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Damages-Pain and Suffering-Use of a Mathematical Formula

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COMMENTS

DAMAGES—PAIN AND SUFFERING—USE OF A MATHEMATICAL FORMULA—Measurement of damages for pain and suffering is, in a sense, an attempt to measure the unmeasurable; yet as long as our law recognizes a right to recover for pain and suffering, the jury or judge must arrive at some concrete figure. The traditional approach of simply instructing the jury that they should arrive at a reasonable amount provides little, if any, guidance. The question is whether this approach, nevertheless, remains the best of a bad lot of alternatives. If more guidance is desirable, what can be accomplished within the framework of our present system? The mathematical formula discussed in this comment presents one possibility.

Prior to the past decade, scant attention had been given to the subject of personal injury damages generally,[1] and to the use of the formula approach specifically. In fact, use of the formula approach had been considered by the highest court of just one state, Pennsylvania, and there only tangentially.[2] In recent years, however, the propriety of the formula approach to damages for pain and suffering has received the attention of a growing number of courts, both state and federal.[3] The question has arisen in two basic situations.[4] The first is the use by counsel of a formula in his argument to the jury. This can involve either a statement by counsel of his beliefs as to the value of pain and suffering per hour or per day, coupled with the suggestion that this figure be used in a formula for calculating the damages to be awarded;[5] or it can

1 Wright, *Damages for Personal Injuries—Foreword*, 19 OHIO ST. L.J. 155 (1958). Wright lists the following reasons for the lack of a well-developed law of damages for personal injuries: it did not make much difference because of the many bars to liability and the small verdicts; judicial review on the damage issue was extremely limited; and there existed a feeling that awards of damages for personal injuries were essentially irrational. He points out, however, that there have been drastic changes in this area since World War II. Wright, *supra*, at 156.

2 See cases cited notes 32-43 *infra* and accompanying text. See also 41 B.U.L. REV. 432 (1961).

3 See 41 B.U.L. REV. 432 (1961).

4 See Annot., 60 A.L.R.2d 1331, 1347 (1958). This annotation suggests a further question: What may the trial judge say in his instructions to the jury as to the use of the formula approach? Discussion of this question is omitted herein, because it has not been a factor in recent cases and because it is so intimately connected with the questions discussed.

5 For example: Five dollars per day for plaintiff's life expectancy of 13,920 days or $69,600. The use of a per diem formula will be discussed herein, although what is said applies equally to a *per mensum* or any other formula approach.

involve merely a suggestion by counsel, without an expression of his personal opinion as to value, that the jury base their evaluation on some per diem figure in conjunction with a formula.[6] The other situation in which the propriety of the formula approach arises is actual use by the jury, or by the judge if he is the assessor of damages in the particular case.[7]

I. DOCTRINAL DEVELOPMENT: CONFLICT AND CONFUSION

It should be emphasized that the courts are running the complete gamut in degree of tolerance of the formula approach. As of the present time, the use by counsel of a per diem formula has been approved in five states:[8] Michigan, Mississippi, Nevada, Utah, and Washington. It has been approved by intermediate courts in five additional states;[9] Florida, Illinois, Kentucky, Maryland and Texas. On the federal level, the Sixth and Third Circuits have added their approval.[10] Minnesota and one federal district court have approved counsel's use of the formula for "illustrative purposes."[11] North Dakota permits counsel to suggest that the jury make use of the formula approach.[12] Four states,[13] New Hampshire, Massachusetts, Missouri, and Wisconsin and the Second Circuit[14] permit mention of the *ad damnum* clause or some total figure. The positions of four other states and one federal

6 King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961). See Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

7 Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956) (use of a formula by a federal judge).

8 Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); 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).

9 Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961); Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Eastern Shore Pub. Serv. Co. v. Corbett, 177 A.2d 701 (Md. 1962); Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960).

10 Pennsylvania R.R. v. McKinley, 288 F.2d 262 (6th Cir. 1961); Bowers v. Pennsylvania R.R., 281 F.2d 953 (3d Cir. 1960), *affirming* 182 F. Supp. 756 (D. Del. 1960).

11 Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956).

12 King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961).

13 Kinnear v. General Mills, Inc., 308 Mass. 344, 32 N.E.2d 263 (1941); Dean v. Wabash R.R., 229 Mo. 425, 129 S.W. 953 (1910); Sanders v. Boston & Me. R.R., 77 N.H. 381, 92 Atl. 546 (1914); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

14 Philadelphia & R. Ry. v. Sherman, 247 F. 269 (2d Cir. 1917).

circuit are not clear, but it seems that all of them at least approve mention of a total figure.[15]

Eight states,[16] Delaware, Missouri, North Dakota, New Jersey, Pennsylvania, South Carolina, Virginia, and Wisconsin clearly prohibit counsel from using a formula approach. The Eighth Circuit has also indicated disapproval,[17] and Connecticut prohibits mention of the *ad damnum* clause.[18] The other state and federal courts, seemingly, have not yet passed on this question.

A. *"Illustrative Purposes"*

It will generally be the case that courts which allow counsel to use a formula will not reverse a verdict simply because the jury apparently used a similar approach. Likewise, one would expect a court which prohibits the use of a formula by counsel to apply the same prohibition to use by the jury.

Nevertheless, at least two courts limit use of a formula to counsel by making it theoretically impossible for the jury to use the formula.[19] This is perhaps best termed the "Minnesota doctrine" because of the prominence it has attained in the courts of that state. Early Minnesota decisions commented that the formula approach, though "illuminating," may be "misleading."[20] In *Boutang v. Twin City Motor Bus Co.*,[21] however, the Minnesota court noted that none of the previous cases had held that a formula could not be used for purely "illustrative" purposes.[22] This means

15 Haycock v. Christie, 249 F.2d 501 (D.C. Cir. 1957); McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 15 Cal. Rptr. 161 (1961); Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955); Haley v. Hockey, 199 Misc. 512, 103 N.Y.S.2d 717 (1950).

16 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Bostwick v. Pittsburgh Rys., 255 Pa. 387, 100 Atl. 123 (1917); Harper v. Bolton, 123 S.E.2d 54 (S.C. 1962); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959). An Ohio court has disapproved of the formula approach but held that the use of a formula did not lead to prejudicial results in the particular case. Hall v. Booth, 178 N.E.2d 619 (Ohio Ct. App. 1961).

17 Chicago & N.W. Ry. v. Candler, 283 Fed. 881 (8th Cir. 1922).

18 Cooley v. Crispino, 147 A.2d 497 (Conn. Super. Ct. 1958).

19 Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956).

20 Hallada v. Great No. Ry., 244 Minn. 81, 69 N.W.2d 673, *cert. denied*, 350 U.S. 874 (1955); Ahlstrom v. Minneapolis St. P. & S. Ste. M.R.R., 244 Minn. 1, 68 N.W.2d 873 (1955).

21 248 Minn. 240, 80 N.W.2d 30 (1956).

22 Boutang v. Twin City Motor Bus Co., *supra* note 21, at 250-51, 80 N.W.2d at 39; *accord*, Flaherty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W.2d 633 (1958).

that a formula can be used by counsel in his argument but it cannot be used by the jury to test the reasonableness of the final damage figure. This result ignores the bases of the early decisions which attack formulas as being generally intolerable. Furthermore, it is unrealistic; because once a figure is before the jurors, they can be unduly influenced by it without using the formula approach themselves. If the earlier criticisms were valid and if there is a fear that the jury will be misled, logically the use of a formula should not be permitted for "illustrative" or any other purposes. On the other hand, if there is confidence in the jury, in the discretion of the trial judge, and in the ability of a court of review to prevent intolerable results, the use of a formula should not be restricted to counsel.

The position of the North Dakota court[23] is even less understandable. It would permit counsel to suggest that the jury adopt a per diem formula approach but prohibit counsel himself from spelling out the details of such an approach with specific figures. This court clearly is worried only that the jury will accept the suggestion of counsel as an established fact. Yet, if the jury itself can safely use the formula approach, it should certainly be able to gauge the accuracy of counsel's figures. Also, the trial judge can make it clear that the suggestions are argumentative and can use his discretion to see that the jury does not go astray. An additional safeguard, as always, is the final review by the appellate courts.

The holdings of the Minnesota and North Dakota courts indicate the confusion which exists with regard to the mathematical formula. The principal concern of both courts is the credulous jury, but they take opposite measures in attempting to solve the problem. It might be argued that these approaches are not, in fact, inconsistent if one accepts the idea that only use by *both* counsel and jury is likely to lead to undesirable results. According to this view the problem could be corrected by eliminating use by either one or the other. Nevertheless, the basic approach should be as follows: If a formula approach is of use to counsel and if it can aid the jury in a given case, both should be permitted to use it unless possible dangers in its use outweigh the advantages. If the decision is that the dangers do outweigh the advantages, the mathematical approach should be banned across the board. It should not be

23 King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961).

permitted on some limited basis in the hope that such limitation will stifle the feared abuses.

B. *The Total Amount Suggestion*

Prior to the problems raised by the use of a mathematical formula the cases dealt only with whether counsel would be permitted to suggest a lump sum as an award for pain and suffering. As a result, in addition to distinguishing between use of a formula by counsel and use by the assessor of damages, some recent cases have also distinguished between mention by counsel of a per diem formula and mention of a total lump sum.[24] However, most courts which permit the suggestion of a lump sum corresponding to pain and suffering also permit suggestion of a per diem figure. Several courts which recently have decided in favor of per diem formulation have pointed to prior decisions in the state which permitted counsel to ask for some total figure, usually corresponding to the *ad damnum* clause in the complaint.[25] Other courts have pointed to state statutes which provided for reading of the *ad damnum* clause to the jury.[26] All of the recent decisions stress that it is illogical to prohibit a per diem suggestion if a total suggestion has already been approved. The feeling is that a per diem figure is no more speculative and no more apt to be misleading than a total damage figure or a total figure for pain and suffering. It would certainly seem that if the basic fear were of a credulous jury, a suggestion of any sum would cause damage regardless of its size and regardless of its incorporation into a formula. Indeed, the New Jersey court, in *Botta v. Brunner*[27] has taken this stand. Prior to *Botta*, counsel could advise the jury of the amount sued for and state his opinion that the jury should award a stated sum short of this amount.[28] The *Botta* court, in the course of prohibiting use

24 Five dollars per day is an example of the former. $50,000 total for pain and suffering is an example of the latter.

25 Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.W.2d 209 (1961), 41 B.U.L. REV. 432; Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950). Some states which prohibit mention of a total figure have used this argument in reverse to prohibit mention of a per diem amount. See, *e.g.*, Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

26 Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Jones v. Hogan, 56 Wash. 2d 23, 351 P.2d 153 (1960).

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

28 Rhodehouse v. Director Gen. of Railroads, 95 N.J.L. 355, 111 Atl. 662 (1920); Kulodzej v. Lehigh V. R.R., 39 N.J. Super. 268, 120 A.2d 763 (App. Div. 1956).

of a formula by counsel, specifically overruled those opinions which had sanctioned these practices. On the other hand, the Wisconsin court, in *Affett v. Milwaukee & Suburban Transport Co.*,[29] banned the per diem formula suggestion but specified that counsel could make a suggestion of a lump sum amount for pain and suffering. Perhaps it can be said that a lump sum figure, if unreasonable, will so appear on its face; whereas a per diem figure might give the illusion of reasonableness while in fact leading to an unreasonable amount. Thus, a court might validly object to a per diem suggestion while approving a lump sum. Nevertheless, use of a per diem formula results ultimately in a total figure, the reasonableness of which should be just as apparent as where no formula is involved. Furthermore, the arguments actually advanced by the *Affett* court against the per diem suggestion apply equally to the suggestion of a lump sum. Once again there is evidence of confusion; and once again, the courts should make the basic decision whether a suggestion of a money amount aids or impedes the trial of a personal injury damage case. The decision should not depend upon the size of the figures suggested, nor upon whether they are suggested in conjunction with a formula. The jury's final determination will be of a total amount, and the effect of any suggestion upon this jury decision is all that really matters.

II. BASIC AREAS OF DISAGREEMENT

The most noticeable feature of recent judicial holdings and editorial comment has been the consistency with which both advocates and opponents of the formula approach have started from identical premises only to proceed to diametrically opposite conclusions. One gets the impression, however, that judges and commentators have likewise at times started with preconceived notions of whether the formula approach is a "good thing." Plaintiffs' and defendants' attorneys clearly have a subjective interest in whether the formula approach is utilized; and consequently their criticism of the opposite position at times becomes quite fanciful.[30] In analyzing the arguments, one should keep in

29 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

30 Compare the following commentary on the opinion in Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958), a leading decision prohibiting the formula approach: *Botta* is a lamentable decision which left the jury "wrapped in a Grand Banks fog." 23 NACCA L.J. 255, 257 (1959). "The decision is a masterpiece of sound thinking and judicial writ-

mind the question whether a decision regarding the formula approach can be based on reasoned principles or whether it must, in the final analysis, be based on subjective interest or a preformed opinion.

A. *The Starting Point: Reasonable Compensation*

Since most authority on the formula approach is of current origin, attempts to draw on long-established case law have often resulted in inaccuracy because the sources were not relevant to the formula question.[31] Nevertheless, one concept basic to the entire problem can be found in Pennsylvania decisions dating back to the nineteenth century.

It was stated in *Baker v. Pennsylvania Co.*[32] that the measurement of damages was in the jury's sole domain and that the jury was to adopt the standard of a "reasonable allowance" in compensating for pain and suffering.[33] In that case, the court felt that the trial judge's instructions had given the jury the idea that what someone would charge to undergo voluntarily the suffering endured by the plaintiff was relevant to their calculations. This was held to be erroneous on the ground that no one would voluntarily undergo such pain. Thus, the idea of "price" as a standard was senseless as there was no marketplace in which it could be determined.[34] Five years later, the Pennsylvania court, in a similar case,[35] once again stressed a distinction between "price" and "reasonable allowance."[36] The court stated that the word "compensation" means, not "price," but rather an "allowance looking towards recompense for, or made because of, the suffering consequent upon the injury."[37] Conceptually, this distinction is difficult to grasp, but a possible explanation is that a juror should think in broad terms of compensating the plaintiff for what he has already undergone and not in terms of what the juror would

ing." 4 DEFENSE L.J. 288, 289 (1958). "The opinion is the most dangerous abridgement of the prerogative of counsel since Erskine defied the King of England." 24 NACCA L.J. 252, 253 (1959).

31 Notice, for example, the criticism of the court's reasoning in Botta v. Brunner, *supra* note 30, in 12 RUTGERS L. REV. 522 (1958).

32 142 Pa. 503, 21 Atl. 979 (1891).

33 *Id.* at 511, 21 Atl. at 980.

34 *Id.* at 510, 21 Atl. at 980.

35 Goodhart v. Pennsylvania R.R., 177 Pa. 1, 35 Atl. 191 (1896).

36 *Id.* at 15, 35 Atl. at 193.

37 *Ibid.*

charge to undergo equivalent pain—the so-called "golden rule" test. Nevertheless, if the court was merely condemning use of the "golden rule," the broad language which it used has been interpreted beyond its intended scope.[38] The appeal of this language to opponents of the formula approach is obvious. They note that because it is the jury's sole province to consider the evidence and to arrive at a figure which will reasonably compensate the plaintiff, any suggestion at all by counsel is unnecessary and undesirable.[39] They also emphasize that the suggestion of a dollar a day, for example, smacks strongly of "price." It, therefore, is doubly improper.[40] Thus, the reasonable compensation principle has been said to prohibit any suggestion of an amount by counsel, especially the suggestion of a per diem figure.

By the time of *Herb v. Hallowell*,[41] decided in 1931, it became apparent that the Pennsylvania court was mired in distinctions which were more verbal than substantive. In this case, the jury was charged to award what the pain and suffering were "worth."[42] The court answered the argument that the idea of "worth" is objectionable because it places a price or money-equivalent on pain and suffering by countering that "price" or "money-equivalent" is "rather close to what a plaintiff is seeking when he asks reasonable compensation for pain and suffering."[43] This willingness by the court to view the concepts of price and reasonable compensation as substantial equivalents would seem to sweep a portion of the ground from beneath the feet of those opponents of the formula approach who look to Pennsylvania for support. Although there remains the idea that only the jury can consider any amount, the "price" objection to a per diem figure, at least, is weakened.

38 The Pennsylvania court, in a later case, did specifically castigate a request that the jury put a "separate yearly value" upon future pain and suffering as part of a formula for reducing such amounts to their present worth. Bostwick v. Pittsburgh Rys., 255 Pa. 387, 389, 100 Atl. 123, 124 (1917).

39 Chicago & N.W. Ry. v. Candler, 283 F. 881 (8th Cir. 1922); Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 15 Cal. Rptr. 161 (1961) (dissenting opinion—majority held point waived on appeal); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954) (dissenting opinion).

40 See *ibid.*

41 304 Pa. 128, 154 Atl. 582 (1931).

42 *Id.* at 133, 154 Atl. at 584.

43 *Id.* at 134, 154 Atl. at 584.

One result of this emphasis on reasonable compensation as measured by the jury alone, and the corresponding belief that no precise measurement of a pecuniary equivalent for pain and suffering is possible, was that Pennsylvania was the first state to prohibit counsel to use a per diem figure in conjunction with a formula approach.[44] This rule seems difficult to justify on the above reasoning alone. A request for a certain sum per day for life, providing that it does not run afoul of the "golden rule" objection, could surely be considered by the jury in their quest for reasonable compensation. The jury decides other issues in a negligence case after hearing argument by counsel; the damage issue should not be an exception. The jury need not abandon the reasonableness standard because counsel has suggested a figure any more than it abandons the reasonable man standard because counsel maintains that the defendant acted in a certain way. A per diem suggestion should not stand in the way of a jury reasonably compensating a plaintiff, although perhaps there remains in the formula approach a hint of the "price" concept frowned upon by the Pennsylvania court.

It is true that some courts outside of Pennsylvania have stressed "reasonable compensation" as one step toward a conclusion that counsel should be prohibited from using a formula.[45] It is just as true, however, that other courts have given hearty assent to the reasonable compensation principle and have approved the formula approach as well.[46] It is a basic tenet of those opposed to a formula approach that pain and suffering simply do not lend themselves to mathematical calculation[47] and as a result there can be no "fixed

44 See 41 B.U.L. REV. 432 (1961). Early decisions of the Third Circuit followed the strong Pennsylvania rule. *E.g.*, Vaughan v. Magee, 218 Fed. 630 (3d Cir. 1914). Later decisions pointed out that this was a matter of procedure and that with the repeal of the Conformity Act federal courts no longer had to follow the state court rule. Garrett v. Faust, 183 F.2d 625 (3d Cir. 1950); Smith v. Philadelphia Transp. Co., 173 F.2d 721 (3d Cir. 1949). In a recent case, the Third Circuit upheld a suggestion by counsel in the district court that $2.77 per hour might be a reasonable figure. Bowers v. Pennsylvania R.R., 281 F.2d 953 (3d Cir. 1960), *affirming per curiam* 182 F. Supp. 756 (D. Del. 1960). Delaware prohibits use of the formula approach. Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958).

45 Cases cited note 39 *supra*.

46 Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956) (use of formula by district judge); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

47 Chicago & N.W. Ry. v. Candler, 283 Fed. 881 (8th Cir. 1922); Gorczyca v. New York, N.H. & H. Ry., 141 Conn. 701, 109 A.2d 589 (1954); Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d

basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries."[48] But the courts which approve the formula see no incompatibility between counsel making a formula argument and the jury arriving at a reasonable allowance. Apparently, something more than this general principle has influenced those courts which have barred counsel from use of a formula approach.

B. *The Evidentiary Basis for Use of a Formula*

Probably the most repeated arguments against the use of a mathematical formula by counsel go to the evidentiary basis of the conversion of pain and suffering into a per diem figure.[49] First, it is usually charged that any figure which counsel supplies is mere speculation on his part.[50] The courts which pursue this line of reasoning point to the subjective nature of pain and suffering, noting that it differs in individuals and differs from day to day in a single individual.[51] Furthermore, they note that pain does not remain constant but will most likely decrease with the passage of time. One court has remarked: "Usually the jury is asked to use the worst hour or the worst day as a yardstick for evaluating pain."[52]

In addition to the charge that any per diem figure is mere

126 (1959); Roedder v. Rowley, 28 Cal. 2d 820, 172 P.2d 353 (1946) (dictum); Braddock v. Seaboard Airline R.R. Co., 80 So. 2d 662 (Fla. 1955) (dictum); Green v. Rudsenske, 320 S.W.2d 228 (Tex. Civ. App. 1959) (dictum).

48 Botta v. Brunner, 26 N.J. 82, 92-93, 138 A.2d 713, 718 (1958).

49 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); 43 MINN. L. REV. 832 (1959), 61 W. VA. L. REV. 302 (1959); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Harper v. Bolton, 124 S.E.2d 54 (S.C. 1962); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 15 Cal. Rptr. 161 (1961) (dissenting opinion—majority held point waived on appeal). One writer has pointed out the conflicting values involved: the right of counsel to argue his case fully and the right of defendant to keep the argument limited to the evidence. D'Alemberte, *The Per Diem Approach to Damages for Pain and Suffering*, 14 FLA. L. REV. 189 (1961). Another has said the critical concept is the distinction between legitimate argument based on evidence versus opinions of counsel not based on evidence. 61 W. VA. L. REV. 302 (1959).

50 *Ibid.*

51 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Herb v. Hallowell, 304 Pa. 128, 154 Atl. 582 (1931); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959). See Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216 (1930); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958).

52 Hallada v. Great No. Ry., 244 Minn. 81, 99, 69 N.W. 2d 673, 687, *cert. denied*, 350 U.S. 874 (1955).

speculation, opponents of the per diem approach sometimes view any suggestion by counsel as an introduction of evidence rather than an inference from evidence already before the court.[53] This means that counsel is giving testimony[54] by suggesting figures and vouching for their reasonableness, and this is something which not even an expert witness would be allowed to do.[55] Thus, it is maintained, counsel is circumventing established rules of procedure.[56]

Those courts which permit the use of a formula are in complete agreement that any suggestion by counsel must be founded in the evidence. They argue, however, that any per diem figure is necessarily based upon whatever evidence of pain and suffering has been introduced and, thus, such a figure is neither mere conjecture[57] nor the introduction of evidence not already before the court.[58] While they agree that people are indeed affected differently by pain and suffering, they stress that this is a reason why counsel ought to have the opportunity to present the case with respect to the specific plaintiff involved.[59] In this connection, it is pointed out that the suggestions have ranged from

53 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958).

54 Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

55 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, *supra* note 54; Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954) (dissenting opinion).

56 Henne v. Balick, *supra* note 55; see 61 W. VA. L. REV. 302 (1959). *Contra*, Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961).

57 Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956) (use of formula by federal judge); Bowers v. Pennsylvania R.R., 182 F. Supp. 756 (D. Del.), *aff'd per curiam*, 281 F.2d 953 (3d Cir. 1960); Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960). One writer has remarked, "Those who contend that there can be no reasonable relation between pain and suffering and any mathematical computation are unconvincing in a society where people are constantly choosing between bearing pain or spending more to assuage it." 41 B.U.L. REV. 432, 435 (1961).

58 Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961); Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Texas & N.O.R.R. v. Flowers, *supra* note 57; 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). In addition to stressing that counsel is not introducing evidence, these cases stress the duty and practice of trial judges in pointing out this fact to the jury.

59 See, *e.g.*, Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944) (total figure suggested); Arnold v. Ellis, *supra* note 58. It has been suggested that the jury can be reminded that pain and suffering will diminish, and can be advised to apply declining or average rate. 43 MINN. L. REV. 832 (1959).

fifty cents per day to five hundred dollars per day.[60] Clearly, the jury's verdict must be based on the evidence which has been offered; and, on the damage issue, this verdict will be a dollar amount. The argument is that, if the jury can infer a dollar equivalent from the evidence before it, counsel should be able to do the same.[61] In the recent case of *Yates v. Wenk*,[62] the Michigan court maintained: "The same speculative quality which exists in a lawyer's estimate of money value of a day's pain and suffering exists likewise in plaintiff's *ad damnum* clause and in the jury verdict to the extent they allow for pain and suffering."[63]

The line between speculation and legitimate inference from the evidence, at least with reference to mathematical formulae, is conceptually difficult to draw. It is true that a per diem figure is not inferred from the evidence in the same way as are hospital costs, nurses' fees, lost wages and the other elements of recovery for personal injury. It must be remembered, however, that pain and suffering, by their very nature, cannot be measured with precision. Nevertheless, an award for this element of damages is a part of compensating the plaintiff, indeed a very important part. And the same obstacles which face the jury in arriving at a figure also face counsel. Although some writers have suggested that the assessment of pain and suffering damages be removed from the province of the jury,[64] this is not yet the case; nor is it probable that it soon

60 Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954) ($5.00 per day); Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960) ($500.00 per day).

61 "Since the jury itself must arrive at a specific figure we see no logical reason why counsel shall not be permitted to speak in terms of specific figures." Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155, 161 (Ky. 1960). "But the fact of pain and suffering is recompensed in dollars. If this is so, it does thereby furnish a basis for argument, qua argument, that pain and suffering have a monetary value." Caley v. Manicke, 29 Ill. App. 2d 323, 335, 173 N.E.2d 209, 214 (1961). One review specifically criticizes the logic of the *Botta* decision on this point. 12 RUTGERS L. REV. 522 (1958). *Accord*, 19 OHIO ST. L.J. 780 (1958); 28 U. CINC. L. REV. 138 (1959).

62 363 Mich. 311, 109 N.W.2d 828 (1961).

63 *Id.* at 318, 109 N.W.2d at 831.

64 GREEN, TRAFFIC VICTIMS—TORT LAW AND INSURANCE 88 (1958) would have "loss insurance" on automobiles which would afford compensation without reference to fault, but exclude any recovery for pain and suffering. Professor James questions the justice of pain and suffering awards whenever an insurer is held liable without proof of misconduct. James, *Some Reflections on the Basis of Strict Liability*, 18 LA. L. REV. 293 (1958). Professor Kalven refers to Professor Jaffe's "heroic thesis" that it is unsound to recognize pain and suffering as a head of damages, in *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958). It has been suggested that pain and suffering which does not result in economic loss should not be compensated, Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959); and that a claimant's pain and suffering

will be. As long as there is evidence of pain and suffering and an award for these elements is forthcoming, argument by counsel on such an important part of plaintiff's claim should not be prohibited solely on the ground suggested above. Since the question of damages may well be *the* issue in the case, it seems unwise to place this topic beyond the scope of legitimate advocacy for any but the most convincing reasons.[65]

Perhaps, in the final analysis, strict adherence to a basis in the evidence requirement would result in a prohibition on the use by counsel of a formula approach to damages. A figure of two dollars per day cannot really be inferred from evidence of pain and suffering. The arguments favoring such a strict adherence, however, are not compelling; and, as with the reasonable compensation principle, the courts which have prohibited per diem argument have not been content to rest on this ground alone. Rather, both principles have been used by the courts to bolster decisions which probably are not founded upon a consideration of fundamental principles at all, but upon a fear of what the opposite holding would bring. Put most plainly, this is the fear of the effect which a formula approach by counsel might have on the average jury. It seems that the presence or absence of this fear has determined the holdings of most courts which have ruled on the per diem issue.[66]

award be held to 50% of his medical expenses, Plant, *supra* note 51; while another writer has proposed legislation resembling the workmen's compensation statutes, Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27 (1954).

65 The argument is sometimes made that use by counsel for plaintiff of a formula approach places counsel for defendant in a precarious position. On the one hand, he must answer with an argument likewise having no foundation in the evidence or suffer the full effects of plaintiff's argument on the jury. On the other hand, by answering, defendant implies approval of the formula approach. Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959). It is maintained further that this places defendant in an "unjustifiable dilemma" because it forces him to argue the issue of damages. See Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E. 2d 209 (1961). If, however, damages are a crucial issue, it would seem that both parties should be heard on this subject. An argument by defendant in mitigation of damages could be made without tacitly approving a formula approach to the question and without admitting liability. The *Caley* court noted that counsel have been doing this for years and that use by counsel for plaintiff of a formula approach renders it no less feasible. 29 Ill. App. 2d at 337, 173 N.E.2d at 215. It has also been noted that an argument on the damage issue can actually prove to be a tactical advantage to the defendant and that, furthermore, defense counsel have despaired too readily of their potential for arguing damage points with vigor. Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Kalven, *supra* note 64; 41 B.U.L. REV. 432 (1961); 43 MINN. L. REV. 832 (1959); 19 OHIO ST. L.J. 780 (1958); 12 RUTGERS L. REV. 522 (1958).

66 See D'Alemberte, *The Per Diem Approach to Damages for Pain and Suffering*, 14

C. *The Fear of the Credulous Jury*

One, indeed, gets the impression from the opinions that, overriding both of the above principles, there stands a feeling on the part of the courts, either born of personal experience or implanted by a forceful argument of the defendant, that the main purpose and effect of a per diem argument are to lead the jury to base its verdict on something other than the evidence presented or to measure it by some standard other than reasonable compensation. As to the former, it is said that a per diem suggestion starts the jurors thinking of amounts which are completely out of proportion to those to which a careful consideration of the evidence would lead.[67] The argument is that the jury ceases to be concerned with the plaintiff's injury and starts thinking solely in terms of dollars and cents. Alternatively, there is the belief that once a formula is suggested the standard of reasonableness is forgotten and the jury neglects to consider the reasonableness of the total figure to which the application of the formula leads.[68] What makes this particularly objectionable is that in both cases there is a conviction that the very reason for counsel using a formula is to mislead the jury.[69]

These fears often lead to a statement that a formula argument is an invasion of the province of the jury.[70] If by the jury's province is meant that it is the jury's function to arrive at a damage figure for pain and suffering, this province is invaded only if the jury itself abandons its appointed function and accepts without question the suggestions of counsel. This, then, is really no more than the fear itself put into other words. It would appear that the anti-formula courts have been convinced that the use of a per diem approach leads to higher verdicts than those returned when

FLA. L. REV. 189 (1961). The writer feels that the source of the dichotomy in this area is a pull between confidence in the judgment of jurors and a fear of the psychological impact of a formula argument on jurors.

67 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Hallada v. Great No. Ry., 244 Minn. 81, 69 N.W.2d 673 (1955), *cert. denied*, 350 U.S. 874 (1955); Ahlstrom v. Minneapolis, St. P. & S. Ste. M. R.R., 244 Minn. 1, 68 N.W.2d 873 (1955); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961).

68 See Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); 43 MINN. L. REV. 832 (1959).

69 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958), 4 DEFENSE L.J. 288; Affett v. Milwaukee & Suburban Transp. Corp., *supra* note 68; Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 15 Cal. Rptr. 161 (1961) (dissenting opinion—majority held point waived on appeal).

70 King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

this approach is prohibited and, moreover, that such an approach leads to excessive,[71] even "monstrous," verdicts.[72]

The verdicts in several of the reported cases lend support to certain of the above arguments. The Florida court has upheld a verdict for 248,439 dollars which coincided with the aggregate of the demands made by counsel for the plaintiff.[73] In a recent California case, counsel's estimates were followed exactly and resulted in a verdict for 187,903 dollars.[74] There are other examples of similar correlation, in which it appears that the jury has clearly followed the lead of counsel.[75] As will be discussed below, however, these amounts, though suggested by counsel, could still be based on the evidence and could still be put to the test of overall reasonableness. Surely a verdict should not be reversed simply because it is what counsel demands and, furthermore, there are countless cases in which the jury did not follow the suggestion of counsel and returned a verdict far below the amount suggested.[76] And as for the mere size of the verdicts, there are many examples of "monstrous" verdicts where no formula at all was in the picture.[77]

Proponents of the formula approach, of course, do not share the fear of excessive verdicts—higher verdicts may, indeed, result from the use of a formula but not excessive or "horrendous" verdicts.[78] It is maintained that to allow the jurors by themselves to

71 Two writers are convinced that breaking figures down into a per diem amount leads to higher verdicts. Kalven, *supra* note 64, at 161-62; Morris, *supra* note 64, at 480. See D'Alemberte, *supra* note 66; 4 DEFENSE L.J. 181 (1958); 43 MINN. L. REV. 832 (1959); 19 OHIO ST. L.J. 780 (1958).

72 Ahlstrom v. Minneapolis, St. P. & S. Ste. M.R.R., 244 Minn. 1, 29, 68 N.W.2d 873, 891 (1955).

73 Braddock v. Seaboard Airline R.R., 80 So. 2d 662 (Fla. 1955), *aff'd on rehearing*, 96 So. 2d 127, *cert. denied*, 355 U.S. 892 (1957). The Missouri court has noted this case as an example of what can happen when a formula approach is used. Faught v. Washam, 329 S.W.2d 588 (Mo. 1959).

74 Seffert v. Los Angeles Transit Lines, Inc., 364 P.2d 337, 15 Cal. Rptr. 161 (1961).

75 *E.g.*, Gardner v. State Taxi, Inc., 336 Mass. 28, 142 N.E.2d 586 (1957).

76 *E.g.*, Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957). In this case $57,860 was suggested as compensation for pain and suffering alone. The jury returned a verdict of $15,000. In another case, the court remarked that the jury could not have followed the computations of counsel since their verdict was less than one-half the minimum recovery sought through the mathematics of counsel. Kimbell v. Noel, 228 S.W.2d 980 (Tex. Civ. App. 1950).

77 *E.g.*, Darnold v. Voges, 143 Cal. App. 2d 230, 300 P.2d 255 (1956); Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953). See Plant, *supra* note 51. Professor Plant believes that the present system leads to overcompensation whether a formula is employed or not.

78 Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961).

arrive at some reasonable figure is to resort to a "by guess and by golly" approach.[79] The jury is said to need guidance in reaching a determination,[80] and the very absence of a definite yardstick is said to make the per diem approach desirable.[81] In addition, great emphasis is put on the discretion of the trial judge and his ability to limit per diem argument if it is leading to prejudice.[82] The proponents are convinced that juries are not so easily swayed by advocacy as the opponents of the formula approach seem to believe and that juries do not expect the degree of restraint on the part of counsel which the opponents would impose.[83] An argument is made that it is silly to forbid counsel to use a formula because the jury might very well adopt this method on its own and no one would be the wiser.[84] In summary, it is stressed that because a formula approach is more persuasive is no reason to prohibit it.[85]

Professor Kalven, in his studies of the workings of the jury system, has become convinced that the jury's quest is more for an appropriate single sum than for a summation of specific components.[86] This would mean that the average jury probably does not give separate dollar consideration to an item labeled pain and suffering, and it certainly means that it normally does not think of such damages on a day-by-day basis. It is part of Professor Kalven's thesis that because a jury thinks in terms of total sum it is less responsive to pain and suffering than is commonly supposed, and

79 Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960). See Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956); Continental Bus Sys., Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959).

80 Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Texas & N.O.R.R. v. Flowers, *supra* note 79; 43 MINN. L. REV. 832 (1959); 12 RUTGERS L. REV. 522 (1958).

81 Ratner v. Arrington, *supra* note 80; Caley v. Manicke, *supra* note 80; 12 RUTGERS L. REV. 522 (1958).

82 Pennsylvania R.R. v. McKinley, 288 F.2d 262 (6th Cir. 1961); Braddock v. Seaboard Airline R.R., 80 So. 2d 622 (Fla. 1955), *aff'd on rehearing*, 96 So. 2d 127, *cert. denied*, 355 U.S. 892 (1957); Louisville & N.R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Continental Bus. Sys., Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960).

83 Yates v. Wenk, *supra* note 82; Continental Bus Sys., Inc. v. Toombs, *supra* note 82; A.B.C. Storage & Moving Co. v. Herron, 138 S.W.2d 211 (Tex. Civ. App. 1940) (total figure suggested).

84 Continental Bus Sys., Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959); 43 MINN. L. REV. 832 (1959).

85 Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961).

86 Kalven, *supra* note 64.

that, as a result, a change in the law to deny such damages would not have a significant effect on verdicts.[87] In any given case, however, a certain part of the damages are subject to definite proof and cannot very well be ignored by the jury. It is the amount for pain and suffering, along with amounts for future lost income and future medical expenses, which are the speculative portions of the award, and often determine the gross size of the final award. In many cases, in fact, the award for these elements will comprise fifty percent or more of the total figure. Even if a juror is thinking only of a single lump sum, it would seem that the size of this sum depends to a great extent upon the variables which it involves, particularly, the pain and suffering award. Consciously or not, the jury still measures and grants an award for pain and suffering.

Counsel's use of a per diem formula should depend upon whether a formula might be of use to the jury in this process and whether its advantages outweigh the dangers pointed out by the opponents of the formula approach.[88] It can certainly be argued that the average juror is more familiar with compensation for services at so much per hour or per day than with large lump sums. It would seem reasonable to permit the suggestion of using a similar standard when compensating for pain and suffering. As mentioned above, there exists much discretion in the trial judge on the issue of damages. This faith in him should extend to a confidence that he will not allow the formula approach to be misused. There remains also the control exercised by the appellate courts.[89] These courts ordinarily hesitate to upset a verdict, but they will do so if it is so excessive as to shock the conscience.[90] All in all, if a formula in some instances can be an aid to the jury, and if in most instances it is an aid to counsel, there seem to be adequate means to prevent its misuse; and the fears of its opponents do not seem to justify its prohibition.

87 *Id.* at 170.

88 See Eastern Shore Pub. Serv. Co. v. Corbett, 177 A.2d 701 (Md. 1962). The court used a balancing approach and decided that the advantages outweighed the disadvantages.

89 An example of such control is offered by a Texas case. The Texas courts have generally permitted the use of formulae, but the court of civil appeals struck down counsel's efforts in one case where it was shown that his calculations were made before the case began and set forth factual matters not supported by the evidence. Warren Petroleum Corp. v. Pyeatt, 275 S.W.2d 216 (Tex. Civ. App. 1955).

90 Hall v. Booth, 178 N.E.2d 619 (Ohio Ct. App. 1961). The judge disapproved of the formula argument but decided that the jury had not been misled and sustained the verdict.

III. THE PRESENT WORTH PUZZLE

Once counsel and jury are permitted to use a formula approach to compensating for pain and suffering, there arises a further question. Assume that, in light of the evidence presented, five dollars per day is found to be a reasonable allowance. Assume further that, upon measurement of plaintiff's life expectancy, there would result an award for pain and suffering of fifty thousand dollars. It has been the general rule that pain and suffering awards are not discounted, with the entire sum being awarded to plaintiff. With the advent of the formula approach, however, the question is presented whether damages for future pain and suffering should be discounted to their present worth.

If no formula is in the picture, there seems to be an assumption that the jury, consciously or unconsciously, takes into account the fact that the plaintiff will receive the present-use value of the amount they award. Because the award can be invested to produce further sums for the plaintiff, the initial award need not be so great. There is, then, no need for further reduction.

It is more difficult to say, however, that such an implicit discounting takes place when a per diem formula is used. This is especially true if an award such as that assumed above is regarded as an allocation to plaintiff of five dollars for each successive day's pain and suffering. There would clearly appear to be overcompensation if a present award is made to plaintiff of the five dollars intended to compensate him for his last day's pain and suffering. Defendant might well demand that the fifty thousand dollars be reduced to present worth.

This conclusion might possibly be avoided if it is emphasized that the formula approach is merely a convenient tool of analysis. On this theory, the jury is not viewed as saying that plaintiff is to get exactly five dollars per day for the rest of his life. Pain and suffering damages are not an amount measurable with precision which plaintiff would have received had he not been injured. Thus, the five dollars can be viewed simply as a guide, with fifty thousand dollars being the important figure.

It is, however, hard to dispel the notion that if five dollars is reasonable compensation for a day's pain, it is unfair for plaintiff, in fact, to receive more than this amount. The use of the formula approach, it seems, presents a problem that is, both practically and

theoretically, a very difficult one. Nevertheless, the conclusion seems inescapable that a per diem approach does not permit the assumption that there has been an implicit discounting. The five dollars is regarded as reasonable compensation for the pain and suffering which plaintiff will undergo on the present day or any succeeding day. It is unlikely that a jury picks five dollars instead of six dollars because they reason that the plaintiff will have the use value of the five dollars which is allocated for succeeding days. Therefore, if no reduction can be implied, it would appear that the total arrived at by the use of a formula should be reduced to its present worth, thus bringing it into line with the figure that would be reached without the use of a formula. Perhaps this assumes precision in an area where it is agreed none can exist, but if an award is to be based on future pain and suffering by using a formula approach, that award should be discounted in the same manner as an award for future loss of income.

IV. SUMMARY

An award for pain and suffering will be a part of almost every personal injury case in which plaintiff wins a verdict. While pain and suffering are impossible to measure with any exactness, the jury, as our system now stands, must arrive at some figure which will represent these elements of the plaintiff's claim. Furthermore, because damages in general, and those for pain and suffering in particular, are so important to both plaintiff and defendant, it would appear that both should be allowed wide latitude in making their arguments on this point. When it comes to pain and suffering, counsel for plaintiff, like the jury, often needs help in making a tangible argument with reference to these intangible elements. A formula approach is clearly a great help to him. It could also be of help to a jury which is accustomed to think of compensation in terms of hourly or daily rates. Counsel should be able to argue amounts and should have the aid of formulae unless these are clearly prohibited by established legal principles or are clearly counter to sound policy considerations. Neither the reasonable compensation principle nor the demand that argument be based upon the evidence and not be mere speculation by counsel seem to require prohibition of a formula. It is possible to reconcile use of a formula with both principles. The risks of misuse and ulti-

mate adverse effect on the jury are problems of the type which trial judges, and eventually the appellate courts, are asked to control every day.

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