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Case Comments

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Abatement and Revival—Death of Party and Revival of Action—Causes of Action Which Survive

By JOHN LAWRENCE KANE JR.

On May 18, 1954, an automobile driven by Russell K. Jensen was struck by a Publix taxicab. The Jensen automobile then struck William H. Anderson, a pedestrian, as he was attempting to cross an intersection. Anderson received injuries which required immediate hospitalization, and which caused him to remain in a coma from the date of injury until his death on December 31, 1954. The Colorado National Bank, acting as conservator for Anderson, filed a personal injury action against Publix Cab Company, its driver, and Jensen on September 16, 1954. After the death of Anderson, the bank filed an amended and supplemental complaint substituting itself as executor in place of its former status as conservator. On appeal, the judgment of the trial court in favor of the bank was affirmed. *Held*: A claim for personal injuries based upon negligence survives the death of the injured person. *Publix Cab Co. v. Colorado Nat'l Bank*, 338 P.2d 702 (Colo. 1959).

The ancient maxim *actio personalis moritur cum persona* provides a sufficient insight into the attitude of the common law toward survival actions. In fact, at early common law all actions died with the person.[1] Most authorities have explained this maxim in terms of the criminal or quasi-criminal origin of wrongs which later were subject to the writ of trespass.[2] Winfield has observed that if a wrong is looked upon as having a criminal essence, then only the actor should be liable.[3] Modern survival statutes, such as that of Colorado,[4] have recognized that not all wrongs or torts have criminal implications and that it is therefore reasonable to seek recompense from someone other than the actor. The Colorado statute which governed the instant case provided that "all actions in law whatsoever, save and except actions for slander and libel, or *trespass for injuries done to the person* . . . shall survive to and against executors, administrators and conservators."[5]

The fundamental question to be decided was whether a negligence action to recover damages for injuries to the person would survive the death of the injured person. If the action was one of trespass, then it could not survive. If, however, an action to recover damages resulting from the negligence of another was not one of trespass under the ruling statute, then the action would survive.

Colorado has held that such damages are recoverable where

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1 See Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808); *cf.* Statute 4 Edw. 3, c. 7 (1330) (declares that henceforth executors shall have an action for trespasses done to their testators).

2 3 Holdsworth, History of English Law 333, 585 (3d ed. 1923).

3 Winfield, *Death as Affecting Liability in Tort*, 29 Colum. L. Rev. 239 (1929); see 3 Blackstone, Commentaries *302.

4 Colo. Rev. Stat. § 152-1-9 (1953).

5 *Id.* (emphasis added) (This statute was amended in 1955 to provide that all actions except slander and libel survive).

the executor sued in assumpsit,[6] but on numerous occasions, the Court has held that negligence actions are trespasses and do not survive.[7] Where the action was for malicious prosecution,[8] for separate maintenance,[9] for malpractice,[10] and for unlawful expulsion from membership in a labor union[11] the Court has held that the damages were the result of trespass to the person and therefore did not survive. However, where the actions were related to real estate,[12] to money fraudulently obtained,[13] or to choses in action,[14] the actions of trespass were held to be for injuries done to property and were therefore not within the exceptions of the statute.

In *Fish v. Liley*,[15] the Court held that a claim for wrongful death survived the death of the tortfeasor even though the tort upon which it was based was a personal one; the action itself was not one which survived, but, instead, there was a *new* action for damages and a property claim which could be asserted since the survival statute did not apply to it.

It would appear from the above authority that negligence actions are trespasses and therefore the rule in Colorado would hold that a negligence action does not survive to or against executors. However, in the instant case[16] the Court overruled its previous decisions and held that the term "trespass for injuries done to the person" as used in the statute is limited to the traditional trespasses to the person, i.e., assault, battery, and false imprisonment. The Court ruled that an action based on negligence is an action on the case[17] and is therefore embraced in the clause "All actions in law whatsoever . . . shall survive . . . ."

The *Publix* case is forced by history to stand alone. Subsequent legislation has divested it of authority so that presently its position is unique. It might be said that the *Publix* decision is a lame-duck case and that therefore the need for study or consideration of it may be seriously questioned. However, in a jurisprudential sense, the need for such study is apparent. The lawyer will note and again be reminded of the practical importance of knowing the common law in order to fully understand his case. He will recognize that his argument will be much stronger if it is rooted in the common law.

Additionally, the *Publix* opinion merits study because of the thoroughness of research and the depth and precision of scholarship that have gone into it. If the *Publix* opinion, along with some other recent opinions, establishes a standard for research and scholarship for the Colorado bench and bar, then its value is obvious.

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6 Kelley v. Union Pac. Ry., 16 Colo. 455, 27 Pac. 1058 (1891).
7 *E.g.*, Greer v. Greer, 110 Colo. 92, 130 P.2d 1050 (1942).
8 Stanley v. Petherbride, 96 Colo. 293, 42 P.2d 609 (1935).
9 Greer v. Greer, 110 Colo. 92, 130 P.2d 1050 (1942).
10 Meffley v. Catterson, 132 Colo. 222, 287 P.2d 45 (1955).
11 Clapp v. Williams, 90 Colo. 13, 5 P.2d 45 (1931).
12 Kling v. Phaver, 130 Colo. 159, 274 P.2d 97 (1954).
13 Brown v. Stookey, 134 Colo. 11, 298 P.2d 955 (1956).
14 Swartz v. Rosenkrans, 78 Colo. 167, 240 Pac. 333 (1925).
15 120 Colo. 156, 208 P.2d 930 (1949).
16 Publix Cab Co. v. Colo. Nat'l Bank, 338 P.2d 702 (Colo. 1959).
17 See Prosser, Torts 27 (2d ed. 1955).

Damages—Pain and Suffering—Per Diem Argument to Jury

By JERRY E. MILLS

In an action for damages for bodily injuries plaintiff's counsel in his closing argument to the jury made use of a placard showing items of damages and suggested amounts to be awarded therefor. The chart had printed thereon the plaintiff's name, age, life expectancy and medical expenses, including names of hospitals and physicians who had rendered services. Then was listed a proposed dollar valuation of the "Pain and Suffering" endured by the plaintiff with a suggested amount per day as an appropriate award to be made by the jury. "Physical Disability and Inability to Lead a Normal Life" was similarly charted, as was the item "Loss of Earnings." Defendant's objection to the use of the placard in front of the jury was overruled. On appeal, *held:* The trial judge did not abuse his discretion in overruling the defendant's objection to the use of the chart and the argument of the plaintiff's counsel based on the chart. *Ratner v. Arrington,* 111 So. 2d 82 (Fla. App. 1959).

It is worthy of notice that the court, although apparently approving the tactic of plaintiff's counsel, stated that the ultimate course of judicial opinion on the point is not yet discernible, and further, that recent holdings are not grounded on reasons of sufficient force either for or against such a tactic.

Even in the face of the above remarks it appears that Florida is one of the leaders in the approval of such an argument by counsel. In *Seaboard Air Line Ry. v. Braddock*[1] the Supreme Court of Florida implicitly endorsed the use of a per diem argument by affirming a jury verdict for $248,439, which coincided exactly with the aggregate of the plaintiff's demands as set out on a chart similar to the one involved in the instant case. In *Andrews v. Cardosa*[2] the use of a blackboard to illustrate or aid in an argument was indirectly recognized. The court held that it was in the discretion of the trial judge to deny the use of such an item.

The general rule is that the trier of facts must determine the amount to be allowed as compensation for pain and suffering.[3] Since pain and suffering are not precisely measurable and have no market price the proper amount to be awarded can not be exactly determined. The award must, therefore, meet the standards of fairness and reasonableness and must be free from sentimental or fanciful considerations.[4]

The weight of authority favors allowing use of a mathematical formula on a per diem basis when damages for pain and suffering are involved. The point has been squarely passed on and approved in five states.[5] The Sixth Circuit Court of Appeals has expressly

1 96 So. 2d 127 (Fla.), *cert denied,* 355 U.S. 892 (1957).
2 97 So. 2d 43 (Fla. 1957).
3 15 Am. Jur. Damages § 71 (1938).
4 *Id.* § 72.
5 Braddock v. Seaboard Air Line Ry., 80 So. 2d 662 (Fla. 1955); 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); Four-County Electric 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).

sanctioned the use of a mathematical formula in determining the amount of an award for pain and suffering.[6] Minnesota can probably be added to the list of states allowing per diem argument to the jury.[7]

New Jersey in the recent case of *Botta v. Bruner*[8] has established itself as the first state to expressly forbid the use of a formula, although Pennsylvania has followed an unswerving course of condemnation of any reference to amount of damages for pain and suffering since 1891.[9] The Supreme Court of New Jersey in the *Botta* opinion not only held that a mathematical formula is an improper suggestion to the jury but that any statement by counsel demanding a specific award or disclosing the amount sued for (ad damnum clause) will constitute error.

Arguments advanced in support of mathematical formulas and per diem awards are: (1) While presenting his case, counsel has a wide latitude of reference[10] and may draw any reasonable inferences from the evidence;[11] (2) Some guidance to the jury is necessary *because* there is no exact scale on which to measure the extent of injury;[12] (3) Such per diem arguments are not evidence and are merely used as illustration and suggestion;[13] (4) The suggestion of a dollar-and-cent value for pain is no more than one method of reasoning which the jury is entitled to hear in attempt-

6 Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956).

7 See Flaherty v. Minneapolis & St. Louis Ry., 87 N.W.2d 633 (1958) (use of mathematical formula proper for purely illustrative purposes); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956) (verdict upheld notwithstanding objection to per diem argument with mathematical formula). *But see* Ahlstrom v. Minneapolis, St. P. & S.S.M.Ry., 244 Minn. 1, 68 N.W.2d 873 (1955) (court castigated the idea of reaching the award on a per diem basis); Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W.2d 673, *cert. denied*, 350 U.S. 874 (1955) (verdict of $170,000 arrived at by mathematical formula held excessive because it did not meet test of reasonableness).

8 26 N.J. 82, 138 A.2d 713 (1958).

9 Stassum v. Chapin, 324 Pa. 125, 188 Atl. 111 (1936); Joyce v. Smith, 269 Pa. 439, 112 Atl. 549 (1921); Bostic v. Pittsburg Rys., 255 Pa. 387, 100 Atl. 123 (1917); Goodhart v. Pennsylvania Ry., 177 Pa. 1, 35 Atl. 191 (1896); Baker v. Pennsylvania Ry., 142 Pa. 503, 21 Atl. 979 (1891).

10 Nusbaum v. Pennsylvania R.R., 340 Ill. App. 131, 90 N.E.2d 921 (1950).

11 Hayes v. Coleman, 338 Mich. 371, 61 N.W.2d 634 (1953).

12 Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956).

13 Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W. 2d 30 (1956).

ing to appraise the amount of compensation to be awarded based on their common sense and judgment.[14]

Authorities opposing such an argument to the jury rely on the following propositions: (1) There is no legal yardstick for the measurement of pain and suffering;[15] (2) The per diem suggestion by counsel takes the place of evidence in the mind of the jury, and admonitions by the court not to consider the per diem argument as evidence fail to erase all prejudicial effect;[16] (3) The employment of a per diem argument by plaintiff's counsel is prejudicial to the right of the defendant's counsel for equal opportunity to offer proof and submit arguments thereon. This is so because if the defendant's counsel suggests a lower per diem argument he fortifies his adversary's suggestion of a per diem formula.[17]

The exact point in the instant case has not been raised in the Colorado Supreme Court. It is difficult to see how the jury is put in an unfavorable position if sound arguments in favor of and against assessment of damages by a per diem formula are presented to them. Should their verdict prove excessive, the judicial practices of remittitur or setting aside the verdict can be employed by the court in order to see that equity is attained. To deprive the plaintiff's counsel of one of his techniques of advocacy seems unjuust since the very essence of his argument is persuasion. Damages must be awarded in cash! To allow counsel to suggest to the jury the most logical method by which they can reduce pain and suffering to money value seems the proper way to do equity to all parties involved.

The modern trend is toward the "Belli approach"[18] and it is hoped that the Colorado Supreme Court will allow use by counsel of per diem arguments involving a mathematical formula for computing damages for pain and suffering. Although the author is not fully in accord with many of the techniques set forth by Mr. Belli, it is thought that the reasoning of the New Jersey Supreme Court in *Botta v. Bruner* will not serve to eliminate the theatrical tactics at which it is evidently aimed.

14 Arnold v. Ellis, 97 So. 2d 744 (Miss. 1957).
15 Herb v. Hallowell, 304 Pa. 128, 154 Atl. 582 (1931).
16 Ahlstrom v. Minneapolis, St. P. & S.S.M.Ry., 244 Minn. 1, 68 N.W. 2d 873 (1955).
17 Botta v. Bruner, 26 N.J. 82, 138 A.2d 713 (1958).
18 See generally Belli, Modern Trials, ch. 8 (1954).