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In an action to recover damages for injuries resulting from a vehicle collision, *P's* counsel in his argument to the jury suggested a money value for pain and suffering based on a mathematical formula or fixed-time basis. *D* appealed, claiming error. *Held,* an argument based on a mathematical formula or fixed-time basis, suggesting a monetary value for pain and suffering, is not based on facts or reasonable inferences drawn from facts before the jury and constitutes reversible error. *Crum v. Ward,* 122 S.E.2d 18 (W. Va. 1961).

It is generally recognized that pain and suffering cannot be measured in terms of dollars and cents and that the only standard is such an amount as a reasonable person would estimate as fair compensation. *Roedder v. Rowley,* 28 Cal. App. 2d 820, 172 P.2d 353 (1946). The determination of such compensation is left to the sound discretion of the jury. *Yuncke v. Welker,* 128 W. Va. 299, 36 S.E.2d 410 (1945); *Landau v. Farr,* 104 W. Va. 445, 140 S.E. 141 (1927).

The problem arises when counsel for the plaintiff suggests to the jury a method of determining compensation for pain and suffering founded on a mathematical formula or fixed-time basis. The authorities are quite divided on this question.

In the principal case the West Virginia Supreme Court of Appeals, in a three to two decision, has relegated the use of mathematical formula not founded on evidence to determine the award of damages for pain and suffering to that of mere speculation by counsel. In so holding, the West Virginia court is adhering to the strict rule laid down in New Jersey in *Botta v. Brunner,* 26 N.J. 82, 138 A.2d 713 (1958). There the court held that counsel's suggestion to the jury by mathematical formula of an amount it should award per minute, hour or day for pain and suffering was improper as it constituted "an unwarranted intrusion into the domain of the jury." The court said that the assessment of damages for personal injury could not be gauged by any graduated scale.

In adopting the rule of *Botta v. Brunner,* the West Virginia court is assuming a position that has been severely criticized in many areas. The criticism centers mainly around the feeling that it is necessary for the jury to be guided by some reasonable and

practical considerations in awarding damages and that refusal to allow plaintiff's counsel to suggest a means of arriving at such compensation encourages the triers of the facts to make a blind guess. The contention is urged that, with proper admonition by the court that the use of mathematical formula is not evidence, such argument can provide the jury with an estimate of damages appropriately tailored to the evidence of the particular case. *Ratner v. Arrington,* 111 So. 2d 81 (Fla. Dist. Ct. App. 1959). Throughout the cases holding contrary to the *Botta* rule, there is prevalent one central theme—counsel for plaintiff should be allowed to state to the jury what he thinks should be proper damages for pain and suffering. *Yates v. Wenk,* 363 Mich. 311, 109 N.W.2d 828 (1961).

The absence of a standard for determining the monetary value of pain and suffering is pointed out as making rather questionable the contention that counsel's suggestions of amounts to be awarded on a per diem basis are misleading to a jury. While speculation by counsel is not permissible, a legitimate area of persuasion in any action is to employ inferences and conclusions based upon the evidence of the case. A serious objection to the rule of *Botta v. Brunner, supra,* is that counsel for plaintiff is somewhat hampered in imploring the jury to return a verdict in the amount desired. The question is raised: Is an attorney's attempt to evaluate pain on a *daily* basis any more speculative than his attempt to place a monetary value on *total* pain and suffering?

In New Jersey the rule is that neither the court nor counsel is allowed to make reference to the ad damnum clause of the complaint. There, perhaps, some justification exists for the disallowance of mathematical formula. But the application of this rule in West Virginia, a jurisdiction which allows free reference to the ad damnum clause, presents legitimate grounds for question. *Johnson v. Brown,* 75 Nev. 437, 345 P.2d 754 (1959).

Judge Haymond of the West Virginia court, in a dissent in the principal case, compares such a practice with requiring the finding of a sum "without adding together its separate parts."

A number of jurisdictions permit the use of mathematical formula arguments where cautionary safeguards, such as strong admonitions to the jury that counsel's statements are not evidence, are applied. Whether, under the circumstances of the particular case, counsel's arguments suggesting a mathematical basis for determining

such damages is an improper invasion of the rights of the jury is, according to this view, to be determined by the trial judge in the exercise of judicial discretion. *Johnson v. Brown, supra; Olsen v. Preferred Risk Mutual Ins. Co.,* 11 Utah 2d 23, 354 P.2d 575 (1960).

But the rule in West Virginia now appears to be that, even with admonitions by the court that mathematical formula suggestions are not evidence, the use in argument of such formula to determine the award of damages for pain and suffering constitutes grounds for reversible error. The West Virginia court justifies the adoption of this rule as a means of avoiding excessive verdicts engendered by prejudice, compassion and sympathy. This same justification is evident in *Faught v. Washam,* 329 S.W.2d 588 (Mo. 1959), wherein the court held that the use in argument of a mathematical formula to determine damages was calculated and designed to implant in the jurors' minds figures and amounts not in the record and to influence jurors to adopt those figures and amounts as a method of arriving at an award for pain and suffering.

The use of mathematical formulae, in the opinion of the majority of the West Virginia court, amounts to counsel's giving testimony and expressing opinions and conclusions on matters not disclosed by evidence. This, it might be noted, is the prevalent opinion among the adherents to the *Botta* rule. *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). The admonition of the court that the jury should not consider such suggestions as evidence is considered as failing to erase the prejudicial effect of their use.

The adoption of the *Botta* rule by the West Virginia court is not without merit. Accepting the premise, as do the adherents to the *Botta* rule, that the use of mathematical formula arguments constitutes mere speculation not based on evidence, the conclusion seems inescapable that the defendant is faced with the dilemma of either rebutting an argument not based on evidence, or ignoring the argument and risking the consequences. In addition, there is some basis for the argument that uncertainty as to the worth of pain and suffering does not change the problem from one of judgment to one of calculation. *Braddock v. Seaboard Air Line R.R.,* 80 So. 2d 622 (Fla. 1955).

It is to be noted that the principal case does not prevent the use of a blackboard or similar method in argument to the jury if based on evidence. The use of the blackboard is limited only in so far as it relates to the use of mathematical formula not based on evidence.

The weight of authority appears to be in opposition to the rule of *Botta v. Brunner, supra,* but the ultimate course of judicial opinion on this question is by no means settled. The problem is a complex one with many variables. A final rule must meet the test of time.

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