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Evidence--Personal Injury Cases--Blackboard Summation

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its decision on the presupposition that the municipality, having power to condemn property so as to provide an adequate approachway, failed to do so with the consequent result that the landowners property was being used and appropriated as an approachway without just compensation having been paid therefor. The court concluded that not only was an unconstitutional taking alleged but also a taking by the municipality, although the municipality itself operated no airplanes.

The principal case, in holding that the continuing flights over vacant land amounted to a taking of an air easement, fortified the rights of property owners even though each case will pose the enigmatic query as to the extent of a property owners' interest in the superadjacent airspace. If the findings show a protected interest, the airport owners, as well as the airplane owners, may be held liable for the diminution in real estate values which occur in the vicinity of airports. The opinion of the Washington court represents a highly skillful solution, adjusting the rights of two diverse interests, wherein the right to the use and enjoyment of private property was preserved while at the same time the promotion of the public interest in the development of modern air transportation was achieved, by recognizing the right of the government to take private property but subject to the due process requirements of the constitution.

H. S. S., Jr.

EVIDENCE—PERSONAL INJURY CASES—BLACKBOARD SUMMATION.—*P's* counsel, in an action for injuries, employed the use of a blackboard during his summation, upon which he placed an itemized list of figures, some of which were supported by evidence and others derived from his own calculations. *Held*, reversing and remanding for a new trial concerning the quantum of damages, a blackboard may be used in summation arguments to place thereon figures supported by evidence, but placing amounts thereon representing pain, suffering, and mental anguish involved speculation on the part of counsel and was putting before the jury matters not in evidence. *Certified T.V. & Appliance Co. v. Harrington*, 109 S.E.2d 126 (Va. 1959).

Two pertinent problems in this case merit discussion in relation to each other. One involves the discussion of pain and suffering in monetary terms before the jury and the other is the use of a blackboard in counsel's closing argument.

It is generally recognized that pain and suffering cannot be stated in dollars and cents. *Roeder v. Rawley*, 28 Cal.App.2d 820, 172 P.2d 353 (1946). Following this line of thought, courts have held that counsel cannot set up a mathematical formula for measuring such damages because the figures so projected constitute counsel's mere speculation without evidence in support thereof. *Henne v. Balick*, 146 A.2d 394 (Del. 1958); *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959); *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713, 60 A.L.R.2d 1331 (1958).

An inference, in contrast to pure speculation, is a permissible deduction. Counsel should discuss the award of damages for pain and suffering and whatever other factors are properly within the consideration of the jury. 3 SCHWETZTER, TRIAL GUIDE 1356 (1945). To do this, he may state all proper inferences from the evidence, and may draw conclusions therefrom through his own system of reasoning. *Burr v. Va. Ry. Co.*, 151 Va. 934, 145 S.E. 833 (1928).

Applying the theory of inferences, courts have held that counsel should be allotted, on such items as pain and suffering, latitude in final argument to comment on evidence and to note all proper inferences. *Ratner v. Arrington*, 111 So 2d 82 (Fla. 1959). One has the right to state to the jury what he thinks would be the proper damages to award for pain. *Arnold v. Ellis*, 231 Miss. 757, 97 So.2d 744 (1957). A mathematical formula is proper for purely illustrative purposes in counsel's summation argument. *Flaherty v. Minneapolis & St.L.Ry.*, 251 Minn. 345, 87 N.W.2d 633 (1958). Counsel may properly argue all phases of the evidence, draw reasonable deductions therefrom, reply to opposing argument, draw from common knowledge and suggest the extent of damages he thinks the evidence justifies. *Louisiana & Ark. Ry. v. Mullins*, 326 S.W.2d 263 (Tex. 1959).

It must be remembered that the question presented is addressed to the discretion of the court and it is incumbent on the trial judge to decide whether such argument by counsel is speculation or an inference. No West Virginia case is found on this point. In *Smith v. Penn Line Serv., Inc.*,—S.E.2d—(W.Va. 1960), the question was not discussed by the court, since decision hinged on procedural matter, but in the trial court the mathematical formula was used. This may be an indication that in the discretion of the trial judge such argument may be considered the development and deduction of permissible inferences to be made by counsel.

The second problem raised in the principal case is whether counsel may properly use a blackboard in his summation argument. "[T]he blackboard, chalk, and the eraser stand out as three dominant teaching tools utilized by teachers. . . . [A]ttorneys should use the same type of technique in attempting to aid the jury in considering the measure and amount of damages." *BELLI, TRIAL AND TORT TRENDS* 513 (1958).

There is no arbitrary rule against the use of blackboards, but they may not be used with uninhibited freedom. There is no impropriety in counsel's use of the blackboard during his summation argument for purposes of illustrating points that are properly arguable. Calculations made or diagrams drawn thereon are not evidence but they should have reasonable foundations in evidence or in inferences fairly arguable from evidence. Control of arguments related to visual aids rests in the sound discretion of the trial judge. *Miller v. Loy*, 101 Ohio App. 350, 140 N.E.2d 38 (1956); *Johnson v. Charleston & W.C.Ry.*, 108 S.E.2d 777 (S.C. 1959); 53 *AM. JUR. Trial* § 490 (1945); 88 *C.J.S. Trial* § 177 (1955).

There is a distinction between a chart which is in evidence or used for evidentiary purposes and one used to illustrate counsel's argument. The former may be exhibited throughout the trial or a portion thereof in which it is relevant, while the latter should be withdrawn from the jury's observation at the conclusion of the argument. *Ratner v. Arrington, supra*.

The only case found in West Virginia to deal with such use of a blackboard is *Smith v. Penn Line Serv., Inc., supra*, in which the Supreme Court did not reach the issue since the case was decided on other grounds.

Since it appears to be proper for counsel to draw inferences as to the amount of damages for pain and suffering and for counsel to use a blackboard to illustrate his summation argument, it seems reasonable that counsel should be able to combine the two, that is, he should be able to spell out permissible inferences in writing on the blackboard. The use of a blackboard to illustrate items of damages to the jury is proper when the use thereof in aid of counsel's argument is limited to record evidence and permissible inferences to be drawn therefrom. *Ratner v. Arrington, supra*; *Green v. Rudsenske*, 320 S.W.2d 228 (Tex. 1959).

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