upon the issues in the case and the action portrayed in the film. Again, the decision on admissibility rests primarily in the discretion of the trial court. It would seem that proper authentication of the motion picture should require preliminary evidence as to the type of camera and particularly the speed control at which the films were taken; the manner or circumstances of development of the film; the method of projection and particularly the speed of projection; and most importantly, testimony by a person, present at the taking, that the film as exhibited accurately and fairly represents the action and things which he saw in the same proportion and at the same speed of action which he observed. It is not essential that the person who took the film himself testify, provided the qualifying information can be given by a person who was present.[18]

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[16] Annot., 159 A.L.R. 1413 (1945).

[17] 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd* 165 Ohio St. 293, 135 N.E.2d 340 (1956), *cert. den.* 352 U.S. 910 (1956).

[18] Kortz v. Guardian Life Ins. Co., 144 F.2d 676 (1944).

In *DeTunno v. Shull*,[19] a motion picture of the plaintiff changing a tire became admissible when the plaintiff denied his ability to perform the feat in the manner portrayed on the film. It must seem surprising to the casual reader of the cases to see how many involve plaintiff's changing tires. One would suspect that plaintiffs' automobiles had a special affinity for flats. The mystery may be solved by the following quotation from the Defense Law Journal:

> Overzealous investigators have sometimes sought by devious methods to entrap the plaintiff. The most common device is to deflate the tire of plaintiff's automobile. When the plaintiff comes out of his home and starts to change the tire, the movies are taken. Again this may be the only method of securing good movies of the subject and such tactics are justified if this is the only way to secure them.[20]

One may question the assertion that the criminal act of malicious mischief is a justifiable tactic, but it is clear that deliberate entrapment is no bar to admissibility. In *Maryland Cas. Co. v. Coker*[21] the evidence established that plaintiff had been enticed to go along on a fishing trip, complete with female companions and liquid refreshments, by a secret agent of defendant who then procured motion pictures of the plaintiff rowing a boat. The pictures were admitted, although the court indicated its disgust at the method of procurement.

The writer had an unusual flat tire case, in which the plaintiff had an operated ruptured disc and really couldn't change the tire. When he found the tire valve removed one morning, he called his brother-in-law to change it, and merely watched the process. While the work was proceeding he observed a strange car parked down the street, which pulled away rapidly when he stared at it. The event was sufficiently strange for him to note the license number.

Deposition was later taken of the owner of that car, who admitted that he was a private investigator hired by the railroad company defendant, and that he and other operatives had taken movies of the plaintiff from time to time, which had been delivered to the railroad. At trial time we issued subpoena for the films, and proposed to show them as demonstrative evidence that the plaintiff could *not* change a tire. Unfortunately no trial court ruling on the point could be made, because the defendant thereupon offered settlement in a sum too generous to be refused. It would seem on principle that such films would be admissible as an unposed, natural response of the plaintiff to a demanding situation which demonstrated his physical inability to cope with the problem himself. The defendant could hardly com-

[19] 75 Ohio L. Abs. 602, 144 N.E.2d 669 (1956).

[20] 4 Defense L.J. 143 (1958).

[21] 118 F.2d 43 (1941).

plain that the necessary identification of the films through its operatives would disclose its own skulduggery.

There can be no doubt that motion pictures pose sensitive problems. Jurors resent the invasion of privacy, and tend to resent entrapment. Thoughtful defense attorneys prefer pictures taken away from the plaintiff's home, when he is voluntarily engaged in an activity of his own choosing, and when the activity makes the plaintiff's claim of injury completely and unqualifiedly false. If the pictures show the plaintiff is a fraud, trying to hoodwink the jury, the pictures will indelibly impress the fraud in the jury's mind. Movies which tend to show only slight exaggeration of the claim of injury are valueless and might well increase the size of the verdict. The pictures must be so overwhelming that the natural resentment of the jury to spying will be lost in their anger at the plaintiff for attempting to defraud the defendant and deceive the court. Motion pictures of this quality remain a rarity in the daily run of trials, simply because the fraudulent plaintiff is rare.

Although the motion picture is chiefly a defense weapon, there are occasions when the plaintiff will be able to proffer movies. The wider sale of eight millimeter home movie cameras should produce situations where the plaintiff will appear in pre-accident amateur motion pictures that will clearly demonstrate his normal posture, gait, and characteristics. The writer had one such case involving a child, and in this case home movies of the child, post-accident, were also introduced. They had been taken over a period of months as the child made a slow, tortured, and incomplete recovery from a crippling brain injury. The trial judge required a preliminary showing in chambers to satisfy himself that the films were not posed or artificially staged, and were more representational than inflammatory. Such preliminary viewing is sound procedure, well designed to eliminate error.

Another area of real evidence is the demonstration, before the jury, of the limitation of function produced by the injury. This is akin to the demonstration of the scar, amputation stump, or deformity, but goes beyond it in testing the power or movement of the injured part. No Ohio case discusses this problem separately, although the practice is commonplace in our courts and is recognized by acquiescence. The many cases in other jurisdictions,[22] indicate that the propriety of such demonstration is usually left to the discretion of the court, and the demonstration is usually permitted. An early Federal case, *Osborne v. Detroit*,[23] approved a courtroom test wherein the doctor stuck a pin into the right side of plaintiff's face, her right arm and right leg, to demonstrate that her sensory nerves

22 Annot., 66 A.L.R. 2d 1382-1400 (1959).

23 32 Fed. 36 (1886).

were so paralyzed that she would not feel pain and wince. A similar test was disapproved in *Madison Coal Corp. v. Altmire*,[24] where the attorney performed the experiment with a needle. The conclusion to be drawn is that pin-sticking had best be done by a licensed medical practitioner who is sworn, who can testify to the scientific validity of the test, and is subject to cross-examination.

There is almost universal disapproval of any test which is deliberately designed to compel the plaintiff to cry out with pain in the jury's presence. A doctor may be permitted to raise the plaintiff's arm to a certain level, and testify that any further movement would cause pain, but if he then manipulates the arm further and forcibly raises it so the plaintiff cries out with pain as predicted, mistrial should be granted for the abuse of the demonstrative technique.[25]

On the other hand, where the demonstration causes plaintiff to wince involuntarily, or grimace, no error occurs in the view of other courts.[26]

The distinguishing feature in the cases seems to be the audible cry or scream of pain, which the courts condemn as overly dramatic and passion provoking. If plaintiff's counsel feels that the medical dispute in the case is sufficiently critical to require a demonstration of the tests given to the plaintiff by the examining physician, it might be proper to film such tests in silent movies. Camera shots of a joint locking, or a muscle group going into spasm, might be strong evidence of injury, and admissible in a silent motion picture which would eliminate the objectionable groans, grimaces, or cries of anguish.

On the current scene, the real controversy concerns, not demonstrative evidence, but demonstrative argument. The plaintiff's bar, under the leadership of NACCA, has embraced with fervor the chalk talk style of final argument in which per diem calculations for pain and suffering are made on the blackboard. There is no magic in the technique (juries seldom return verdicts in an amount even approaching the blackboard figures) but the defense bar is greatly alarmed by the plausibility of the per diem argument. The defense efforts to stamp out this technique have been vigorous, and to some extent successful.

Pennsylvania has long forbidden attorneys in argument to tell the jury the amount sued for, to state the amount of their real demand or expectation, or to argue damages on a mathematical dollar formula.

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[24] 215 Ky. 283, 284 S.W. 1068 (1926).

[25] Landro v. Great N.R.R., 117 Minn. 306, 135 N.W. 991 (1912); Meyer v. Johnson, 244 Mo. App. 565, 30 S.W.2d 641 (1930); Peters v. Hockley, 152 Ore. 434, 54 P.2d 1059 (1935).

[26] Willoughby v. Zylstra, 5 Cal. App. 2d 297, 42 P.2d 685 (1935); Shell Petroleum Corp. v. Perrin, 179 Okla. 142, 64 P.2d 309 (1936); Hiller v. Johnson, 162 Wis. 19, 154 N.W. 845 (1916).

The major decision on the point in recent years is *Botta v. Brunner*.[27] The analysis of the New Jersey Court was that argument must be limited to matters in evidence; that no evidence can be adduced as to the value of pain because it has no market value; that any argument as to value is therefore sheer speculation unsupported by evidence and cannot be permitted. It would make equal sense, or equal nonsense, to say that juries can return verdicts based only on evidence, that no evidence on the value of pain can be adduced, and that therefore no verdict can be given to compensate for pain since it would necessarily involve sheer speculation. One suspects the real reasoning behind the court's opinion would run: per diem arguments lead to overly large verdicts; excessive verdicts may be destructive of the insurance industry; the insurance industry is essential to our economy; therefore public policy condemns the type of argument that seems too effective. The opinion quotes Belli's Modern Trials as to the effectiveness of the per diem argument, which indicates the court itself was looking outside the record in the case and was engaged in policy-making.

The effect of the *Botta v. Brunner* decision is to permit evidence as to the existence of pain, but deny argument as to its value. The skill of the advocate is not to be used in the critical area of the amount of recovery. The Texas court, in an inspired phrase, referred to this as the "By guess and by golly" rule of procedure, and has rejected the *Botta* rule in *Continental Bus Sys., Inc. v. Toombs*.[28]

In the Federal courts of the Sixth Circuit the per diem approach to computing damages is sanctioned by *Imperial Oil Ltd. v. Drlik*.[29] At the appellate level in Ohio, in *Miller v. Loy*, it has been held that blackboard calculations, not based on specific evidence, may be permitted in the discretion of the court.[30]

The prerogative of trial counsel in final argument is stated in the early case of *Southard v. Morris*:[31]

> His illustrations may be as various as the resources of his genius, and his argument as full and profound as his learning can make it.

As early as 1853 it was held, in *Legg v. Drake*,[32] that counsel in final argument could read from books and other works of the sciences or the arts, or repeat passages from memory, by way of argument or illustration "adopting it and making it a part of his own address to the jury; but not using it as evidence in the case."

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[27] 26 N.J. 82, 138 A.2d 713 (1958).

[28] 325 S.W.2d 153 (Tex. Civ. App. 1959).

[29] 234 F.2d 4 (1956).

[30] 101 Ohio App. 405, 140 N.E.2d 38 (1956). For further discussion, see Note, 19 Ohio St. L.J. 780 (1958).

[31] 14 Ohio N.P. (n.s.) 465, 31 Ohio N.P. 684 (1913).

[32] 1 Ohio St. 286 (1853).

Appropriate quotations from the Bible and from Shakespeare are part of the stock in trade of many a trial lawyer, and it has never been deemed necessary to put the Book in evidence to support the quotation used. One wonders whether the *Botta*[33] rule, logically extended, would permit the attorney to argue negligence. Negligence is defined as the failure to exercise the care of the ordinarily prudent person; but no evidence as to what an ordinarily prudent person actually does on a statistical basis has ever been permitted. Whenever an attorney argues what the ordinarily careful man would do, he indulges in speculation, but this kind of speculation which seeks to persuade the jury to adopt a particular point of view is the essence of the advocate's art.

It should be recognized that there may be considerable validity to the defense viewpoint that argument on per diem valuation for pain and suffering should not be permitted in many cases where it is now used. The argument is permissible only when there is a basis in the evidence for the argument. The evidentiary basis required is not evidence of *value*, but evidence of per diem pain. Pain is transient and varied. It comes and goes, sometimes hard and hot, sometimes dull, sometimes so slight it is scarcely noticed. The attack of the defense on the per diem valuation argument should be directed against the concept of per diem pain. When daily pain is proven, then daily compensation is justified. The hospital records of the days immediately following injury or operation will ordinarily give adequate basis for arguing the existence of pain each day, and the necessity of compensating for it each day.

In the late stages of injury, when pain is occasional, plaintiff's counsel will be on safer grounds to argue a per annum basis of recovery, provided his evidence has developed the fact that pain and suffering will occur during some part of every year.

The blackboard is not a substitute for evidence, but a useful demonstrative tool for illustrating the argument of counsel as to the advocated values to be placed upon those items of damages established by the proof. Blow-ups of hospital charts, demonstration by model and by exhibition, charting of significant testimony, and quotation from the classics are all a part of effective, demonstrative final argument. The blackboard and chalk constitute a similar tool, equally effective, and equally legitimate. It is to be hoped that the use of the blackboard—the primary teaching tool—will continue to be approved by Ohio courts. The art of advocacy is essential to the adversary system, and it is submitted that advocates should be encouraged to advocate, and to advocate effectively.

[33] *Supra* note 27.