BOTTA V. BRUNNER REVISITED: ARGUING PER DIEM DAMAGES IN SUMMATION

[T]he Botta v. Brunner *rule is not immutable. If it can be demonstrated that it is bottomed on faulty reasoning, or that it has not achieved its intended purpose and actually prejudices a plaintiff's ability to recover a fair amount of damages for pain and suffering, recourse to this Court is available.*

Justice Sullivan writing for the majority in *Cox v. Valley Fair Corp.*[1]

INTRODUCTION

The Code of Professional Responsibility compels attorneys to represent their clients zealously.[2] This representation, especially in the eyes of the public, occurs most frequently in litigation. Informative opening statements, sharp cross examinations, and dramatic, convincing summations are tools a lawyer employs to effectuate this mandate. In a minority of jurisdictions headed by New Jersey,[3] however, severe constraints are placed upon counsel's ability to make persuasive jury arguments in personal injury cases.

During the 1950's the per diem formula was introduced into personal injury litigation as a new method of arguing damages.[4] This is a mathematical formula by which plaintiff's attorney suggests that the jurors, when computing an award for pain and suffering, apply a dollar figure per day multiplied by the total number of days of pain suffered.[5] Some legal commentators heralded this approach as a boon to effective advocacy of the pain and suffering damage issue.[6]

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[1] 83 N.J. 381, 386, 416 A.2d 809, 812 (1980).

[2] N.J. Ct. R. DR7-101; Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1160-61 (1958).

[3] Beagle v. Vasold, 65 Cal. 2d 166, 175, 417 P.2d 673, 677, 53 Cal. Rptr. 129, 133 (1966). Sounding "[t]he opening guns in the battle to prohibit" per diem arguments, *Botta v. Brunner* has been a model for other state courts taking a stand against the use of per diem arguments in personal injury cases. *Id.* Conversely, *Beagle* represents the majority view which permits formula summations. *Id.*

[4] Cooper, *The Role of the Per Diem Argument in Personal Injury Suits*, 5 Duq. U. L. Rev. 393, 396 (1967); Note, 18 Hastings L.J. 684, 684 (1967). *See generally* Belli, *Demonstrative Evidence and the Adequate Award*, 22 Miss. L.J. 284 (1951).

[5] Carton, *Justice Francis and the Botta Rule—A Continuing Controversy*, 24 Rutgers L. Rev. 443, 443-44 (1970). In the case of permanent injuries, the jury must consider the number of days the plaintiff has suffered in the past and will suffer in the future. *Id.* at 444.

[6] Phillips, *Botta in Focus*, 6 Trial Law. Guide 69 (1962); Comment, 60 Mich. L. Rev. 612 (1962).

Others condemned it as an invasion of the province of the jury and anticipated it would open the floodgates for excessive verdicts.[7] The parameters of the controversy came into sharp focus in *Botta v. Brunner*[8] wherein the Supreme Court of New Jersey persuasively rocked the theoretical foundations of the per diem argument.[9] The result was the judicially promulgated "*Botta* Rule," a prohibition against suggesting to the jury a specific dollar amount per unit of time or a total dollar amount as compensation for pain and suffering.[10] This rule sparked a great debate in the courts in every jurisdiction.[11] When presented with the per diem issue, courts have prohibited the argument,[12] permitted the argument,[13] and permitted the argument with limitations.[14]

The most recent development in the controversy again focuses attention on the courts of New Jersey. In *Cox v. Valley Fair Corp.*,[15] Alan Medvin represented a plaintiff who had sustained personal injuries.[16] Cognizant of New Jersey's *Botta* Rule,[17] the attorney in his summation attempted to illustrate how people equate pain with money by drawing a parallel between choosing to pay for a painkiller and choosing to experience pain, and then placing a monetary value on that pain.[18] In so doing, Medvin convinced the jury that the plaintiff's damages for pain and suffering were worth approximately $50,000.[19] The New Jersey supreme court, not convinced of this amount, concluded that counsel's summation violated the spirit of *Botta*.[20] A new trial was ordered solely on the issue of damages.[21] As

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[7] Carton, *supra* note 5; Note, *supra* note 4.

[8] 26 N.J. 82, 138 A.2d 713 (1958). Several articles written immediately following the *Botta* decision demonstrate the variety and seriousness of the reaction to the ruling. *See, e.g.*, Recent Cases, 28 U. CIN. L. REV. 138 (1958); Recent Cases, 12 RUTGERS L. REV. 522 (1958); Recent Developments, 19 OHIO ST. L.J. 780 (1958).

[9] 26 N.J. at 92-103, 138 A.2d at 718-25. *See* notes 89-105 *infra* and accompanying text.

[10] 26 N.J. at 103-04, 138 A.2d at 25.

[11] The controversy over the use of per diem arguments is reflected in a number of articles written on the subject. *See, e.g.*, Carton, *supra* note 5; Cooper, *supra* note 4; Phillips, *supra* note 6. See also the commentary collected in Beagle v. Vasold, 65 Cal. 2d 166, 174-75, 417 P.2d 673, 677, 53 Cal. Rptr. 129, 133 (1966). For a collection of cases dealing with per diem arguments, see Annot., 3 A.L.R.4th 940 (1981). This annotation supercedes Annot., 60 A.L.R.2d 1347 (1958 & Supplements 1976 & 1980).

[12] *See, e.g.*, cases collected in note 43 *infra*.

[13] *See, e.g.*, cases collected in note 125 *infra*.

[14] *See, e.g.*, Warp v. Whitmore, 123 Ill. App. 2d 45, 260 N.E.2d 45 (1970); Graeff v. Baptist Temple, 576 S.W.2d 291 (Mo. 1978); Combined Ins. Co. v. Sinclair, 584 P.2d 1034 (Wyo. 1978); cases collected in notes 126 & 127 *infra*.

[15] 83 N.J. 381, 416 A.2d 809 (1980).

[16] *Id.* at 383, 416 A.2d at 810.

[17] *Id.* at 387, 416 A.2d at 812.

[18] *Id.* at 384-85, 416 A.2d at 811.

[19] *Id.* at 383, 416 A.2d at 810.

[20] *Id.* at 385, 416 A.2d at 812.

in Sisyphus' dilemma, plaintiff's attorney successfully pushed a rock uphill only to have it roll back down and come to rest at the foot of the hill.

The *Botta* Rule and its latest extension in the *Cox* decision are indeed open to question. The supreme court's invitation to reevaluate this rule[22] should not go unanswered. This comment will examine the validity of the *Botta* Rule in the 1980's and explore the scope and implications of the *Cox* expansion in light of New Jersey case law and the development of the per diem approach in other jurisdictions.

THE THEORETICAL SETTING

In the typical personal injury action the remedy sought by the plaintiff is compensatory damages for the injuries sustained.[23] Trial attorneys normally divide these damages into special and general categories. Special damages include the actual out-of-pocket medical expenses flowing from the injuries,[24] while general damages constitute compensation for the plaintiff's pain and suffering.[25] The former category is readily ascertainable in the market place.[26] It is the latter category which creates the difficulties.[27]

Traditionally, the jury is instructed that if it finds for the plaintiff, it must then determine an amount of money to compensate for the plaintiff's injuries.[28] There is no standard rule, however, for

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[21] *Id.* at 387, 416 A.2d at 812.

[22] *See* text accompanying note 1 *supra*. Subsequent to *Cox*, the New Jersey supreme court submitted the *Botta* Rule to the Civil Practice Committee "to consider . . . [its] continued efficacy." 106 N.J.L.J. 405, 405 (1980).

[23] C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137 (1935). In a tort action, the purpose of awarding compensatory damages is to make the injured party whole by giving him a sum of money which will restore him as closely as possible to the position he would have been in had the wrong not occurred. *Id. See* James, *Damages in Accident Cases*, 41 CORNELL L. Q. 582 (1956), *reprinted in*, S. SCHREIBER, DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 17 (1965).

[24] C. McCORMICK, *supra* note 23, § 8. Other special damages include: lost time and earnings, impairment of future earnings, aggravation of preexisting ailments, and "insanity resulting from the injury." *Id.*

[25] *Id.* Physical pain is the immediate effect upon the nerves and brain resulting from injury to the body.

> Beside the mental distress which is the accompanying shadow of physical pain, the courts have most frequently authorized compensation for the following: The victim's fright and terror at the time of the injury, and reasonable apprehension thereafter over the effects of the injury upon his health; apprehension of a pregnant woman of injury to the child; anxiety over inability to make a living; and fear of death or insanity as a consequence of the injury.

C. McCORMICK, *supra* note 23, § 88 (footnotes omitted).

[26] *See* James, *supra* note 23, at 590-92.

[27] C. McCORMICK, *supra* note 23, § 88. The difficulty of translating pain and suffering into dollars and cents is at the heart of the per diem argument controversy. *Id.*

[28] *See, e.g.*, J. ALEXANDER, JURY INSTRUCTIONS ON MEDICAL ISSUES 213 (1966).

translating pain and suffering into dollars and cents.[29] Damages for pain and suffering are evaluated by estimating the amount that a reasonable person would deem to be fair compensation; the only measure of these damages is the enlightened conscience of impartial jurors.[30] To date, no judicial consensus has emerged on the propriety of juries using mathematical formulas in determining an award for pain and suffering.[31]

To aid the jury in arriving at an amount, attorneys present a number of arguments concerning pain and suffering. For example, an attorney might urge the jurors "to fix what they would want as compensation if they had sustained the [plaintiff's] injuries or what the pain and suffering would be worth to them."[32] This approach, termed "an appeal to the golden rule," is universally condemned.[33] The underpinning of the rejection of the golden rule is that a plaintiff may not sit in judgment of himself; a juror would not be a fair judge of the case if he were permitted to place himself in the shoes of the plaintiff.[34] Any proposed method of computing damages combined with an appeal to the golden rule would be similarly condemned.[35]

One method of assisting the jury in its function of providing fair compensation for the plaintiff is to inform it of the amount the plaintiff believes the injuries are worth.[36] The ad damnum clause, which is either a part of the complaint or a separate pleading, is the vehicle whereby the plaintiff notifies the defendant of the amount of money sought in the lawsuit.[37] Two rationales for permitting an attorney to inform the jury of the ad damnum clause are that it places a limit on the plaintiff's damages[38] and that it is accepted custom and practice.[39]

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[29] 26 N.J. at 92-93, 138 A.2d at 718-19.

[30] *Id.* at 94-95, 138 A.2d at 719-20. For a discussion of the inadequacies of the traditional approach, see notes 261-64 *infra* and accompanying text.

[31] Annot., 60 A.L.R.2d 1347, § 2 (1958 & Supplements 1976 & 1980). For a discussion of the jury's employment of per diem formulas, see note 259 *infra*.

[32] 26 N.J. at 94, 138 A.2d at 719. This argument—an appeal to the golden rule—may refer specifically to the "golden rule" or may use language patterned after the Biblical quotation attributed to Jesus in Luke 6:31. "'Do to others what you would have them do to you.'" Luke 6:31 (New American). *See* Matthew 7:12 (New American) (alternate phrasing). For an example of a golden rule argument see note 75 *infra*.

[33] *See* cases collected in Annot., 70 A.L.R.2d 927 § 3 (1960 & Supplement 1978).

[34] Faught v. Washam, 329 S.W.2d 588, 602 (Mo. 1959).

[35] For examples of arguments combining an appeal to the golden rule with a suggestion of a per diem formula, see notes 75 & 154 *infra*.

[36] Graeff v. Baptist Temple, 576 S.W.2d 291, 302 (Mo. 1978). *See* cases collected in Annot., 14 A.L.R.3d 541 (1967 & Supplement 1980).

[37] BLACK'S LAW DICTIONARY 35 (5th ed. 1979).

[38] Franco v. Fujimoto, 47 Hawaii 408, 422, 390 P.2d 740, 748-49 (1964) (overruled in part in Barretto v. Akau, 51 Hawaii 383, 393, 463 P.2d 917, 923 (1969)).

[39] Duguay v. Gelinas, 104 N.H. 182, 187, 182 A.2d 451, 454 (1962).

Some courts reject this method on the grounds that the ad damnum clause states the price of pain and has no probative value.[40]

Under the lump sum approach, an attorney may suggest a sum for plaintiff's total suffering which he believes is fairly inferred from the evidence.[41] Further, he may be permitted to suggest lump sums for specific periods, for instance, $250 for time spent in traction.[42] This form of argument has been approved as customary trial practice[43] and deemed "far less misleading" than a per diem argument.[44] Nonetheless, the lump sum and the ad damnum approaches have been rejected by some courts which assert that the jury will accept the attorney's suggestion without critically analyzing the evidence.[45]

The most controversial method of aiding the jury, and the focus of this comment, is the technique whereby an attorney argues a dollar-figure-per-unit-of-time equation—the per diem formula.[46] This equation contains two variables: a dollar unit and a time unit. Assuming the jury decides to use the formula, it must then substitute a number for each variable. The attorney assists the jury in choosing a dollar unit by suggesting that it either consider the attorney's opinion of the value of pain[47] or formulate its own opinion of that value.[48]

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[40] *E.g.*, Affett v. Milwaukee & Suburban Transp. Co., 11 Wis. 2d 604, 614, 106 N.W.2d 274, 280 (1960).

[41] *E.g.*, Caley v. Manicke, 24 Ill. 2d 390, 394, 182 N.E.2d 206, 209 (1962); Halsted v. Kosnar, 18 Wis. 2d 348, 352, 118 N.W.2d 864, 866 (1963); Affett v. Milwaukee & Suburban Transp. Co., 11 Wis. 2d 604, 614, 106 N.W.2d 274, 280 (1960).

[42] *E.g.*, Graeff v. Baptist Temple, 576 S.W.2d 299, 303 (Mo. 1978).

[43] *E.g.*, Caley v. Manicke, 24 Ill. 2d 390, 394, 182 N.E.2d 206, 209 (1962); Caylor v. Atchison, Topeka & Santa Fe Ry., 190 Kan. 261, 263-64, 372 P.2d 53, 54-55 (1962); Faught v. Washam, 329 S.W.2d 588, 602 (Mo. 1959); Affett v. Milwaukee & Suburban Transp. Co., 11 Wis. 2d 604, 614, 106 N.W.2d 274, 280 (1960). In the case of Halsted v. Kosnar, 18 Wis. 2d 348, 118 N.W.2d 864 (1963), the court noted that the jury's ability to follow the court's instructions on damages and to recognize "lawyer's talk" would be a sufficient safeguard against the jury's yielding to the advocate's excessive demands. *Id.* at 352, 118 N.W.2d at 866. For a discussion of safeguards used with per diem arguments, see notes 273-79 *infra* and accompanying text.

[44] Caley v. Manicke, 24 Ill. 2d 390, 394, 182 N.E.2d 206, 209 (1962). *E.g.*, Caylor v. Atchison, Topeka & Santa Fe Ry., 190 Kan. 261, 263-64, 374 P.2d 53, 54-55 (1962).

[45] *E.g.*, Botta v. Brunner, 26 N.J. at 104, 138 A.2d at 725; Purpora v. Public Serv. Elec. & Gas Co., 53 N.J. Super. 475, 481, 147 A.2d 591, 594-95 (App. Div. 1959). *See* cases collected in Annot., 14 A.L.R.3d 541, § 4 (1967 & 1980 Supplement).

[46] *See* Carton, *supra* note 5, at 443-44.

[47] *See, e.g.*, Ratner v. Arrington, 111 So.2d 82, 89 (Fla. Ct. Dis. App. 1959); Arnold v. Ellis, 231 Miss. 757, 765, 97 So.2d 744, 747 (1957); Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 429-30, 73 So.2d 144, 151 (1954); J.D. Wright & Son Truckline v. Chandler, 231 S.W.2d 786, 789 (Tex. Civ. App. 1950).

[48] *See, e.g.*, Evening Star Newspaper Co. v. Gray, 179 A.2d 377, 382 (D.C. 1962); Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 711 (1964).

Alternatively, the attorney may make no suggestion.[49] The time variable used by the jury is the number of days suffered prior to trial[50] and, in the case of permanent injury, the number of days remaining in the plaintiff's life expectancy.[51] A separate question relates to the mode of presenting the argument, for example, expert testimony, charts, blackboards, oral argument, or instructions to the jury.[52] This comment will primarily examine the per diem approach in the context of oral argument.[53]

A careful examination of per diem summations reveals a subjective basis for differentiating between per diem arguments used to illustrate or suggest and those used to influence or persuade. The courts have not articulated the distinguishing characteristics, but in many instances the distinction appears to hinge upon the language of the argument.

Generally, to "illustrate" means to clarify by examples, and to "suggest" means to mention for consideration.[54] A per diem argument may either suggest a formula as a method for computing damages or demonstrate the technique by examples, or both. During summation, plaintiff's counsel might present this typical illustrative argument:

> There is no rule of damages for converting pain and suffering into dollars and cents. Any determination of damages must be based on your impartial judgment. You can, however, estimate the value of plaintiff's pain and suffering if you decide that he is entitled to compensation. For example, you may decide that he is entitled to one dollar a day for his pain. In that case, multiply this sum by the one hundred days he has suffered since the accident and/or the 7,300 days (20 years) he has remaining in his life expectancy.[55]

Under this approach the attorney merely suggests the use of a formula, and does not attempt to persuade the jury to adopt his figures.

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[49] *E.g.*, King v. Railway Express Agency, Inc., 107 N.W.2d 509, 517 (N.D. 1961). *See* note 62 *infra* and accompanying text.

[50] *See, e.g.*, Ratner v. Arrington, 111 So.2d 82, 85-86 (Fla. Dis. Ct. App. 1959); Crum v. Ward, 146 W.Va. 421, 426-27, 122 S.E.2d 18, 22 (1961).

[51] *See, e.g.*, Cross v. Robert E. Lamb Co., 60 N.J. Super. 53, 76-77, 158 A.2d 359, 371-72, *certif. denied*, 32 N.J. 350, 160 A.2d 847 (1960); Crum v. Ward, 146 W.Va. 421, 426-27, 122 S.E.2d 18, 22 (1961). *See generally* 1 M. BELLI, MODERN TRIALS § 133(2) at 870-72 (1954).

[52] *See* 1 M. BELLI, *supra* note 51, §§ 130-36.

[53] The discussion concerning oral per diem arguments applies equally to per diem formulas presented in blackboard illustrations. See notes 161-71 *infra* and accompanying text for an example of a blackboard illustration.

[54] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1127, 2286 (3d ed. 1971).

[55] This argument is modeled after an illustrative argument approved in Edwards v. Lawton, 244 S.C. 276, 278-81, 136 S.E.2d 708, 709-11 (1964).

Ideally, the jury then applies an analogous course of reasoning to arrive at its own value for pain and suffering.[56]

An attorney's reminder to the jury that only it can place a monetary value on pain;[57] a mention of per diem sums qualified by the phrase "reasonable compensation;"[58] the suggestion of a formula not presented as the only correct approach for computing damages;[59] and use of the per diem technique to explain the manner in which the amount sought was determined[60] are each characteristic of an illustrative argument. Also characteristic is the absence of an attorney's opinion as to the value of the plaintiff's pain.[61] One court has described what may be the purest form of illustrative argument—a suggestion of the mechanics of a formula as a method for computing damages without suggesting dollar amounts for particular time periods.[62]

Opposed to the illustrative argument is the "influential" or "persuasive" per diem argument. In addition to presenting a per diem formula to the jury, this argument may appeal to the individual interests of the jurors or be in some way inflammatory. For instance, under the "job offer" approach the attorney offers the jurors the job of suffering plaintiff's pain and physical disability for a particular

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[56] Courts permitting illustrative arguments usually require an instruction to the jury that the argument is not evidence. *E.g.*, Johnson v. Brown, 75 Nev. 437, 447, 345 P.2d 745, 759 (1959); Jones v. Hogan, 56 Wash. 2d 23, 32, 351 P.2d 153, 159 (1960). *See, e.g.*, cases collected in note 127 *infra*.

[57] Evening Star Newspaper Co. v. Gray, 179 A.2d 377, 382 (D.C. 1962); Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710-11 (1964).

[58] Evening Star Newspaper Co. v. Gray, 179 A.2d 377, 382 (D.C. 1962). In approving an illustrative argument, the court apparently found that use of the phrase "fair and reasonable compensation" in conjunction with suggested dollar figures mitigated any potential prejudice arising from the figures by reminding the jury of its duty to award only reasonable compensation. *Id.* Nevertheless, the New Jersey supreme court in *Cox* found that a comment concerning fair compensation for each day of plaintiff's life expectancy to be a component of a suggested formula. 83 N.J. at 385-86, 416 A.2d at 812. *See* notes 194 & 202 *infra* and accompanying text.

[59] *E.g.*, Warp v. Whitmore, 123 Ill. App. 2d 157, 164, 260 N.E.2d 45, 49 (1970). For a discussion of the *Warp* case, see notes 141-46 *infra* and accompanying text.

[60] *E.g.*, Newbury v. Vogel, 151 Colo. 520, 526, 379 P.2d 811, 814 (1963); Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962).

[61] Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710-11 (1964).

[62] King v. Railway Express Agency, Inc., 107 N.W.2d 509, 517 (N.D. 1961). The North Dakota Supreme Court held that counsel's use of sheets of paper to present a mathematical formula for pain on a per week or per year basis was improper, since there was no evidence to substantiate the values for pain. *Id.* at 516-17. It then stated that it would be permissible for the attorney to suggest the use of a formula without referring to particular dollar values. *Id.* at 517. The court found that such a suggestion would not invade the province of the jury. *Id.* Thus, this court approved an illustrative per diem argument without dollar figures and successfully harmonized this approach with the invasion-of-the-province-of-the-jury premise. Consider the discussion of *Cox* in notes 213-37 *infra* and accompanying text.

amount per day for each day the plaintiff suffered or will suffer pain.[63] A mathematical formula for pain and suffering persuasively presented in this manner intensifies the jurors' normally sympathetic reaction to the discussion of pain.[64] Thus, a single reference to a dollar figure may have a great impact on the jurors' determination of damages when presented in an inflammatory manner.

Similarly, repetition of the same dollar figure in an argument purportedly for illustrative purposes may be deemed an influential argument. For example, an attorney might argue to the jury:

> I would like to suggest to you a method of computing plaintiff's damages for pain and suffering. This method involves multiplying some dollar figure—let's say $10 a day—times the number of days remaining in plaintiff's life expectancy. Now let me demonstrate how this formula works. Let's assume plaintiff has a life expectancy of 20 years—in days, that would be 7,300 days.
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> Again, I have suggested $10 a day. Applying the formula, $10 per day times 7,300 would equal $73,000 dollars in damages.
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> You, members of the jury, of course are not bound by the $10 per day figure, but in my opinion $10 per day appears reasonable. I decided upon $10 a day by averaging amounts for days of greater pain, for example, $15 per day, and for days of lesser pain, $5 per day.[65]

These multiple references to the same dollar figure cause the figure to be accepted unconsciously by the jury as a true indication of the

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[63] Faught v. Washam, 392 S.W.2d 588, 602 (Mo. 1959). In *Faught* plaintiff's counsel made the following job offer argument:

> "In considering what is an adequate sum for this young man, suppose I was to meet one of you ladies on the street and I say to you, 'I want to offer you a job and I want to tell you a little bit about this job before you say you are going to accept it; one peculiar thing, if you take it you have to keep it for the rest of your life, you work seven days a week, no vacations, work daytime and night. The other thing is, you only get paid $3.00 a day. Here is your job—your job is to suffer Mr. Faught's disability.'"

Id. (quoting summation). *See* note 138 *infra*.

[64] *See* Crum v. Ward, 146 W.Va. 421, 435, 122 S.E.2d 18, 26-27 (1961). This court indicated its belief that psychological factors, particularly the power of suggestion, enter into the determination of damages for pain and suffering. *Id.* The court apparently found that the argument of a dollar a day for pain, for example, would evoke as much sympathy as an appeal to the golden rule.

[65] The attorney's repeated utterance of the $10 per diem figure serves to instill this number into the jurors' minds, since rote repetition is one method of memorization. Moreover, this "forced memorization" technique can be augmented by illustration of the calculations on a blackboard. *See* Cox v. Valley Fair Corp., 83 N.J. 381, 416 A.2d 809 (1980) (repetition of phrase "daily pain" deemed to constitute a component of impermissible per diem formula); Gilborges v. Wallace, 156 N.J. Super. 121, 379 A.2d 269 (App. Div. 1977) (repetition of word "millions" deemed improper and prejudicial).

value of pain without the critical thought that would otherwise occur.[66] Also, the attorney's constant urging of his opinion of the value of plaintiff's pain impinges upon the jury's province since the jurors might mistakenly believe his figure is supported by the evidence.[67] Interference of this nature identifies a persuasive argument.

The above discussion highlights the factors distinguishing illustrative and persuasive per diem arguments. Such categorization results in a workable approach to the issue of whether per diem arguments should be allowed. Although the courts deciding the issue have not expressly voiced this distinction, it is not artificial. An examination of the courts' rationales for permitting and prohibiting per diem arguments, coupled with the attorneys' language used in presenting the arguments to the juries, reveals the following: those courts permitting per diem arguments appear generally to be referring to illustrative arguments;[68] those courts prohibiting per diem arguments, though the prohibition includes both forms of argument without distinguishing between them, appear generally to be referring to persuasive arguments.[69]

THE PER DIEM CONTROVERSY

Botta v. Brunner—*The Minority View*

In the leading case of *Botta v. Brunner*,[70] the New Jersey supreme court presented the first definitive analysis of the per diem issue[71] and stated the major criticisms of this approach for computing

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[66] *See* Henne v. Balick, 1 Del. 369, 376-77, 146 A.2d 394, 398 (1958); Faught v. Washam, 329 S.W.2d 588, 603 (Mo. 1959).

[67] *See* Harper v. Bolton, 239 S.C. 541, 548, 124 S.E.2d 54, 59 (1962).

[68] *See, e.g.*, Corkery v. Greenberg, 253 Iowa 846, 114 N.W.2d 327 (1962) (per diem argument used as a suggestion or illustration is proper); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961) (acceptable for attorney to evaluate pain on a daily basis for illustrative purposes); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959) (per diem arguments may be used for illustrative purposes only); Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964) (use of per diem formula for illustrative purposes is not error). *See* note 83 *infra*.

[69] *See, e.g.*, Faught v. Washam, 329 S.W.2d 588 (Mo. 1959) (job offer argument—hybrid per diem argument and golden rule argument); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958) (per diem argument coupled with an appeal to the golden rule); Gilborges v. Wallace, 153 N.J. Super. 121, 379 A.2d 269 (1977), *aff'd*, 78 N.J. 342, 396 A.2d 338 (1978) (per diem argument and attempt to subliminally suggest one million dollar figure); Henman v. Klinger, 409 P.2d 631 (Wyo. 1966) (per diem argument and appeal to golden rule).

[70] 26 N.J. 82, 138 A.2d 713 (1958).

[71] Cooper, *supra* note 4, at 402. *See* note 3 *supra*.

damages for pain and suffering.[72] The court's rationale has served as the focal point of the per diem controversy.[73]

The plaintiff in *Botta* sought recovery of personal injury damages arising from an automobile accident.[74] In his summation, plaintiff's counsel said to the jury: " 'how much do you think you should get for every day you have to go through that harrowing experience. . . . Would fifty cents an hour for that kind of suffering be too high?' "[75] The defendant objected and the trial court declared that the argument provided an improper measure of damages for pain and suffering.[76] The appellate division, reversing the decision of the trial court, found that counsel's per diem argument conformed with prior precedent and fell within the fair scope of summation.[77]

The supreme court, in an opinion authored by Justice Francis, considered both the propriety of using a golden rule argument and counsel's use of a per diem argument. In holding that counsel's

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[72] 26 N.J. at 92-101, 138 A.2d at 719-24.

[73] Cooper, *supra* note 4, at 402. *See* notes 8 & 11 *supra*.

[74] 26 N.J. at 86, 138 A.2d at 715. During the course of the trial the extent of Mrs. Botta's alleged injuries, which included lower back pain, bruises, contusions, and abrasions, Botta v. Brunner, 42 N.J. Super. 95, 100, 126 A.2d 32, 35 (App. Div. 1956), became a seriously disputed issue. 26 N.J. at 89, 138 A.2d at 716. At the trial's conclusion, the jury returned a verdict of $5,500. Plaintiff appealed, contending this amount was inadequate, and asserted that the per diem argument was proper and should have been allowed. *Id.* at 86-87, 91, 138 A.2d at 715, 717.

[75] 26 N.J. at 91-92, 138 A.2d at 717 (quoting summation). In his closing statement, Botta's attorney made the following argument:

> "How much can you give for pain and suffering? As a guide, I try to think of myself. What would be a minimum that a person is entitled to? And you must place yourself in the position of this woman. If you add that disability which has been described to you, and you were wearing this 24 hours a day, how much do you think you should get for every day you had to go through that harrowing experience, or every hour?
>
> Well, I thought I would use this kind of suggestion. I don't know. It is for you to determine whether you think I am low or high. Would fifty cents an hour for that kind of suffering be too high?"

Id. at 91-92, 138 A.2d at 717 (quoting summation). This summation states that fifty cents an hour is merely a suggestion. It would not, however, constitute an illustrative argument because this suggestion is coupled with an appeal to the golden rule. *See* notes 63-64 *supra* and accompanying text.

[76] 26 N.J. at 92, 138 A.2d at 117.

[77] Botta v. Brunner, 42 N.J. Super. 95, 107-08, 126 A.2d 32, 39-40 (App. Div. 1956). The appellate division, in approving this per diem argument, reasoned that "the fair scope of argument in summation" includes informing the jury of the amount of recovery sought and counsel's supporting reasoning for that amount. *Id.* at 107, 126 A.2d at 39. It was concluded that this settled practice would then support a reference to per diem amounts. The appellate division also noted that the trial judge can effectively caution the jury that the argument on the amount of damages is not evidence. *Id.* at 107-08, 126 A.2d at 39-40. This reasoning was consistent with that of courts in other jurisdictions which had approved the use of per diem arguments. *See* notes 109-23 *infra* and accompanying text.

summation was an appeal to the golden rule and therefore improper, the court stated that jurors are not free to fix compensation according to what pain and suffering would be worth to them if they had sustained the plaintiff's injuries.[78] Counsel was prohibited from making this argument because the verdict should be based upon reasonable compensation,[79] not a sympathetic appeal to the jurors.[80]

Although the case could have been disposed of solely on these grounds, the court, undertaking an extensive examination of the per diem issue,[81] announced the *Botta* Rule: counsel for plaintiff or defendant may not suggest to the jury in opening or closing statements, either directly or indirectly, "per hour or *per diem* sums as the value of or as compensation for pain, suffering and kindred elements associated with injury and disability."[82] These suggestions were characterized as "an unwarranted intrusion into the domain of the jury."[83] The fundamental assumption underlying the rule was that "pain and suffering have no known dimensions, mathematical or financial."[84] There was no market in which the law of supply and demand could equate pain and suffering with dollars and cents.[85] Thus, the jury's task was to make an impartial judgment and award reasonable compensation based on the evidence.[86] The court, in addition, stated that under no circumstances may the jury be

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[78] 26 N.J. at 94, 138 A.2d at 719. For a discussion of the golden rule argument, see text accompanying notes 32-35 *supra*.

[79] 26 N.J. at 94, 138 A.2d at 719.

[80] *Id.* at 97, 138 A.2d at 721.

[81] *Id.* at 92-105, 138 A.2d at 718-26. For an evaluation of the case law relied upon by the *Botta* court, see articles collected in notes 4, 6 & 8 *supra*.

[82] 26 N.J. at 99, 103, 138 A.2d at 722, 725.

[83] *Id.* at 103, 138 A.2d at 725. The court suggested the scope of the prohibition it was promulgating:

> But since the nature of the subject matter admits only of the broad concept of reasonable compensation, may counsel for the plaintiff or the defendant state to the jury, in opening or closing, his belief as to the pecuniary value or price of pain and suffering per hour or day or week, and ask that such figure be used as part of a mathematical formula for calculating the damages to be awarded? Without expressing a personal opinion, may he suggest that the valuation be based on so much per hour or day or week, or ask the jurors if they do not think the pain and suffering are fairly worth so much per hour or day or week—and then demonstrate, by employing such rate as a factor in his computation, that a verdict of a fixed amount of money would be warranted or could be justified?

Id. at 94-95, 138 A.2d at 719. To these questions the court answered a resounding "no." *Id.* at 99, 103, 138 A.2d at 722, 725. Note that the first question relates to a persuasive argument and the second to an illustrative one. The court's ban of both forms of argument demonstrates the comprehensiveness of the *Botta* prohibition.

[84] *Id.* at 95, 138 A.2d at 720.

[85] *Id.* at 92-93, 138 A.2d at 718-20.

[86] *Id.* at 94, 138 A.2d at 719.

informed of the ad damnum clause by the court, an attorney, or in any other fashion.[87] The rationale behind this corollary rule was that even though the jury is instructed to award reasonable compensation, the suggested figure would consciously or unconsciously influence their award of damages.[88]

The foundation of *Botta's* rationale[89] involved the interplay of three elements: the function of the jury;[90] the scope of summation;[91] and the administration of the trial.[92] Turning to the function of the jury, the court stated that damages should be deduced from the evidence and not calculated from counsel's proposed figures.[93] Per diem arguments, according to the court, suggest figures not based on evidence that become implanted in the minds of the jurors and may then be substituted for evidence.[94] The resulting influence on the jury's decision-making process constitutes an invasion of the province of the jury.[95] Further, the court found that instructions to the jury

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[87] *Id.* at 104, 138 A.2d at 725. This part of the court's ruling has been integrated into the New Jersey Court Rules, which provide that a party demanding unliquidated damages shall not specify an amount. N.J. Ct. R. 4:5-2.

[88] 26 N.J. at 104, 138 A.2d at 725. To give the rule "its full and intended scope," the *Botta* court expressly overruled a number of decisions which approved counsel's references to the amount of money damages sought. *Id.* at 103-04, 138 A.2d at 725. Justice Wachenfeld dissented from this portion of the majority opinion. He reasoned that these long-standing practices had not resulted in inequities or difficulties which required correction, and would have limited the holding to a prohibition of the per diem approach without disturbing counsel's right to suggest a lump sum for the injuries. *Id.* at 105, 138 A.2d at 726 (Wachenfeld, J., dissenting in part). For a discussion of how other jurisdictions solved a similar conflict between their established practices and the per diem approach, see notes 114-16, 133-35 *infra* and accompanying text.

[89] Legal scholars analyzing the *Botta* decision have reached differing conclusions about what constitutes its underlying rationale. *Compare* Recent Cases, 12 Rutgers L. Rev. 522 (1958) (absence of evidentiary basis for converting pain and suffering into dollars and cents) *with* Carton, *Justice Francis and the Botta Rule—A Continuing Controversy*, 24 Rutgers L. Rev. 443 (1970) (inability to formularize pain and suffering). This disagreement has contributed to the myriad of positions taken by the courts on the per diem issue. *See* Cooper, *supra* note 4, at 404-11.

[90] 26 N.J. at 97-99, 138 A.2d at 721-23.

[91] *Id.* at 100-01, 138 A.2d at 723.

[92] *Id.* at 101, 138 A.2d at 723-24.

[93] *Id.* at 97-99, 138 A.2d at 721-22.

[94] *Id.* at 98-99, 138 A.2d at 722.

[95] *Id.* at 98-99, 103, 138 A.2d at 722, 725. In Purpora v. Public Serv. Elec. & Gas Co., 53 N.J. Super. 475, 147 A.2d 591 (App. Div. 1959), the appellate division clarified *Botta's* premise that a monetary suggestion improperly influences the jury. During summation, Purpora's attorney commented that the plaintiff deserved " 'a high amount in five figures' " for his injury. He also referred to Public Service as " 'a big corporation worth a lot of money.' " *Id.* at 479, 147 A.2d at 593 (quoting summation). The jury subsequently returned a verdict of $3,424 for the plaintiff. The defendant appealed, charging that counsel's remarks were improper and the verdict excessive. *Id.* at 477-78, 147 A.2d at 592. The appellate division, finding the remarks improper, held that prejudice existed even though the jury did not return a five-figure verdict. *Id.* at 479, 481, 147 A.2d at 593, 595. The court stated that under *Botta* prejudice results from

that per diem arguments are not based on evidence were inadequate to remove the figures from the jurors' minds.[96] Thus, as in the case of the ad damnum clause, the award would reflect the influence of the suggested figures.[97]

The *Botta* court next focused on the scope of permissible summation. In Justice Francis' opinion, suggestions about the monetary value of pain have no evidentiary foundation.[98] Since no witness or expert is competent to estimate the amount of pain experienced per hour or per day,[99] it would be anomalous to allow counsel's per diem estimation to be considered as evidence by the jury. Therefore, the Justice concluded that any suggestion by counsel that places a dollar value on pain is necessarily speculative and outside the scope of permissible summation.[100]

The third element of the *Botta* rationale concerned fair administration of the trial. The court asserted that both parties should have an equal opportunity to offer proofs and to argue based on those proofs.[101] Per diem arguments, however, present speculative valuations as evidence.[102] If defense counsel suggests his own per diem sums, he is engaging in the same speculation as plaintiff's counsel, yet his failure to respond could be interpreted by the jury as tacit approval of plaintiff's counsel's suggestions.[103] These arguments thereby deny defense counsel an opportunity for adequate rebuttal.[104] Justice Francis implied that a great injustice to the defendant is that effective use of per diem valuations for pain and suffering could result in "'monstrous verdicts.'"[105]

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the influence exerted on the jurors' minds, not from their acceptance of the suggested figures. *Id.* at 481, 147 A.2d at 595. No decision was reached as to whether a trial judge could in some manner remove the prejudicial impact of such statements. In fact, in *Purpora,* the prejudice was actually heightened by the trial court's failure to admonish counsel or instruct the jury to ignore the improper remarks. *Id.* at 482, 147 A.2d at 595.

[96] 26 N.J. at 98, 138 A.2d at 722.

[97] *Id.* at 97-99, 138 A.2d at 721-22.

[98] *Id.* at 100-01, 138 A.2d at 723.

[99] *Id.* at 100, 138 A.2d at 723. A number of articles, however, have discussed the possibility of using experimental and clinical methods of measuring pain in personal injury cases. *E.g.*, Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation,* 1962 DUKE L.J. 344; Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence,* 24 DEF. L.J. 219 (1975).

[100] 26 N.J. at 100-01, 138 A.2d at 723.

[101] *Id.* at 101, 138 A.2d at 723-24.

[102] *Id.*

[103] *Id.*

[104] *Id. But see* notes 275 & 281 *infra* and accompanying text.

[105] *See* 26 N.J. at 102, 138 A.2d at 724 (quoting Ahlstrom v. Minneapolis, St. Paul & Sault Ste. M. R.R., 244 Minn. 1, 30, 68 N.W.2d 873, 891 (1955)). It has been stated that the purpose of the *Botta* Rule and its progeny in other jurisdictions is to prevent excessive verdicts. *See*

Botta *Rebutted*—Beagle v. Vasold

The California Supreme Court in *Beagle v. Vasold*,[106] "align[ing] itself with the majority of jurisdictions," held that an attorney may argue per diem formulas for pain and suffering.[107] Justice Mosk authored a persuasive opinion answering many of the contentions raised by the *Botta* decision of some eight years earlier. He also presented workable solutions to some of the basic problems underlying the per diem controversy.[108]

Addressing the *Botta* court's contention that per diem arguments lack an evidentiary basis, Justice Mosk asserted that evidence presented at trial would support a per diem suggestion.[109] He reasoned that the suggested per diem sums can be inferred from both the jury's observation of the plaintiff and expert testimony about the nature and extent of the injuries.[110] The jury must infer a total dollar amount from what it observes and hears at trial; the same evidence will support the attorney's inference concerning a total amount.[111] Justice Mosk rejected the argument that although damages in total can be inferred from the evidence, the inference vanishes when the "sum

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Beagle v. Vasold, 65 Cal. 2d 166, 178, 417 P.2d 673, 679, 53 Cal. Rptr. 129, 135 (1966); Cooper, *supra* note 4, at 366; Recent Cases, 28 U. CIN. L. REV. 138, 142 (1958). This arguably is not true. In *Botta*, where a per diem formula was used, the defendant did not challenge the verdict as excessive; instead, the plaintiff appealed the $5,500 verdict as inadequate. 26 N.J. at 86-87, 138 A.2d at 715. Nonetheless, a *Botta* Rule violation was found on the grounds of impermissible influence on the jurors' minds. *Id.* at 103, 138 A.2d at 725. Because the court found a violation without finding an excessive verdict, the prevention of excessive verdicts could not have been the court's purpose. Rather, the court's major concern was to prevent impermissible influence on the jurors. *Id.* at 99, 103, 138 A.2d at 722, 725.

It would be error to conclude, however, that the court was not concerned with large verdicts. The court viewed "monstrous verdicts" as a potential result of utilizing per diem arguments. *Id.* at 102, 318 A.2d at 724. This concern surfaced in *Cox* where the court did not consider excessiveness as a result, but viewed the size of the verdict as an indicator of impermissible influence arising from a per diem argument. 83 N.J. at 386, 416 A.2d at 812.

[106] 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966).

[107] *Id.* at 175, 182, 417 P.2d at 677, 682, 53 Cal. Rptr. at 133, 138. In *Beagle* the plaintiff argued on appeal that the verdict was inadequate because his attorney was not permitted to present a per diem formula for damages. The court agreed and, based on the evidence, found that $1,719.48 was an inadequate figure for plaintiff's permanent disability and severe pain. It concluded that plaintiff probably would have been awarded a larger verdict had the trial court not limited counsel's agrument. The court held that the trial judge had improperly restricted the argument, and therefore reversed the judgment. *Id.* at 170-71, 183, 417 P.2d at 674-75, 682, 53 Cal. Rptr. at 130-31, 138. *See* note 105 *supra*.

[108] 65 Cal. 2d at 179-81, 417 P.2d at 680-81, 53 Cal. Rptr. at 136-37.

[109] *Id.* at 176-77, 417 P.2d at 678, 53 Cal. Rptr. at 134. *See* note 98 *supra* and accompanying text.

[110] 65 Cal. 2d at 176-77, 417 P.2d at 678, 53 Cal. Rptr. at 134.

[111] *Id.* One commentator has asserted that evidence presented at trial can provide a basis for per diem valuation. The injured party testifies to the number of hours of pain per day and its changes in intensity, and the defense counsel cross-examines plaintiff in an effort to reduce the

is divided into segments representing days, months or years."[112] Disagreeing with the *Botta* court's finding that per diem arguments are speculative because they lack an evidentiary basis, he concluded that these arguments are inferable from the evidence and are therefore permissible.[113]

Justice Mosk also indicated that many courts which traditionally allow counsel to inform the jury of the amount claimed, or to argue for a total monetary amount, find it logically inconsistent to prohibit the use of per diem arguments.[114] These courts find no greater harm in exposing the jury to a sum "fragmented to represent periods of time," than to a total amount for the plaintiff's life expectancy.[115] Suggesting a per diem sum is deemed to be no more speculative than suggesting a total amount.[116]

Answering *Botta's* invasion of the jury's province contention, Justice Mosk examined the impact of per diem summations on the jury's decision-making process.[117] He compared the effect of arguing the per diem method of computing damages to that of urging the jury to find the defendant negligent.[118] When an attorney discusses a defendant's conduct and the reasonable inferences therefrom, no one contends that the jury abdicates its duty to apply the reasonable man standard. Why then, Justice Mosk queried, should the jury upon hearing an argument for the dollar per day technique, be presumed

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amount of time suffered. Therefore, sufficient evidence is offered on the segmentation of pain. Phillips, *supra* note 6, at 85-86. Furthermore, other proponents of the per diem approach have asserted that an attorney has always been allowed to discuss issues which are not part of the evidentiary basis of the record, such as credibility of the witnesses or negligence of the defendant. Thus, they maintain that the per diem argument falls within that class of issues which may be discussed without having a basis in evidence. Cooper, *supra* note 4, at 406.

[112] 65 Cal. 2d at 176-77, 417 P.2d at 678, 53 Cal. Rptr. at 134.

[113] *Id.* Justice Mosk further noted that a court could control any unwarranted inferences from evidence by its power to contain argument within legitimate bounds. *Id.* at 177, 417 P.2d at 678, 53 Cal. Rptr. at 134.

[114] *Id.* at 177, 417 P.2d at 679, 53 Cal. Rptr. at 135. Two approaches to the "logical inconsistency" dilemma have arisen. The *Botta* court, in recognition of the dilemma, overruled prior precedent permitting reference to a total amount. 26 N.J. at 103-04, 138 A.2d at 725. Similarly, although it found *Botta* persuasive, the Nevada Supreme Court was compelled by a desire for consistency to permit per diem arguments based upon Nevada's long standing practice of informing the jury of that ad damnum clause. Johnson v. Brown, 75 Nev. 437, 446-47, 345 P.2d 754, 759 (1959).

[115] 65 Cal. 2d at 177-78, 417 P.2d at 679, 53 Cal. Rptr. at 135.

[116] *Id.* Moreover, the jury's verdict has the "same speculative quality" to the extent that it contains an amount for pain and suffering as a suggestion of the total amount or per diem sum. Yates v. Wenk, 363 Mich. 311, 318, 109 N.W.2d 828, 831 (1961).

[117] 65 Cal. 2d at 177, 417 P.2d at 678-79, 53 Cal. Rptr. at 134-35. *See* notes 93-97 *supra* and accompanying text.

[118] 65 Cal. 2d at 177, 417 P.2d at 678-79, 53 Cal. Rptr. at 134-35.

as a matter of law to ignore the court's instruction to award reasonable compensation and to "slavishly follow counsel's suggestions on damages?"[119] The jury is instructed that it is "the ultimate judge of the inferences" drawn from the evidence; it should be presumed that the jury will act accordingly. Thus, Justice Mosk concluded that an attorney's assertion "that damages be measured on a segmented basis" does not invade the province of the jury.[120]

Justice Mosk also rejected the *Botta* court's contention that per diem arguments impede the fair administration of justice.[121] He noted that a per diem argument "is a double-edged sword" which can be used to present alternative per diem values and to expose exaggeration in the plaintiff's proposal.[122] Thus, a defendant is not disadvantaged by the per diem technique.[123]

AN OVERVIEW OF THE *BOTTA* RULE IN OTHER JURISDICTIONS

A majority of jurisdictions have approved the use of per diem arguments.[124] There may, however, be restrictions on the right to argue and the form of argument. Some courts permit attorneys to use the per diem approach as a matter of right.[125] Other jurisdictions place the use of per diem arguments within the discretion of the trial judge based on his traditional control of counsel's argument to the jury.[126] Frequently, use of a per diem formula is limited to illustrative arguments.[127]

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[119] *Id.*

[120] *Id.* Where per diem arguments are permitted at the discretion of the trial court, the judge determines whether a particular argument invades the province of the jury. Johnson v. Brown, 75 Nev. 437, 447, 345 P.2d 754, 759 (1959). This direct control over potential interference with the jury's decision-making process is a principal reason why some courts permit per diem arguments subject to this procedural limitation. *See* cases collected in note 126 *infra*.

[121] 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137. *See* notes 101-05 *supra* and accompanying text.

[122] 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137.

[123] *Id.*

[124] *Id.* at 173-75, 417 P.2d at 676-77, 53 Cal. Rptr. 132-33. *See* cases collected in Annot., 3 A.L.R.4th 940 (1981). This annotation supercedes Annot., 60 A.L.R.2d 1347 (1958 & Supplements 1976 & 1980).

[125] *E.g.*, Beagle v. Vasold, 65 Cal. 2d at 182, 417 P.2d at 682, 53 Cal. Rptr. at 138; Corkery v. Greenberg, 253 Iowa 846, 854-55, 114 N.W.2d 327, 332 (1962); Yates v. Wenk, 363 Mich. 311, 318-19, 109 N.W.2d 828, 831 (1961); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977).

[126] *E.g.*, Ratner v. Arrington, 111 So.2d 82, 89 (Fla. Dis. Ct. App. 1959); Johnson v. Brown, 75 Nev. 437, 447, 345 P.2d 754, 759 (1959); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 25-26, 354 P.2d 575, 576 (1960); Jones v. Hogan, 56 Wash. 2d 28, 32, 351 P.2d 153, 159 (1960). This comment will not treat the "discretionary approach" to per diem arguments separately. It should be noted, however, that the limitations on form, the supporting rationale, and the safeguards that will be discussed *infra* also apply to this approach.

[127] *E.g.*, Newbury v. Vogel, 151 Colo. 520, 526-27, 379 P.2d 811, 814 (1963); Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962); Christy v. Saliterman, 288 Minn.

Many courts, recognizing the difficulty of converting pain and suffering into dollars and cents, reason that juries need practical guidelines to ascertain unliquidated damages.[128] Per diem arguments, in their opinion, may provide necessary assistance by suggesting a "course of reasoning" or illustrating a method for computing damages.[129] Moreover, there are sufficient safeguards to prevent any prejudicial effects resulting from the use of the per diem approach.[130]

A minority of states have adopted[131] and maintained the *Botta* position on per diem arguments.[132] Most of the courts that follow the *Botta* Rule have not adopted its corollary rule which prohibits arguing the ad damnum clause or a total monetary amount for pain and suffering.[133] Some of these courts have reasoned that a suggested

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144, 169-70, 179 N.W.2d 288, 304 (1970); Johnson v. Brown, 75 Nev. 437, 447, 345 P.2d 754, 759 (1959); Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 711 (1964). For a discussion of the illustrative approach, see notes 54-62 *supra* and accompanying text.

[128] *E.g.*, Newbury v. Vogel, 151 Colo. 520, 526-27, 379 P.2d 811, 814 (1963); Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977).

[129] *E.g.*, Newbury v. Vogel, 151 Colo. 520, 526-27, 379 P.2d 811, 814 (1963); Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962); Yates v. Wenk, 363 Mich. 311, 318-19, 109 N.W.2d 828, 831 (1961); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977).

[130] Beagle v. Vasold, 65 Cal. 2d at 180-81, 417 P.2d at 680-81, 53 Cal. Rptr. at 136-37; Yates v. Wenk, 363 Mich. 311, 318, 109 N.W.2d 828, 831 (1961); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977). For a discussion of safeguards used with per diem arguments, see notes 273-79 *infra* and accompanying text.

[131] Beagle v. Vasold, 65 Cal. 2d at 173-75, 417 P.2d at 676-77, 53 Cal. Rptr. at 332-33. *See* Carton, *supra* note 5, at 455; cases collected Annot., 3 A.L.R.4th 940 (1981) (superceding Annot., 60 A.L.R.2d 1347 (1958 & Supplements 1976 & 1980)). In analyzing the per diem issue, most of these courts focused upon the issues raised in *Botta*, including lack of evidentiary basis for per diem arguments, invasion of the province of the jury, and fair administration of the trial. *E.g.*, Caylor v. Atchison, Topeka & Santa Fe Ry., 190 Kan. 261, 374 P.2d 53 (1962); Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961). In addition, some courts contended that formulas were inherently misleading because they created an "illusion of certainty." *E.g.*, Caley v. Manicke, 24 Ill. 2d 390, 393, 182 N.E.2d 206, 208 (1962). Other courts were concerned that jurors might be confused by deliberate manipulation of time periods and dollar values, and consequently return excessive awards. Duguay v. Gelinas, 104 N.H. 182, 185-87, 182 A.2d 451, 453-54 (1962).

[132] For a discussion of cases that have modified the *Botta* Rule, see notes 136-58 *infra* and accompanying text.

[133] *E.g.*, Caley v. Manicke, 24 Ill. 2d 390, 394, 182 N.E.2d 206, 209 (1962); Graeff v. Baptist Temple, 576 S.W.2d 291, 302 (Mo. 1978); Faught v. Washam, 329 S.W.2d 588, 602 (Mo. 1959); Duguay v. Gelinas, 104 N.H. 182, 187, 182 A.2d 451, 454 (1962); Halsted v. Kosnar, 18 Wis. 2d 348, 351-52, 118 N.W.2d 864, 866 (1963). *Compare* cases collected in Annot., 3 A.L.R.4th 940 (1981) and Annot., 60 A.L.R.2d 1347 (1958 & Supplements 1976 & 1980) (superceded) (deciding whether to permit per diem arguments) *with* cases collected in Annot., 14 A.L.R.3d 541 (1967 & Supplement 1980) (deciding whether to permit reference to ad damnum clause or lump sum amount). Consider the discussion of *Botta's* rationale for prohibiting reference to the ad damnum clause in notes 87 & 88 *supra* and accompanying text.

total amount is "far less misleading" than a per diem figure;[134] others have relied upon a statewide practice of permitting argument of the total amount.[135]

Several jurisdictions that initially followed the *Botta* Rule have chosen to limit its application.[136] These courts have allowed arguments that exceed the bounds of the rule—arguments ranging from the suggestion of a dollar amount for a particular time period provided that period is not reduced to one day, to permitting an illustrative argument which is clearly per diem in form but used only as a suggestion.

In *Graeff v. Baptist Temple*,[137] decided in 1978, the Missouri Supreme Court held that counsel's argument suggesting lump sums for specific periods including hospitalization, time in a cast, pain and suffering from the injury's occurrence to the time of the trial, and future pain and suffering did not violate their prohibition of per diem arguments.[138] According to the court, counsel's argument merely suggested a lump sum for each time period without segmenting the periods into per hour or per day units.[139] In light of the finding that

[134] *E.g.*, Caley v. Manicke, 24 Ill. 2d 390, 394, 182 N.E.2d 206, 209 (1962) (far less misleading); Caylor v. Atchison, Topeka & Santa Fe Ry., 190 Kan. 261, 264, 374 P.2d 53, 55 (1962) (far less misleading).

[135] *E.g.*, Graeff v. Baptist Temple, 576 S.W.2d 291, 302 (Mo. 1978) (custom and practice); Duguay v. Gelinas, 104 N.H. 182, 187, 182 A.2d 451, 454 (1962) (custom and practice). Recall that some jurisdictions permit per diem arguments precisely because they are considered a logical extension of the practice of arguing a total monetary amount. *See* notes 114-16 *supra* and accompanying text.

[136] This discussion is not intended to be an exhaustive examination of the *Botta* Rule in other jurisdictions. The cases presented here highlight the New Jersey supreme court's expansion of the *Botta* Rule in Cox v. Valley Fair Corp., 83 N.J. 381, 416 A.2d 809 (1980). *See* text accompanying notes 219 & 235-37 *infra*.

[137] 576 S.W.2d 291 (Mo. 1978).

[138] *Id.* at 303. The Missouri Supreme Court in 1959 adopted the *Botta* prohibition in Faught v. Washam, 329 S.W.2d 588, 603 (Mo. 1959). The court refused to permit a job offer argument in which the attorney offered the jurors the job of suffering plaintiff's disability for three dollars a day. *Id.* at 601-02. The court held that the job offer argument was improper because it was an appeal to the golden rule and suggested the use of a mathematical formula. *Id.* at 602, 604. Moreover, the job offer technique was considered particularly unfair because it preyed upon the "motivating emotions and besetting frailties of the courts, counsel and jurors." *Id.* at 604. In subsequent Missouri cases, arguments bordering on the per diem technique were not deemed improper unless the defendant contended that the verdict was excessive. These courts reasoned that errors in argument concerning the computation of damages related to the size of the verdict, and therefore, could not be deemed prejudicial absent a claim of excessiveness. McCormick v. Smith, 459 S.W. 2d 272, 278 (Mo. 1970); Chambers v. City of Kansas City, 446 S.W. 2d 833, 841 (Mo. 1969); Ricketts v. Kansas City Stockyards, 537 S.W.2d 613, 623 (Mo. App. 1976).

[139] 576 S.W.2d at 303. The *Graeff* court distinguished between "pure per diem" arguments in which a monetary value for pain is applied to a unit of time, and the lump sum and job offer approaches in which there are no strict per diem computations. The job offer argument was disapproved, however, because it included an appeal to the golden rule. *Id.* at 302.

the verdict was not excessive, the *Graeff* court could not be persuaded that the lump sum per period argument was prejudicial even though the verdict returned was identical to the maximum amount suggested.[140] Thus, *Graeff* demonstrates that where a total dollar amount is suggested for a span of time as opposed to a unit of time, and the resulting verdict is not excessive, there is no per diem violation under the Missouri prohibition.

In the three cases that follow, *Botta* Rule courts in different jurisdictions have permitted "illustrative" per diem arguments and thereby eroded the *Botta* Rule. An Illinois appellate court modified that state's per diem prohibition in *Warp v. Whitmore*.[141] The court in *Warp* did not find reversible error where counsel's argument merely suggested a per diem formula but did not imply that it was the only or the correct method for computing damages.[142] There, the attorney suggested $100 a year over the remaining life expectancy for plaintiff's pain and suffering.[143] He indicated that based on the jury's view of reasonable compensation, the suggested figures might "be high or low."[144] The court reasoned that the absence of an objection by the defense attorney and the failure of plaintiff's attorney to challenge his adversary "to offer a better 'scheme' for [determining] . . . damages" supported its finding of no error.[145] As in previous Illinois appellate decisions, the court approved this "illustrative" line of reasoning.[146] If the Illinois Supreme Court follows this line of appellate cases, its acceptance of illustrative per diem arguments would overrule that court's former prohibition of mathematical formulas.

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[140] *Id.* at 303-04. The *Graeff* court's conclusion concerning the size of the verdict issue should be compared with the New Jersey supreme court's ruling in *Cox* where the court found that a large verdict, although not excessive, indicated impermissible influence on the minds of the jurors. 83 N.J. at 386, 416 A.2d at 812. *See* notes 204-05 *infra* and accompanying text.

[141] 123 Ill. App. 2d 157, 260 N.E.2d 45 (1970). In Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962) the Illinois Supreme Court prohibited the use of per diem arguments and indicated that illustrative arguments were no less harmful. It noted that use of a cautionary instruction with an illustrative argument would not cure its misleading effect. *Id.* at 393-94, 182 N.E.2d at 208-09. Further, the court suggested that the jury could better determine reasonable compensation without being fettered by an attorney's partisan views on the value of pain. *Id.* The accepted practice of counsel suggesting a total monetary award was not affected by the per diem prohibition, since it was considered "far less misleading" than use of formula arguments. *Id.* at 394, 182 N.E.2d at 209.

[142] 123 Ill. App. 2d at 164, 260 N.E.2d at 49.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See id. See, e.g.*, Fortner v. McDermott, 1 Ill. App. 3d 358, 367-68, 272 N.E.2d 503, 510 (1971). *Cf.* Fintak v. Catholic Bishop, 51 Ill. App. 3d 191, 198, 366 N.E.2d 480, 485 (1977) (limiting instruction given, harmless error due to lack of excessive verdict). In *Fintak*, the appellate court acknowledged that it was improper "to urge a *per diem* formula for computing damages." 51 Ill. App. 3d at 198, 366 N.E.2d at 485. However, citing *Warp* and *Fortner* with

In 1965, the Supreme Court of Hawaii ruled that per diem arguments were improper and prohibited them.[147] The legislature subsequently promulgated a statute allowing attorneys to argue "in terms of suggested formulas for the computation of damages or by way of other illustration."[148] Five years after the first decision, the Hawaii supreme court, in *Barretto v. Akan*, was presented with the conflict between the aforementioned statute and its prior proscription against the per diem approach.[149] The defendant in *Barretto* challenged the statute as a violation of the separation of powers doctrine. The Hawaii court, however, did not reach the constitutional question, choosing instead to overrule that part of the previous opinion prohibiting the use of formula arguments.[150] The court expressed confidence in the jury's ability to recognize veracity and reasonableness in exercising its function of weighing and reconciling conflicting evidence arising from the use of the per diem approach.[151] Consequently, the court approved the use of the illustrative technique when accompanied by a cautionary instruction.[152]

The Wyoming Supreme Court adopted the *Botta* Rule[153] in a case involving a "persuasive" per diem argument.[154] In a later case,

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approval, the court found no reversible error where the attorney had merely suggested a per diem formula, and the trial court had given a limiting instruction after sustaining defense counsel's objection to the argument. *Id.* In addition, the court found that since the verdict was not excessive in light of the injuries proven, the trial court did not abuse its discretion in finding that the error did not result in prejudice. *Id.*

[147] Franco v. Fujimoto, 47 Hawaii 408, 418-20, 390 P.2d 740, 747-48 (1964). The *Fujimoto* court did not follow *Botta's* prohibition against informing the jury of the ad damnum clause. It found that the sole purpose of the ad damnum clause was to inform the jury of the amount sought and not to affect the jurors' reasoning process. *Id.* at 442, 390 P.2d at 748-49. Consider *Botta's* rationale for prohibiting reference to the ad damnum clause, see notes 87 & 88 *supra* and accompanying text.

[148] HAWAII REV. STAT. § 635-52. In sum, the statute provided for suggestion or illustration of formulas and argument of the total amount expected by the plaintiff. *Id.*

[149] 51 Hawaii 383, 463 P.2d 917 (1969).

[150] *Id.* at 387, 393, 463 P.2d at 920, 923.

[151] *Id.* at 394, 463 P.2d at 923. A typical conflict arising under the per diem approach would involve plaintiff's and defendant's attorneys presenting differing estimates of the value of pain, the time suffered, or the effect of analgesics on the injured party.

[152] *Id.*, 463 P.2d at 923-24. The *Barretto* court maintained that a judge's charge to the jury provides a sufficient safeguard against possible prejudice arising from the per diem approach. *Id. Barretto* exemplifies the typical approach to allowing per diem arguments which is to permit illustrative arguments when accompanied by a cautionary instruction. *See* notes 56 & 127 *supra*.

[153] Henman v. Klinger, 409 P.2d 631, 633 (Wyo. 1966). The *Henman* court concluded that the *Botta* Rule was "better suited to safeguard the fundamentals of a fair trial of the factual issue of reasonable compensation . . . and [did] not serve unduly to restrain the prerogatives of counsel to argue all legitimate inferences . . . from the evidence." *Id.*

[154] In Henman v. Klinger, 409 P.2d 631 (Wyo. 1966), the following persuasive argument was presented:

> "[T]his man was hurt and hurt horribly and he was in excruciating pain and most of the time it was indescribable pain, and he was in the hospital for seventy days

Combined Insurance of America v. Sinclair,[155] the attorney argued that a monetary value could be placed on suffering when he suggested:

> "[A] physician . . . was paid one hundred seventy-six dollars to stop pain during the operation. . . . Now that is what he charged. And you have to make that decision. This pain, what is it worth, a dollar a day, a dollar a week?"[156]

The court held that while counsel's remarks "[came] seriously close to infringing upon the 'unit of time' argument, they [fell] somewhat short."[157] Since the attorney clearly suggested a per diem formula of "a dollar a day" or "a dollar a week," it may be argued that the *Sinclair* court differentiated between an impermissible persuasive argument and a permissible illustrative one rather than per diem versus non per diem.[158]

The courts in *Warp*, *Barretto*, and *Sinclair* have modified the *Botta* Rule in their respective jurisdictions by permitting arguments which are beyond the spirit if not the literal bounds of the rule, thus eroding the *Botta* principle to such an extent that it is no longer a viable prohibition to the per diem method. The New Jersey courts, however, have taken the opposite approach when presented with an opportunity to reexamine the scope of the rule.[159]

THE NEW JERSEY APPROACH

The Botta *Rule As Applied*

The *Botta* decision has been followed, for the most part, in subsequent New Jersey decisions.[160] In *Cross v. Robert E. Lamb Co.*,[161]

> . . . . [W]hat would you take in money for seventy days in the hospital in this kind of pain? . . . I don't know what you would take for it, but I am going to say in this case the evidence is of such a nature that you could award $200.00 a day for that seventy days."

Id. at 632 (quoting summation). The court noted that this statement contained a clear appeal to the golden rule and violated the prohibition against per diem arguments. *Id.* at 632-34. For a discussion of "persuasive" per diem arguments, see notes 63-67 *supra* and accompanying text.

[155] 584 P.2d 1034 (Wyo. 1978).

[156] *Id.* at 1050 (quoting summation).

[157] *Id.* In addition, the *Sinclair* court reasoned that since the verdict was not excessive, the jury was not impermissibly roused to "passion and prejudice by the argument." *Id.* at 1051. The court also indicated that defense counsel, after objecting to the argument, should have asked the trial judge to admonish the jury to disregard the statement. *Id.* at 1050-51.

[158] *See id.* at 1050; text accompanying notes 68-69 *supra*; notes 54-67 *supra* and accompanying text.

[159] *See* text accompanying notes 219 & 235-37 *infra*.

[160] See Carton, *supra* note 5, at 448 n.24, for a collection of cases applying the *Botta* Rule.

[161] 60 N.J. Super. 53, 158 A.2d 359 (App. Div. 1960), *certif. denied*, 32 N.J. 350, 160 A.2d 847 (1960).

however, the appellate division authorized a blackboard illustration of damages arguably beyond the scope of the *Botta* Rule and in so doing mitigated the effect of the rule.[162] The attorney listed plaintiff's life expectancy in years, weeks, and days. Past and future lost earnings were computed and totaled. The past pain and suffering entry stated the number of days from the accident to the trial with a blank for the dollar total. The future pain and suffering notation indicated that the plaintiff should receive one lump sum for the remainder of his life and had a blank for the total.[163] On appeal, the defendant contended that the blackboard argument with its references to figures and computations resulted in an inflated verdict.[164] The appellate division held that counsel's blackboard argument did not connote a per diem formula for pain and suffering.[165] Thus, listing plaintiff's life expectancy in days and weeks together with an entry for pain and suffering did not

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[162] *Id.* at 76-77, 158 A.2d at 371-72. *See* notes 222-24 *infra* and accompanying text. Blackboards are frequently used by attorneys for explanation, specification and argument. 60 N.J. Super. at 73, 158 A.2d at 370. Generally, attorneys can write on a blackboard whatever they can "argue as a legitimate interpretation of or inference from the evidence." *Id.* at 75, 158 A.2d at 371. Any figures used, however, must have some evidentiary basis. *Id.* at 75, 158 A.2d at 371. According to *Cross*, states following the *Botta* Rule do not allow dollar figures for pain and suffering to be written on blackboards. Since pain cannot be translated into dollars, such figures lack a basis in evidence. *Id.*, 158 A.2d at 370-71.

[163] 60 N.J. Super. at 73, 158 A.2d at 370. Plaintiff's counsel drew the following chart on the blackboard during his argument:

HOWARD CROSS—
10/17/17—41—Exp. 30.29 yrs. = 1575 wks. = 11,000 days
Age 65—23½ yrs.

$4.25	$4.25		
−2.50	−2.75		
$1.75 less	$1.50 less		
		Medical expenses	$ 587.00
		Lost wages 142 days @ $32.00	4,544.00
			$5,131.00
		Pain and suffering to present 485 days	$
	Future:		
	$1.75 × 40 = $70 × 52 = $3640 less per year		
	$1.50 × 40 = $60 × 52 = $3120 less per year		
	$3640 per year × 30 years = $109,200.00		
	$3120 per year × 30 years = $ 93,200.00		
	$3640 per year × 23½ years = $ 85,540.00		
	$3120 per year × 23½ years = $ 72,320.00		
	Pain and suffering, for rest of life—one lump sum.		$
			$

Id.

[164] *Id.* at 72-73, 158 A.2d at 370.

[165] *Id.* at 76-77, 158 A.2d at 371-72.

suggest that the jury decide on an amount per day or per week and multiply that figure by the number of days or weeks of life expectancy.[166] The *Cross* court found that the references were not prejudicial because the chart suggested no dollar unit or total figures for pain and suffering.[167] Although some entries might have reminded the jury that the plaintiff had suffered for 485 days since the accident and would continue to suffer, this effect was permissible because the existence and permanency of the plaintiff's pain could have been inferred from the evidence.[168] Moreover, since it was proper to show the jury the plaintiff's life expectancy in terms of years, the court found no prejudicial effect in translating that expectancy into days or weeks.[169] Counsel had merely told the jury what it could calculate for itself.[170] The *Cross* holding was arguably beyond the scope of the *Botta* Rule because the court approved the illustration of an argument in which the time periods for pain and suffering were segmented into days.[171]

More recently, the *Botta* Rule was reaffirmed by a New Jersey supreme court decision upholding the reversal of a one million dollar verdict. In *Gilborges v. Wallace*,[172] the infant plaintiff was catastrophically injured when the car in which she was a passenger collided with a truck.[173] The Gilborges' attorney, in his closing statement, commented that a movie provides two hours of entertainment for three, four, or five dollars, but " '[h]ow much is one hour of pain and suffering worth?' "[174] He continued his argument by alluding to large jury verdicts in urban areas as opposed to notoriously small verdicts in rural areas such as Burlington County.[175] In addition, the attorney repeatedly used the word "millions" in relation to plaintiff's

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[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.* N.J. Ct. R. 1:13-5 provides that "[t]he tables of mortality and life expectancy printed as an Appendix to these rules shall be admissible in evidence as prima facie proof of the facts therein contained." *Id.* The table of mortality, stated in terms of years, is a general guide for the jury which must exercise its discretion in estimating the expected length of the plaintiff's life. Kappovich v. LeWinter, 43 N.J. Super. 528, 532-33, 129 A.2d 299, 301 (App. Div. 1957).

[170] 60 N.J. Super. at 76-77, 158 A.2d at 371-72.

[171] *See* Carton, *supra* note 5, at 452 n.44; notes 220-27 *infra* and accompanying text.

[172] 153 N.J. Super. 121, 379 A.2d 269 (App. Div. 1977), *aff'd in part*, 78 N.J. 342, 396 A.2d 338 (1978).

[173] 153 N.J. Super. at 126, 379 A.2d at 271. Rosemarie Gilborges, age sixteen, was totally paralyzed and suffered severe brain damage due to the automobile accident. Her parents, as guardians ad litem, subsequently sued multiple defendants for her injuries. *Id.*

[174] *Id.* at 140, A.2d at 278 (quoting summation). The attorney then related the value of an hour of suffering to the determination of "'reasonable and adequate compensation'" for plaintiff's injuries. *Id.*

[175] *Id.* at 141, 379 A.2d at 279.

injuries.[176] Finally, after discussing the parents' emotional loss, he asked the jurors if they knew what that loss was worth.[177] The jury awarded the plaintiff one million dollars for her injuries.[178]

The appellate division held that counsel's summation violated the *Botta* Rule[179] and reversed the verdict.[180] The attorney's attempt to equate the price of pain per hour with the cost of a movie ticket was held to constitute an indirect suggestion of a per diem formula.[181] The court, in its analysis, focused upon the attorney's conscious intent to influence the jury impermissibly which was evidenced in part by his attempt to suggest subliminally a one million dollar figure to the jury.[182] The court relied heavily on the attorney's lecture, given after the trial, on his "one million dollar summation."[183]

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[176] *Id.* at 142, 379 A.2d at 279.

[177] *Id.*, 379 A.2d at 280.

[178] *Id.* at 126-27, 379 A.2d at 271, 272.

[179] *Id.* at 140-41, 379 A.2d at 279.

[180] *Id.* at 143, 379 A.2d at 280. The case was remanded for a new trial on the issue of damages. *Id.* The appellate division reviewed the questionable summation, notwithstanding the lack of objection to it at trial, because the *Gilborges*' closing statements clearly violated judicially promulgated standards of propriety concerning argument, including the *Botta* Rule. *Id.* at 139-41, 379 A.2d at 278-79. The court cautioned attorneys that modeling their closing arguments after the *Gilborges* summation could result in an injured plaintiff losing a deserved verdict. *Id.* at 140, 379 A.2d at 278. It also noted that although the Gilborges' attorney's remarks may have been motivated by a desire to zealously represent his client, they were nonetheless, "unnecessary and prejudicial." *Id.*

[181] *Id.* at 140-41, 379 A.2d at 279. The appellate division's description of the movie ticket comment, as "an oblique, but nevertheless transparent, attempt to circumvent the principles of *Botta*," *id.* at 140, 379 A.2d at 279, supports the view that this was an indirect suggestion of a per diem formula. *Id.* The supreme court, however, found that the summation clearly violated the guidelines stated in *Botta*. 78 N.J. at 353, 396 A.2d at 343. These comments can be harmonized by recalling that the *Botta* Rule prohibits both direct and indirect suggestions of per diem sums for pain. 26 N.J. at 99, 103, 138 A.2d at 722, 725. Under a strict interpretation of a formula—applying a dollar figure to a unit of time—the movie ticket comment falls short of directly suggesting a formula. A per diem sum can be inferred, however, from the juxtaposition of the comment concerning $3 for two hours of enjoyment, and the question how much is an hour of pain worth. Thus, an indirect suggestion is characterized by a need to use inference to identify a formula. When compared with the *Botta* formula of fifty cents an hour, the *Gilborges* movie ticket comment is clearly a violation of *Botta* by indirect suggestion. For an even more expansive reading of the indirect suggestion, see Cox v. Valley Fair Corp., 83 N.J. at 385-86, 416 A.2d at 812. *See also* text accompanying notes 213-19 & 235-37 *infra*.

[182] 153 N.J. Super. at 139-42, 379 A.2d at 278-80.

[183] *Id.* at 140-42, 379 A.2d at 278-80. On its own motion, the appellate division supplemented the record with the *Gilborges* attorney's lecture on his "one million dollar summation." *Id.* at 139-40, 379 A.2d at 278. The court examined the lecture to demonstrate the impropriety of the argument. *Id.* In his lecture, the Gilborges' attorney stressed the use of words such as "'astronomical,'" "'big case,'" and "'millions of ways.'" *Id.* at 142, 379 A.2d at 279-80. He advised that use of these words helps jurors relate to the plaintiff in a way that can be translated into dollars and cents. *Id.*, 379 A.2d at 279. Apparently, the attorney was more concerned with presenting and keeping the idea of "millions" before the jury than with presenting a formula. *Id.*, 379 A.2d at 280.

On appeal, the Supreme Court of New Jersey agreed that counsel's summation violated the guidelines set forth in *Botta*.[184] The attorney's suggestion of a per diem formula prejudiced the defendant's right to have the damages fairly ascertained.[185] Accordingly, the court expressly reaffirmed the *Botta* Rule that an attorney may not suggest per diem sums to the jury for pain and suffering.[186] Again, such suggestions were viewed as injecting speculation into the trial on a matter incapable of being evaluated.[187] Thus, *Gilborges* reinforced the letter and spirit of the *Botta* Rule.

Cox v. Valley Fair Corp.—Botta *Extended*

The most recent development in the *Botta* prohibition against per diem arguments was announced in *Cox v. Valley Fair Corp.*[188] In that case, plaintiff sought recovery of damages for personal injuries arising from a slip-and-fall accident in defendant's supermarket.[189] Medvin, plaintiff's counsel, focused upon the issue of damages during his closing statements.[190] He gave " 'an example of how we . . . put a monetary value on pain' " when he argued:[191] " 'Your dentist examines your mouth and he sees a bad tooth. . . . [I]t is very possible for him to take that tooth out without giving you any painkiller, . . . [b]ut how many of us wouldn't pay the extra few dollars to have a painkiller to avoid that pain?' "[192] Medvin then asked the jury to "'think what it means to suffer on a daily basis'" for a lifetime when evaluating the plaintiff's intangible damages.[193] He also informed the jury that plaintiff's life expectancy was 31 years, or 11,000 days when

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[184] 78 N.J. at 353, 396 A.2d at 343. In reviewing the *Botta* violation, the supreme court did not consider the attorney's lecture. *Id.* It did indicate, however, that reference to the parents' emotional loss was improper, since the parents had not sued for damages in their own right. *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] 83 N.J. 381, 416 A.2d 809 (1980).

[189] *Id.* at 383, 416 A.2d at 810. Ruby Cox suffered arm, leg, and back injuries as a result of the fall. She then underwent physical therapy treatments for approximately eleven months. *Id.* At the time of the trial, Mrs. Cox still complained of stiffness, soreness, and occasional numbness in her leg. Testimony indicated her disabilities were permanent and directly related to the fall. Mrs. Cox's special damages included $500 in lost wages and $627.25 in medical expenses. *Id.* Mr. Cox joined his wife in the suit seeking *per quod* damages. *Id.* The jury awarded him $1,000, but the appellate division vacated this judgment. *Id.* at 387, 416 A.2d at 812. On appeal, the supreme court reinstated the judgment of $1,000 for Mr. Cox finding that the errors in summation did not affect this award. *Id.*

[190] *Id.* at 384-85, 416 A.2d at 811-12.

[191] *Id.* at 385, 416 A.2d at 811 (quoting summation).

[192] *Id.* at 384-85, 416 A.2d at 811 (quoting summation).

[193] *Id.* at 385, 416 A.2d at 811 (quoting summation).

multiplied out, and argued that she was "'entitled to fair compensation, not nominal, but fair compensation for each and every one of those days.'" [194] The jury returned a verdict of $51,200.[195] The trial judge refused to overturn the verdict as excessive because the award was not so disproportionate as to be manifestly unjust.[196] He did not comment on the *Botta* question.[197] The appellate division, when confronted with the issue, held that counsel's summation violated *Botta* and remanded for a new trial on the issue of damages only.[198] Certification was granted to determine whether the appellate division had unnecessarily extended *Botta*.[199]

In an opinion authored by Justice Sullivan, the Supreme Court of New Jersey held that counsel's summation contained a "subtle appeal" to the golden rule and clearly suggested a per diem formula, thus violating the prohibitions of *Botta*.[200] The golden rule was invoked by counsel's suggestions "that the members of the jury consider the few extra dollars they would be willing to spend to avoid the pain of a tooth extraction and to think what it means to suffer on a daily basis." [201] The court found a per diem formula suggested in counsel's reference to plaintiff's daily pain, people's willingness to pay a few extra dollars for a painkiller, and plaintiff's life expectancy in days with a request for fair compensation for each day.[202] The court found this to be a "patent violation" of the *Botta* Rule, reasoning that the summation must be considered as a whole, regardless of whether any particular statement, standing alone, violated *Botta*.[203] Justice Sullivan also examined the effect of counsel's summation on the jury's verdict. He held that though the trial court did not find the verdict manifestly unjust [204] the size of the verdict indicated that the per diem argument of counsel "impermissibly influenced the jury." [205]

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[194] *Id.* at 385, 416 A.2d at 811 (quoting summation). The defendant's attorney objected to Medvin's comments that a monetary value could be placed on pain and suffering. *Id.*, 416 A.2d at 811-12.

[195] *Id.* at 383, 416 A.2d at 810.

[196] *Id.*

[197] *Id.* at 383-84, 416 A.2d at 810. The trial judge's failure to comment may indicate that he did not find a *Botta* violation in the summation.

[198] *Id.* at 384, 416 A.2d at 810.

[199] *Id.* at 383, 416 A.2d at 810.

[200] *Id.* at 385, 416 A.2d at 812. The supreme court affirmed the remand for a new trial on Mrs. Cox's damages. *Id.* at 387, 416 A.2d at 812.

[201] *Id.* at 385, 416 A.2d at 812.

[202] *Id.* at 385-86, 416 A.2d at 812.

[203] *Id.* at 386, 416 A.2d at 812.

[204] *Id.*

[205] *Id.* In a dissenting opinion, Justice Handler disagreed with the majority and asserted that counsel's summation was within the bounds of reasonable advocacy. *Id.* at 387, 416 A.2d at 813

The Implications of Cox

The Supreme Court of New Jersey in *Cox* found an implicit appeal to the golden rule in a neutral statement and applied the *Botta* Rule to a summation that did not suggest a per diem formula. In addition, the courts analysis of the size of the verdict departed from previous treatment of what constituted an improper argument.[206]

The apparent expansion of what constitutes an appeal to the golden rule is suggested by the court's characterization of the appeal as a subtle one.[207] In *Botta*, the attorney told the jurors to put themselves in the plaintiff's position, to think about how much they would want to endure this painful experience, and then suggested fifty cents an hour.[208] The first requirement of asking the jurors to step into the shoes of the injured party might be satisfied in *Cox* by Medvin's suggestion that the jury " 'think what it means to suffer on a daily basis.' "[209] But the second requirement that the jurors be asked to consider how much they would want to be paid to suffer this pain, or how much the injured party would probably want, does not appear to

(Handler, J., dissenting). He criticized the majority for interpreting *Botta's* fair and reasonable compensation standard "too sweepingly and [too] severely," by misapplying it to the facts. *Id.* at 388, 416 A.2d at 813 (Handler, J., dissenting). Focusing on the absence of a specific monetary figure, Justice Handler found no suggestion of a per diem argument or a "subtle appeal" to the golden rule. *Id.* He noted that the tooth extraction example lacked a specific monetary suggestion and merely demonstrated that pain is compensable. He further commented that there was no impropriety in stating Cox's life expectancy in days. *Id.*

During the course of his summation, Mr. Medvin commented on the relationship between out-of-pocket expenses and the intangible damages of pain and suffering. He stated:

> [W]e are talking about . . . out-of-pocket expenses of $1,200.
>
> Members of the jury, that represents a tiny fraction of the total damages in this case because merely to contemplate something for their out-of-pocket expenses doesn't begin, doesn't even start to take into consideration the second element, damages, what I call the intangible element of damages, pain and suffering, permanent disability. So the $1,200 of out-of-pocket expenses is nothing in relation to these intangibles.

Petition for Certification and Appendix for Petitioners at PA-12, Cox v. Valley Fair Corp., 83 N.J. 381, 416 A.2d 809. Justice Handler found Medvin's comment that out-of-pocket expenses would not constitute reasonable compensation in light of plaintiff's pain and suffering was "reasonable and accurate." 83 N.J. at 388, 416 A.2d at 813 (Handler, J., dissenting). Further, since no court found the verdict excessive, he viewed counsel's remarks as not "so suggestive" as to require the verdict be overturned. *Id.* at 388-89, 416 A.2d at 813 (Handler, J., dissenting). Hence, Justice Handler found no violation of the *Botta* Rule. *Id.*

[206] *See* notes 238-47 *infra* and accompanying text.

[207] *Id.* at 385, 416 A.2d at 812. The *Cox* court restated the *Botta* prohibition against the golden rule: an attorney may not suggest "to the jury that it apply the 'golden rule' under which jurors would fix what they would want as compensation if they had sustained the injuries, or what the pain and suffering would be worth to them." *Id.* at 384, 416 A.2d at 811.

[208] 26 N.J. at 92, 138 A.2d at 718. *See* note 75, and text accompanying notes 75 & 78-80 *supra*.

[209] 83 N.J. at 385, 416 A.2d at 811 (quoting summation). *See* notes 32-35 *supra* and accompanying text.

have been met.[210] To ask, " 'how many of us wouldn't pay the extra few dollars to have a painkiller to avoid th[e] pain,' "[211] is not equivalent to a request that the jurors give the plaintiff the amount of compensation they would want for this pain and suffering.[212]

The *Botta* prohibition against per diem arguments was also pushed to the outer limits in *Cox*.[213] Prior to *Cox*, an attorney could not directly or indirectly suggest a dollars per unit of time formula for pain and suffering. A comparison of the "per diem formulas" identified under the *Botta* Rule, however, reveals that the New Jersey courts have not required a strict formula. For example, in *Botta* the attorney suggested fifty cents an hour.[214] In *Gilborges*, the attorney, after noting that three, four or five dollars would purchase two hours of entertainment, asked how much an hour of pain was worth.[215] In *Cox*, however, it is difficult to isolate the particular language that suggests a formula. Plaintiff's counsel asserted that people can and do place a monetary value on pain in their everyday lives and then demonstrated this evaluation through his tooth extraction example.[216] In so doing, he contradicted *Botta's* underlying rationale, that is, pain and suffering have no known dimensions and cannot be equated with dollars and cents.[217] The court reacted by finding an attenuated formula in Medvin's comments with respect to an " 'extra few dollars' " for a painkiller, repeated references to daily pain and

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[210] *See* 83 N.J. at 384, 416 A.2d at 811; 26 N.J. at 94, 138 A.2d at 719.

[211] 83 N.J. at 385, 416 A.2d at 811 (quoting summation).

[212] Justice Handler, in his dissenting opinion, stated that the tooth extraction example was not monetarily specific enough to constitute an appeal to the golden rule. *Id.* at 385, 416 A.2d at 813 (Handler, J., dissenting). Rather than urging the jurors to put themselves in the plaintiff's shoes, this example was used rhetorically to show that pain is a factor to be considered in determining damages. *Id.* Despite Justice Handler's perceptive analysis, it is questionable whether the suggestion of a particular dollar figure is necessary for a golden rule argument. *See* notes 32-35 *supra* and accompanying text.

[213] One commentator has succinctly described the effect of the *Cox* decision on the *Botta* Rule:

> With the advent of Cox, the law went from a prohibition against equating a unit of time with a unit of money, which is a relatively precise and definable mathematical formulation, to barring all "subtle" allusions to an assessment of damages, which include as a part of the equation the element of time and duration of pain and suffering.

Stein, *Expansion of the* Botta *Rule*, 106 N.J.L.J. 189, 189 (1980).

[214] *See* note 75 *supra* and accompanying text.

[215] *See* text accompanying note 174 *supra*. When the *Gilborges* summation is analyzed in light of the *Cox* holding, *Gilborges* appears to lose its status as the outermost limit of what constitutes an indirect suggestion. *See* note 181 *supra*. An indirect suggestion of a per diem formula in New Jersey may now be presented even if there is no mention of a dollar amount. *See* 83 N.J. at 385-86, 416 A.2d at 812.

[216] *See* text accompanying notes 191-92 *supra*.

[217] 26 N.J. at 92-93, 95-96, 138 A.2d at 718-20.

suffering, and the statement of plaintiff's life expectancy in days coupled with the request for fair compensation for each day.[218] Perhaps the court found a dollar amount per unit of time suggestion in the above statements, but it may not be necessary to identify these elements with specificity under *Cox*. Arguably some comments taken separately did not violate the *Botta* Rule, but the court concluded that the summation must be looked at as a whole.[219]

Particular attention should be given to the comment on plaintiff's life expectancy in days,[220] since this statement relates to *Botta's* prohibition against considering per hour or per diem sums.[221] In *Cross*, the appellate division held that stating plaintiff's life expectancy in days did not suggest a per diem formula,[222] nonetheless, the blackboard illustration was highly suggestive. Segmenting life expectancy into days focused the jury's attention on evaluating pain in terms of a daily amount of compensation. Further, the chart viewed as a whole reflected the notion of a formula; the entries for past and future lost earnings were computed on a per diem basis and the jury could have readily applied the logic of determining lost earnings to the question of damages for pain and suffering.[223] Hence, the essence of a per diem formula was implicitly suggested but no violation of the *Botta* Rule was found.[224] In contrast, a reference to life expectancy in days in *Cox* was deemed to be part of a per diem formula.[225] The court apparently found the reference tainted by its relationship to the other statements in the summation, the overall effect generating the suggestion of a formula.

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[218] 83 N.J. at 385-86, 416 A.2d at 812 (quoting summation). Justice Handler, in his dissenting opinion, interpreted this example more realistically noting that it merely demonstrated that pain is compensable. He also noted that a *Botta* violation required a specific mention of a monetary amount. 83 N.J. at 388, 416 A.2d at 813 (Handler, J., dissenting). *See* note 205 *supra*.

[219] 83 N.J. at 386, 416 A.2d at 812.

[220] *Id.* at 385, 416 A.2d at 811.

[221] *See* 26 N.J. at 99, 103, 138 A.2d at 722, 724.

[222] 60 N.J. Super. at 76-77, 158 A.2d at 372.

[223] *See* note 163 *supra*. Consider the discussion of the *Cox* approach to finding a *Botta* violation—looking at the summation as a whole. *See* text accompanying note 219 *supra*, and notes 226 & 227 *infra* and accompanying text.

[224] *See* 60 N.J. Super. at 77, 158 A.2d at 372. *See generally* Carton, *supra* note 5, at 452 n.44. Reconsidering *Cross* in light of the per diem approach in other jurisdictions, the blackboard illustration approved therein could be characterized as an illustrative argument which suggests the mechanics of a formula without presenting specific dollar values for pain. *See* note 62 *supra* and accompanying text.

[225] 83 N.J. at 385-86, 416 A.2d at 812. Justice Handler, in his dissenting opinion, found no impropriety in Medvin's statement of plaintiff's life expectancy in days. He reasoned that "[t]he remaining life expectancy of a personal injury plaintiff—whether measured in years, months or days—is a fact quite properly before the jury and, thus, permissible for inclusion in summation." *Id.* at 388, 416 A.2d at 813 (Handler, J., dissenting).

It is unclear whether *Cross* remains good law in light of the *Cox* holding.[226] Perhaps stating plaintiff's life expectancy in days, absent other improper comments,[227] is not a violation of the *Botta* Rule. However, the subjective analysis applied by the *Cox* court does not provide any useful guidelines. It may be very difficult to determine when the juxtaposition of particular phrases suggests a formula. Although there is clearly no magic incantation that identifies a per diem formula, the *Botta* analysis as applied in *Cox* leaves the area in hopeless confusion.

Careful examination of the *Cox* decision in light of New Jersey precedent provides some insight into the changed scope of what constitutes a per diem argument, but the extent of this expansion and its appropriateness in the 1980's can be more fully appreciated when viewed against the background of the development of the per diem technique in other jurisdictions.[228] The closing argument in *Cox* has properties similar to those constituting an illustrative per diem argument.[229] It may be recalled that the attorney presents a per diem formula merely as a method for calculating damages for pain and suffering under the illustrative approach. Implicit in the reasoning of the jurisdictions that allow this form of argument is the notion that jurors can establish a value for pain. The argument then suggests a method for computing the damages.[230] In the *Cox* summation, Medvin proposed that people can and do place a monetary value on pain in their everyday lives.[231] He carefully refrained from suggesting any actual figures.[232] Compare this component of the *Cox* argument with the closing statement in *Sinclair* which "came seriously close" but fell short of infringing upon Wyoming's per diem prohibition.[233] The attorney, in *Sinclair*, presented an analogous physician-operation example in order to illustrate how the avoidance

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[226] The *Cox* court did not address the question of the continued validity of the *Cross* holding. Given the court's reasoning that a permissible comment may be part of a *Botta* violation based upon the context in which it was presented, a court would clearly have the tools to invalidate a reference to life expectancy in days without explicitly prohibiting it. *See id.* at 386, 416 A.2d at 812.

[227] Since improper comments may be defined by their context, a court has almost unlimited ability to expand the scope of the *Cox* formulation of the *Botta* Rule. In effect, a court could construct violations of the rule solely from implications drawn from the context of the statements. *See id.*

[228] *See* notes 54-67 & 136-59 *supra* and accompanying text.

[229] *See* 83 N.J. at 384-85, 416 A.2d at 811.

[230] *See* text accompanying note 56 *supra*.

[231] 83 N.J. at 384-85, 416 A.2d at 811. *See* text accompanying notes 191 & 216 *supra*.

[232] 83 N.J. at 384-85, 416 A.2d at 811.

[233] 584 P.2d at 1050. *See* text accompanying note 156 *supra*.

of pain may be valued. It should be noted that this example went beyond *Cox* in that the attorney placed a dollar figure on that avoidance.[234]

The majority's finding of a patent violation in the *Cox* summation demonstrates the expanded reach of the *Botta* prohibition.[235] Clearly, the process of implication necessary in *Cox* to identify the suggestion of a per diem formula indicates that the argument would lie on the outermost periphery of the illustrative approach.[236] While Medvin's comments were somewhat beyond an illustrative argument which merely proposes the mechanics of a mathematical formula without suggesting a particular dollar value,[237] the suggestion, if any, that the jury formularize pain was implicit, not patent as suggested by the court.

Prior to *Cox*, the amount returned by the jury was not considered relevant to a *Botta* violation since the prejudice was believed to be the impermissible influence on the jury, and not merely a large verdict.[238] The *Botta* court had focused primarily on the per diem prohibition as a method of preventing interference with the jury's decision-making process.[239] The court in *Cox* focused on the size of the verdict. This portion of the *Cox* analysis signals the court's most striking departure from the prior formulation of the *Botta* Rule. In determining how close the attorney's comments came to improper argument, Justice Sullivan examined the relationship between the amount awarded and the damages proven.[240] Mrs. Cox had proven $500.00 in lost wages and $672.25 in medical expenses, and had additional claims for pain, suffering, and permanent disability. Justice

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[234] *See* 584 P.2d at 1050; 83 N.J. at 384-85, 416 A.2d at 811.

[235] 83 N.J. at 385-86, 416 A.2d at 812. Looking to other jurisdictions, both sides of the per diem controversy seem to be moving toward approval of the illustrative approach. Many courts approving the per diem approach have limited permissible argument to those of the illustrative type. *See* note 127 *supra*. Further, several courts following the *Botta* Rule have approved arguments similar to or going beyond the closing statement in *Cox*, which have been of the illustrative type. *See* notes 141-46, 152 & 156-58 *supra* and accompanying text.

[236] *Compare* Evening Star Newspaper Co. v. Gray, 179 A.2d 377, 381 (D.C. 1962) (where attorney suggested $3.50 or $7.00 a day) and King v. Railway Express Agency, Inc., 107 N.W.2d 509, 517 (N.D. 1961) (where attorney could only suggest that jury determine per diem value for pain, and multiply it by number of days involved) *with* Cox v. Valley Fair Corp., 83 N.J. at 384-85, 416 A.2d at 811-12 (counsel commented on plaintiff's daily pain, people's willingness to pay a few extra dollars for painkiller, and stated plaintiff's life expectancy in days with request for fair compensation for each day).

[237] *See* note 62 *supra* and accompanying text.

[238] *See* Purpora v. Public Serv. Elec. & Gas Co., 53 N.J. Super. 475, 481, 147 A.2d 591, 595 (App. Div. 1959).

[239] 26 N.J. at 98-103, 138 A.2d at 722-25.

[240] 83 N.J. at 386, 416 A.2d at 812.

Sullivan apportioned the verdict as the jury apparently had: $1,200 in special damages and $50,000 for the subjective complaints.[241] He stated that the trial judge had not taken his analysis far enough in reviewing the verdict and concluded that the size of the verdict may be considered in determining whether the jury was impermissibly influenced.[242] The size of the verdict was held to support the contention that the plaintiff's summation improperly influenced the jury.[243]

The court's analysis distinguished between excessiveness of the verdict[244] and a violation of the *Botta* Rule as demonstrated by the size of the verdict.[245] Under *Cox*, a large verdict alone may indicate impermissible influence on the jury, but the verdict need not be excessive to be considered by the court.[246] The test for an improper argument can now be visualized as a sliding scale.[247] Where there is a clear statement of a formula, it will be deemed a violation of *Botta* regardless of the size of the verdict. Where the suggested formula is more indirect and requires examination of the summation as a whole, the size of the verdict may be considered as an indicator of impermissible influence. In other words, the closer the comments come to the *Botta* line

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[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.* The standards for determining excessive jury verdicts in New Jersey are set forth in notes 278 & 279 *infra* and accompanying text.

[245] 83 N.J. at 386, 416 A.2d at 812. The size of the verdict analysis in *Cox* might also be construed as recognizing excessiveness of the verdict as a criterion under *Botta*. Some courts in other states have held that an excessive verdict is necessary for a violation of the per diem prohibition. *E.g.*, McCormick v. Smith, 459 S.W.2d 272, 278 (Mo. 1970). Other courts have recognized that prejudice resulting from per diem arguments would be manifested in excessive verdicts. *E.g.*, Beagle v. Vasold, 65 Cal. 2d at 180, 417 P.2d at 680, 53 Cal. Rptr. at 136.

[246] 83 N.J. at 386, 416 A.2d at 812.

[247] A comparison of *Botta*, *Gilborges*, and *Cox* will demonstrate the functioning of the sliding scale:

	Formula Suggested	Size of Verdict	Extent of Injuries
Botta	50¢ an hour	$5,500	Severity disputed
Gilborges	$3, $4, $5 for two hours of entertainment, how much is one hour of pain worth?	$1 million	Total paralysis
Cox	Tooth extraction example, life expectancy in days, reference to plaintiff's daily pain	$51,200	Stiffness, soreness, occasional numbness

without actually crossing over, the more important the size of the verdict becomes in finding a violation. Thus, where a verdict is large but not excessive, the court now has an additional avenue of review under the *Botta* Rule.

A REEVALUATION OF THE *BOTTA* RULE

The New Jersey supreme court surprisingly[248] declined the opportunity to reconsider the *Botta* Rule in the context of the *Cox* decision, but indicated that *Botta* might be reconsidered under the proper circumstances.[249] In formulating the rule, the court narrowly circumscribed the scope of permissible argument and effectively foreclosed the presentation of the monetary aspects of pain and suffering by concluding that to admonish the jury to disregard suggested dollar figures is a useless exercise.[250] Further, the expansion in *Cox* unnecessarily brought within the scope of the rule argument beyond the reasonable limits of its application.[251] The implications of this decision underscore the need to reexamine the propriety of per diem arguments.

Policy Considerations

The *Botta* court identified three major policy considerations in analyzing the per diem issue: the scope of permissible summation,[252] the jury's function,[253] and the fair administration of the trial.[254] The scope of summation issue is best described as the legal question of whether counsel's per diem argument is based on independent evidence or legitimate inference.[255] Traditionally, an attorney has been

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[248] Although neither party raised the *Botta* issue at trial or before the appellate division, 83 N.J. at 386, 416 A.2d at 812, the Association of Trial Lawyers of America submitted an amicus brief on the issue. *Id.* The Association took the position that the *Botta* Rule should be overruled and per diem summations permitted in New Jersey or, in the alternative, the *Botta* Rule should not be expanded to proscribe equating pain and suffering over time with money. The Association of Trial Lawyers of America, Amicus Brief, On Behalf of Movant at 2, 9, Cox v. Valley Fair Corp., 83 N.J. 381, 416 A.2d 809 (1980).

[249] 83 N.J. at 386-87, 416 A.2d at 812. One commentator noted that theoretically "no case is a proper one to review the [*Botta*] rule since no attorney who follows the law and the ethical constraints of his profession can rightfully jeopardize his client's case by testing the concept in his summation." Stein, *Expansion of the* Botta *Rule*, 106 N.J.L.J. 189, 194-95 (1980).

He further asserted that no better vehicle existed to test the *Botta* Rule than the *Cox* case, in which the Association of Trial Lawyers of America had already filed an amicus brief, and participation of the Bar could have been easily achieved. *Id.* at 195.

[250] *See* 26 N.J. at 99, 103-04, 138 A.2d at 722, 725.

[251] *See* text accompanying notes 207-19 & 235-37 *supra*.

[252] *See* text accompanying notes 98-100 *supra*.

[253] *See* text accompanying notes 93-97 *supra*.

[254] *See* text accompanying notes 101-05 *supra*.

[255] *See* Recent Decisions, 1962 U. ILL. L.F. 269, 274.

permitted to argue based upon the evidence and any reasonable inferences therefrom.[256] Proponents of per diem arguments have asserted that an attorney should have wide latitude in arguing damages to the jury,[257] while opponents, contending that such arguments lack an evidentiary basis, have urged that the courts confine arguments closely to the evidence presented.[258] Since the scope of permissible summation is basically a question of definition, it is a factor to be weighed but is not determinative of whether per diem arguments should be permitted.

Questions concerning per diem arguments and the interaction of the jury's function[259] have often been analyzed in terms of invasion of the province of the jury.[260] Clearly, an unbiased determination of damages is essential to the fair resolution of a personal injury suit. Yet, the traditional method of instructing jurors to award reasonable compensation has often been criticized as inadequate to the task.[261]

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[256] Wimberly v. Paterson, 75 N.J. Super. 584, 604, 183 A.2d 691, 702 (App. Div. 1962). Generally, counsel is allowed wide latitude in summation and may argue from the evidence to any conclusion the jury may freely reach, regardless of whether it is "improbable, illogical, erroneous, or even absurd." *Id.* Counsel's conclusions, however, may not be presented in language that transcends the bounds of legitimate argument. Moreover, they must be grounded in evidence. *Id.*

[257] *See* Cooper, *supra* note 4, at 406-07.

[258] *See* Cooper, *supra* note 4, at 405-06. Opponents also assert that jurors might tend to sympathize with the plaintiff on the pain and suffering issue. Therefore, the attorney's argument must be controlled to avoid prejudice to the defendant. *Id.* at 405.

[259] One commentator, writing about juries and personal injury litigation in the 1950's, indicated that the jury tended to approach the assessment of damages by searching for a single appropriate sum rather than by analyzing the components of damages. *See* Kalven, *The Jury, the Law and the Personal Injury Damage Award,* 19 OHIO ST. L.J. 158, 161-62 (1958). Hence, the jury might be less responsive to pain and suffering as an element of damages. He asserted that when the jury's attention was directed to the process of adding together the components of damages the award would be increased. *Id.* at 161-62. The jury would explicitly consider pain and suffering in addition to the tangible elements of medical expenses and lost earnings and therefore return a larger verdict. *Id.* at 161-62, 170. Given the above argument, the per diem approach is a valid attempt to focus the jury's attention on an element of damages that should be assessed.

[260] *E.g.*, Beagle v. Vasold, 65 Cal. 2d at 177, 417 P.2d at 678-79, 53 Cal. Rptr. at 134-35. *See generally* Carton, *supra* note 5, at 449-55; Cooper, *supra* note 4, at 408-10.

[261] Cooper, *supra* note 4, at 395. *See* Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137; Newbury v. Vogel, 151 Colo. 520, 526, 379 P.2d 811, 814 (1963); Barretto v. Akau, 51 Hawaii at 394, 463 P.2d at 923; Yates v. Wenk, 363 Mich. 311, 317-18, 109 N.W.2d 828, 830-31 (1961).

Society recognizes "the day" as the basic unit of human affairs, yet the traditional method of determining damages requires jurors to consider pain and suffering in a "lifetime lump," while they live their lives on a day by day basis. Jurors are unfamiliar with lifetime meals, lifetime haircuts or lifetime pain. Therefore, "[f]orcing jurors to think in a language they have never heard of cannot be designed or expected to produce just results." Caylor v. Atchison, Topeka & Santa Fe Ry., 190 Kan. 261, 277, 374 P.2d 53, 64 (1962) (Wertz, J., dissenting). The per diem approach can permit "more explicit comprehension and humanization of the plaintiff's

Jurors are presumed to know the nature of pain and the value of money.[262] Their function is viewed as one of equating the two in order to determine a money award.[263] The trial judge's instruction to use their impartial judgment in making this determination provides minimal guidance for the jurors.[264] The use of an illustrative per diem argument which suggests a course of reasoning for the jurors to follow in translating the evidence of pain and suffering into an award,[265] however, could be used to provide the guidelines lacking under the traditional method.[266]

The fair administration of trial issue has been framed in terms of insuring adversary parties an equal opportunity to offer proof and submit arguments.[267] Two competing interests may be identified with this issue. Counsel for plaintiff has a right to the "full fruits of effective advocacy" on the issue of damages.[268] Such is essential to a personal injury suit. However, counsel for defendant also has a right to "a fair assessment of damages once liability" is established.[269] These interests can be reconciled without resort to the "all or nothing" approach under the current *Botta* Rule, but this requires examination of the source of the fair administration question—fear of prejudice from per diem arguments.

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predicament" since the "'worth'" of pain may be easier to comprehend when considered over shorter periods of time such as a day or an hour. Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137.

[262] 26 N.J. at 103, 138 A.2d at 725. Per diem arguments have been criticized for replacing the jury's "common knowledge and experience" about pain. One court, however, perceptively noted that a person who has "intimately experienced" similar pain and suffering would not be allowed to sit on the jury. Grossnickle v. Village of Germantown, 3 Ohio St. 2d 96, 100, 209 N.E.2d 442, 446 (1965). Hence, the average juror has not been exposed to the type of pain he is asked to evaluate in monetary terms. *Id.* This consideration underscores the jurors' need for more guidance than their enlightened consciences.

[263] 26 N.J. at 103, 138 A.2d at 725.

[264] Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137. *Accord,* Newbury v. Vogel, 151 Colo. 520, 526, 379 P.2d 811, 814 (1963). The inadequacy of the traditional approach raises an important policy question: is it fair that an injured plaintiff's financial future be determined by a jury with no other criterion than reasonable judgment? *See* Cooper, *supra* note 4, at 395.

[265] Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962). *See* note 60 *supra* and accompanying text.

[266] Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977). *Accord,* Newbury v. Vogel, 151 Colo. 520, 526, 379 P.2d 811, 814 (1963); Evening Star Newspaper Co. v. Gray, 179 A.2d 377, 382 (D.C. 1962); Corkery v. Greenberg, 253 Iowa 846, 855, 114 N.W.2d 327, 332 (1962); Yates v. Wenk, 363 Mich. 311, 318-19, 109 N.W.2d 828, 831 (1961).

[267] 26 N.J. at 101, 138 A.2d at 723-24.

[268] Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137. *See* N.J. Cr. R. DR 7-101, which imposes a duty on attorneys to represent their clients zealously with respect to all matters, *id.*, including damages.

[269] Gilborges v. Wallace, 78 N.J. at 353, 396 A.2d at 343.

Prejudice occurs at several levels. First, a per diem argument can generate prejudice where it is imbedded in an appeal to the golden rule or other inflammatory remarks.[270] Second, if the jury adopts counsel's proffered figures without critical evaluation and thereby abdicates its damage-assessing role, the defendant is prejudiced.[271] Finally, prejudice may be the product of the jury's use of a formula to determine damages, thus creating the excessive verdict problem.[272]

Various safeguards have been recognized as adequate to prevent the feared prejudicial effects. The trial judge, for example, can reduce prejudicial impact through a number of cautionary instructions particularly by admonishing the jurors that suggestions made by counsel in summation are not binding upon them.[273] Other safeguards stem from the jurors' awareness of the attorney's role as a partisan advocate, and their ability to distinguish between per diem arguments and evidence of the value of pain.[274] The adversary system itself provides an effective counterbalance such that the per diem technique can be used as a double-edged sword with which defendant's attorney may argue the suggested figures are excessive or present his own suggestions.[275] The attorney who uses this technique is aware that he bears the risk of overpersuasion if the mathematical computations are carried to an extreme because the jury would probably dismiss the argument and opposing counsel would have sufficient ammunition for rebuttal.[276]

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[270] For examples of summations involving appeals to the golden rule or other inflammatory remarks, see notes 63-66 & 75 *supra* and accompanying text.

[271] *See* Caley v. Manicke, 24 Ill. 2d 390, 393, 182 N.E.2d 206, 208-09 (1962). *See* Cooper, *supra* note 4, at 409-10.

[272] *See* Caley v. Manicke 24 Ill. 2d 390, 393, 182 N.E.2d 327, 332 (1967); Louisville & Nashville R.R., 339 S.W.2d 155, 161 (Ky. 1960); Cooper, *supra* note 4, at 408-09; Recent Decisions, 1962 U. ILL. L.F. 269, 274; Note, 33 S. CAL. L. REV. 214, 219 (1960).

[273] *E.g.*, Beagle v. Vasold, 65 Cal. 2d at 180-81, 417 P.2d at 680-81, 53 Cal. Rptr. at 136-37; Yates v. Wenk, 363 Mich. 311, 318, 109 N.W.2d 828, 831 (1961); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977). Other cautionary instructions which may be used to control prejudice include an instruction that the argument is not evidence; that any statement by counsel that is not sustained by the evidence should be disregarded; that the jury is not bound by any proposed method of calculating damages; and, the jury's duty is to award only reasonable compensation. Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137; Jones v. Hogan, 56 Wash. 2d 23, 31-32, 351 P.2d 153, 159 (1960).

[274] *E.g.*, Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977); Jones v. Hogan, 56 Wash. 2d 23, 31-32, 351 P.2d 153, 159 (1966).

[275] Beagle v. Vasold, 65 Cal. 2d at 181, 417 P.2d at 681, 53 Cal. Rptr. at 137. *Accord*, Yates v. Wenk, 363 Mich. 311, 318, 109 N.W.2d 828, 831 (1961). Further, defendant's counsel can underscore other defects in the plaintiff's formula. He "may point out . . . overlapping items such as inability to lead a normal life, humiliation and embarrassment," or demonstrate that plaintiff's pain may be minimized by sedation. *See* Phillips, *supra* note 6, at 85.

[276] *E.g.*, Beagle v. Vasold, 65 Cal. 2d at 180, 417 P.2d at 681, 53 Cal. Rptr. at 137; Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977).

A remedy still exists if the jury is misled into awarding an excessive verdict after the aforementioned safeguards have been employed. The trial judge has the power to set aside or reduce any verdict[277] which is "so disproportionate to the injury and resulting disability shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust."[278] In addition, the appellate court has the power to review such an unreasonable result under similar standards.[279]

In sum, the potential prejudice problem in the issue of fair administration may be mitigated by the appellate court's power to review and the trial court's power to reduce any unreasonable verdict; by the adversarial process of argument; by the trial court's cautionary instructions; and by the jury's responsible exercise of its role as ultimate judge of reasonable compensation which is the basis of every damage award for personal injuries.

THE *BOTTA* RULE—A PROPOSED SOLUTION

Per diem arguments should be permitted subject to the following qualifications. First, the argument should not appeal to the golden rule or be otherwise inflammatory. Second, the argument should not urge the attorney's proffered figures on the jury. Finally, per diem arguments should be limited to the illustrative type which merely suggests a course of reasoning and does not influence the jury's determination of damages. In determining whether the line has been

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[277] Beagle v. Vasold, 65 Cal. 2d at 180, 417 P.2d at 680, 53 Cal. Rptr. at 136. *Accord,* Newbury v. Vogel, 151 Colo. 520, 527, 379 P.2d 811, 814 (1965).

[278] Baxter v. Fairmont Food Co., 74 N.J. 588, 596, 379 A.2d 225, 229 (1977), Sweeney v. Pruyne, 67 N.J. 314, 315, 338 A.2d 193, 193-94 (1975). This is the test applied by New Jersey trial courts when reviewing a verdict for excessiveness or when the remedy of remittitur is sought. The practice has been recognized as a valuable tool for trial administration and has been "encouraged at both trial and appellate levels to avoid the unnecessary expense and delay of a new trial." Baxter v. Fairmont Food Co., 74 N.J. at 595, 379 A.2d at 228-29. "[A] court may not set aside a verdict merely because in its opinion, the jury upon the evidence might well have found otherwise." Hager v. Weber, 7 N.J. 201, 210, 81 A.2d 155, 159 (1951). It is the jury which has "exclusive privilege and function . . . to draw the inferences in the first instance. . . . Once the jury has reached its decision, the trial judge . . . cannot then step in [and] weigh the evidence to determine what conclusion he would have come to." Kulbacki v. Sobchinsky, 38 N.J. 435, 444-45, 185 A.2d 835, 841 (1962). Further, the supreme court has stated that "judges are admonished to resist the natural temptation to substitute their judgment for that of the jury." Baxter v. Fairmont Food Co., 74 N.J. at 597, 379 A.2d at 229; Dolson v. Anastasia, 55 N.J. 2, 6, 258 A.2d 706, 708 (1969). As stated in *Dolson v. Anastasia,* the trial judge "is not a thirteenth and decisive juror." *Id.* It should be recalled that trial practice concerning remittitur and setting aside verdicts for excessiveness varies from state to state.

[279] Baxter v. Fairmont Food Co., 74 N.J. 588, 596, 379 A.2d 225, 229 (1977). Again, this is New Jersey's policy as to appellate review of jury verdicts.

crossed between permissible per diem and inflammatory argument, the courts should use the size of the verdict analysis established in *Cox*.[280] The size of the award would then serve as an indicator of whether inflammatory remarks impermissibly influenced the jury.

Under present trial practice, defense counsel sums up first, followed by plaintiff's counsel's closing statements. Were per diem arguments permitted, defense counsel would be placed in the position of having to anticipate plaintiff's use of a per diem formula. To insure fairness to both parties, defense counsel must have an opportunity to answer plaintiff's per diem argument. This can be achieved by two procedural approaches. Where plaintiff's counsel presents a per diem formula for the first time in his closing argument, defense counsel can be given an opportunity for rebuttal. In the alternative, the order of summations can be reversed;[281] with plaintiff's counsel arguing first, defense counsel can respond to any formula presented in his summation.

CONCLUSION

This suggested per diem approach is not a substitute for reasonable compensation. Rather it is one method of attaining that goal. The illustrative approach when used with the safeguards presented earlier would balance any prejudicial effect that might arise from a per diem argument. As one court perceptively stated, "'if the evil feared is excessive verdicts, then the cure ought to be directed against the product, not the practice.'"[282]

Aimee L. Manocchio

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[280] 83 N.J. at 386, 416 A.2d at 812. *See* text accompanying notes 245-47 *supra*.

[281] Courts approving the use of per diem arguments have recognized that defense counsel should have an opportunity to rebut plaintiff's argument. Grossnickle v. Village of Germantown, 3 Ohio St. 2d 96, 101-02, 209 N.E.2d 442, 447 (1965); Worsley v. Corcelli, 377 A.2d 215, 219 (R.I. 1977). *See* Beagle v. Vasold, 65 Cal. 2d at 180-81, 417 P.2d at 681, 53 Cal. Rptr. at 137. In federal criminal trials, Federal Rule of Criminal Procedure number 29.1 provides that: "[a]fter the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal." FED. R. CRIM. P. 29.1. The purpose underlying this procedure is "that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution [on] behalf of conviction before the defendant is faced with the decision whether to reply or what to reply." Notes of Advisory Committee on Rules, FED. R. CRIM. P. 29.1. By analogy, in civil trials where a per diem argument may be used, the fair administration of trial policy would be furthered if defense counsel's closing statement followed plaintiff's arguments. Defense counsel will know if plaintiff's attorney has used a per diem formula, and will therefore be able to present an adequate rebuttal.

[282] Beagle v. Vasold, 65 Cal. 2d at 178, 417 P.2d at 679, 53 Cal. Rptr. at 135 (quoting Johnson v. Colglazier, 348 F.2d 420, 429 (5th Cir. 1965)(Brown, J. dissenting)).