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Argument of Counsel -- The Measure of Damages for Pain and Suffering

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COMMENT

ARGUMENT OF COUNSEL — THE MEASURE OF DAMAGES FOR PAIN AND SUFFERING

I. Introduction

It long has been recognized that damages for pain and suffering are not susceptible to exact monetary evaluation.[1] Because there is no market value[2] for such items as pain, suffering, humiliation, ridicule, embarrassment, inability to lead a normal life, and mental anguish, they are difficult to translate into dollars and cents, and a monetary award becomes an arbitrary allowance and not a process of measurement. Consequently, the judge, in his instructions, is unable to give the jury a firm standard upon which to base their decision,[3] but can only charge that in determining a proper award they resort to their own knowledge of these matters and to their enlightened conscience.[4] The purpose of this comment is to examine the approaches an attorney may utilize properly in arguing the amount of these damages to the jury.

II. The Concept of Recovery for Pain and Suffering

In determining the amount of damages for pain and suffering the proper basis for the award is just and reasonable compensation,[5] not sentiment or largesse.[6] Compensation in this connection is not to be considered as the price in money one might charge another to endure voluntarily the same pain as has been suffered by the plaintiff, for it is recognized that often no amount of money could meet such a yardstick. Instead, the award should represent an allowance looking toward recompense

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1. 25 C.J.S. *Damages* § 93 n. 25 (1941).

2. ". . . there is no measure by which the amount of pain and suffering endured by a particular human can be calculated. No market place exists at which such malaise is bought and sold. A person can sell quantities of his blood, but there is no mart where the price of a voluntary subjection of oneself to pain and suffering is or can be fixed." Botta v. Brunner, 26 N.J. 82, 93, 138 A.2d 713, 718 (1958).

3. Goodhart v. Pennsylvania R.R., 177 Pa. St. 1, 35 Atl. 191 (1896); Texarkana Bus Co. v. Carter, 301 S.W.2d 300 (Tex. Civ. App. 1957): "In a world so full of pain and suffering it is strange that no one has perfected a gauge that will accurately measure its value. Courts have wisely left this to the sound discretion of fair and unbiased juries, . . ."

4. Richardson, Florida Jury Instructions § 1361 (1954); 7 Am. Jur. Pleading and Practice Forms § 7:70 (1957); Annot., 85 A.L.R. 1010 (1933).

5. Southern Ry. v. Gresham, 114 Ga. 183, 39 S.E. 883 (1901); Goodhart v. Pennsylvania R.R., 177 Pa. St. 1, 35 Atl. 191 (1896); Daniels, *Measure of Damages in Personal Injury Cases*, 7 Miami L. Q. 171 (1951).

6. Van Gordon v. United States, 91 F. Supp. 834 (W.D. Mo. 1950).

for, or made because of, the suffering consequent to the injury.[7] It is the jury's function to determine what amount, under the circumstances, the plaintiff should be allowed in addition to the other items of damage, in consideration of the pain and suffering which was necessarily endured.[8]

It is interesting to note that several tort authorities recently have suggested a reformation of the law of damages for pain and suffering.[9] An examination of this question, however, would extend beyond the scope of this comment.[10]

III. IMPROPER ARGUMENT

The above mentioned concept of recovery for pain and suffering makes it improper for counsel to imply that the defendant has purchased the plaintiff's damages and now must pay a fair price for his purchase, especially where such an argument would tend to foster indignation concerning the defendant's wrong.[11] It is equally objectionable for counsel to request the jury to apply the golden rule[12] in their deliberations and to allow recovery to the same extent that they would desire should they be in the plaintiff's position.[13] Such an argument is deemed to interject sympathy or charitable considerations into the jury's determination.[14] Any argument contrasting the wealth of the defendant with the poverty of the plaintiff is also generally objectionable as an appeal to class prejudice.[15]

In *Hayes v. New York Cent. R.R.*,[16] when counsel mentioned in argument that the plaintiff was a family man with three children, the court granted a new trial, holding the judgment was obtained by appeals to passion and prejudice in placing before the jury facts calculated to

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7. Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); Herb v. Hallowell, 304 Pa. 128, 154 Atl. 582 (1931); Baker v. Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979 (1891).

8. Goodhart v. Pennsylvania R.R., 177 Pa. St. 1, 35 Atl. 191 (1896).

9. GREEN, TRAFFIC VICTIMS — TORT LAW AND INSURANCE (1958); James, *Some Reflections on the Basis of Strict Liability*, 18 LA. L. REV. 293 (1958); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958).

10. For an excellent discussion of the question see, Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959).

11. Klotz v. Sears, Roebuck & Co., 267 F.2d 53 (7th Cir. 1959); Littman v. Bell Tel. Co., 315 Pa. 370, 172 Atl. 687 (1934); Red Top Cab Co. v. Capps, 270 S.W.2d 273 (Tex. Civ. App. 1954).

12. "This argument, in effect, affirms as a correct principle that a man may properly sit in judgment on his own case — an idea abhorrent to all who love justice. Nor is such argument given a cloak of respectability by associating it with the Golden Rule. Such Rule is perfect but it applies in favor of the defendant as well as the plaintiff." Red Top Cab Co. v. Capps, 270 S.W.2d 273, 275 (Tex. Civ. App. 1954).

13. Johnson v. Stotts, 344 Ill. App. 614, 101 N.E.2d 880 (1951); Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242 (1946); Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914). *Contra*, Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 Pac. 534 (1910); White Cabs v. Moore, 199 S.W.2d 202 (Tex. Civ. App. 1946).

14. F. W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934).

15. Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242 (1946); Alpine Tel. Corp. v. McCall, 195 S.W.2d 585 (Tex. Civ. App. 1946); Annot., 32 A.L.R.2d 9 (1953). *Contra*, Savery v. Gray, 211 Miss. 811, 51 So.2d 922 (1951).

16. 328 Ill. App. 631, 67 N.E.2d 215 (1946).

arouse their sympathy. Generally, any reference by counsel, in arguing a personal injury action, to the fact that the plaintiff has a wife and children to support is considered improper as tending to prejudice the jury in plaintiff's favor and to enhance the damages.[17]

It also has been held improper for defense counsel to appeal to the self-interest of jurors, by pointing out the effect any recovery would have upon the jurors as taxpayers.[18]

There seems to be no doubt that arguments which appeal to racial,[19] religious,[20] social,[21] or political prejudices[22] of the jury are grounds for granting a new trial or reversing a judgment when the effect of the improper argument was not sufficiently corrected by action of the trial court.[23]

When a defense counsel revealed in his argument that any verdict awarded the plaintiff would not be subject to federal income tax, an Illinois court held that since the tax was a matter which concerned the plaintiff and the government, the tort-feasor had no interest in such a question and therefore should not argue it to the jury.[24]

A typical approach by the court to improper argument may be seen in *Missouri-Kansas-Texas Ry. v. Ridgway*,[25] where plaintiff's counsel made unwarranted denunciations of the defendant and repeatedly implied that opposing counsel had attempted to suppress evidence. While recognizing that the counsel must be accorded freedom of speech, the court held that he must not base his argument on an appeal to passion or prejudice, but must confine his argument to questions at issue, evidence adduced at the trial, and such inferences, deductions or analogies that may be reasonably drawn therefrom. Because the court reasoned that the verdict was influenced by the improper arguments of counsel, the case was reversed and remanded with directions to grant a new trial.[26]

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17. Chicago, St. P., M. & O. R.R. v. Arnold, 160 F.2d 1002 (8th Cir. 1947); McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 N.E. 957 (1908); Maggio v. Cleveland, 151 Ohio St. 136, 84 N.E.2d 912 (1949); Hobbs v. Stayton, 265 S.W.2d 838 (Tex. Civ. App. 1954). For a discussion of possible correction by the trial court see, Annot., 68 A.L.R.2d 990 (1959).

18. Williams v. Anniston, 257 Ala. 191, 58 So.2d 115 (1952); Chicago & E. Ill. R.R. v. Garner, 83 Ill. App. 118 (1899); Teche Lines, Inc. v. Kellar, 174 Miss. 527, 165 So. 303 (1936); Annot., 33 A.L.R.2d 442 (1954).

19. Atlanta Coca-Cola Bottling Co. v. Shipp, 170 Ga. 817, 154 S.E. 243 (1930); Barnaby v. Vorauer, 212 Mich. 395, 180 N.W. 477 (1920).

20. Morgan v. Maunders, 37 S.W.2d 791 (Tex. Civ. App. 1930); Ogodziski v. Gara, 173 Wis. 371, 181 N.W. 227 (1921).

21. San Antonio Traction Co. v. Lambkin, 99 S.W. 574 (Tex. Civ. App. 1907); P. Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920).

22. Bloodgood v. Whitney, 192 N.Y. Supp. 383 (App. Div. 1921).

23. Annot., 78 A.L.R. 1438 (1932).

24. Hall v. Chicago & N.W. R.R., 5 Ill.2d 135, 125 N.E.2d 77 (1955).

25. 191 F.2d 363 (8th Cir. 1951).

26. See, Annot., 68 A.L.R.2d 999 (1959); *cf.* Williams v. Brooklyn Elevated Rv. 126 N.Y. 96, 26 N.E. 1048 (1891); Narciso v. Mauch Chunk TP, 369 Pa. 549, 87 A.2d 233 (1952).

IV. FACTORS FOR THE JURY TO CONSIDER

The courts have suggested the following factors as valid considerations for determining fair and reasonable compensation and therefore proper points for argument: the intensity and duration of the pain suffered by the plaintiff;[27] the plaintiff's life expectancy;[28] the age and physical condition of the plaintiff;[29] the health, habits, and pursuits of the plaintiff and the absence of cruel or wanton purpose in the defendant;[30] the nervous temperament of the plaintiff, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, and the nature of his injuries;[31] the motive for the defendant's wrongful act and the manner in which it was committed;[32] the fluctuations in the value of money;[33] the degree of sensitiveness of the plaintiff as compared to others;[34] the inconvenience and annoyance of certain types of pain and suffering;[35] and the manner and extent to which different individuals react to the loss of certain pleasures.[36]

All courts appear to follow the general rule mentioned earlier in connection with the *Missouri-Kansas-Texas Ry.* case in determining the propriety of argument. This rule is that an attorney may properly draw into argument all reasonable inferences and deductions from facts and circumstances in evidence, so long as it does not result in an appeal to sympathy, passion or prejudice.[37]

A factor which can extend the bounds of argument is the failure of opposing counsel to object to prejudicial statements. As a general rule, an appellate court will not reverse a judgment because of an appeal by counsel to the prejudices of the jury, when the effect of the improper argument could have been rectified had opposing counsel objected at trial.[38] An example of such an extension may be found in *Alpine Tel. Corp. v. McCall*,[39] where although the following comments were held inflammatory, they were not considered sufficiently improper for reversal:

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27. Chicago, R.I. & P. Ry. v. Lannon, 86 Ark. 587, 112 S.W. 177 (1908).
28. Denco Bus Co. v. Keller, 202 Okla. 263, 212 P.2d 469 (1949).
29. Disheroon v. Brock, 213 Ala. 637, 105 So. 899 (1925). *Contra*, Sykes v. Brown, 156 Va. 881, 159 S.E. 202 (1931).
30. Baker v. Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979 (1891).
31. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 Pac. 534 (1910).
32. Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303 (1880).
33. Van Gordon v. United States, 91 F. Supp. 834 (W.D. Mo. 1950); Dabareiner v. Weisflog, 253 Wis. 23, 33 N.W.2d 220 (1948).
34. Ware v. Garvey, 139 F. Supp. 71 (D. Mass. 1956); Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206 (1903).
35. Purdy v. Swift & Co., 34 Cal. App.2d 656, 94 P.2d 389 (1939).
36. May v. Farrell, 94 Cal. App. 703, 271 Pac. 789 (1928).
37. 53 AM. JUR. *Trial* §§ 485, 495 (1945).
38. Aydlott v. Key Sys. Transit Co., 104 Cal. App. 621, 286 Pac. 456 (1930); St. Louis, I. M. & S. R.R. v. O'Connor, 43 Okla. 268, 142 Pac. 1111 (1914); P. Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920).
39. 195 S.W.2d 585 (Tex. Civ. App. 1946).

> [A]nd having been just, be generous, so that in after years when you see that boy limping along, struggling through life, doing the best he can, but with this infirmity over which he had no control and for which he is in no matter responsible, *you won't hear your neighbors say 'Poor boy! something should have been done for him.' Don't be in a position to think that you had an opportunity to help him and to help his father with a few measley dollars and cents. Don't place yourself in the position of hearing such remarks and having such regrets, in years to come, . . .* (Emphasis by court.)[40]

The *Alpine* case would appear to stand for the proposition that in the absence of objection by opposing counsel, the plaintiff's attorney may take every opportunity to expound in behalf of his client's cause as long as the appellate court does not find the resulting verdict so manifestly excessive as to show it to be the result of passion or prejudice.

V. Argument of Amount to the Jury

A majority of states allow counsel to disclose to the jury the amount claimed for damages.[41] The major dissenting state, Pennsylvania, has maintained steadfastly that such a practice tends to mislead the jury because there has been no evidence presented as to the value of pain and suffering.[42] The theory of the Pennsylvania rule is that the damages should be ascertained from the evidence alone, not from an estimate of counsel which is not based on any evidence.[43]

In a recent Michigan case the trial court prevented disclosure of the ad damnum figure to the jury during voir dire. The appellate court affirmed the ruling, but mentioned in dictum that the amount claimed could be disclosed properly later in the trial. The case indicates that the time at which counsel makes his comment is a controlling factor in determining the propriety of informing the jury of the amount which the plaintiff claims for damages.[44]

A majority of courts hold that when the evidence has shown the plaintiff's pain and suffering, counsel may comment on all proper inferences

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40. *Id.* at 592.

41. Graham v. Mattoon City Ry., 234 Ill. 483, 84 N.E. 1070 (1908); Shockman v. Union Transfer Co., 220 Minn. 334, 19 N.W.2d 812 (1945); Dean v. Wabash R.R., 229 Mo. 425, 129 S.W. 953 (1910); Williams v. Williams, 87 N.H. 430, 182 Atl. 172 (1935).

42. Goodhart v. Pennsylvania R.R., 177 Pa. St. 1, 35 Atl. 191 (1896); ABA, Sec. of Ins., Neg., and Comp. Law 163 (1959 Proceedings).

43. Clark v. Essex Wire Corp., 361 Pa. 60, 63 A.2d 35 (1949); Quinn v. Philadelphia Rapid Transit Co., 224 Pa. 162, 73 Atl. 319 (1909). Although recognizing it is not bound by the state rule, at least one Federal court sitting in Pennsylvania has seen fit to follow the rule. Stein v. Meyer, 150 F. Supp. 365 (E.D. Pa. 1957).

44. Spelker v. Knobloch, 354 Mich. 403, 93 N.W.2d 276 (1958). *Contra,* Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 106 S.E.2d 417 (1958).

from the evidence — the measure of damages for pain and suffering being one such inference.[45]

At least one state has held that it is reversible error to deny counsel the right to argue the amount of damages to be awarded for pain and suffering. In *Aetna Oil Co. v. Metcalf*,[46] the court reasoned that if counsel has the right to argue the extent of the plaintiff's injuries as shown by the evidence, then it logically follows that he also can argue what sum in his opinion would reasonably compensate the plaintiff for his injuries.

Evidently, it is now well settled and beyond dispute in the great majority of jurisdictions that counsel may argue the total damage figure which he considers appropriate from the evidence presented. The current problem facing the courts is the right of counsel to suggest methods to the jury for determining the total damage figure.

VI. MATHEMATICAL FORMULAS

In recent years it has been the practice of plaintiffs' attorneys to base their closing arguments as to the measure of damages for pain and suffering upon a per diem mathematical formula.[47] A leading exponent of adequate recovery for the plaintiff, Melvin Belli,[48] contends that in order to obtain a just award, it is imperative that the jury divide the total pain and suffering into daily equivalents and then multiply by the total time in question. If the jury uses this method, *i.e.*, ascertaining the value of one day's suffering and then multiplying by the number of days of the plaintiff's life expectancy, they are less apt to be shocked by the resultant figure than if the grand total is thrust directly upon them.[49]

The justification for this method is that it assists the jury by providing a system for their deliberations which they can comprehend and apply, and that in the absence of such a system there is a danger of the total pain and suffering award being ascertained "by guess and by golly."[50]

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45. McLaney v. Turner, 267 Ala. 588, 104 So.2d 315 (1958); Four County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954); J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).

46. 298 Ky. 706, 183 S.W.2d 637 (1944).

47. Clark v. Hudson, 265 Ala. 630, 93 So.2d 138 (1957); Henne v. Balick, 146 A.2d 394 (Del. 1958); Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959); Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956); Four County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954); Arnold v. Ellis, 97 So.2d 744 (Miss. 1957); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Continental Bus Sys. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

48. Former president of National Association of Claimants and Compensation Attorneys (NACCA). See, Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

49. Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951).

50. Continental Bus Sys. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959).

Mr. Belli in speaking on the use of mathematical formulas in argument expressed this view:

> It is not only the responsibility, but it is the *duty*, of the counsel for plaintiff to help present the cause in a manner that can best be understood and remembered by the jury as they are considering the case. If he does not do this, the verdict reflects confusion and uncertainty, not fact. (Emphasis by Mr. Belli.)[51]

A typical case allowing the use of a formula argument is *Arnold v. Ellis*,[52] where the plaintiff's counsel recommended computing the plaintiff's suffering at 20 cents per hour for a life expectancy of 33 years. The court, while recognizing that it is practically impossible to prove the exact dollars-and-cents value of pain in varying degrees and also that such a determination must be left to the jury, held that counsel was merely stating what he thought the damages should be — a statement he had a perfect right to make under the general rule that an attorney should have full latitude in commenting on the evidence.

VII. The Botta v. Brunner Decision

The view against per diem arguments is best expressed in the leading case of *Botta v. Brunner*,[53] where the New Jersey Supreme Court held it was not error to refuse to permit plaintiff's counsel to suggest to the jury a mathematical formula for the measurement of damages for pain and suffering. The court stated that such a suggestion had no foundation in the evidence, and interjected into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible of evaluation on a scientific basis, and thus the suggestion constituted an unwarranted intrusion into the domain of the jury. It is interesting to note that the court was much impressed by the Pennsylvania view (discussed earlier concerning disclosure of the amount claimed to the jury) and overruled prior New Jersey decisions which conflicted with that view.

Defense attorneys are, of course, bitter opponents of the per diem theory. One defense counsel states there are two basic fallacies to such a line of argument.[54] First, the issue in a personal injury case is not the value of an hour of pain and suffering, but the total amount the plaintiff should be awarded in consideration for all the pain and suffering he has endured and will endure in the future. Under this concept, it is the duty of the jury to value the entire period of suffering rather than any one

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51. Belli, *supra* note 49 at 308.
52. 97 So.2d 744 (Miss. 1957).
53. 26 N.J. 82, 138 A.2d 713 (1958).
54. Bunge, *Demonstrative Evidence — A Grandstand Play?* 4 Fed'n Ins. Counsel Q. 9 (1954).

segment of the whole.[55] Secondly, a necessary prerequisite for the conclusion that X number of hours of pain are worth the value of one hour multiplied by X is that the amount of pain suffered by the plaintiff in each of these hours is exactly the same. Since the injured person is apt to have varying degrees of pain on various days, defense attorneys do not consider the prerequisite present.[56]

An editor of a tort service[57] seems to strike at the heart of the problem when he states that allowing recovery for pain and suffering in itself authorizes the measurement of an unmeasurable. Therefore, the question of formulas in argument becomes simply whether the rank speculation of the jury properly may be suggested and augmented by the rank speculation of counsel. The editor offers the suggestion that the jury be required only to grade the pain suffered to certain standards, such as moderate, severe and excruciating, and then apply a legislatively prescribed valuation table.[58]

The activity created in this area by the *Botta* decision indicates that other jurisdictions soon will be called upon to rule on the use of mathematical formulas in argument. Of the four opinions which have been decided subsequent to *Botta*, two held in favor of the use of the per diem argument,[59] and two held against this major weapon in the arsenal of the plaintiff.[60]

VIII. FLORIDA DECISIONS

The Florida Supreme Court first had occasion to discuss the measure of damages for pain and suffering in *Florida Ry. & Nav. Co. v. Webster*,[61] where it stated:

> From the very nature of the matter, it is not practicable to fix any definite scale for measuring the money damage to be awarded for physical and mental suffering; but it should be confined to compensation within reasonable limits, and not partake of the character of punishment on the party inflicting the injury. Inasmuch as some injuries cause more pain and suffering than others, the jury must be allowed some latitude of discretion in

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55. ". . . at best the allowance is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, . . ." Chicago & N.W. Ry. v. Chandler, 283 Fed. 881, 884 (8th Cir. 1922).

56. For another defense attorney's arguments see, Shaw, *The Impact of Botta v. Brunner on Recovery for Pain and Suffering*, 6 DEFENSE L.J. 3 (1959).

57. 2 PERSONAL INJURY COMMENTATOR 27 (Vol. III 1960).

58. Professor Plant, *supra* note 9, has suggested that pain and suffering be limited to a certain fixed percentage of the plaintiff's damages; such as 50% of his medical, nursing and hospital expenses.

59. Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959); Continental Bus Sys. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959).

60. Henne v. Balick, 146 A.2d 394 (Del. 1958); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

61. 25 Fla. 394, 5 So. 714 (1889).

> adjusting the compensation for pain and suffering to the facts of each case. . . .[62]

In *Baggett v. Davis*,[63] counsel for plaintiff stated to the jury in summation that they need not consider the effect the size of the verdict would have upon the defendant, for it would not cost him a cent. The court held his argument clearly beyond the bounds of propriety and reversible error, even though the defense counsel had failed to object in the lower court. The court stated:

> [I]t is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury, and to seek by proper instructions . . . to remove any prejudicial effect they may be calculated to have against the opposite party. A verdict will not be set aside by an appellate court because of such remarks . . . unless objection be made at the time of their utterance. This rule is subject to the exception that, if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in which event a new trial should be awarded regardless of the want of objection or exception.[64]

In *Toll v. Waters*,[65] the trial judge in his instructions to the jury suggested several factors, which would appear to be valid points for arguing the amount of plaintiff's recovery for pain and suffering. They were: ". . . what sort of injuries the plaintiff received, if any, their character as producing or not producing pain, the mildness or intensity of the pain; [and] its probable duration, . . ."[66]

In *Atlantic Greyhound Lines v. Lovett*,[67] the following elements were mentioned as being proper for the jury's consideration in determining the extent of the mental suffering of the plaintiff for being ejected from a bus: the ignominy endured in consequence of his ejection, his standing in the community and his status in life.

The problem of mathematical formulas first arose in *Braddock v. Seaboard Air Line R.R.*,[68] in which the Florida Supreme Court noted the use of a $5-a-day argument at trial and commented as dicta that if this argument should produce an excessive verdict the court, in its sound discretion, could prevent injustice by ordering an appropriate remittitur.

The District Court of Appeal, Third District, in *Ratner v. Arrington*,[69] devoted a good portion of its opinion to the question of mathematical

62. *Id.* at 424, 5 So. at 721.
63. 124 Fla. 701, 169 So. 372 (1936).
64. *Id.* at 716-17, 169 So. at 379.
65. 138 Fla. 349, 189 So. 393 (1939).
66. *Id.* at 353, 189 So. at 395.
67. 134 Fla. 505, 184 So. 133 (1938).
68. 80 So.2d 662 (Fla. 1955). On a second appeal the Florida Supreme Court implicitly endorsed the use of the per diem argument by affirming a jury verdict for the exact amount argued by the plaintiff's counsel. Seaboard Air Line R.R. v. Braddock, 96 So.2d 127 (Fla. 1957).
69. 111 So.2d 82 (Fla. App. 1959).

formulas in argument. Although the court approved the practice in this case, the court specifically stated that it did not intend to foreclose the question of whether the use of mathematical formulas is proper in general. The court believed that recent holdings on both sides of the question were not grounded on reasons of sufficient force to compel a decision either way. In conclusion the court stated:

> In so holding we give due regard to the proposition that "pain and suffering have no market price." But the very absence of a fixed rule or standard for any monetary admeasurement of pain and suffering as an element of damages supplies a reason why counsel for the parties should be allotted, on this item of damages, their entitled latitude in argument — to comment on the evidence, its nature and effect, and to note all proper inferences which reasonably may spring from the evidence adduced.[70]

IX. CONCLUSION

This writer finds it difficult to advocate either side of the mathematical formula problem, for it is his opinion that both have serious shortcomings. If a mathematical formula is allowed in argument, it appears that a jury can be led to an excessive verdict by much the same logic as an installment buyer who considers only the small monthly payment and not the total price. On the other hand, if no system is presented for the jury's consideration, it is highly possible that an inadequate award will be returned by a confused jury.

Perhaps a step towards the solution of the problem would be to allow plaintiff's counsel to recommend a method or system by which damages such as pain and suffering may be measured, but to forbid any mention of monetary figures to be used in the system. This rule would allow counsel to express an opinion of monetary value upon only those damages which are susceptible of ascertainment by evidence, and would leave entirely to the jury the estimation of those damages which cannot be measured by any standard of pecuniary value.

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70. *Id.* at 89.