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James W. Payne Jr.  
*University of Richmond*

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## Personal Injury Damage Arguments

JAMES W. PAYNE, JR.

This brief comment deals only with one facet of *Certified T. V. & Appliance Co., Inc. v. Harrington*, 201 Va. 109, 109 S.E. 2d 126 (1959). The plaintiff brought an action for personal injuries. In summation plaintiff's attorney listed on a blackboard and exhibited to the jury the following items bearing on the question of damages:

Dr. Shoenfeld's bill of \$40.00, Dr. Vann's bill of \$110.00, Dr. Alpert's bill of \$255.00, Mrs. Gibbon's bill of \$280.00, past and future hospitalization (\$1,200.00), \$463.00; crutches, stockings \$36.98; future medical \$1,000.00, permanent phlebitis \$4,475.00, traumatic arthritis at 50 cents—\$5,475.00, mental anguish, re: Pregnancy, five months—\$750.00, seven weeks on crutches at \$10.00 daily—\$490.00, inability to wear shoes, dance et cetera—\$5,000.00, 20 percent permanent disability—\$10,000.00—making a total of \$29,374.98. Record No. 4955, pp. 83, 84.

The jury gave the plaintiff a verdict for \$12,500. The Court of Appeals reversed and remanded holding that the use of the blackboard in the manner noted was reversible error. Why?

Certainly the court did not hold that the use of the blackboard in making computations before the jury or for the purpose of diagramming or for other illustrative purposes was, per se, wrong. The court states as much and the propriety of such practice, in the discretion of the court, seems fairly well settled. 201 Va. 109, 115, 109 S.E. 2d 126, 131. McCormick, *Evidence* §180 (1954). What the court condemned is a method of computing damages noted in the following language:

The suggested amount for permanent phlebitis is the sum of \$5,475.00, and, while the record does not show how counsel arrived at that figure, it can be assumed that it

was fixed by calculating so many days of ailment at 50 cents per day, since the next item listed is traumatic arthritis at 50 cents—\$5,475.00. The next items, mental anguish, re: pregnancy, five months—\$750.00, seven weeks on crutches at \$10.00 per day—\$490.00, and inability to wear shoes, dance, etc.—\$5,000.00, appear to have been calculated on a basis of a fixed amount to be allowed each day for so many days. The last item of 20 percent total disability—\$10,000.00 would appear to have been suggested by counsel and calculated on the plaintiff's life expectancy. 201 Va. 109, 114, 109 S.E. 2d 126, 130.

At the outset, it might be noted that the court's decision as to the damages claimed for permanent phlebitis, traumatic arthritis, or 20 percent total disability, or, perhaps, "inability to wear shoes, dance, et cetera" might be supported on the basis that the claims overlapped or that there was no evidence as to the life expectancy of the plaintiff—a factor which might have been rendered considerably less speculative in nature by reference to mortality tables supplemented by medical testimony. The record does not disclose any such testimony and the appellant's brief in the case states that such testimony was never offered. Record No. 4955, Brief of Appellant, p. 31. The court might well adopt a rule requiring this evidence, where feasible and relevant, as a condition to permitting per diem calculations as to damages in counsel's summation. Per diem calculations are speculative in at least two respects:

1. The time span to be covered in determining compensation.
2. The amount to be awarded per unit of time. If evidence as to life expectancy would be relevant, depending on the nature of the damages shown, and there is no showing of unavailability, the court might well insist on testimony concerning this point as a means of relieving the problem of uncertainty as to time by way of establishing a proper foundation for per diem damage calculations or arguments. Otherwise, it might, with force, be said that counsel is assuming and arguing facts as to which there is no evidence. However, the Virginia court in the *Harrington* case hands down a blanket indictment against

counsel's suggesting or arguing to the jury "an amount to be allowed for pain, suffering, mental anguish and disability calculated on a daily or other fixed basis. . . ." 201 Va. 109, 114, 115, 109 S. E. 2d 126, 131.

What are the counts in this indictment?

1. *The method amounts to speculation by the lawyer unsupported by evidence.* *Id.* at 115, 109 S.E. 2d 126, 130. The court notes:

It has been repeatedly held in Virginia and in other jurisdictions that there is no fixed rule or yardstick by which to measure with mathematical precision the definite amount of damages for physical pain, suffering and mental anguish endured in personal injury cases. It is within the sound discretion of the jury to determine what is fair and reasonable compensation, and a verdict of the jury will not be disturbed unless it appears that it was influenced by partiality, prejudice, corruption of the jury, or by some mistaken view of the evidence. *Id.* at 114.

It is difficult for this writer to see how the measure of damages could be rendered more speculative than by a rule stating that there is no rule by which damages may be measured except the conscience of a jury empowered to operate within far-ranging limits. It is equally difficult to believe that there is a proper mathematical figure hovering over the courtroom like a "brooding omnipresence in the sky" which the jury, through some cabalistic process, can haul down and apply fairly in an average of cases over any substantial period of time. The very fact that the damage problem is so speculative here is an argument and, it seems, a strong one in favor of permitting counsel to argue the issue of damages on a per diem or some other fixed basis. This procedure carries with it the virtue or merit of reducing a hopelessly nebulous figure to manageable units of time—manageable in the sense that they are small enough to convey a realistic picture of the injuries sustained in a given case. If intelligent recognition of the nature and extent of the injuries involved in a given case

is desirable, there is reason to suggest a significant difference between the picture conveyed to the jury when they are simply told that P has lost a leg, or that P has lost a leg and has a life expectancy of 40 years, and the picture conveyed when the jury, in the same case, is informed of the daily difficulties involved in such an injury and asked to compensate on this basis. The latter procedure suggests a method of compensation that is perhaps more realistic and perceptive in operation than no method at all and since, in this kind of disability case, the difficulties experienced by P may be experienced from day to day it is difficult to see clearly any considerable wickedness involved in arguing for this means of compensation in such a case.

It is admittedly true that any such method of computing damages is speculative. The writer is simply urging here that less speculation is involved than when the jury is told that there is no method of calculation or when no method is suggested to them. It is also true that a per diem or fixed basis for determining damages for pain, suffering, mental anguish, or disability may be deceptive when counsel argues for the award of a fixed amount per unit of time. This is true because the full impact of the injuries suffered by the plaintiff is apt to diminish with time. Conceivably, in many cases, however, these injuries might become much more serious with the passage of time. The extent of psychological or physical harm done is also apt to vary with the personality, age, sex, and occupation of the injured party. If this is true, it is perhaps also true that the deception involved will be heightened by the verbal reiteration of specific sums as suggested awards, and even more so by placing such figures on a chart or blackboard so that they become fixed in the jury's mind. (However, in the absence of the blackboard or chart, the jury may well be permitted to take notes of any sums suggested by counsel. Annot. 154 A.L.R. 878, 886 (1944)). The listing of these dangers, however, is simply another way of stating in part what has been stipulated—i.e., the speculative character of damages in such a case. These are also dangers which can be minimized

by at least three factors: (1) the argument of opposing counsel, (2) the court's instructions, and (3) the standard procedural devices available to eliminate excessive verdicts—e.g., putting the plaintiff on terms or the motion to set aside the verdict. Finally, there is some inconsistency involved in the view that the jury is entirely capable of awarding a fair sum via compensation with no specific basis for arriving at that sum, but at the same time incapable of appreciating the relatively obvious dangers involved when a method of calculation is suggested so that arbitrary jury action might result.

If the jury can determine what is reasonable compensation in a lump sum award, why can't they decide what is a reasonable per diem award? Arguably, the jurors may have a better knowledge or awareness of the effect and power of money over a shorter period of time. If this is so, the per diem argument may contribute to a fairer verdict.

Finally, consider the argument that the compensation arrived at under a per diem formula would be without evidence to support it. In the first place, the same argument can be made with reference to a compensation award arrived at as a matter of conscience, hunch, instinct, or inspiration. Secondly, in either case it is difficult to see that this criticism is justified if there is evidence of the nature of the injury involved, the prognosis, and, in an appropriate case, the life expectancy of the party injured. All of these items of proof are "evidence" on the damage problem under the present Virginia rule which involves, perhaps, unspecified units or periods of time but permits counsel to argue for a fixed sum via recovery for the speculative items discussed here. The evidence seems to be just as cogent, or perhaps more cogent, if damages could be calculated according to a per diem or similar fixed basis procedure.

In a note titled *Per Diem Damages Argument for Pain and Suffering Approved in Personal Injury case*, 33 So. Cal. L. Rev. 214 (1960), the arguments against the per diem method of computing damages are considered and rebutted. With reference to the point under discussion, the author notes that counsel's per diem argument is merely in the nature

of a comment on evidence already introduced regarding pain and suffering. Also it is noted that since the final award must be in terms of money, and the plaintiff must be prepared to argue that the verdict is consistent with the evidence, *i.e.*, to be inferred from it, it follows inevitably that counsel must have some way of showing that the money award is inferrable from the evidence. The per diem formula is perhaps the most rational way to do this. Wigmore has noted: "So long as the law gives compensation in the shape of money, there is an inconsistency in excluding estimates in money." 7 Wigmore, *Evidence* §1944, at p. 56 (3d ed. 1940). If the estimate can be given, the argument for allowing proof of the method of arriving at the estimate is almost overwhelming.

2. *The per diem or other fixed basis for calculating damages by counsel in argument invades the province of the jury.* 201 Va. 109, 115.

Two suggestions by way of noting the obvious can be made here. This argument pressed too far logically would prohibit any comment on the evidence by the plaintiff's lawyer. Secondly, the jury still retains the power and the duty to pass on the evidence and to weigh the arguments of opposing counsel.

The suggestion that a given statement "invades the province of the jury" or "usurps the function of the jury" is normally made when the court is striking down the testimony of a witness as an inadmissible statement of opinion. Indeed, this ties in with the court's suggestion that to permit the lawyer to argue per diem damages would be tantamount to permitting him to testify as to the "value" of the injuries sustained by his client—a statement of opinion which an expert would not be permitted to make. (*Ibid.*) It is really difficult to see just how the lawyer is testifying here any more than he would be testifying in performing the daily and necessary tasks of arguing simply for a lump sum recovery where damages are speculative, or arguing that the evidence does or does not support a finding of any other fact. One of the few situations in which this writer has had sympathy with

the rejection of opinion testimony as invading the province of the jury is the situation in which a witness offers to state a conclusion as to legal consequences or result, assuming and applying in his testimony some unexpressed legal principle to a given factual situation. But even that difficulty is avoided here where there simply is no rule of law as to damages other than the rule that damages are to be determined by a jury in the exercise of good conscience and discretion, if there is a jury. Then, too, it would seem that a lawyer, in argument, is necessarily forced time and again to contend for a conclusion or verdict by urging a "legal result" or at least a result involving the resolution of a mixed question of law and fact—*e.g.*, the argument on the issue of negligence. It is true that there is at least one limitation recognized by some courts which, presumably, the court will state to the jury in instructing on the issue of damages. This takes the form of the statement that there is no market value for pain or suffering and/or no "golden rule" applicable here. (*E.g. Botta v. Brunner, infra.*) This rule, in practical application, prevents the argument that damages should be determined by any juror's asking himself what he would charge (or what any person would charge) to undergo the same pain or disability. *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 35 A. 191 (1896); 15 Am. Jur., *Damages* § 72 (1938). As long as the lawyer in summation, avoids these suggestions or arguments, again, it is difficult to see that the per diem damage argument, or some similar argument, invades the province of the jury in any meaningful sense. It might also be noted in this connection, that the jury can always reject or modify the award suggested as a result of per diem calculations. In the *Harrington* case this method of determining damages led to a suggested verdict of \$29,374.98 and the jury returned a verdict for the plaintiff in the amount of \$12,500.00.

The *Harrington* decision poses certain practical problems. One of the cases relied on in the opinion is *Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331 (1958). This decision in turn leaned heavily on the Pennsylvania cases which prohibit any mention to the jury of the amount sought to be

recovered for such items as pain, mental anguish, or disability. It is certainly not the apparent intention of the Virginia court to adopt this radical departure from existing practice. (However, the court relies on *Botta v. Brunner, supra*, which adopts and applies the Pennsylvania rule in this respect and also on *Vaughan v. Magee*, 218 F. 630, (3d Cir. 1914) which applies the Pennsylvania rule in a diversity case and commends the rule as a proper one.) It is also true that in a jurisdiction like Pennsylvania or New Jersey where the jury is left uninformed as to the damages claimed, it follows very easily that it would be improper for counsel to resort to a per diem or fixed basis method of calculating damages in argument, particularly where the argument suggests a given sum per unit of time by way of damages. Presumably, it is still proper for the plaintiff's attorney in Virginia to state to the jury the amount that he is seeking to recover for pain, suffering, mental anguish, and disability in addition to the special damages shown. If this is true, can counsel introduce evidence of plaintiff's life expectancy, say in a permanent disability case, and emphasize such evidence in his argument. (*E.g.*, "The plaintiff is going to have to live with this thing for 40 years!"). The *Botta* court cites with approval judicial language permitting this practice. Could this evidence be noted on a blackboard within the view of the jury? Logically, all of this suggests a fixed method of calculating damages. If this is permissible could counsel argue that this disability will cause daily inconvenience, perhaps pointing out the number of days involved in the life expectancy estimate but avoiding any explicit suggestion as to the amount to be awarded for each day? These various shadings in the approach to the problem of arguing damages may well become a source of very real difficulty to the practitioner, and, again, it is difficult to see any substantial difference between the practice suggested in these questions and the more detailed argument in the *Harrington* decision. The problem of suggesting or arguing specific amounts to be allowed for future hospitalization and future medical expenses is still up in the air. Presumably evidence will normally be introduced as to these

items and the *Harrington* decision does not single them out for express condemnation. The doubt created lies partially in the court's statement: "Most of the other items appearing on the blackboard appear to have been supported by the evidence. We find no error in using the blackboard to place upon it figures which were supported by the evidence." 201 Va. 109, 115, 109 S.E. 2d 126, 131. (Emphasis added.) These, too, are speculative items and again logically, in a given case counsel's argument for a fixed figure as to these items might meet all of the objections advanced by the *Harrington* opinion with reference to the items singled out for discussion there, although to a lesser degree. Such a result could come close to placing a premium on the circumstance that a given defendant managed to inflict damages necessarily conjectural or speculative in amount. Cf. 15 Am. Jur. *Damages* §21 (1938).

In considering the practical consequences of the *Harrington* case, it is important to emphasize that the conduct condemned in this case was a method of computing damages—*i.e.*, a suggestion by counsel of a specific dollar value per hour, per day, or per week, for pain and suffering. The court does not forbid counsel to point out to the jury the duration of the plaintiff's suffering as shown by the evidence (*e.g.*, evidence of life expectancy), or even to ask the jury to decide what, in their judgment, would be fair compensation for that kind of pain and suffering per hour, per day, etc. Nor does the court condemn a reference to the *ad damnum* clause in the pleadings whether or not such reference is coupled with testimony as to the life expectancy of the injured plaintiff. This latter testimony is just as cogent in a permanent injury case as is proof of the nature of the plaintiff's injury, and proof of the effects and results of such injury. Certainly a description of the daily difficulties to be experienced by the plaintiff would be proper. Proof of life expectancy is consistent with the court's urging that the argument be supported by evidence, and the reference to the lump sum sought for pain and suffering does not disturb the kind of vagueness that the court apparently deems desirable in its effort to

avoid misleading the jury. Of course, assuming that counsel can still state to the jury the total amount sued for, then list his special damages, and then argue for an allowance for pain and suffering, simple and readily self-suggested subtraction inevitably tells the jury what lump sum is being included for this last item of damages. The *Botta* case is cited by *Harrington* only for its condemnation and rejection of the use of an explicit per diem formula.

It may be that some help on these practical questions is held out in a New Jersey case (decided in the Superior Court, Appellate Division) succeeding the *Botta* decision. This is *Cross v. Robert E. Lamb, Inc.*, 60 N. J. Super. 53, 158 A. 2d 359. This was an action by a welder to recover for personal injuries sustained while working on his job. The defendant general contractor appealed from an \$80,000.00 verdict (which had been reduced from \$110,000.00). In his damage arguments, the plaintiff's lawyer used the blackboard to show *P*'s life expectancy broken down into years, weeks, and days; to show his expected normal retirement age of 65, to itemize medical expenses and lost wages for 142 days, to note a damage item of pain and suffering to the present of 485 days, to note "pain and suffering for rest of life—one lump sum;" and finally, to compute in four different ways probable loss of future wages. These last amounts were calculated on the assumptions: (1) Plaintiff might stop work at 65. (2) *P* might stop work at 71 (life expectancy). (3) *P*'s earnings might be reduced to \$2.50 per hour instead of \$4.25. (4) *P*'s earnings might be reduced to \$2.75 per hour instead of \$4.25. There was evidence that at the time of the trial *P* still earned \$4.25 per hour. The court allowed the mention of pain and suffering and then stated at pp. 371, 372:

To minimize the possibility of prejudice the jury should be given to understand by the court as well as counsel that the figures written on the board are not evidence. . . . In the same vein, the blackboard should be under view by the jury only during the argument in which counsel who has written the figures is discussing damages. . . . With these general principles as background, we turn to

the argument and blackboard entries made by plaintiff's counsel here. We observe, preliminarily, that we find nothing prejudicial insofar as the references to pain and suffering are concerned, notwithstanding defendant's argument to the contrary. No figures were suggested, either by unit or in total, for pain and suffering. If the effect of some of the notations was to remind the jury that plaintiff had suffered during the 485 days since the accident, this was a fact proven by the evidence, and it was also inferable from the proofs that he would have pain for the remainder of his life. The life expectancy of 30.29 years was taken from the table of mortality incorporated in the rules of court, and both plaintiff's counsel and the court told the jury that the table was only a general guide based upon average expectations and might or might not turn out to be true in plaintiff's case, and that the jury might exercise its own judgment in this respect. . . . Since the jury properly had the plaintiff's life expectancy of 30.29 years before it there was no prejudicial effect in its being apprised by counsel what it could have calculated for itself—that this was equal to 1,575 weeks and 11,000 days. We find no merit in the argument that this connoted to the jury that it should determine its award for pain and suffering by first arriving at a daily or weekly unit of damage for that item and then multiplying it by the number of days or weeks of the period."

This language of course appears in a context where it would be improper to tell the jury the amount demanded for pain and suffering. There is no statement in *Harrington* which prevents the addition of this information in lump sum form in argument to the jury.

The court went on to hold that counsel's figures as to loss of future earnings were simply not supported by evidence or accompanying instructions that counsel's formulae and figures here did not constitute evidence. However, as to this item, the court stated at page 373:

We do not suggest that there are no situations at all in which the general formula approach to argument of

lost future wages, with or without use of a blackboard, could properly be employed. As in trial practice generally, a broad discretionary area reposes with the trial judge.

Each case, of course, hinges on its facts. It is my own hope that *Harrington* may be modified in a case in which, along with proper instructions to the jury which we have noted, the fixed formula argument as to future damages (including pain and suffering) is supported by the strongest and best evidence that the nature of the case allows. The problem of proof, the insufficiency of supporting evidence, may have been the Achilles heel that brought about the *Harrington* case. If so, supplying proof, for example by use of mortality tables, accompanied by a careful effort to avoid overlapping claims may serve as a basis for distinguishing the *Harrington* case at some future date.

As might be suspected by now this note does not purport to be an exhaustive exploration of the cases pro and con on our problem. Reference can be made to the citations listed in the *Harrington* case and particularly to the cases collected in Annot. 60 A.L.R. 2d 1331 (1958), to *Botta v. Brunner, supra*, and to *Ratner v. Arrington*, 111 So. 2d 82 (Fla. 1959), a leading decision contra to *Harrington* which cites authorities and notes the arguments both ways. The cases are divided.