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The Unit-of-Time Method of Computing Pain and Suffering as Portrayed on Blackboards and Charts, 3 J. Marshall J. of Prac. & Proc. 422 (1970)

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THE UNIT-OF-TIME METHOD OF COMPUTING PAIN AND SUFFERING AS PORTRAYED ON BLACKBOARDS AND CHARTS

BLACKBOARDS AND CHARTS AS TRIAL AIDS

We live in a nation of viewers[1] and it has become well established that people learn more rapidly by observing than by listening.[2] Thus the time spent in preparation of visual evidence and its presentation at trial has proved invaluable to juries in finding the facts. The use of this type of evidence by plaintiffs' attorneys in recent years and the corresponding failure of defense attorneys to use similar evidence may explain some of the high verdicts throughout the country.[3] There is no doubt that in preparation for trial an attorney should utilize his imaginative processes and every opportunity available to prepare this type of evidence.[4] since it is more understandable to lay jurors and obtains better results for clients.[5]

The visual aids most widely used in the courtroom are blackboards and charts.[6] Melvin Belli, a fervent advocate of

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[1] Kilroy, *Seeing Is Believing*, 8 KAN. L. REV. 445 (1960). In Brown-Miller Co. v. Howell, 224 Miss. 136, 79 So.2d 818 (1955), the court said that: "The greater part of man's information and knowledge is acquired through the eye." *Id.* at 149, 79 So.2d at 822.

[2] Goodnow, *Visual Aid in Court*, 1960 A.B.A. SECT. INS. & NEG. C. L. 60. The author also said "people absorb up to thirty three per cent more when appeal is made to the eye as well as the ear and they retain what they hear fifty five per cent longer." *Id.* *See also* BARLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932); Cohen, *Interaction Between a Visually Perceived Simple Figure and Appropriate Verbal Label in Recall*, 24 PERCEPTUAL AND MOTOR SKILLS 2387 (1967), Hanawalt & Tarr, *The Effect of Recall Upon Recognition*, 62 JOURNAL OF EXPERIMENTAL PSYCHOLOGY 361 (1961).

[3] Kilroy, *supra* note 1. *See* M. BELLI, THE ADEQUATE AWARD (1950). Belli says that it is apparent that the development of persuasive and novel use of demonstrative evidence is resulting in higher verdicts and defense attorneys are painfully aware of the efficacy of their techniques. He continues, "[b]ut even the call to arms of the defense attorneys is predicated on countering these techniques on their own terms and not by resorting to judicial strait-jacketing on the advocate's role." *Id.* at 73.
See also comment, *Damages — Pain and Suffering — Counsel's Argument to Jury re Amount of Award Held Improper*, 12 RUTGERS L. REV. 522 (1958).

[4] Kilroy, *supra* note 1.

[5] C. MCCORMICK, THE LAW OF EVIDENCE §181 (1954). McCormick indicates that charts and diagrams are so useful in giving clarity and interest to spoken statements that it may be argued that no special control over their admission is needed beyond the requirements for all testimony, that it be relevant. *See* Kelly v. Spokance, 83 Wash. 55, 145 P. 57 (1914), where the court said:

> [T]he practice of admitting photographs and models in evidence in all proper cases should be encouraged. Such evidence usually clarifies some issue and gives the jury and the court a clearer comprehension of the physical facts that can be obtained from the testimony of the witnesses.

Id. at 56, 145 P. at 58.

[6] Bronson, *Visual Aids in Jury Argument*, 10 DEF. L. J. 3 (1961).

the use of such trial aids, has not tried a case in the last several years without the use of at least two blackboards.[7] He also recommends that the trial lawyer have at least one blackboard in his office to prepare for trial as well as to explain tactics to clients.[8] The use of these trial aids has become so widespread that some courts have even taken judicial notice thereof.[9]

It should be kept in mind that there is a distinction between a chart which is used in evidence and one used in argument only.[10] Evidence may be exhibited throughout the trial where relevant, while the chart used for argumentative purposes must be withdrawn from the jury's observation at the conclusion of the argument in which it is employed.[11] The chart used in argument should refer only to matters which are in evidence or to inferences which may be reasonably drawn from evidence.[12] It is within the trial court's discretion to permit the use of a blackboard or chart in aid of counsel's argument to show any matter which counsel could state to the jury in proper argument.[13] It is also within the trial court's discretion to permit a blackboard or chart to illustrate the testimony of a witness.[14] Wigmore has said: "It would be folly to deny ourselves on the witness stand those effective media of communication commonly employed at other times as a superior substitute for words."[15] But even if the trial judge permits a witness to use a blackboard during the testimony, he may later refuse to allow its use during final argument.[16] A witness should, of course, not

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[7] Belli, *Demonstrative Evidence and The Adequate Award*, 22 MISS. L. J. 284, 308 (1951).

[8] *Id.* at 314.

[9] Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959).

[10] *Id.*

[11] Haycock v. Christie, 249 F.2d 501 (D.C. Cir. 1957); Davis v. Haldeman, 150 F. Supp. 669, (E.D. Pa. 1957); Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

In Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955), the court said that counsel should not allow damage figures to remain before the jury at any time other than during argument. The court in Clark v. Hudson, 265 Ala. 630, 93 So.2d 138 (1956), refused to make a distinction between the use of a blackboard listing damages prayed for and the use of a prepared chart for the same purpose. The use of a prepared chart would preclude the opposing attorney from erasing figures and replacing them with some of his own, but this did not change its character to that of evidence as opposed to an argumentative aid. *See* 1 M. BELLI, MODERN TRIALS §§130, 133(2), 135 (1954).

[12] Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959). See Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

[13] Ryan v. C. & D. Motor Delivery Co., 38 Ill. App. 2d 18, 186 N.E.2d 156 (1962).

[14] State v. Jones, 51 N.M. 141, 179 P.2d 1001 (1947).

[15] 3 J. WIGMORE, EVIDENCE §790 (3d ed. 1940).

[16] Wilson v. Hampton, Ill. App. 2d 175, 194 N.E.2d 564 (1963).

The granting or denying of permission to use a blackboard or chart and the extent to which it may be employed rests in the sound discretion of the trial court, Haycock v. Christie, 249 F.2d 501 (D.C. Cir. 1957). Upon timely objection, however, the jury should be instructed that neither the chart nor

be permitted to use a chart or diagram to illustrate his testimony in order to show an assumed condition which admissible proof has not shown to exist in fact.[17] The chart finds its proper use as mere illustration; that is, when it shows visually nothing more than the jury is permitted to hear.[18]

The utility of employing blackboards and charts as trial aids can be readily observed when they are used to portray damages for pain and suffering.[19] Such techniques are often utilized during closing arguments,[20] a stage of trial where the attention of the jury is critical.[21] This logical nexus between the use of such visual aids and the employment of a unit-of-time formula for computing pain and suffering cannot be severed.[22] This view can be illustrated by the following:

> In recent years the use of demonstrative evidence in the courtroom has been highly refined, particularly by lawyers who represent plaintiffs in personal injury litigation. The blackboard, for example, has proved very effective as a device for making graphic presentations . . . on a unit-of-time basis.[23]

THE UNIT-OF-TIME METHOD OF COMPUTING PAIN AND SUFFERING

The standard of "certainty," or at least "reasonable certainty," is an established rule in proving damages.[24] These standards manifest an insistence that the jury must be furnished with some yardstick, however rudimentary, which will

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argument is evidence, Miller v. Loy, 101 Ohio App. 405, 140 N.E.2d 38 (1956).

[17] Louisville Gas & Elec. Co. v. Sanders, 249 S.W.2d 747 (Ky. Ct. App. 1952).

[18] Darling v. Charleston Comm. Mem. Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964). The chart contained references to what counsel considered reasonable damages and suggested figures with a total which was in black crayon on a sheet of easel paper and displayed to the jury.

But see Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

[19] Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961) where the chart appeared as follows:

15 days at $100.00	$1,500.00
5/8/38 - 3/4/59 — 301 days at $25.00	7,525.00
34.73 years 12,676 days at $3.00	38,028.00
	$47,053.00

The fifteen days refer to hospitalization at $100 per day. The second line is the date from the injury to trial and the fee for treatment per day, while the third line is the amount of days left to the plaintiff's life expectancy. Thus the whole amount that might, at first blush look large, is now accounted for by the sum of its parts.

Id. at 426, 122 S.E.2d at 22.

[20] Darling v. Charleston Comm. Mem. Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), Seaboard Air Line R.R. Co. v. Braddock, 96 So.2d 127 (Fla. 1957), *cert. denied*, 355 U.S. 892.

[21] *See generally* Comment, *Damages — Pain and Suffering — Counsel's Argument to Jury re Amount of Award Held Improper*, 12 RUTGERS L. REV. 522 (1958).

[22] *See* Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

[23] *See* Introduction to Bolen, *The Blackboard Jungle of Demonstrative Evidence: View of a Defense Attorney*, 48 VA. L. REV. 913 (1962).

[24] Comment, *The Probability of the Happening of an Event as a Test for Awarding Damages*, 28 COL. L. REV. 76 (1928). See C. MCCORMICK, *The Law of Damages* §26 (1935).

aid them in making their determination.[25] There are, however, many modifications to the rule of certainty which enable the courts, while professing a high standard of certainty as an ideal, to avoid harsh applications of it.[26]

One exception is that the law has no standard by which to measure pain and suffering in money.[27] "Physical pain" and "mental suffering" are combined together as elements of damage in personal injury litigation.[28] Physical pain is an immediate reaction upon the nerves and brain provoked by some injury to the body, while mental suffering is distress which is not felt as being directly connected with any bodily condition.[29] Mental suffering is regarded by the courts as a usual companion to physical pain and the difficulty of distinguishing the two has been deemed a reason for allowing damages for mental suffering.[30]

Justice Kelly, specially concurring in *Goertz v. Chicago & North Western Railway Company*,[31] said:

> It might . . . be said that it is fruitless to search for any norm to measure compensation for intangible painful consequences of a wrongful injury. On the other hand there must be a norm, otherwise how can the rule state that a verdict may not be set aside as excessive unless it be "wholly unwarranted," "palpably excessive" and so on. The very words used in the rule presuppose a norm.[32]

Thus the per diem method of computing pain and suffering in personal injury litigation has evolved, and with it its pendent controversies.

In the trial of a personal injury case, unlike a trial in a court of equity, the verdict can only be written in terms of dollars and cents. It cannot be amended periodically to meet the plaintiff's needs, "[i]t is one lump sum for all times."[33]

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[25] Comment, *Uncertain Damages*, 59 U. PA. L. REV. 180 (1910); See Illinois Pattern Jury Instruction (I.P.I.) No. 30.05 which provides: "The pain and suffering experienced [and reasonably certain to be experienced in the future] as a result of the injuries," as an element of damages.

[26] C. MCCORMICK, THE LAW OF DAMAGES, §27 (1935).

[27] *Id.*

[28] McDaniels v. Terminal R.R. Ass'n, 302 Ill. App. 332, 350, 23 N.E.2d 785, 792 (1939); *See*, Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 241, 81 N.E. 857, 860 (1907).

[29] Webster defines "pain" as mental distress, anxiety, grief, anguish, and does not necessarily mean physical pain. *See*, Robertson v. Craver, 88 Iowa 380, 390, 55 N.W. 492, 495 (1893).

In a personal injury action, the defendant was not entitled to have the terms "pain" and "suffering" so restricted as to exclude the mental phase in an instruction authorizing damages for past and future pain and suffering. "Pain" was construed to mean an acute discomfort of body or mind, and "suffering," the enduring of pain or distress. Prettyman v. Topkis, 39 Del. 568, 572, 3 A.2d 708, 712 (1938).

[30] *See* Bonelli v. Branciere, 127 Miss. 556, 90 So. 245 (1922).

[31] 19 Ill. App. 2d 261, 153 N.E.2d 486 (1958).

[32] *Id.* at 275-76, 153 N.E.2d at 494.

[33] Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L. J. 284, 308 (1951).

Thus it behooves the plaintiff's attorney to do a complete job at the trial court level attaining for his client all he is legally entitled to. This means one must spell out to the jury exactly what comprises the amount of damages to be asked for.[34] Melvin M. Belli gave an illustration of this technique saying:

> You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years. You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result . . . . [35]

A typical mathematical formula can be exemplified by respondent counsel's argument in *Johnson v. Brown*,[36] "[n]ow, what is it worth. . . . to have the traction pin pushed through your leg. . . . Would ten cents a minute be unfair? That would be six dollars an hour."[37] The effectiveness of using this

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[34] *Id.* at 318.

[35] *Id.*

[36] 75 Nev. 437, 345 P.2d 754 (1959).

[37] *Id.* at 446, 345 P.2d at 758-59 (1959). Another effective per diem argument can be illustrated as follows:

> Let's take Pat, my client, down to the waterfront. He sees Mike, an old friend . . . and says, "Mike, I've got a job for you . . . You're not going to have to work any more for the rest of your life and the best part of this job is . . . you'll never lose it . . . You don't have to do any work . . . All you have to do is to trade me your good back for my bad one and I'll give you five dollars a day for the rest of your life. Do you know what five dollars a day for the rest of your life is? Why that's $60,000! Of course, I realize that you are not going to be able to do any walking, or any swimming, or driving an automobile, or be able it sit in a movie picture show; you're going to have excruciating pain and suffering with this job, thirty-one million seconds a year and once you take it on, you'll never be able to relieve yourself of this, but you get $60,000!"

Address by Melvin M. Belli, *supra* note 7 at 319.

Note the actual chart which appeared in *Ratner*:

Wendell Arrington

Age 43 — Expectancy 28.8 years

	To Date
Medical Expense	
Lee Memorial Hosp.	$1,211.15
North Shore Hosp.	20.00
St. Francis Hosp.	1,227.42
Mercy Hosp.	1,102.30
Dr. Warnock	575.00
Dr. Quillian Jones	240.00
Dr. Russell	1,290.00
Dr. Zaydon	1,175.00
Drs. Leslie & Small (anesthetists)	292.50
Dr. Ferrer (anesthetist)	172.50
Dr. Fusco (anesthetist)	30.00
Nurse Early	661.30
Nurse Skelton	721.30
Wheatley Brace Company	55.00
Drugs & Medicines	470.72
	9,244.19
Pain and Suffering	
12/8/55 - 1/30/58 — 783 days @ 15.	11,745.00
Physical Disability and Inability to Lead a Normal Life	
12/8/55 - 1/30/58 — 783 days @ 5.	3,915.00

type of argument coupled with the visual stimuli of a blackboard or chart can be readily appreciated.

DEVELOPMENT OF THE LAW

In *Ratner v. Arrington*,[38] the leading case in this area, the court was careful not to foreclose the question of using a unit-of-time argument for evaluating pain and suffering:

> [R]ecent holdings, for and against the allowance of such arguments, are not grounded on reasons of sufficient force to compel the decision either way. The ultimate course of judicial opinion on the point is not yet discernible.[39]

In 1958, the decision of *Botta v. Brunner*[40] pointed out that the blackboard technique of computing a per diem formula is, in reality, an attempt to interject testimony which a witness would not otherwise be permitted to give. The court quoted from several old Pennsylvania cases which likewise denounced the mathematical formula saying that:

> In cases where the damages are unliquidated and incapable of measurement by a mathematical standard, statements by plaintiff's counsel as to the amount claimed or expected are not to be sanctioned, *because they tend to instill in the minds of the jury impressions not founded upon the evidence.*[41]

Further the court continued, "[S]tatements calling attention to claims and amounts not supported by the evidence constitute a suggestion to the jury *'which in their minds takes the place of evidence.'* "[42]

The court went on to point out that an expert witness would be incompetent to estimate pain on a per hour or per diem basis and therefore plaintiff's counsel and his blackboard are likewise incompetent.[43] In conclusion, the court said the

Loss of Earnings		
111 weeks @ 125.		13,875.00
Future		
10,220 days	28 years	38,779.00
Medical Expense		500.00
Pain and Suffering		
10,220 days		10,220.00
Physical Disability and Inability to Lead a Normal Life		
10,220 days @ 3.		30,660.00
Loss of Earning Capacity		
To age 70	27 years	162,000.00
		242,159.00

111 So.2d 82, 86 (Fla. App. 1959).

[38] 111 So.2d 82 (Fla. App. 1959).

[39] *Id.* at 89. *See* Rudolph, *Trial-Argument of Counsel — Use of a Formula Not Based on Evidence*, 64 W. VA. L. REV. 454 (1962), where the court said: "Obviously, the question is still an open one and it appears that it will remain open . . . the end is not near." *Id.* at 455.

[40] 26 N.J. 82, 138 A.2d 713 (1958).

[41] *Id.* at 98, 138 A.2d at 722.

[42] *Id.*

[43] *Id.* See dissent in Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

best test that the law has provided for juries to determine the amount to be awarded for pain and suffering is "their enlightened conscience."[44]

Then, one year later, *Ratner v. Arrington*[45] was decided by a Florida court of appeals, which held it admissible to use a per diem argument portrayed on a blackboard as a measurement of pain and suffering.[46] The reasons given in support of the formula were:

1. The very absence of a fixed standard for the monetary measurement of pain and suffering is reason for allowing wide latitude in arguing these damages[47] and counsel should be allowed to draw all proper inferences from the evidence.[48]

2. The trier of facts should be guided by some reasonable and practical considerations since an award for pain and suffering should not depend upon a mere guess.[49]

3. The per diem arguments are not evidence but are merely illustrative[50] and the jury is free to weigh the argument and pass on its credibility.[51]

The trend seemed to be in favor of the per diem formula until *Crum v. Ward* in 1961, where it was said that an argument based on a mathematical formula or fixed time basis suggesting a monetary value for pain and suffering was error.[52] Citing *Botta,* the court said:

> For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been "fair and reasonable compensation." The general standard was adopted because of universal acknowledgment that a more specific or definitive one is impossible.[53]

The court concluded that the mathematical formula argument is based wholly on speculation, or imaginary inferences, not supported by facts, but by supposed facts, which could not be received as evidence if offered.[54]

A survey of the case law would not be complete without mention of the Illinois case of *Caley v. Manicke.*[55] At the trial court level the defendant's motion that the plaintiff's attorney

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[44] Botta v. Brunner, 26 N.J. 82, 103, 138 A.2d 713, 725 (1958).
[45] 111 So.2d 82 (Fla. App. 1959).
[46] *Id.*
[47] *Id.*
[48] McLaney v. Turner, 267 Ala. 588, 104 So.2d 315 (1958).
[49] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), *cert. denied,* 352 U.S. 941 (1956).
[50] Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956).
[51] J. D. Wright & Son Truckline v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).
[52] 146 W. Va. 421, 122 S.E.2d 18 (1961).
[53] *Id.* at 429, 122 S.E.2d at 23.
[54] Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961).
[55] 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

could not portray on a chart an hourly, daily, weekly, monthly or yearly basis for computing pain and suffering, was denied and this was affirmed by the appellate court.[56] The appellate court, reasoning syllogistically, cited the old Illinois case of *Graham v. Mattoon City Railway Company*[57] which held that counsel, in his argument to the jury, can comment as to what he considers fair compensation for the injuries received.[58] From here the court reasoned that since it was proper argument to point out that pain and suffering are compensated for in money, it cannot be improper to discuss the components of the total. The fact that such argument might be more persuasive than arguing a gross amount is no reason to forbid its use, and surely the portrayal of such in arithmetic terms on a chart cannot make what was once valid invalid.[59] Three months later the First District Appellate Court handed down the opinion in *Jensen v. Elgin, Joliet & Eastern Railway Company*[60] which was in accord with *Caley*. *Jensen* was another well reasoned opinion which permitted plaintiff's counsel to argue to the jury an hourly rate for the evaluation of such pain and suffering.[61] Citing *Caley* in approval, they went on to say: "[W]e are inclined to regard this use of the per diem argument as a more adequate resolution of the problem and clearly less speculative than the 'by gosh and by golly' approach."[62]

It appeared as if Illinois law was in favor of such tactics until, by certificate of importance, *Caley* became a case of first impression for the Illinois Supreme Court.[63] The majority of the court held that this was improper argument and reversed the judgment. They felt that pain and suffering have no commercial value to which a jury can refer in determining what

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[56] 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961).

[57] 234 Ill. 483, 84 N.E. 1070 (1908).

[58] The court in *Graham v. Mattoon City Ry. Co.* said:

> [T]hat the sum of $10,000 which he asked you to give him in his declaration is what he should fairly have, gentlemen of the jury. The objection made to these remarks is that they refer to the amount claimed in the declaration. We do not think that there is any valid objection to counsel, in argument, telling the jury what, under the evidence, counsel considers a fair compensation for the injuries received.

Id. at 491, 84 N.E. at 1073.

[59] 29 Ill. App. 2d 323, 173 N.E.2d 209, where the court in summary said:

> In the first place, such an argument can suggest valid considerations for rendering the abstraction of pain and suffering comprehensible for concrete translation into dollars; Secondly, the argument is logically suggested by the evidence when read in context with the monetary determination that must be made; Thirdly, this line of argument falls within hitherto accepted bounds of advocacy and it is not apparent to us where it now o'er leaps them.

Id. at 340, 173 N.E.2d at 217.

[60] 31 Ill. App. 2d 198, 175 N.E.2d 564 (1961).

[61] *Id.*

[62] *Id.* at 221, 175 N.E.2d at 576.

[63] 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

monetary allowance should be given to a plaintiff. Thus the jury must be left to its own judgment and conscience since "[j]urors are as familiar with pain and suffering and with money as are counsel."[64] The court did point out, however, that they had no objection to the method of preparing the chart as illustration of counsel's argument, "except for those portions reflecting the mathematical formula for pain and suffering."[65]

It is interesting to note, however, that in the dissenting opinion the majority is reminded, academically, of the tradition in Illinois of permitting counsel to suggest a total monetary award for pain and suffering,[66] and that there is no logical basis in permitting counsel to suggest a total monetary value of pain and suffering, while prohibiting him from explaining to the jury his reasoning in arriving at such a figure.[67] In 1964, in *Darling v. Charleston Community Memorial Hospital*,[68] the dissent's reasoning in *Caley v. Manicke*,[69] was reinforced. In *Darling*, the plaintiff's counsel, with the use of an easel, included reference to computation for immediate suffering and future pain in his closing argument. The court, not specifically making reference to the mathematical formula, held that such a chart was proper as a mere illustration of counsel's argument since "it showed the

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[64] *Id.* at 393, 182 N.E.2d at 209.

[65] *Id.* at 394, 182 N.E.2d at 209.

[66] Graham v. Mattoon City R.R., 234 Ill. 483, 84 N.E. 1070 (1908), the argument which defendant contended was prejudicial was:

> We say to you, gentlemen of the jury, and repeat it again, that the evidence shows a case of a man who in sound health weighed three hundred pounds, an active man, whom this company trusted and employed; that this man is permanently injured; that the sum of $10,000 which he asked you to give him in his declaration is what he should fairly have, gentlemen of the jury.

Id. at 491, 84 N.E. at 1073.

[67] 24 Ill. 2d 390, 182 N.E.2d 206, where dissent says:

> It appears anomalous that, according to the majority opinion, plaintiff's counsel may, without error, place upon a chart before the jury his estimate of the monetary value of the nature of the injury, ($10,000); the future pain, ($8,760); the hospital and medical bills, ($1,288.90); the lost earnings, ($5,312); and the permanency of the injury, ($8,000); for a total of $33,360.90. He may also suggest a total monetary value of $50,140.90 as just compensation for the injury. However, when he suggests that $16,780.10 is a reasonable figure for 11,680 hours and 510 days of pain, this court feels compelled to reverse. . . .

Id. at 398, 182 N.E.2d at 211.

In accord Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960).

Judge Crockett, concurring, said:

> If he [plaintiff's counsel] can talk about it [amount of damages sought for pain and suffering] at all and mention some gross figure, which it has always been assumed he could do, it would seem no more harmful to invite the jury's attention to a process of analysis and reasoning with respect thereto based upon the time involved and reasonable compensation therefor.

Id. at 28, 354 P.2d at 578.

[68] 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964).

[69] 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

jury visually nothing more than the jury heard orally."[70] The per diem argument has been rejected by the Illinois Supreme Court on first impression, but the dissent in that case and other Illinois Appellate Court opinions seems to hint that the issue is not yet foreclosed.

EVALUATION AND ANALYSIS OF UNIT-OF-TIME FORMULA

The split authority on the issue of using a mathematical formula for computing pain and suffering has sparked much criticism. The attorney who desires to take advantage of such a formula must be aware of the arguments advanced against its use, as well as the corresponding answers posed by its advocates.

The first argument against the formula is that there is no evidentiary basis for connecting pain and suffering into monetary terms since it has no market value.[71] The lack of such market value, however, does not deprive the plaintiff of the right to tell the jury what he estimates proper compensation to be.[72] Counsel's formula is merely a comment on the evidence in the record concerning pain and suffering[73] or a reasonable inference from such evidence.[74] Professor Wigmore has said that, "[s]o long as the law gives compensation in the shape of money, there in an inconsistence in excluding estimates in money."[75]

It is also contended that the formula for computing pain and suffering is an invasion of the domain of the jury.[76] If the jury has the final word and the attorney is merely commenting on the evidence, there is no usurpation of the jury's function. The jurors are ultimately the ones who weigh the comments of counsel and are free to disregard them as they see fit.[77] Furthermore, there is no harm in giving a reasonable and practical standard to guide the judge or jury in their determination of an award. This

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[70] 50 Ill. App. 2d 253, 336, 200 N.E.2d 149, 190 (1964).

[71] Gorczyca v. New York, N.H. & H. R.R., 141 Conn. 701, 109 A.2d 589 (1954); Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Stassun v. Chapin, 324 Pa. 125, 188 A. 111 (1936).

[72] Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So.2d 144 (1954).

[73] J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).

[74] See Comment, *Damages — Pain and Suffering — Counsel's Argument to Jury re Amount of Award Held Improper*, 12 RUTGERS L. REV. 522 (1958).

[75] 7 J. WIGMORE, THE LAW OF EVIDENCE §1944 (3d ed. 1940).

[76] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958), where the court said:

> Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right.

Id. at 103, 138 A.2d at 725.

[77] J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).

is preferable to leaving them to a "blind guess or the pulling of a figure out of the air."[78]

The fact that the formula may carry too much weight with the jury and may be considered as evidence[79] has also been raised as an argument by opponents of the formula. The answer to this argument is simply that a prejudicial effect, if any, caused by this technique of evaluating pain and suffering, can be eradicated or prevented by cautionary instructions given by the judge.[80] Some courts have made it a requirement that the mathematical formula be accompanied by a cautionary instruction to the jury to the effect that the argument is not evidence and that they alone must determine the proper verdict.[81]

It is also argued that each individual has a different reaction to a particular injury, a different "threshold of pain,"[82] which the formula fails to recognize. This argument, however, would be equally applicable to any method of computing pain and suffering, whether mathematical or otherwise. With this contention, there is usually coupled the argument that such formulas include the connotation of "disability," "inability to lead a normal life," "humiliation and embarrassment," as well as "pain and suffering."[83] This, it is contended, confuses the jury and results in an over-estimation of the damages.[84] But this argument is one attacking the practicality of the formula's application rather than a condemnation of the method itself. If such overlapping of terms does in fact exist, and an over-estimation by the jury is a possible result, it is the job of the defense attorney to prevent it.[85] An attack on this method by an ineffective defense

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[78] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, 11 (6th Cir. 1956).

[79] Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

[80] See Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Vaughan v. Magee, 218 F. 630 (3d Cir. 1914).

See Illinois Pattern Jury Instructions (I.P.I.) No. 1.01 (5) which provides:

> Arguments, statements, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but are not evidence. If any argument, statement, or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

[81] Eastern Shore Pub. Serv. Co. v. Corbett, 177 A.2d 701 (Md. App. 1962).

[82] *See* Herb v. Hallowell, 304 Pa. 128, 154 A. 582 (1931).

[83] Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959).

[84] Seaboard Air Line R.R. Co. v. Braddock, 96 So.2d 127 (Fla. 1957), *cert. denied*, 355 U.S. 892 (1957). In the dissenting opinion it was pointed out that the verdict was excessive due to the overlapping of terms used by plaintiff on a placard. A portion of the placard appeared as follows:

Pain and Suffering	20,440 days	20,440
Humiliation and Embarrassment	20,440 days	40,880
Inability to Lead a Normal Life	20,440 days	40,880
Loss of Earning Capacity	5500 x 50% x 56	121,000
	Total	248,439

Id. at 129.
The minority felt that at least some of the elements of damages were included more than once.

[85] Sessions, *The Trial Lawyer of the Future*, 35 TENN. L. REV. 442

attorney would be merely an attack on the practical results of his own inactions.

The defense attorneys say that such argument puts them in the position of having to rebut an argument which has no basis in evidence.[86] They contend that if counsel attempts to argue a lower formula, he has in effect admitted that the law recognizes such a method of evaluating pain and suffering. His silence, on the other hand, might constitute a tacit approval for the argument. But counsel for the defendant could also cast doubt on the validity of the formula by skillful illustration and criticism. He could likewise advance arguments to keep the evaluation of the damages reasonable and objective, urge reasons why a lower figure should be used, and point out to the jury that plaintiff's estimate may contain overlapping items. A "sliding-scale" per diem evaluation could also be employed which would tend to keep the figure in proportion to the possibly diminishing future suffering and also reduce the future per diem award to present values.[87]

Finally, the argument most frequently posed is that counsel's suggestion of a mathematical formula is equivalent to the attorney giving testimony on a matter upon which testimony is not allowed, since pain and suffering have no exact value.[88] The answer to this argument seems to be that counsel's suggestions are not, in fact, testimony or evidence, but merely an attempt to present one method by which the jury may compute a reasonable award of damages.[89]

CONCLUSION

For two decades the courts throughout the country have been plagued with the issue of whether pain and suffering may be portrayed by way of a mathematical formula.[90] The slow progress in this area is partially attributable to the custom of reserving the per diem argument for summation, a stage of trial

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(1968). It was said that:

> The primary purpose of a trial is to ascertain the truth. The most effective means devised to achieve that purpose is by the adversary system — trial lawyers examining witnesses pursuant to established rules, a principal working part of which machinery being what Dean Wigmore calls the "anvil" of cross-examination. No judge and no court can effect a sufficient substitute for the competing trial lawyers in the search for truth.

Id. at 447. See note 3 *supra.*

[86] *See* Fearon, *Evidence: Use of Chart to Illustrate Per Diem Formula for Measurement of Plain and Suffering,* 16 ME. L. REV. 233 (1964).

[87] Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956).

[88] *See* Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

[89] *See* Graham v. Mattoon City R.R. Co., 234 Ill. 483, 84 N.E. 1070 (1909).

[90] See note 3 *supra.*

where judicial reprimand is to be avoided.[91] As yet, the ultimate course of judicial opinion is not crystallized.[92]

Possibly the unenunciated reasons for excluding the unit-of-time method are the underlying philosophies that:

1. Pain and suffering should not be compensable.
2. If pain and suffering are compensable, they should be so only to a limited degree.
3. The lay jury is not competent to evaluate conflicting facts and theories in making an award.[93]

If any of these suggested reasons has validity, the solution lies not in withholding problem-solving ideas from the jury, but in attacking the problem more directly and less hypocritically.

The courts objecting to the use of a formula-type argument labor under the assumption that the excessive verdicts result from their use. Even if this rationale is sound, it overlooks the power of the court to control the outer limits of verdicts by setting them aside for excessiveness, or inadequacy. In view of this it is submitted that the prohibition of the use of unit-of-time formulas involve an unwarranted restriction upon the right of the advocate to comment on inferences drawn from the evidence. In determining "fair and reasonable compensation" the jury must convert pain and suffering into dollars. The court gives the jury little or no help in performing this difficult task. Consequently it would seem that counsel should have a wide latitude in argument.[94]

The issue is a basic one: namely, how much money should be given to plaintiff to compensate him for the experiences he has had to endure and the changes that have been made in his life as a result of the defendant's negligence? The term "compensation" is used throughout the cases, but money cannot really compensate or be equivalent to the plaintiff's inability to lead a normal life. Pain and suffering is not like "loss of bargain," on the contrary, it is unique; yet specific performance cannot be had. Few would argue that it is less valuable than possessions that can be bought and sold, and most would consider it more valuable, even though its value is not easily calculated in dollars. As long as

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[91] Comment, *Damages — Pain and Suffering — Counsel's Argument to Jury re Amount of Award Held Improper*, 12 RUTGERS L. REV. 522 (1958). Testing of the court's opinion at trial in a search for admissible phrasing of a money-oriented argument will proceed slowly, since the type of argument is customarily reserved for summation and it is obvious trial technique to avoid judicial reprimand during this last and most persuasive address to the jury.
Id. at 526.

[92] Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959).

[93] Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 36 DUKE L. J. 344 (1962).

[94] *See* Snyder, *Trial — Damages — Counsel's Suggestion to Jury of Formula for Pain and Suffering*, 28 U. CIN. L. REV. 138 (1962).

money is considered a "good" by our society, money should be given the victim in an attempt to counteract his loss of something. Otherwise what is the accident victim's quid pro quo?

The pain associated with a doctor or dentist is compensated by the arresting of an unhealthy condition. The pain accompanying childbirth is compensated by the life-proclaiming cry of a new son or daughter. What compensation is there for the agony suffered by the tort-feasor's innocent victim? The award of money is, at best, only an attempt at compensation, but it is better than no attempt at all. How much money will be awarded of course depends upon the current attitude of society as represented by a cross section thereof which is usually a jury. It was said that:

> Judges as well as jurors need some basis for calculating awards, otherwise their decisions are apt in many cases to be unfair to either plaintiff or defendant. Juries have nothing but their consciences to guide them. Judges may look to other cases for comparison, but in so doing they will find themselves struggling in a sea of incomparables.[95]

The better-reasoned cases hold that the suggestion of a mathematical formula by plaintiff's counsel is within the right of counsel to draw inferences from the evidence in arguing damages. "Jurors are presumed to be intelligent"[96] and they try to give a fair verdict to the best of their ability.[97] With the assistance of instructions, there is no reason to believe they will be mislead into thinking counsel's arguments are evidence, nor will they give too much weight to anything put in a formula or on a chart.

The exclusion of a per diem argument for pain and suffering necessarily results in a restriction upon the right and duty of counsel to argue every phase of his case. Such would be a denial of the right of advocacy where the techniques of persuasion are critical to the client.[98] Furthermore, the denial of analytical argument will result in inconsistent awards[99] as well as unreal-

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[95] Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 28 (1954). *See* Lockwood v. Twenty-third St. Ry. Co., 15 Daly 374, 7 N.Y. Supp. 663 (N.L. Com. Pleas 1889) where the court said:

> It is difficult to estimate the damages and, as has already been said, the best attainable criterion of the reasonableness of a verdict is its conformity to the average amount awarded by juries in cases in which injuries of like nature and like extent have been sustained.

Id. at 375, 7 N.Y. Supp. at 664.

Almost identical language was used in Buswell v. San Francisco, 89 Cal. App. 123, 127, 200 P.2d 115, 117 (1948).

[96] Fearon, *Evidence: The Use of Charts To Illustrate Per Diem Formula for Measurement of Pain and Suffering*, 16 ME. L. REV. 233, 236 (1964).

[97] See note 7 *supra*.

[98] See note 96 *supra*.

[99] For cases recognizing the need of a reasonable uniformity in awards for similar injuries, despite differences between plaintiffs, see Cavicchi v. Gaiety Amusement Co., 173 So. 458 (La. Ct. App. 1937); Morris v. E. I. Du-

istic ones.[100] On the other hand, the danger of an abuse of the privilege, either in application or presentation, can be controlled by the appellate judiciary processes to prevent injustice to either party.[101]

The enlightened view is to allow the use of blackboards and charts in jury argument and permit the jury to see all they are allowed to hear.[102] Likewise, many jurisdictions also permit comment upon a total amount of dollars which counsel feels will be compensable for pain and suffering.[103] Therefore, the only issue remaining is whether counsel can explain visually how he arrived at such a figure to a jury who without such explanation would be left to a "blind guess." Such a technique could only increase the utility of our adversary system.

Barton Alan Hyman

Pont de Nemours & Co., 346 Mo. 126, 139 S.W.2d 984 (1940); Coca Cola Bottling Co. v. Black, 186 Okla. 596, 99 P.2d 891 (1940).

[100] See note 96 *supra.*

[101] McNair, *Trial Practice — Damages — Pain and Suffering — Per Diem Argument to the Jury,* 38 N.C.L. REV. 329 (1960).

[102] Darling v. Charleston Comm. Mem. Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149, (1964).

[103] Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).