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The Unit-of-Time Argument - Inherently Prejudicial

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6687b, section 22, of the Texas Revised Civil Statutes[34] may provide a precise formula for establishing such incompetence. That provision contains the statutory definition of "habitual" violator for purposes of establishing criteria for revoking one's driver's license. A certain number of violations or convictions within a certain time period for a *type* or *class* of negligence or incompetence could be formulated to establish incompetence of the driver in negligent entrustment cases. Such a rule would make proof of general incompetence considerably easier and could be used to establish reputation for incompetence. Such a rule would contribute clarity to the burden of proving negligent entrustment in Texas and if strictly construed and confined to the competency issue (as distinguished from negligence at the time of the accident) would reduce jury prejudice to some degree.

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I. The Measure of Damages for Pain and Suffering

Prior to World War II very little attention was given to the subject of damages for personal injuries.[1] Since that time drastic increases in recoveries in personal injury litigation have resulted in mounting concern over the methods used to determine the damages awarded an injured party.[2] Generally a party is entitled to be compensated for his economic loss and for the pain and suffering he has incurred—the theory being that such an award will serve to make him as "whole" a person as he was before the injury.[3] Because economic loss (*i.e.*, past and future medical expenses, past wages lost, and loss of future earning capacity) can be determined with reasonable certainty, few problems have arisen as to its method of cal-

[34] Section 22(b) of the statute states:

> The authority to suspend the license of any operator . . . is granted to the Department . . . [of Public Safety] upon determining after proper hearing . . . that the licensee:
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> 3. Is a *habitual reckless* or *negligent* driver of a motor vehicle.
>
> 4. Is a *habitual violator* of the traffic law. The term "habitual violator" as used herein shall mean any person with four (4) or more convictions arising out of different transactions in a consecutive period of twelve (12) months, or seven (7) or more convictions . . . within a period of twenty-four (24) months, such convictions being for moving violations of traffic laws of the State of Texas. . . ."

[1] Wright, *Damages for Personal Injuries—Foreword*, 19 Ohio St. L.J. 155 (1958).

[2] *Id.* at 156.

[3] Eastern Iron & Metal Co. v. McMorrouh, 135 S.W.2d 750, 751 (Tex. Civ. App. 1940).

culation.[4] The amount of damages to be awarded a plaintiff for his pain and suffering is a different matter. Juries traditionally have been instructed to award an amount which they consider will fairly and reasonably compensate the plantiff,[5] and to consider such factors as the nature, intensity, and extent of the pain and suffering as disclosed by the evidence.[6] Thus the trier of fact, guided only by evidence of a subjective nature, must determine in its sound discretion what amount of money would reasonably compensate a plaintiff for the pain and suffering he has sustained. Because the jury is placed in the difficult position of measuring damages which are unavoidably vague, courts in recent years have been presented with the problem of deciding whether counsel should be allowed to argue to the jury contentions supplemental to the traditional "reasonable compensation" instruction.[7]

II. Use of the Mathematical Formula or Unit of Time Argument

Theorizing that it is necessary for the jury to be guided by some reasonable and practical considerations rather than blindly guessing what a reasonable allowance for pain and suffering would be, some jurisdictions[8] have allowed plaintiff's counsel to use a mathematical formula in arguing for such damages. The mathematical formula is based upon the suggestion of a specific sum of money per day or other unit of time during which pain has been or will be suffered, *e.g.*, five dollars per day for past and future suffering, or one dollar

[4] Plant, *Damages for Pain and Suffering*, 19 Ohio St. L.J. 200, 211 (1958).

[5] Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[6] *Id.* at 277, 11 Wis. 2d 604.

[7] See *e.g.*, Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Botta v. Bruner, 26 N.J. 82, 138 A.2d 713 (1958); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Hoyle v. Van Horn, 236 Or. 205, 387 P.2d 985 (1963); Harper v. Bolton, 124 S.E.2d 54 (S.C. 1962); Simmons Motor Co. v. Mosley, 379 S.W.2d 711 (Tex. Civ. App. 1964) *error ref. n.r.e.*; Jones v. Hogan, 56 Wash. 2d 23, 351 P.2d 153 (1960).

[8] *Alabama*: McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); *Arkansas*: Vandlandingham v. Gartman, 236 Ark. 504, 367 S.W.2d 111 (1963); *California*: Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 15 Cal. Rptr. 161, 364 P.2d 337 (1961); *Colorado*: Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811 (1963); *District of Columbia*: Evening Star Newspaper Co. v. Gray, 179 A.2d 377 (D.C. Mun. Ct. App. 1962); *Florida*: Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); *Indiana*: Evansville City Coach Lines, Inc. v. Atherton; 133 Ind. App. 304, 179 N.E.2d 293 (1962); *Iowa*: Corkery v. Greenberg, 253 Iowa 846, 114 N.W.2d 327 (1962); *Kentucky*: Louisville & N.R. Co. v. Mattingly, 339 S.W.2d 155 (Ky. App. 1960); *Louisiana*: Little v. Hughes, 136 So. 2d 448 (La. App. 1961); *Maryland*: Lebow v. Reichel, 231 Md. 421, 190 A.2d 642 (1963); *Michigan*: Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); *Mississippi*: Four-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); *Nevada*: Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); *Oregon*: Hoyle v. Van Horn, 236 Or. 205, 387 P.2d 985 (1963); *Utah*: Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960); *Washington*: Jones v. Hogan, 56 Wash. 2d 23, 351 P.2d 153 (1960).

per waking hour for past and future suffering. This unit-of-time argument is allowed because these courts consider it a segment of counsel's authority to draw all reasonable inferences and conclusions from the evidence.

At the opposite end of the judicial spectrum are those jurisdictions[9] which take the position that an award for pain and suffering based on a mathematical fomula ignores the fundamentally subjective basis of such damages. The prevailing rationale of these cases is that since no monetary value can objectively be placed on pain and suffering (as distinguished from economic loss) any suggestion of a specific monetary value, either per unit or lump sum, is not derived from the evidence and tends only to lead the jury into making excessive awards. Because pain varies with the individual, these jurisdictions feel that any dollars and cents estimate per unit of time cannot be accurate.

A middle ground is held by those jurisdictions[10] which have disapproved the unit-of-time argument, yet expressly allow plaintiff's counsel to mention to the jury the lump-sum figure being sought for damages resulting from plaintiff's pain and suffering. It has been contended[11] that this view is inconsistent because it is not remedial of the objection to placing a specific monetary value, which cannot be derived from the evidence, on pain and suffering.

Still another position is held by jurisdictions[12] which rather than allowing the unit-of-time argument unconditionally, allow it for illustrative purposes only. In these states counsel may relate to the jury the mathematical calculations used to arrive at the sum asked for, but the jury is not allowed to use such calculations in reaching their award. This "look, but don't touch" position also has been criticized as being inconsistent in admitting that a jury is sophistica-

[9] *Delaware*: Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); *Hawaii*: Franco v. Fujimoto, 47 Haw. 1, 390 P.2d 740 (1964); *Illinois*: Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962); *Kansas*: Caylor v. Atchison, Topeka & Santa Fe Ry. Co., 190 Kan. 261, 374 P.2d 53 (1962); *New Jersey*: Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); *New York*: Paley v. Brust, 250 N.Y. Supp. 2d 356 (1st Dept. App. Div. 1964); *Ohio*: Boop v. B. & O. R.R. Co., 118 Ohio App. 171, 193 N.E.2d 714 (1963); *Pennsylvania*: Bostwick v. Pittsburgh Rys., 255 Pa. 387, 100 A. 123 (1917); *South Carolina*: Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962); *Virginia*: Certified T. V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); *West Virginia*: Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961); *Wisconsin*: Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[10] *Massachusetts:* Kinnear v. General Mills, Inc., 308 Mass. 344, 32 N.E.2d 263 (1941); *Missouri:* Goldstein v. Fendelman, 336 S.W.2d 661 (Mo. 1960); *New Hampshire:* Sanders v. Boston & Me. R.R., 77 N.H. 381, 92 A. 546 (1914); *Wisconsin:* Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

[11] Comment, *Damages—Pain and Suffering—Use of a Mathematical Formula,* 60 MICH. L. REV. 612 (1962).

[12] *Minnesota:* Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 30 (1956); *North Dakota:* King v. Railway Express Agency Inc., 107 N.W.2d 509 (N.D. 1961).

ted enough to hear the argument without being unduly influenced, while refusing to recognize that a jury is sophisticated enough to use a mathematical formula to reach a reasonable and just award.[13]

Texas is a jurisdiction difficult to categorize. In 1932 the Texas Commission of Appeals held in *Renner v. West Texas Utilities*[14] that it was improper for plaintiff's attorney to argue that if the jury awarded three dollars per day for twenty years to one who had lost the use of a leg as that plaintiff had, the amount so paid would be $25,000. The opinion was adopted by the Texas Supreme Court.[15] A later Texas court of civil appeals case[16] held that it was improper for plaintiff's attorney to display to the jury a blackboard which depicted, among other things, the lump-sum figure requested, and to argue therefrom damages for pain and suffering. However, in the more recent Texas court of civil appeals cases,[17] where the issue of the propriety of the unit of time argument in calculating damages for pain and suffering was met squarely, the courts consistently have held, without mentioning *Renner,* that the argument is proper with or without the aid of blackboards, placards, or charts.[18] The prevailing rationale of these cases is that the attorney is entitled to discuss freely or comment on such facts as are in evidence and draw from the facts and circumstances any inferences and deductions that are reasonable, fair, and drawn in good faith. Since there must be some evidence in the record that pain was actually suffered, and since pain is suffered month-by-month and year-by-year, it is a fair argument to treat pain the way it was endured.[19] However because the intermediate appellate courts neither have distinguished nor considered *Renner* controlling, and, because the Supreme Court has consistently "*n.r.e.'d.*" cases involving the question,[20] Texas' position remains uncertain.

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[13] See note 11 *supra.*

[14] West Texas Util. v. Renner, 53 S.W.2d 451 (Tex. Comm. App. 1932).

[15] *Id.* at 457.

[16] Warren Petroleum Co. v. Pyeatt, 275 S.W.2d 216 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[17] Simmons Motor Co. v. Mosley, 379 S.W.2d 711 (Tex. Civ. App. 1964) *error ref. n.r.e.;* Mid Tex Dev. Co. v. McJunkin, 369 S.W.2d 788 (Tex. Civ. App. 1963); Hernandez v. Baucum, 344 S.W.2d 498 (Tex. Civ. App. 1961) *error ref. n.r.e.;* Chemical Express v. Cole, 342 S.W.2d 773 (Tex. Civ. App. 1961) *error ref. n.r.e.;* Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960); Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959) *error ref. n.r.e.;* Texas Employer's Ins. Ass'n v. Cruz, 280 S.W.2d 388 (Tex. Civ. App. 1953) *error ref. n.r.e.;* J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950) *error ref. n.r.e.*

[18] See Texas Employer's Ins. Ass'n v. Cruz, 280 S.W.2d 388 (Tex .Civ. App. 1955) *error ref. n.r.e.,* and cases cited therein.

[19] Hernandez v. Baucum, 344 S.W.2d 498, 500 (Tex. Civ. App. 1961) *error ref. n.r.e.*

[20] See cases cited in note 17 *supra.* It is possible that the writ history of these cases indicates a *sub-silentio* repudiation of the language of West Texas Util. v. Renner, 53 S.W.2d 451 (Tex. Comm. App. 1932).

The position of the federal courts is equally unclear. Prior to 1965 only two United States courts of appeals had been confronted with the question of the propriety of the unit-of-time argument. In 1960 the Third Circuit held[21] that it no longer would follow an earlier decision[22] which prohibited the jury, in personal injury suits, from hearing any fixed sum claim for damages for pain and suffering. In so doing the court affirmed the district court's opinion[23] that no error was committed by plaintiff's attorney in suggesting that plaintiff's hourly wage rate ($2.77) would be a reasonable award per hour for future pain and suffering where the result was not only fair, but was also clearly supported by the evidence. In 1961 the Court of Appeals for the Sixth Circuit heard *Pennsylvania Railroad v McKinley*.[24] There the court had the issue of the propriety of the unit-of-time argument directly before it, but rather than deciding conclusively for or against use of the argument, the court chose to leave the question of its propriety to the discretion of the trial judges. In refusing to reverse and remand the judgment because of the plaintiff's attorney's use of the unit-of-time argument, the court stated:

> Control of the conduct of counsel so as to keep it within the limits of legitimate advocacy is primarily the duty and responsibility of the trial judge. We will not find error in his discharge of such duty unless we are persuaded that what he did, or failed to do, in matters within his discretion resulted in a miscarriage of justice or deprived one of the parties litigant of a fair trial.[25]

An early Eighth Circuit case,[26] in which the issue actually before the court was whether or not the amount awarded for damages should be discounted to present value, has been considered authority for the proposition that the unit-of-time argument is improper. The court held that because damages for future economic loss can be mathematically computed with reasonable accuracy, an award for such damages should be discounted to present value; however, damages for pain and suffering should not be discounted to present value because any attempt to set a specific value per unit of time for an individual's pain, suffering, or inconvenience would be an absurdity. The court felt that the more just and reasonable award for pain and

[21] Bowers v. Pennsylvania R.R., 281 F.2d 953 (3d Cir. 1960), *affirming* 182 F. Supp. 756 (D. Del. 1960).

[22] Vaughn v. Magee, 218 F. 630 (3d Cir. 1914).

[23] See note 21 *supra*.

[24] 288 F.2d 262 (6th Cir. 1961).

[25] *Id.* at 267. As authority for the proposition that use of the argument does not per se result in error, the court cited Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir. 1956), in which it affirmed use of a unit-of-time formula by a United States district judge, sitting without a jury in an admiralty case.

[26] Chicago & N.W. Ry. v. Chandler, 283 F. 881 (8th Cir. 1922).

suffering would be reached by a jury considering the injured party's life as a whole. In light of this background, the Fifth Circuit was called upon to decide whether the use of the unit-of-time argument was proper. The question was squarely presented, and both parties directed their argument to the issue.

III. JOHNSON V. COLGLAZIER[27]

Plaintiffs, husband and wife, brought a civil diversity action in the United States District Court for the Eastern District of Texas seeking damages for injuries sustained as a result of a collision between their automobile and a trailer, which had become detached from a truck owned by the defendant.[28] Prior to closing arguments, the defendant objected to plaintiff's proposed use of the unit-of-time argument, supported by use of placards for illustration. The objection was overruled. Plaintiffs' attorney stated to the jury that he had, "prepared a chart for the purpose of outlining my argument . . . [and that] these charts merely reflect my contentions. . . ."[29] After emphasizing that the charts were not in evidence, plaintiffs' attorney proceeded to argue, with reference to the charts, as to the measure of damages for the physical pain and mental anguish suffered by the plaintiffs. The attorney argued for sums ranging from five dollars to five cents per waking hour per day, the amounts varying in relation to various time periods such as days spent in the hospital, days from the accident to the trial, and days of future pain and suffering.[30] While defendant objected to this argument, no requests for

[27] 348 F.2d 420 (5th Cir. 1965).

[28] See Brief for Appellants, p. 2, Johnson v. Colglazier, note 27 *supra*.

[29] *Id.* at 15-16.

[30] A part of one of the placards which plaintiffs' attorney displayed to the jury and argued the measure of damages from read as follows:

Physical Pain:	
1st 15 days in hospital @ $5 per waking hour x 16 hrs. per day =	$ 1,200.00
Next two months @ $2 per waking hour x 16 hrs. x 60 days =	1,920.00
January 1962 to date of trial @ 25¢ per waking hr. =	3,500.00
Balance of life expectancy @ 25¢ per waking hour: 25¢ x 16 hrs. x 365 x 8 yrs.	11,430.00
	$18,050.00
Mental Anguish:	
1st 15 days in hospital @ $2 per waking hr. x 16 hrs. per day =	$ 480.00
Next two months @ $1 per waking hour x 16 hrs. x 60 days	960.00
Jan. 1962 to date of trial @ 10¢ per waking hr.: 10¢ x 16 x 505 days =	808.00
Balance of life expectancy @ 5¢ per waking hr.: 5¢ x 16 hrs. per day x 365 days per yr. x 8 yrs. =	2,336.00
	$4,584.00

Brief for Appellants, pp. 12-13.

special instructions were made respecting it. The jury returned a verdict for the husband in the amount of $24,486.25 and for the wife in the amount of $46,220.47.[31] The defendant appealed to the United States Court of Appeals for the Fifth Circuit, contending that the verdicts were excessive, and that the court erred in the following respects: in allowing plaintiffs' attorney to use the unit-of-time basis in arguing for damages for pain, suffering, and mental anguish; and in allowing him to exhibit large charts showing the computation of damages on this basis.[32]

The Fifth Circuit was unanimous in determining that the questions of the propriety of argument by counsel and of the propriety of the conduct of the trial court in relation to the argument were procedural matters to be governed by federal law.[33] A majority of the court, however, reversed and remanded the cause for a new trial. It felt that the trial court had permitted the argument of plaintiffs' counsel to transgress the bounds of legitimate advocacy because the argument had the effect of a "golden rule" appeal, *i.e.*, a plea to the jury to put themselves in the plaintiffs' place, and because it resulted in the jury's returning a larger verdict than could have been expected without the use of the argument.[34]

Maryland Casualty v. Reid[35] was relied upon for the holding that the trial court's failure to take corrective measures in relation to the closing argument of plaintiffs' attorney was reversible error. The *Johnson* court inserted into its opinion a lengthy quotation from *Maryland Casualty*, which concluded with the following language: "This court, as to law cases, is a court of error. We do not retry the case. We review the record made in it for reversible error, error by the judge, in conducting or failing to conduct the trial, which has, by

[31] For the total amount requested for Mrs. Colglazier's injuries, see note 52 *infra*.

[32] Johnson v. Colglazier, 348 F.2d 420, 421 (5th Cir. 1965).

[33] 348 F.2d 420, 421 (5th Cir. 1965). The court reasoned that under the rule of Byrd v. Blue Ridge Electric Cooperative, Inc., 356 U.S. 525, as applied in Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401 (5th Cir. 1960), federal law controlled as to the propriety of counsel's argument and the judge's conduct in relation thereto, because the need of the federal courts, as an independent system, to provide uniformity of practice outweighed any possible difference in outcome which could result from choice of forum. *Cf.*, Yeargin v. National Dairy Products Corp., 317 F.2d 779, 780 (8th Cir. 1963); Illinois Central R.R. Co. v. Staples, 272 F.2d 829, 834 (8th Cir. 1959); Garret v. Faust, 183 F.2d 721, 726 (3d Cir. 1950); Smith v. Philadelphia Transp. Co., 173 F.2d 721, 726 (3d Cir. 1949). See generally Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692 (1963). Because the court held that federal law was controlling, the decision should not be considered speculation by the Fifth Circuit as to whether the Texas Supreme Court considers its adoption of West Texas Util. Co. v. Renner, 53 S.W.2d 451 ((Tex. Com. App. 1932), to be controlling in that jurisdiction.

[34] 348 F.2d 420, 425 (5th Cir. 1965).

[35] 76 F.2d 30 (5th Cir. 1935).

permitting the case to get out of bounds, *prejudiced the just result.*"[36] In order to stay within the language of *Maryland Casualty, i.e.,* to determine that a just result had been prejudiced, the *Johnson* court resorted to language which was inconsistent at best. It stated that while the amount of the verdict was"not so excessive per se as to require reversal,"[37] since a part of the verdict was a product of an improper argument the judgment "must be reversed because excessive."[38] Apparently the court was of the opinion that any use of the unit-of-time argument is inherently prejudicial and that consequently any verdict returned by a jury which had been confronted with the argument is inherently excessive, regardless of whether this excessiveness is manifested in the result.

Only brief mention was made of the federal cases[39] which specifically pertained to the unit-of-time argument. The court chose to rely upon *Botta v. Brunner*[40] as stating that the best reasons for rejecting the unit-of-time argument. In that case, the Supreme Court of New Jersey held that the unit-of-time argument was improper, as was any mention of a lump-sum figure to the jury. The rationale of this holding was as follows: the argument is not supported by the evidence because pain, suffering, and mental anguish cannot be measured forensically in dollars on a unit-of-time basis; the argument creates an illusion of certainty which does not and connot exist; and the argument tends implicitly to encourage the "golden rule," or "put yourself in the plaintiff's shoes," approach by the jury. These considerations were held to outweigh the counter arguments that counsel is entitled to draw all reasonable inferences from and state his opinion of the evidence, and that it is preferable for the jury to have some guideline rather than being left with the task of fixing a damage figure by guesswork.

The *Johnson* court was not called upon to decide, and did not hold, as the *Botta* court did, that mention of a lump-sum figure would be reversible error. In his dissenting opinion[41] Judge Brown contended that, aside from its possible greater effectiveness, the same objections to use of the unit-of-time argument apply with equal force to the

[36] 348 F.2d 420 (5th Cir. 1965). (Emphasis added.) *Maryland Casualty* went on to state further: "We do not reverse cases for insubstantial error." *Supra.*

[37] 348 F.2d 420, 425 (5th Cir. 1965).

[38] *Ibid.*

[39] 348 F.2d 420, 423-424 (5th Cir. 1965). In favor of the appellants, the court quoted from Chicago & N. W. Ry. v. Candler, 283 Fed. 881, 884 (8th Cir. 1922). In favor of the appellees, the court quoted from Pennsylvania R.R. v. McKinley, 288 F.2d 262, 267 (6th Cir. 1961).

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

[41] 348 F.2d 420, 425 (5th Cir. 1965).

permissible practice of arguing a lump-sum figure to the jury.[42] He concluded that the majority's reason for holding the argument to be improper must therefore be its effectiveness, *i.e.*, its tendency to produce larger verdicts than would mention of the lump sum.[43] Judge Brown took the position that excessive verdicts can be curtailed without denying the resourceful attorney an effective tool of advocacy. He considered the majority's sweeping condemnation of the unit-of-time argument an undue restriction on attorneys as well as an unwarranted debasement of both the federal district judge's capacity to keep the case in bounds and the jurors' capacity to employ their common sense.[44] As safeguards against excessive verdicts, while still allowing the use of the unit-of-time argument, Judge Brown suggested that the attorney should be required to forewarn his adversary of his intent to use the argument; the court should carefully scrutinize any demonstrative devices which are to be used in connection with the argument in order to avoid false factual impressions; and the court should instruct the jurors that they are not hearing evidence but merely counsel's contentions. In harmony with these safeguards, more faith should be given to the good sense of jurors and to the ability of the opposing attorney to counteract the argument.[45]

Judge Brown further contended[46] that possibly the unit-of-time argument possibly could be employed in harmony with the majority opinion so long as a specific sum of money is not correlated with a specific unit of time, and no demonstrative devices, *e.g.*, placards, charts, or blackboards, are used in conjunction with the argument. Judge Brown felt that this could be accomplished by mentioning the lump-sum figure sought and then impressing upon the jurors' minds that pain is endured over a period of time during which years, months, weeks, days, hours, and minutes pass by. The attorney could then suggest that it would be reasonable for the jury to consider these units of time in reaching the lump-sum figure to be awarded. While such an approach would avoid the objection of placing a monetary value on what is considered inherently immeasurable, there is little reason to believe that the majority would close its eyes to the

[42] *Id.* at 428.
[43] *Ibid.*
[44] 348 F.2d 420, 426 (5th Cir. 1965).
[45] *Id.* at 429-430. One writer suggests that where the unit-of-time argument is allowed, discounting the award of damages for pain and suffering to its present value would be a necessary and effective safeguard. Comment, *Damages—Pain and Suffering—Use of a Mathematical Formula,* 60 MICH. L. REV. 612 (1962). Such an approach, however, of necessity would require the presumption that all juries, when allowed to hear the argument, will use it in determining their award. This cannot be a certainty, particularly where defendant's attorney does an effective job of rebuttal. See text accompanying note 49 *infra.*
[46] 348 F.2d 420, 426-428 (5th Cir. 1965).

fact that only the step of division by the jury of the units (a) of time into the lump-sum figure distinguishes this approach from the true unit-of-time argument. If the majority's real objection to the unit-of-time argument was its greater effectiveness, as compared to mention of the lump-sum figure, it is doubtful that such an argument would be permissible.

If fear of excessive verdicts was the sole reason for dissallowance of the unit-of-time argument, the court should have been more concerned with the amount of the judgment itself rather than how it was obtained. In *Pennsylvania R.R. v. McKinley*,[47] the question of the propriety of the unit-of-time argument was squarely decided; and the Sixth Circuit refused to hold that use of the argument resulted in prejudicial error. It was recognized that use of the argument could be a factor in producing a judgment which was clearly excessive, and the court stated that such a judgment would be reversed. By ignoring the sound reasoning of the federal cases most directly in point and by condemning the judgment as excessive, even though the verdict was not so "excessive per se as to require reversal,"[48] the *Johnson* court has made a sweeping condemnation of an argument without clearly showing its prejudicial nature. Rejected was the alternative of placing confidence in the jury and the adversary system.

Certainly the most effective control over excessive verdicts can and should be the opposing attorney. The unit-of-time argument is not irrebutable, as many decisions seem to indicate.[49] Some defense attorneys have successfully used the "TV Argument."[50] The argument proceeds in the following manner: The jurors are reminded that a television set can be purchased for $200 and enjoyment from the set can be derived by the family daily. The attorney then explains that he is going to show the jury a trick based on a mathematical calculation. He states that one can go to a movie which lasts approximately two hours by purchasing a ticket for $1.25, and for simplicity's sake and fairness the movie will be valued at 50¢ per hour; thus, if a movie is worth 50¢ per hour, then television entertainment is worth 50¢ per hour. Stressing that he wishes the account to be fair, the attorney argues that the television will be viewed by various members of the family at least four hours per day for 300 days of

[47] 288 F.2d 262 (6th Cir. 1961).
[48] 348 F.2d 420, 425 (5th Cir. 1965).
[49] See, *e.g.*, Botta v. Brunner, 26 N.J. 82, 183 A.2d 713 (1958); Affett v. Milwaukee & Suburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).
[50] See "The TV . . . Answer To . . . Blackboard Build Up of Damages," Alabama Defense Lawyers' Journal, April 1965, p. 59.

each year. Thus a television set given a ten-year life expectancy would be worth $6,000. If four members of the family derive enjoyment from the television over this ten-year period, the television set is worth $24,000 to the family as a whole. The purpose of the argument is to ridicule the method of calculation argued by plaintiff's attorney; and, while not logically flawless, it is often effective. If the attorney's suggestions are susceptible to ridicule, the jury is made aware of this fact and the plaintiff will suffer as a result. If on the other hand, plaintiff's argument is not susceptible to ridicule, *i.e.*, his calculations are reasonable, this "TV Argument" may have an adverse effect on the defendant's case.[51] If the defendant's attorney is content to leave the argument unanswered, he should not be heard to complain later that use of the argument was prejudicial merely because it was effective.

IV. Conclusion

If the same verdict had been returned by a jury which had not been exposed to the unit-of-time argument, it seems clear that the *Johnson* court would have upheld it as a fair and just result. Since the argument was allowed, however, the court took the position that reversible error was created because the verdict was inherently excessive in part, even though not excessive as a whole. The court also equated use of the unit-of-time argument with the universally prohibited "golden rule" appeal. As contended by Judge Brown in his dissent, the unit-of-time argument, absent specific language requesting the jurors to put themselves in the plaintiff's place, presents no more of an appeal to the "golden rule" than does mention to the jury of a lump-sum figure. Because this and other objections to the unit-of-time argument apply with equal force to the mention of a lump-sum figure, it seems clear that the principal motivation for the court's holding was the effectiveness of the unit-of-time argument.

Texas courts, as well as courts of other jurisdictions, when called upon to decide the issue of the propriety of the unit-of-time argument might well consider the following statements from Judge Brown's dissent:

> That a forensic technique is effective is hardly grounds for prohibiting it. The real hazard arises, of course, from the fact that the standard for damages for pain and suffering is unavoidably vague. But so long

[51] *Ibid.* The reporter of the argument, as a *caveat*, suggests that the argument cannot be used in all cases, as it may be construed by the jury as an attempt to belittle the seriousness of the plaintiff's injuries.

> as the law tolerates the jury measuring what *Botta* and all the other anti cases regard as monetarily immeasurable, it is counsel's right—indeed duty—to employ all honorable appeals to persuasive action.[52]

Rather than making a sweeping condemnation of the use of the unit-of-time argument, courts should place more faith in the good sense of present day jurors and in the adversary system itself. Because the award was substantially less than plaintiffs' attorney argued for,[53] *Johnson* exemplifies the proposition that "juries are not so likely to get excited or inflamed by lawyer's talk as lawyers think they are."[54]

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[52] 348 F.2d 420, 429 (5th Cir. 1965).

[53] *Id.* at 430, n.13. For Mrs. Colglazier, damages in the amount of $180,536.67 were sought. The jury returned a verdict of $46,220.46.

[54] Smith v. Philadelphia Transp. Co., 173 F.2d 721, 726 (3d Cir. 1949).