June 1959

New Hope for the Defense--The Rule of Botta v. Brunner

R. C. P.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol61/iss4/10

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
NEW HOPE FOR THE DEFENSE—THE RULE OF Botta v. Brunner

In the trial of a personal injury action, it has heretofore been the practice in this jurisdiction, and many others, for the court in examining jurors upon their voir dire, to indicate the nature of the action and the amount sued for; the subliminal effects of this pronouncement are imponderable. Before the jury is sworn to try the case, prior to the introduction of a particle of evidence, indeed, before the actual trial of the case is initiated, the plaintiff has struck the first blow; he has placed a dollar value for compensation upon his injuries, pain and suffering, and imported to the entire panel of jurors, valuations which have no foundation in evidence and are elements of sheer speculation on a loss which by unanimity of opinion is not susceptible of evaluation on any monetary basis.¹

Recognizing the unfair advantage of this abuse, the esteemed Supreme Court of New Jersey has recently held² that it is improper for counsel for the plaintiff in a personal injury action to: (1) By mathematical formula suggest to the jury the amount it should award per minute, hour or day, for conscious pain and suffering; (2) employ blackboards or charts exhibiting to the jury calculations of specific amounts which in view of counsel should be awarded for pain and suffering; (3) state in arguing the case to the jury, the amount for which suit is brought. This has been the rule in Pennsylvania since before the turn of the century.³

In order to utilize the holding of Botta v. Brunner in West Virginia trial courts, it is urged that at the pretrial conference, or at the earliest possible moment, defense counsel should present the following motions to the court:⁴

I. That the amount sued for in this case be kept from the jury throughout the trial and that, to this end:

(1) the court make no mention of this amount in examining the jurors upon their voir dire;

(2) counsel for plaintiff be instructed to make no oral mention of the amount sued for in any phase of the trial;

⁴ These motions were drafted by Stanley C. Morris, Esq., of the Kanawha County Bar for use in personal injury litigation.
(3) no mention of this amount be made in any written instruction read to the jury; and

(4) the declaration in which this amount is stated be not given to the jury to take to their jury room.

II. That plaintiff's counsel be instructed that no figures may be placed upon a blackboard or be otherwise presented to the jury whereby counsel's estimate of a proper amount per hour, per day, or in gross, to be found by the jury for plaintiff's suffering, be stated.

Certain superficial objections to these motions may be encountered upon submission of these motions to West Virginia trial courts: first, that it is necessary to inform the jury in a wrongful death case of the $20,000.00 ceiling for recoveries, imposed by the legislature,5 and second, that the plaintiff's recovery is limited to the amount laid in the declaration and that any amount in excess thereof cannot be reduced to a valid judgment.6

These objections may be readily disposed of by suggesting to the trial court that although the court is powerless in West Virginia to require a remittitur upon its own volition, the parties to the action are not so inhibited.7 If the jury returns an amount in excess of the statutory limitation in wrongful death cases, or in excess of the amount laid in the plaintiff's declaration, the plaintiff may preserve the validity of the award to the extent of the permitted amounts and reduce that portion of the verdict to judgment. In point of fact, with the inflated and exorbitant amounts currently set out in ad damnum clauses by plaintiff's lawyers, only an infinitesimal number of verdicts are now, or are likely to be returned in excess of these enormous amounts sued for. The fractional number of cases in which these problems are likely to be encountered is indicative of the fact that these objections are of less than arrant severity.

An integral part of the art of advocacy and a legitimate area of persuasion in any action or suit is to urge certain inferences and conclusions based upon the evidence of the case, to the end that the jury or court will adopt conclusions and resolve issues to the advantage of the advocate's client. A more serious objection to the

7 Ibid.

https://researchrepository.wvu.edu/wvlr/vol61/iss4/10
rule of *Botta v. Brunner* is that the holding of the New Jersey court is likely to deprive counsel of part of this area of permitted and legitimate persuasion—the opportunity to implore the jury to return a verdict in the amount of the desired number of dollars.

Even the most partisan plaintiff's counsel will readily perceive and acknowledge that evidence of any correlation between pain and dollars is totally absent in any personal injury action. There is no fair market value for pain and suffering, or any replacement value for a physical disability. The voluntary subjection of oneself to pain would have no market value in precise monetary terms, for no market exists where such malaise is purchased and sold. It is futile, even absurd, to argue that a scientific or economic gage or index may be employed to guide in the establishment of awards for pain and suffering.\(^8\) No expert opinion or any type or form of evidence tending to estimate the money value of damages for pain and suffering may be introduced by either party.\(^9\) Argument not based upon proof presented and received into evidence should not be deemed within the permitted field of counsel's persuasion of the jury.\(^10\)

Therefore, the denial to plaintiff's counsel of the opportunity to present his estimate of the monetary value of the injuries does not inhibit the legitimate area of counsel's argument based upon evidence, but merely restrains an attempt to gain an unfair advantage by stating to the jury an amount claimed or expected which tends to instill in the minds of jurors an impression not founded upon a scintilla of evidence.\(^11\) The verdict of the jury and any allowance for injuries in a personal injury case, should be a deduction by the jury based upon evidence confined to the merits of the case and nature and extent of the injuries, and should not be the adoption of the monetary estimates of counsel. Such estimates by counsel are offered in lieu of evidence which is inadmissible.\(^12\) These statements by counsel of his monetary estimate of damages, not supported or based upon any evidence, can have the effect of taking the place of evidence in the minds of jurors, who, not being

---

\(^8\) Jackson v. LaPollette Hardware & Lumber Co., 193 F.2d 647 (6th Cir. 1951); 25 C.J.S., *Damages* § 93.


\(^10\) Clark v. Essex Wire Co., 361 Pa. 60, 63 A.2d 35 (1949); Stassum v. Chaplin, 324 Pa. 125, 188 Atl. 111 (1936)


\(^12\) Clark v. Essex Wire Co., supra.
learned in the law, do not always make refined distinctions between mere argument and evidence. It is an "exceedingly bad practice" because "it tends to get figures and amounts into the minds of jurors without evidence."\textsuperscript{13}

The critical concept to grasp, is the distinction between the restraint of legitimate argument based upon evidence which urges certain inferences and conclusions based thereon, and the opinions of counsel not based upon any evidence. The only formula the law provides for the determination of monetary damages for pain and suffering is a fair and just compensation, and this determination may best be left to the enlightened conscience of jurors who should be spared the intrusion of plaintiff's counsel into their province.

The belief is widespread among laymen that personal injury actions are initiated for sums in excess of the actual amounts expected; what lawyer would dispute this impression? If this is so, when a hypothetical jury is informed by plaintiff's counsel that the action is brought for $50,000.00, the jury may place a tentative value of $25,000.00 or less upon the plaintiff's claim, knowing that plaintiffs expect one half or less of the amount sued for. If, because of some question of contributory negligence or other consideration, the jury wishes to extend some sympathetic treatment to the defendant, they may return a verdict of only $10,000.00 to preserve the defendant from suffering the entire monetary consequences of the plaintiff's alleged loss. This "sympathetic treatment" may well be accorded a defendant in a case where a realistic appraisal of the plaintiff's injuries, not permanent in nature, might fairly lead to a valuation of less than $2,000.00. Our hypothetical jury may be misled by an inordinate and exorbitant amount communicated to the jury by plaintiff's counsel, based only upon the fanciful and capricious reflections of counsel.

We may only hope that the West Virginia court will condemn this reprehensible practice which leads to the indefensible result of verdicts based only upon an opinion of plaintiff's counsel.

R. G. P.

\textsuperscript{13} Reese v. Hershey, 163 Pa. 253, 255, 29 Atl. 907, 908 (1894).