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Damages - Physical Suffering and Inconvenience Resulting from Injuries - The Use of Mathematical Formula during Closing Argument to the Jury as a Guide for Measuring the Plaintiff's Compensatory and Actual Damages

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DISCUSSION OF RECENT DECISIONS

DAMAGES—PHYSICAL SUFFERING AND INCONVENIENCE RESULTING FROM INJURIES—THE USE OF MATHEMATICAL FORMULA DURING CLOSING ARGUMENT TO THE JURY AS A GUIDE FOR MEASURING THE PLAINTIFF’S COMPENSATORY AND ACTUAL DAMAGES—The Supreme Court of Missouri was recently faced with the issue of whether or not it was error for the plaintiff’s counsel, during his closing argument to the jury, to write on a large cardboard a statement of his client’s claims concerning the value of her particular injuries and then to ask the jury to adopt the stated amounts in determining the plaintiff’s damages.  

The case arose when the plaintiff, who was allegedly in a safety zone waiting to board an approaching streetcar, was struck by the defendant’s automobile. A verdict was returned in favor of the plaintiff in the amount of twenty thousand dollars ($20,000.00). The defendant appealed from the judgment, which was entered in accordance with the aforesaid verdict.

The defendant alleged, among other things, that the trial court committed prejudicial error in allowing the plaintiff to write on a large cardboard poster the amount of damages sustained by the plaintiff, and to further argue those amounts to the jury in his closing argument.

In affirming the judgment of the Trial Court, the Supreme Court of Missouri held that although in the past it had been improper to invite the jury to admeasure damages for pain on the basis of a mathematical formula, it is not error for the plaintiff to engage in such conduct in his closing argument to the jury when the verdict is supported by evidence in the record and the question as to the amount of damages is in issue.

It could be considered appropriate, at the outset, to note that the problem posed in the aforesaid case is one which has never been decided by the Illinois Supreme Court. However, the issue as to whether or not it is prejudicial error for the plaintiff’s counsel to submit to the

1 Goldstein v. Fendelman, 336 S. W. (2d) 661 (Mo. 1960).
2 Defendant also alleged that the trial court erred in giving certain instructions to the jury; that the trial court committed error in allowing the marital status of the plaintiff to be known to the jury and that the verdict was grossly excessive.
3 The question of damages was at issue during the course of the trial and during the plaintiff’s closing argument, plaintiff’s counsel wrote on a large cardboard the amounts he asked the jury to award the plaintiff for each of 14 claimed items totaling $77,735.00. Two items were medical and hospital bills, two were loss of earnings, present and future. The others were claims for definite amounts for specific injuries and results therefrom such as humiliation, suffering and pain.
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jury in his closing argument a mathematical formula for the purpose of measuring the amount of damages for pain and suffering, and to place the same on a poster or blackboard for the jury to view is not unfamiliar in a great number of jurisdictions in the United States.\(^5\) In recent years there has been a great amount of controversy over this issue. How the Illinois Supreme Court will treat this problem when faced with it is a matter of speculation and conjecture, however, the writer will attempt to make a determination.

Only within the past few years have resourceful and ingenious counsel developed the trial technique of appealing to the jury to follow a mathematical formula in admeasuring damages for pain and suffering. Cases in Illinois have gone no further than to hold that counsel’s mere argumentative suggestion of a lump sum does not constitute reversible error\(^6\) and no Illinois case discussing the so-called mathematical formula, and presenting the same to the jury on a poster or blackboard has been found.

It would be appropriate at this time to discuss the pros and cons on the issue\(^7\) as determined by other jurisdictions. The most outstanding case supporting the theory of those jurisdictions which deny the use of a mathematical formula and the presentation of the same to the jury is *Seaboard Air Line Railroad Company v. Virgil Braddock and James M. Braddock.*\(^8\)

In the *Seaboard Air Line* case, *supra*, a jury returned a verdict in the amount of two hundred forty eight thousand, four hundred thirty nine dollars ($248,439.00), the precise amount sought by counsel based on a mathematical formula, which was visually presented to the jury on a placard during closing argument of counsel for the plaintiff. The Supreme Court of Florida affirming the judgment without opinion, im-

\(^5\) Ratner v. Arrington, 111 So. (2d) 82 (Fla. App. 1959); Four County Electric Power Assoc. v. Claridy, 221 Miss. 403, 73 So. (2d) 144 (1954) (A chart which listed pain and suffering at a rate of five dollars per day was used in the opening statement by counsel and allowed by the court but expressly limited its opening or closing statements); McLaney v. Turner, 267 Ala. 588, 104 So. (2d) 315 (1958); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N. W. (2d) 30 (1956) (Allowed the use of a mathematical formula for illustrative purposes and not as a yardstick to test the reasonableness of the amount sought to be recovered); Imperial Oil Ltd. v. Drlik, 254 F. (2d) 4 (1956); Botta v. Brunner, 26 N. J. 82, 138 A. (2d) 713 (1958); Stassun v. Chapin, 324 Pa. 125, 158 A. 111 (1936); Cooley v. Crispino, 21 Conn. Super. 150, 147 A. (2d) 497 (1958); Henne v. Ballick, 51 Del. 369, 146 A. (2d) 394 (1958); Wuth v. U. S., 161 F. Supp. 661 (E. D. Vir. 1958); Warren Petroleum Co. v. Pyeatt, 275 S. W. (2d) 216 (Tex. Civ. App. 1955).

\(^6\) Graham v. Mattoon City Railroad Co., 234 Ill. 483, 84 N. E. 1070 (1908).

\(^7\) Admeasuring the damages for pain and suffering on a mathematical formula and presenting the same to the jury during closing argument on a poster or blackboard.

\(^8\) 96 So. (2d) 127 (Fla. 1957).
plied that the use of the mathematical formula and placard by plaintiff's counsel was proper. However, Justice Ogilvie in his dissenting opinion made the following statement: "... the verdict for the plaintiff was unconscionably excessive, that the verdict was not the product of fair and unimpassioned reasoning of the jury; and same was partially induced by the placard and final argument adding at least some of the elements of damages more than once into the total requested figure." 9

The landmark case used as the basis in reasoning for the majority of jurisdictions which are not in favor of the mathematical formula is *Botta v. Brunner.* 10 In the *Botta* case, the plaintiff brought an action for injuries sustained as a result of an auto accident. The jury rendered a verdict in favor of the plaintiff against one defendant and no cause of action in favor of the other defendant, and the plaintiff appealed to the Appellate Division. 11 In his appeal the plaintiff urged that the trial court erred in refusing to permit counsel to suggest to the jury in closing argument a mathematical formula for the admeasurement of damages for pain and suffering. The Appellate Division agreed with plaintiff's viewpoint and a certification was granted by the Supreme Court of New Jersey to review the decision of the Appellate Division.

The Supreme Court of New Jersey reversed the decision of the Appellate Division relative to the issue of whether or not it is proper to use a mathematical formula. In so doing, they stated: "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 the universal knowledge that a more specific or definite one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that 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 ... there is no mart where the price of a voluntary subjection of oneself to pain and suffering is or can be fixed ... the varieties and degrees of pain are almost in-

9 The placard used by Plaintiff's counsel is completely set out in the reported dissenting opinion.
10 *Botta v. Brunner, 26 N. J. 82, 138 A. (2d) 713 (1958).*
11 *Botta v. Brunner, 42 N. J. Super. 95, 126 A. (2d) 32 (1956).*
finite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.'"12

At present there are more than eleven (11) jurisdictions agreeing with the decision of the Supreme Court of New Jersey.13 Their primary reasons for not allowing the presentation of a mathematical formula to the jury are based on the language of the Botta case,14 and also because those courts have adhered to the time immemorial standard, for measuring damages for personal injuries, which is a just or reasonable compensation. The administration of this criterion is entrusted to the impartial conscience and judgment of jurors.

There is one further point which should be mentioned. It appears the basic underlying theory for not allowing the presentation of a mathematical formula to the jury is the result of a deep rooted fear that the adoption of the mathematical formula would grant to the plaintiff an unfair advantage over the defendant. The writer submits that those jurisdictions opposed to the adoption of a mathematical formula for pain and suffering clearly express the idea that the use of such a formula would be nothing more than an attempt to acquire an emotional decision from the jury rather than a well reasoned and factual determination.

Would Illinois follow those jurisdictions which are opposed to the use of a mathematical formula? In the case of Graham v. Mattoon City Ry. Co., counsel for the plaintiff asked for a specific lump sum amount as he inferred and deduced that amount from the evidence in the case. The Illinois Supreme Court approved the argument and stated: "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.”15


14 See case cited in note 10, ante.

15 See case cited in note 6, ante.
Illinois has consistently followed the approach that an attorney is entitled to a wide latitude in his closing argument. As stated in the principal case of Goldstein v. Fendelman, where one of the issues involved in the case was the damages suffered by the plaintiff, counsel for the plaintiff should be permitted to explain and argue those elements which comprise the total amount sought. Inasmuch as the Illinois Supreme Court allows counsel for the plaintiff to suggest a lump sum as a suggestion of damages, it seems only fair to assume that he should also be allowed to further analyze and logically suggest the means by which he arrived at the lump sum amount of damages.

If the Illinois Supreme Court were to so hold, it would not be alone in adopting the mathematical formula technique. There are at least twelve (12) jurisdictions which presently allow the use of a mathematical formula or its equivalent. Even New Jersey, the jurisdiction which is looked to as the landmark for those opposing the use of the mathematical formula techniques, has recently restricted the applicability of the theory it adopted in the case of Botta v. Brunner. In Mathews v. Nelson it was held that the reasoning of the Botta case is not applicable to the closing argument of a wrongful death action.

It would be grossly inconsistent to deny counsel for the plaintiff the right to analyze and specify certain amounts to be used in computing the amount of damages sought as recovery in view of the fact that the Illinois legislature has expressly granted the courts permission to allow the jury to carry from the bar papers read or received in evidence. However, the fear of being inconsistent should not be the primary reason for allowing plaintiff’s counsel to use a mathematical formula.

As previously stated, the basic reason for not allowing the mathematical formula is a fear that the jury will not be able to render a well reasoned and factual verdict. This fear is not well founded. The

18 See case cited in note 10, ante.
20 Ill. Rev. Stat. 1959, Vol. 2, Ch. 110 § 67 (4); Papers read or received in evidence, other than depositions, may be carried from the bar by the jury.
jury should be guided by reasonable and practical considerations, but they should not be required to determine the issue of damages in the abstract which is exactly the burden placed upon them by those jurisdictions adopting the standard of reasonable compensation rather than the mathematical formula. The contention that the use of a mathematical formula presents a danger in that it may be mistaken for evidence is not valid and nothing more than an exaggeration. Such danger, if at all present, can also be easily dispelled by the court's proper instruction. In the trial of any case, whether it be civil or criminal, the court is always faced with the problem of properly instructing the jury to prohibit the jury from taking into consideration facts or speculations which are not in evidence.

The scales of justice are not in danger of being improperly balanced. If counsel for the plaintiff uses a mathematical formula during his closing argument in an attempt to justify the amount of recovery sought, the opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which the damages are sought. The absence of a fixed standard for the monetary admeasurement of damages for pain and suffering is the very reason why counsel for both parties should be allowed the use of a mathematical formula.

HUSBAND AND WIFE—ACTIONS—WHETHER LOSS OF CONSORTIUM MAY BE ASSERTED BY WIFE OF NEGLIGENTLY INJURED HUSBAND—A significant development in the realm of damages founded upon the common-law concept of loss of consortium has appeared in the recent decision of Dini v. Naiditch.¹ For the first time in Illinois it was decided that the wife of a negligently injured husband was entitled to a right of action for loss of consortium. The question on the allowance of damages to the wife for loss of consortium arose in the aforementioned case in the Superior Court of Cook County joined with another cause of action by the husband for negligent injury. Plaintiff's husband was a fireman for the City of Chicago. He was injured while fighting a fire in the defendants' premises. The Superior Court dismissed both causes of action and entered judgments for the defendants notwithstanding verdicts in favor of the plaintiffs, on the ground that there was no legal basis for liability. Upon direct appeal to the Illinois Supreme Court the decisions as to both causes of action were reversed and remanded. After deciding the degree of due care required by landowners in main-

taining their property free from the hazards which might contribute to the injury of firemen upon the premises in the performance of their duties, the court also dealt favorably with the allowance of damages claimed by the wife of the injured fireman based upon the common-law rule restricting recovery to the husband for loss of consortium due to the negligent injury of his wife. The Illinois Supreme Court held, however, that the claim for loss of consortium should be a reciprocal cause of action capable of being asserted by either husband or wife upon the negligent injury of the other.

The question concerning a wife's right of action for loss of consortium due to the negligent injury of the husband was first heard in Illinois in *Patelski v. Snyder.* By application of the Act of 1874 which gave married women the right to sue and be sued without joining their husbands, it was argued that married women by virtue of this statute acquired the right to a cause of action for loss of consortium. This argument was refuted by the court saying, "... the law of 1874, while extending the legal independence of a married woman as to all legal proceedings and in many particulars increasing her responsibilities and diminishing those of her husband did not undertake, as we read it, to give her any more control of her husband's property, earnings or other choses in action than she had before. Nor did it create in her a right of action for personal injuries to him which did not before exist." The U. S. Court of Appeals 7th Circuit, in 1954, when facing the same issue in a diversity case, bound itself to the Appellate decision since there had been no indication that the higher court of the state would rule otherwise.

What is Consortium? How and why did the doctrine emerge? The court in the present case under scrutiny defined the term "consortium" as including, "... in addition to material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity" (emphasis supplied). The court, however, pierced the "unity" concept which is strictly adhered to in England. In denying recovery, an English Court interpreted "consortium" as being an indivisible concept incapable of being dissected for purposes of recovery for loss of any specific element or elements, short of total loss. In

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the leading American case of Hitaffer v. Argonne Co. the gist of the action was for the loss of sexual relations. The tendency in American jurisdictions has been to treat "consortium" as a divisible unity, entitling the litigant to recover for what under the strict English rule would be considered a partial loss of consortium.

Since historical background seems to constitute a major reason for denying to the wife a cause of action for loss of her husband's consortium, this phase of the problem should be fully covered. The Illinois court did precisely this, extending their discussion to the origin of the common-law rule. The concept of "consortium" grew out of a proprietary interest which husbands had in their wives based upon the idea that the wife was her husband's servant, and any interference with the service of a servant constituted an actionable trespass upon that property right. This right of action, however, was carefully restricted to the husband since it was only intended to be vested in the husband, and a reciprocal exercise of the same action by the wife could not be effectively employed because of the common-law rule making a married woman incapable of suing, except when joined by her husband.

Upon the foregoing foundation, the courts built an impressive wall of precedent. So deeply was this common-law rule imbedded in historical precedent that even subsequent to the removal of a married woman's disability to sue, the courts remained entrenched in the firm belief that no extension of a husband's cause of action could attach to the wife. This steady flow of cases continued unchanged until 1950 with the exception of a North Carolina decision, which was subse-

quently overruled, and a Georgia decision, in which the court was evenly divided. In both decisions, arguments denying a wife's right to a cause of action for loss of consortium due to the negligent injury of her husband were disputed and renounced. Here, then, was formed the beginning of opposition to the existing majority rule, and included a reflection of thinking by legal writers who branded the rule as being void of logic in view of existing Married Women's Acts, the intent of which was to provide legal equality between spouses. Aside from the equality argument aimed at destroying the historical confines for scope of liability, other reasons upholding the majority rule were slashed at by revealing the complete inconsistency which has resulted in denying a reciprocal action to both spouses.

In 1950 the U. S. Court of Appeals for the District of Columbia in Hitaffer v. Argonne Co. made a complete departure from the majority rule and extended the husband's cause of action to the wife also. The court made an extensive review of prior litigation and other authorities disallowing a wife the reciprocal right to a cause of action for loss of consortium where the husband's injury resulted from a third party's negligence. The majority of the Illinois Supreme Court in Dini v. Naiditch concurred in this decision to depart from historical precedent compiled almost entirely without deviation until 1950.

Even though the Hitaffer case was well reasoned and very thorough in its coverage, subsequent decisions in most states still clung doggedly to the ancient common-law rule. Courts still refusing to alter their position set forth different lines of argument to sustain their position.

A popular approach to the problem rested in the avoidance of it. Some courts explained their position by concluding that the legislature must first clarify the rights of husband and wife as to actions for loss of consortium. Other courts of a lower judicial stature were reluctant

15 Holbrook, op. cit.
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to depart from existing rules and passed responsibility for an initial decision to a higher court in the State. Still another method used by courts in side-stepping the necessity of reaffirming the existing law by sound logic and valid legal reasoning was to yield to precedent. In some instances, expressions by majority judges indicated that they did not wholeheartedly support the once unanimous denial of the wife’s right to a remedy for the loss of her husband’s consortium. In other cases, vehement dissents reflected a breach appearing in the once solid wall of precedent. Federal courts sitting in various states still adhering to the old rule were bound to the state precedent despite their own contrary opinions in the light of the Hitaffer decision.

In attempting to meet the challenge which the Hitaffer decision posed to judicial precedent, numerous other explanations were attempted to put decisions denying a wife’s recovery upon a sounder legal basis. One of these pointed to the danger of double recovery. It was contended that since the husband could also bring an action for damages resulting from his inability to earn a living due to his injuries, a wife’s recovery for loss of consortium, also alleging such loss would result in dual recovery. Therefore, in order to avoid this, actions by the wife were restricted to direct and intentional injuries inflicted upon the wife, for which no suit for damages could be brought by the husband (intentional interference with the consortium, alienation of affections, criminal conversation, sale of incapacitating drugs, etc.). This dilemma had been approached in the Hitaffer decision by suggesting that damages for loss of support recovered in the husband’s suit be offset against the wife’s recovery in her suit for loss of consortium. Chief Justice Schaefer in his dissenting opinion to the Naiditch case decried the inconsistency with

which the majority applied the meaning of consortium, first separating
the material service element for elimination against the husband’s re-
covery and then criticizing a division of the consortium concept. He
suggested that when looking at the problem of a double recovery realis-
tically, the only practical solution would be a “. . . compulsory joinder
of the two causes of action. . . .”

No matter how impeding the problem of “double recovery” may be, the proponents of such an argument fail to answer a question posed by legal writers, which is, why hadn’t the problem of double recovery been anticipated with regard to a hus-
band’s suit for loss of consortium in relation with the wife’s suit for
negligent injury?

Another line of opposition has examined the effect which modern
times and Married Women’s Acts have had upon the original common-

law remedy of the husband for loss of consortium and consider the
remedy as it once existed, dead, and not expanded in its scope. This,
of course, would be the path of least resistance to the advocates of denying
the remedy to the wife, and perhaps just as logical as a proposed extension
of the remedy to the wife.

If the wife is allowed to maintain her own action by extending
the remedy once restricted to the husband, how far will this extension
be permitted to reach? This question was posed by Chief Justice Schaefer
in his dissenting opinion. Perhaps to give validity to such an action
by the wife would open the door to claims under the same theory by
children, dependent members of households and possibly even business
partners. This argument, however, loses some of its force when the
term “consortium” examined for definition, discloses that the term re-
stricts itself to the conjugal fellowship of husband and wife.

In England, a revealing decision was rendered which contained
a discussion of factors heretofore shoved into the background by Ameri-
can decisions. Although denying the wife the right to sue for loss of
her husband’s consortium, some members of the court made very pene-

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trating observations of the problem. Lord Justice Asquith and Lord Justice Birkett agreed that consortium was an indivisible concept, consisting of companionship, love, affection and comfort, mutual service and sexual intercourse. These were considered as being welded into one inseparable unity. This definition was also accepted in the Naiditch case but applied only partially. The English Court, however, maintained a strict adherence to this definition, denying a recovery by the wife because she had not suffered a concurrent loss of every constituent part of consortium. Lord Justice Asquith concluded that the problem should be solved by the Legislature by either one of two alternative solutions, either by abolishing the husband’s cause of action or by retaining it and conferring a similar cause of action on the wife. Lord Justice Birkett amplified the intimated approval of a cause of action in the wife as being in conformity with present day legal equality of husband and wife. He disapproved of the Hitaffer decision, but only on the point of there having been a partial impairment of consortium (sexual relations). Lord Justice Cohen agreed with Lord Justice Birkett on the principle of total impairment of consortium as a requisite to recovery, but felt that, lacking a malicious and willful act on the part of the defendant, even proof of total loss of consortium would not enable the wife to succeed.

The requirement of an intentional act still adhered to in England has, however, noticeably faded from the American armory of arguments attempting to deny the wife recovery and therefore, was rather summarily dismissed in the Naiditch decision. This argument has been soundly denounced as inconsistent with the right of action existing in the husband, where no such distinction is made, and where the injury sustained is the same under either circumstances.

Another ground for denying the wife an action for loss of consortium was founded upon remoteness of the injury. This contention was extremely popular among courts prior to the Hitaffer decision. Its existence as a principal ground for denying relief has given ground as of late to such reasons as, the need for legislation, double recovery, abolis-

ment of husband's recovery and possible extent of recovery to persons outside the marital relation. Principally responsible for this decline in persuasiveness have been arguments which point to the liability of a wrongdoer for acts of negligence despite the foreseeability of the ultimate result, and the fact that, if such a rule were accepted, there would no longer exist a basis for distinguishing between an action by a husband and one by the wife since in both cases, the damages for the sentimental elements of consortium would be too remote and consequential.\(^{39}\)

Some recent decisions have also looked to the effect which an adoption of a reciprocal action for loss of consortium would have upon the status of litigation. The main concern centered about claims which had already been settled based upon prior precedent and still within the statute of limitations. These claims would be vulnerable to a reopening if such a right of action in the wife was conceded to by the courts.\(^{40}\) This reason may have some merit when looking at the problem from a practical viewpoint, but provides no real legal justification for a denial of the right of action in the wife.

Despite courageous attempts by courts to retain the common-law rule relating to an action for loss of consortium as it existed long before the appearance of Married Women's Acts, the sands of time coupled with the incessant surge of changing conditions appear to be the irresistible forces contributing to the slow destruction of the old rule.

With the decision of \textit{Dini v. Naiditch}\(^ {41}\) Illinois has joined Arkansas, Georgia, Iowa, Michigan, Nebraska and South Dakota as states whose reviewing courts have chosen to follow the \textit{Hitaffer} decision.\(^ {42}\) This change in direction by the Illinois Supreme Court constitutes a gigantic forward stride in abolishing legal inconsistencies and fictions which have far outlived their utility.

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\( ^{41} \) 20 Ill. (2d) 406, 170 N. E. (2d) 881 (1960).