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Damages For Pain And Suffering - - The Propriety Of Per Diem Arguments

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accordance with a marital settlement her tax basis is the fair market value of the property at the time she acquired it. In the area of income tax liability the only unresolved area of the law is the income tax consequences to the husband of property settlements involving property that has increased in value from the time of its acquisition. The pending decision in the *Davis* case could settle the hiatus in this area. However, it is submitted that congressional action will be required to alleviate the present tax void in antenuptial property settlements.

D. Mark Bienvenu

Damages For Pain And Suffering--The Propriety Of Per Diem Arguments

It is now generally recognized that pain and suffering are proper elements to be considered in determining damages in a personal injury suit.[1] When attempting to award these damages the difficult problem of determining what is a fair and adequate award immediately presents itself. There is no way to evaluate the losses caused solely by pain and suffering in monetary terms owing to the impossibility of making a third person exactly aware of the extent and nature of this damage. In recognition of this fact, it has been stated that the enlightened conscience of the jury is the only permissible guide,[2] and that the ultimate test is that of the reasonableness of the award.[3] But in actuality, the standard of reasonableness is of only limited assistance to a juror attempting to arrive at a proper award. He is still left relatively uninformed and may be skeptical of his ability to cor-

1. *Physical pain and suffering*: Lacy v. Lucky, 19 La. App. 743, 140 So. 857 (1932); Nevala v. City of Ironwood, 232 Mich. 316, 205 N.W. 93 (1925); Nashville v. Brown, 25 Tenn. App. 340, 157 S.W.2d 612 (1942). *Mental pain and suffering*: Crawford v. Zurich General Accident and Liability Ins. Co., 42 So.2d 553 (La. App. 2d Cir. 1949); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949). *Future pain and suffering*: Shuck v. Keefe, 205 Iowa 375, 218 N.W. 31 (1928); City of Richmond v. Hill, 195 Ky. 566, 242 S.W. 867 (1922).

2. See Braddock v. Seaboard Air Line Ry., 80 So.2d 662, 667 (Fla. 1955). In states such as Louisiana where juries are seldom used in civil cases, the judge will of course serve the same function as the jury normally would if used. However, this Note deals primarily with the damage problem as it concerns the jury. The problem in Louisiana is dealt with in note 17 *infra*.

3. See Braddock v. Seaboard Air Line Ry., 80 So.2d 662, 666 (Fla. 1955); Faught v. Washam, 329 S.W.2d 588, 602 (Mo. 1959); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 609, 106 N.W.2d 274, 277 (1960).

relate pain and suffering with a reasonable monetary figure. Where the juror is unsure of himself, he may be amenable to suggestions and arguments as to quantum advanced by counsel. This situation invites trial lawyers to put great emphasis on argumentative skill, and has led to the development of new methods of presenting to the jury the question of damages for pain and suffering.

Lately a somewhat controversial method of presenting damage arguments to the jury has been used in several jurisdictions. This method consists of determining damages on a limited time basis with an award for each period being suggested by counsel.[4] The estimated length of time which the plaintiff has suffered or is expected to suffer is broken down into days or even into hours, minutes, or seconds. By means of simple multiplication a final tabulation is obtained. Thus if the suggested rate of recovery is one dollar per hour and the condition is expected to continue unabated for five years, the total amount would be computed by determining the number of hours in five years and assigning one dollar for each to arrive at the total damage figure, $43,800.00. The propriety of such arguments by counsel has provoked much controversy. However, before examining the pros and cons of the question, the nature of pain and suffering and the desirability of allowing such damage *at all* should be considered.

It has been suggested that damages given for pain and suffering are punitive rather than compensatory in nature.[5] If this were true, any reference to them, in per diem arguments or otherwise, would be improper in states such as Louisiana where

4. Mr. Melvin Belli, an advocate of per diem arguments, explains the necessity of them as follows: "You must break up the thirty years life expectancy into finite detailed periods of time. You must take these small periods of time, seconds and minutes and determine in dollars and cents what each period is worth. You must start with the seconds and minutes rather than at the other end of thirty years. You cannot stand in front of a jury and say, 'Here is a man horribly injured, permanently disabled, who will suffer excruciating pain for the rest of his life, he is entitled to a verdict of $225,000.'

"You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years. You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result on an award approaching adequacy at $225,000. If you throw a novel figure at a jury or an appellate court of $225,000, without breaking it down, you are going to frighten both your trier of facts and your reviewer of facts." BELLI, THE USE OF DEMONSTRATIVE EVIDENCE IN ACHIEVING THE MORE ADEQUATE AWARD 33-34 (1951).

5. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 206 (1958).

punitive damages are not recognized.[6] According to the more generally accepted doctrine, punitive damages are primarily for the purpose of punishing a wrongdoer.[7] In comparison, compensatory damages are those awarded as compensation, indemnity, or restitution for harm sustained.[8] The primary notion is that of repairing the plaintiff's injury or of making him as nearly whole as a monetary award will permit.[9] Compensatory damages are designed to afford indemnity to an injured party for that which he has actually suffered or is likely to suffer, rather than to castigate a tortfeasor for his conduct. Hence, it appears that pain and suffering damage awards can be justified only on the ground that they are compensatory.

As the presently accepted theory underlying tort damages is based upon the proposition of making the injured party whole, it clearly seems that pain and suffering must be considered as an element in determining the quantum of an award for damages. Undoubtedly the plaintiff who has suffered pain at the hands of the defendant tortfeasor has lost his right to freedom from physical and mental suffering. Of course, such an injury is not as easily discernible as one manifested by obvious physical symptoms, but it is nonetheless present and often of much more serious consequences. Perhaps the real reason for opposition to pain and suffering damages is the administrative problems involved — the impossibility of accurately correlating pain and suffering with an exact money value and the possibility of fabricated claims. Despite these problems, tort law is rapidly expanding to provide recovery for injuries once thought too speculative to be considered by a court of law, including those which pose difficult problems of evaluation and administration. Awarding damages in such nebulous areas as pain and suffering is expressive of the trend of modern law toward recognizing the more subtle aspects of personal injuries, despite the problems presented.[10] Thus it appears that pain and suffering will and should be a basis for recovery.

6. In Louisiana the right of recovery in actions for personal injury is limited to actual and compensatory damages affording adequate indemnity for injury, and does not extend to punitive damages. Moore v. Blanchard, 216 La. 253, 43 So.2d 599 (1949); Burt v. Shreveport Ry., 142 La. 308, 76 So. 723 (1917).

7. Barnes v. Lehman, 118 Colo. 161, 193 P.2d 273 (1948); Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291 (Fla. 1953); Davenport v. Woodside Cotton Mills Co., 225 S.C. 52, 80 S.E.2d 740 (1954).

8. RESTATEMENT, TORTS § 903 (1934).

9. Kalven, *The Jury, The Law and Personal Injury Damage Awards*, 19 OHIO ST. L.J. 158, 160 (1958).

10. As an example of the expanding scope of tort law, see RESTATEMENT, TORTS II, TENTATIVE DRAFT I, § 46 (1957).

In some jurisdictions counsel are permitted to suggest a total lump sum award for pain and suffering.[11] Not only may an award be suggested, but it is also proper to attempt to convince the jury that the proposed figure is desirable under the circumstances of the case. It seem that such suggestions have some effect upon the jury in reaching a final decision as to the proper quantum of damages. The juror has likely devoted little time to the consideration of damages, and could be expected to have in mind only some vague generalities as to a maximum and minimum award. It would seem that at this point a persuasive attorney could greatly influence the ultimate decision by arguing the appropriateness of a suggested lump sum award. However, the opposite effect might be reached where the award suggested is far in excess of anything which could be considered as reasonable by a juror. If counsel attempts to convince the jury of the reasonableness of a completely unrealistic figure, this fact might be detected and lead to a general distrust of his position.

Just as a lump sum suggestion by counsel may influence the jury, the use of per diem arguments seemingly accomplishes the same result. However, when dealing with per diem arguments the danger of undue influence on the jury is greater than where only lump sum arguments are permitted. This is because per diem arguments are deceptive in that they give the jury a sensation of mathematically computing damages when such damages are not mathematically computable at all. Even though a per diem figure is as likely to be inappropriate as that suggested by a lump sum argument, the mathematical computations by counsel give the total sum an aura of calculability which it does not necessarily deserve. Also, what seems to be reasonable when suggested for pain and suffering for one hour may not lead to reasonable results when multiplied out for several years. But when the final tabulation is obtained and a total result presented, the jury is confronted with the idea that the original choice was good and from there on it was just a matter of computation. There seems to be the possibility that in such a situation the juror will not go back and weigh the suggested figure used as a base, but will assume its validity in the face of a maze of computations. Thus it seems that there is the danger that when a juror sees or hears computations based on an arbitrary per diem

11. See Aetna Oil Co. v. Metcalf, 300 Ky. 817, 190 S.W.2d 562 (1945); Sanders v. Boston & M. R.R., 77 N.H. 381, 92 Atl. 546 (1914); Magnolia Petroleum Co. v. Herman, 295 S.W.2d 430 (Tex. Civ. App. 1956).

figure he will be influenced to give the result more weight than it deserves.

In some jurisdictions per diem arguments have been condemned on the basis of various refinements of the general proposition that closing arguments are to be confined to that which may be properly inferred from the evidence.[12] As an example, one criticism advanced by the courts against per diem arguments is that their use presents counsel with an opportunity to instill in the minds of jurors impressions not founded on evidence.[13] Another theory is that following the presentation of per diem arguments by plaintiff, a defendant is prejudiced by being placed in a position of attempting to rebut an argument having no basis in the evidence.[14] It seems that these objections to the use of per diem arguments are justified, but are perhaps equally applicable to lump sum suggestions. Rejecting the per diem approach on the basis of such reasoning would lead to an obvious inconsistency in jurisdictions where lump sum arguments are permitted.[15] The reason for excluding per diem arguments is to be found in the idea that they have a more harmful effect by bestowing upon the plaintiff more of an advantage than does the lump sum argument. It appears that, at least in jurisdictions where lump sum arguments are permitted, it would be more realistic to exclude per diem arguments simply because there is a greater possibility that they will unduly confuse the jury without furnishing a better guide to offset this increased risk of confusion.

It is submitted that a solution to the problem of damages for pain and suffering cannot be obtained simply by breaking the period of suffering into time periods and assigning a value to each. Due to the subjective nature of pain and suffering, correlation with an exact money value is an impossible task, no matter how small the period under consideration might be.[16] The

12 Haynes v. Coleman, 338 Mich. 371, 61 N.W.2d 634 (1953).

13. See Henne v. Balick, 146 A.2d 394, 398 (Del. 1958); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 613, 106 N.W.2d 274, 280 (1960).

14. See a discussion of the various criticisms of per diem arguments in Ratner v. Arrington, 111 So.2d 82, 88-89 (Fla. App. 1959).

15. In Wisconsin lump sum arguments are permitted but per diem arguments are excluded. See Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 106 N.W.2d 274 (1960). In that case the court condemned per diem arguments because their use presents counsel with an opportunity to instill in the minds of jurors impressions not founded on evidence. The court then went on to say that lump sum arguments were permissible, apparently not realizing the inconsistency of reasoning expounded.

16. There is no exact correspondence between money and physical or mental

vast imponderable is still present whether the problem be viewed by seconds, days, or years. Thus a policy objection to the per diem approach is that it is essentially a trial tactic, which confuses the jury, and at the same time does nothing to assist in the solution of the actual problem. It is therefore suggested that per diem arguments should not be permitted when the quantum for pain and suffering damage is at issue.[17]

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Liability In Left Turn Collisions[1]

Louisiana courts are frequently called upon to decide the issue of liability for damages arising out of automobile collisions where, at the moment of impact, one of the parties was attempting to turn to his left. In this Comment, it is sought to derive the prevailing attitudes of the Louisiana appellate courts concerning what constitutes negligence on the part of the motorist turning to his left, what constitutes negligence on the part of the non-turning motorist involved in a left turn collision, and the interrelationships of their two patterns of conduct in deciding the issue of liability.

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injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this reason, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation. Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

17. As juries are seldom used in Louisiana civil cases, the damage problem will usually be handled by a judge. Due to the experience of trial judges, per diem arguments are not as likely to influence their decisions as they would a juror's. However, it seems that per diem arguments should still be condemned in Louisiana for the same reasons mentioned in the text. If for no other reason, such tactics should not be permitted as they do nothing to assist in the solution of the damage issue, and serve only to delay the trial.

1. As used by the Louisiana courts, the term "left turn" incorporates a variety of maneuvers, in all of which a motorist changes course more or less to his left. The term is most commonly applied where a motorist turns across the opposite lane of traffic in order to enter an intersecting street or a private drive. However, the courts also characterize as a left turn such maneuvers as turning onto a street from a private drive or parking lot with intention to travel in the far lane. Zurich Fire Ins. Co. v. Thomas, 49 So.2d 460 (La. App. 2d Cir. 1950). The motorist who turns left across the neutral ground of a boulevard and stops before crossing the opposite lane is considered to be turning left after having stopped, even though after stopping he is in the same position as one who crosses the boulevard on the intersecting street. Wilson v. Southern Farm Bureau Cas. Co., 275 F.2d 819 (5th Cir. 1960); Terrell v. Fargason, 67 So.2d 771 (La. App. Orl. Cir. 1953). A recent case characterized a motorist as turning left when he was changing from the right to the left lane of a multiple roadway, preparatory to making a left turn. Mock v. Savage, 123 So.2d 806 (La. App. 2d Cir. 1960).