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CASE NOTES

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CONSTITUTIONAL LAW — Eminent Domain — "Just Compensation" Does Not Include Payment of Interest from Time of "Taking" to Day of Trial. — A condemnation proceeding was brought by the South Carolina Highway Department condemning part of the Defendant's right-of-way. The Trial Judge charged the jury to the effect that interest from the date of the "taking" to the date of the trial is a proper consideration in arriving at a land owner's "just compensation," notwithstanding the fact that the applicable state statute which provided for such proceedings did not explicitly provide for the payment of interest. HELD: Reversed. Interest from the time of the "taking" to the day of the trial is not to be considered in ascertaining "just compensation" to be paid by the South Carolina Highway Department to a condemnee. *S. C. Hwy. Dept. v. So. Ry.*, 239 S. C. 1, 121 S. E. 2d 236 (1961).

From the day of the Lords Proprietors until the adoption of its Constitution of 1868, South Carolina did not pay *any* compensation for private property taken for public use. *Wilson v. Greenville County*, 110 S. C. 321, 327, 96 S. E. 301, 303 (1928); *Lindsay v. The Comm'rs*, 2 Bay 38 (S. C. 1796); *Patrick & Mannigault v. Comm'rs of Cross Roads on Charleston Neck*, 4 McCord 541 (S. C. 1828). Nevertheless, the present State Constitution guarantees that "just compensation" shall be paid. S. C. CONST. art. I, § 17 (1895). It is inferable from the State Constitution that a "taking" for public use by the State Highway Department should receive preferential treatment over a "taking" by a public utility. *City of Spartanburg v. Belk's Dep't Store*, S. C. CONST. art. 9, § 20 (1895); S. C. CONST. art. 1, § 17 (1895); 199 S. C. 458; 20 S. E. 2d 157 (1942). If a condemnation by the State Highway Department produces a benefit to the land owner, such benefit is applied toward offsetting his damages. CODE OF LAWS OF SOUTH CAROLINA § 33-136 (1952), *City of Spartanburg v. Belk's Dep't Store, supra.* However, any benefit which inures to a landowner by virtue of a taking by a public utility is not to be considered. S. C. CONST. art. 9, § 20 (1895). If the "taking" is by a Public Utility, the General Assembly has provided for the payment of interest

pendente lite. CODE OF LAWS OF SOUTH CAROLINA §§ 25-57, 25-110 (1952). Nevertheless, a federal court has declared that, even if the South Carolina statute did not provide for the payment of interest, it is collectable under the constitutional provision guaranteeing "just compensation." *In re South Carolina Public Service Authority,* 37 F. Supp. 28, 31 (E. D. S. C. 1941). Also, the South Carolina Supreme Court has unequivocally held that the State Constitution is self-executing and that no act of the General Assembly is necessary to implement the "just compensation" provision. *McColl v. Marlboro Graded School Dist. No. 10,* 143 S. C. 120, 124; 141 S. E. 265, 266 (1927); *Chick Springs Water Co., Inc. v. State Highway Dep't,* 159 S. C. 481, 497; 157 S. E. 842, 848 (1932). The Legislature can provide the "yardstick" by which compensation is measured. *City of Spartanburg v. Belk's Dep't Store, supra; Smith v. City of Greenville,* 229 S. C. 252, 92 S. E. 2d 591 (1960). Nevertheless, it cannot place a monetary limit on what is "just." *Chick Springs Water Co., Inc. v. State Highway Dep't, supra* at 504, 157 S. E. at 851; *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 37 L. Ed. 463 (1893). Both the State Constitution and the "due process" clause of the United States Constitution are to be considered in a condemnation proceeding by the South Carolina Highway Department. *Huston v. Town of West Greenville,* 126 S. C. 484, 496, 120 S. E. 236, 239 (1923); *Chicago Burlington & Quincy R.R. v. City of Chicago,* 166 U. S. 226, 41 L. Ed. 979 (1897). The United States Supreme Court holds that, in a taking by the United States, interest should be paid if payment for the land is not made contemporaneously with the "taking." *Seaboard Air Line Ry. v. United States,* 261 U. S. 299, 67 L. Ed. 664 (1923). The overwhelming majority of the states concur with the United States Supreme Court, e.g., *Appleton Water Works Co. v. Railroad Comm'n,* 154 Wis. 121, 142 N. W. 476, 478; Annot., 36 A. L. R. 2d 413 (1954), and a holding which denies the recovery of interest at the legal rate from the time of the "taking" to the final determination of the case is a minority view. *San Francisco & S. J. Valley R. Company v. Leviston,* 134 Cal. 412, 66 P. 473; Annot., 36 A. L. R. 2d 426 (1954).

It would appear that if a landowner is entitled to be paid for his land, he is entitled to be paid on time. The Constitutions of the United States and of South Carolina use the

identical words "just compensation." The United States Supreme Court has interpreted the Fifth Amendment of the United States Constitution as providing that "just compensation" necessitates payment being made contemporaneously with the taking and if not so made, interest should be paid. The Fourteenth Amendment (due process clause applicable to the States) guarantees that no state shall deprive its citizens of property without due process. As the state must stay within the bounds of the Fourteenth Amendment of the United States Constitution, it is arguable that a denial of interest by the state is a denial of due process under the United States Constitution. Logic would seem to command that "just compensation" should mean the same in both the State and the United States Constitution. Irrespective of the national constitutional question, it cannot be convincingly argued that a dollar paid today represents the same value of a dollar owed two years ago when one is deprived of the use of it for two years. As the money when paid should represent the true value of the property when it was condemned, it seems that interest is not an addition to but is a component of just compensation.

JAMES OTIS DUNN, SR.

EVIDENCE — Admissibility of Illegally Obtained Evidence in a Civil Case. — In a New York divorce proceeding instituted by her husband, defendant wife moved to suppress evidence of her alleged adultery. Pursuant to a New York decree of separation, the wife had been living apart from her husband and maintained her own apartment. The evidence she sought to suppress was admittedly procured in a deliberate planned search of her apartment, conducted by her husband. The New York Civil Rights Statute § 8 provides, "The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." On motion to suppress evidence, HELD, granted. Evidence procured by an unreasonable search conducted by a private person should be suppressed in a civil action. *Sackler v. Sackler*, 224 NYS 2d 790 (1962).

At common law, the admissibility of evidence in court is not affected by the illegal means employed to obtain it. 8

WIGMORE, EVIDENCE § 2183 (3d ed. 1940). Although "unreasonable searches and seizures" are barred both by the federal and the typical State constitution, U. S. CONST. amend. IV; S. C. CONST. art. I, § 16; N. Y. CONST. art. I, § 12, evidence obtained in violation of these guarantees has been held freely admissible in criminal proceedings both in the federal, *Stockwell v. United States,* 23 Fed. Cas. 116 (No. 13,466) (C. C. D. Me. 1870); *United States v. Distillery,* 25 Fed. Cas. 853 (No. 14,961) (C. C. E. D. Va. 1876), and state courts. *Town of Blacksburg v. Beam,* 104 S. C. 147, 88 S. E. 447 (1916); *State v. Waystaff,* 115 S. C. 198, 105 S. E. 283 (1920). In 1914 the Supreme Court held that evidence obtained by an unreasonable search and seizure would be excluded in criminal trials in federal courts as a constitutional requirement, *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652 (1914). In 1949 the core of the Fourth Amendment was held to be enforceable against the states through the due process clause; adoption of the exclusionary rule by the state courts, however, was specifically held not to be essential to due process. *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782 (1949). Thereafter, the new rule was extended to prohibit federal law enforcement officers from testifying in a state criminal prosecution to evidence illegally obtained by them, notwithstanding such evidence was admissible in the state proceeding under state law. *Rea v. United States,* 350 U. S. 214, 100 L. Ed. 233 (1955). And despite the absence of federal agents, evidence obtained by unreasonable state searches has also been held inadmissible in federal courts. *Elkins v. United States,* 364 U. S. 206, 4 L. Ed. 2d 1669 (1960). In 1961 the Supreme Court overruled its narrow 1949 construction of the Fourth Amendment, as applied to the states through the due process clause, *Wolfe v. Colorado, supra,* and imposed the federal exclusionary rule on state courts requiring the exclusion in criminal proceedings of illegally obtained evidence though acquired solely by state officers. *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081 (1961). The federal Constitution, the New York Constitution, and the New York Civil Rights Law all employ the same language forbidding unreasonable intrusion. U. S. CONST. amend. IV; N. Y. CONST. art. I § 12; N. Y. Civil Rights Law § 8. However, the first ten amendments of the federal Constitution are safeguards against law officials and Government authority only. *Silver-*

man v. United States, 365 U. S. 505, 5 L. Ed. 2d 734 (1961). Similarly, the provision of the New York Constitution relates solely to sovereign authorities and its agencies and not to private parties. *People v. Appelbaum,* 301 N. Y. 738, 95 N. E. 2d 410 (1950). On the other hand, Judge Cardozo long ago recognized the applicability of the Civil Rights Law to private as well as official trespassers. *People v. DeFore,* 242 N .Y. 13, 150 N. E. 585 (1926). Prior to *Mapp v. Ohio, supra,* the states were about evenly divided in their adoption of the exclusionary rule in criminal prosecutions, *Elkins v. United States,* 364 U. S. 206 at 225, but only one state has applied the rule in civil proceedings, *Lebel v. Swinciki,* 354 Mich. 427, 93 N. W. 2d 281 (1958).

The instant decision should evoke widespread interest since it interprets a statute whose operative language is identical with that of the Fourth Amendment of the United States Constitution and of comparable provisions of many State Constitutions and statutes. Given the prior judicial construction of the New York statute, the holding of the present case is not unexpected. But it is quite another matter to extend this rule to other jurisdictions which lack the New York Civil Rights statutory basis and judicial gloss. Such an extension might come about in two ways, either as a construction of constitutional provisions inhibiting searches and seizures or as an exclusionary rule of evidence fashioned by courts in their control of proceedings before them. In either event, special problems are presented. First of all, absent the now controlling constitutional doctrine of *Mapp,* the states have been divided on their policy of whether or not to exclude unlawfully seized evidence even in criminal proceedings where protection of the defendant is supposedly at its maximum. Secondly, even if all states accepted on their own the propriety of excluding such evidence in criminal cases, it by no means follows that they should do so in civil litigation. The Fourth Amendment, as construed by *Weeks,* was held to abrogate a common law rule of evdence which existed at the time of the amendment's adoption and which, apart from that amendment, has remained unchanged to the present day. The Fourth, like the other amendments of the Bill of Rights, was adopted as a restraint on governmental police power, and under *Weeks* it operates by obstructing the truth-seeking process in litigation through exclusion of evidence which is

logically relevant and material. In fact, Professor Wigmore classes it as one of "those rules which rest on no purpose of improving the search after truth, but on the willingness to yield to requirements of extrinsic policy." 8 WIGMORE, EVIDENCE 2184 (2d ed. 1940). The justification for the rule is, of course, the prevention of injuries to citizens by removing incentives to violate their rights by seizure of evidence, *i.e.*, it is a device to enforce the Fourth amendment's command, and the courts have probably been justfied in striking this balance between the requirements of prosecution and the prevention of abusive searches and seizures. The basic rationale does not come into play when the case is a civil action between private parties, for here no governmental action is involved in the acquisition of the evidence. The incentives to unlawful search and seizure are perhaps not as great. Trespass actions are available and are probably not so beset with the difficulties which attend trespass actions against police officers and other governmental personnel seizing property for evidence. Here, it is at least arguable that the public interest in securing full, relevant and material evidence in civil proceedings overrides the aid which an exclusionary rule would undoubtedly give towards inhibiting private raids and searches. If these considerations would not warrant the courts extending the exclusionary rule to civil actions through an interpretation of constitutional guarantees, they should equally inhibit a court from barring on its own and without specific statutory sanction logically relevant evidence, *i.e.*, overriding the common law acceptance of illegally seized evidence.

DOUGLAS L. HINDS.

FEDERAL INCOME TAX — Year of Taxability — Income Received Either as Part Payment for Property Under an Option to Purchase or as Consideration for Extension of Option. — Taxpayer in 1949 granted a license to a corporation to manufacture and sell licensor's product under a trademark for a stipulated royalty. The term of the license was for five years, at the end of which the licensee had the option to purchase taxpayer's interest in the trademark for $350,000. Alternatively, the licensee could, upon payment of $50,000, obtain a five year extension of the license agree-

ment, and, at the close of any calendar month within that extension, could purchase taxpayer's interest in the trademark for $300,000. The Tax Court held that the $50,000 was not taxable in 1954 when received by the taxpayer. The Commissioner of Internal Revenue filed a petition in the Third Circuit of the United States Court of Appeals for review of the decision of the Tax Court. HELD: Affirmed. The $50,000, which was intended to serve both as consideration for an extension of the agreement and as payment on the purchase price should the option to purchase be exercised, was not includible in taxpayer's income until the option was exercised or had lapsed. *Comm'r v. Dill Co.*, 294 F. 2d 291 (3d Cir. 1961).

The general rule for the taxable year of inclusion is that the amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer. INT. REV. CODE OF 1954, § 451 (a); *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 75 L. Ed. 383 (1931). In support of the general rule the courts have developed the "claim of right" doctrine, first stated in *North Am. Oil Consol. v. Burnet*, 286 U. S. 417, 76 L. Ed. 1197 (1932), to the effect that if the taxpayer has received income under a claim of right, he must include it in the year in which he received it. *Comm'r v. Alamitos Land Co.*, 311 U. S. 679, 85 L. Ed. 437 (1940); *Brown v. Helvering*, 291 U. S. 193, 78 L. Ed. 725 (1933). When the courts speak of income held under a claim of right, they generally mean that the taxpayer has received and treated the monies as his own. *Comm'r v. Security Flour Mills Co.*, 135 F. 2d 165 (10th Cir. 1943); *Moore v. Thomas*, 131 F. 2d 611 (5th Cir. 1942). This doctrine has been applied in cases where payments received for future rent were held taxable income upon receipt. *Comm'r v. Lyon*, 97 F. 2d 70 (9th Cir. 1938); *Renwick v. United States*, 87 F. 2d 123 (7th Cir. 1936). The rule that income is taxable in the year received has been modified where contingencies are involved. Generally, a contingency in the taxable year with respect either to a liability and its enforcement or to the collectibility of income will prevent accrual. *Baltimore & Ohio* R. R. v. Magruder, 174 F. 2d 896 (4th Cir. 1949); *Keasbey & Mattison Co. v. United States*, 141 F. 2d 163 (3d Cir. 1943). Such contingencies have been found in cases involving deposits and advance payments for

the sale of property, the nature of which income could not be determined until a subsequent year. *Doyle v. Comm'r,* 110 F. 2d 157 (2d Cir. 1940); *Bourne v. Comm'r,* 62 F. 2d 648 (4th Cir. 1933). Similarly, where a contract to assign a lease provides for forfeiture of a deposit if a second payment is not made when due, an advance payment is not considered income until the lapse of the period in which the purchaser may or may not default. *Baird v. United States,* 65 F. 2d 911 (5th Cir. 1933). Where there is an option or an executory contract for the sale of property and part payment is made therefor, the payment may become part of the purchase price and is taxable in the year the option is exercised or the executory contract completed. *Doyle v. Comm'r, supra; Aiken v. Comm'r,* 35 F. 2d 620 (8th Cir. 1929). If an option is terminated without being exercised or a down payment on the purchase price is forfeited, the entire income is taxable as ordinary income in the year of termination or forfeiture. *Hunter v. Comm'r,* 140 F. 2d 954 (5th Cir. 1944); *Virginia Iron, Coal & Coke Co. v. Comm'r,* 99 F. 2d 919 (4th Cir. 1938). Whether the contract specifies that payment for an option to buy property may or may not be applied against the purchase price contained in the option, the payment is not income at the time of its receipt and becomes taxable only in the year when its purpose and nature can be determined. *Comm'r v. Dill Co., supra; Virginia Iron, Coal & Coke Co. v. Comm'r, supra.*

The development of the exception, in the case of a contingency, to the general rule that monies are taxable in the year received is a marked advancement in the law of taxation. The older view that income received in advance or contingently is taxable upon receipt seems quite opposed to the rule of common sense. The more reasonable view would insist that the taxation of such payments be deferred until the period in which the income is realized, where the nature of the proceeds can not be determined at the time the payment is made. In the instant case the court was faced with the problem of whether the payment was a royalty, consideration for the license agreement, or part of the purchase price. The only logical result that the court could reach was that in the year of receipt of the payment it was impossible to determine whether the payment would represent ordinary income or capital gain. Such rationale affords a

reasonable and desirable result in solidifying the rule that income should be taxable only when the event determining its nature has occurred.

DONALD R. MCALISTER.

TORTS AND CONTRACT — Implied Warranty and Negligence — Liability of Cigarette Manufacturer for Lung Cancer of Remote Vendee. — Plaintiff, remote vendee, purchased advertised product of defendant cigarette manufacturer on the representation that the product was non-harmful to nose, throat, and accessory organs. Plaintiff contracted lung cancer, and brought action for negligence alleging that defendant's product contained ingredients making it unsafe for human consumption. A second cause of action was brought for breach of implied warranty alleging that defendant cigarette manufacturer represented that the smoking of its product was not harmful. Plaintiff attempted to establish a causal relationship between smoking and lung cancer by expert testimony. The trial court dismissed the warranty count and granted defendant's motion for a directed verdict as to the negligence. Plainiff appealed on the ground that he was denied the right, allegedly guaranteed by the Seventh Amendment to the Constitution, to have his case submitted to the jury. HELD: Reversed and remanded. Whether the cigarette smoker who had contracted lung cancer and who sues the manufacturer that advertised its product as non-harmful had established a breach of implied warranty of merchantability was an issue for the jury. And the question of whether the cigarette manufacturer was negligent in failing to conduct additional tests to determine if use of its product caused lung cancer and in failing to give warning of any cancer producing ingredients that might cause cancer of the type contracted by the plaintiff was also for the jury. *Pritchard v. Liggitt and Myers Tobacco Co.*, 295 F. 2d 292 (3d Cir. 1961).

Manufacturer's liability arising from negligence in the manufacturing process has undergone extensive change in the United States. One whose negligence in the manufacture of an inherently dangerous article causing injury is liable to the injured party. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852). However, absent privity of contract

between the negligent manufacturer and the injured party, there could be no recovery for negligent manufacture of a product not inherently dangerous. *Loop v. Litchfield,* 42 N. Y. 351, 1 Am. Rep. 513 (1870). Today, however, where negligence in the manufacturing process causes any article to be dangerous to life or limb, a remote vendee may recover against the manufacturer who failed to exercise due care even though there is as between the parties no privity. *MacPherson v. Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050 (1916). Thus, where a cigarette, defective through negligent construction, caused injury to a smoker, liability was imposed on the manufacturer. *DeLape v. Liggitt and Myers Tobacco Co.,* 25 F. Supp. 1006 (S. D. Calif. 1939), Modified 109 F. 2d 598 (9th Cir. 1940). Further, where an article is so advertised that its use, as urged by the maker, produces injury, the maker has been held liable for negligent advertising. *Jones v. Raney Chevrolet Co.,* 213 N. C. 775, 197 S. E. 757 (1938); *Crist v. Art Metals Works,* 230 App. Div. 114, 234 N. Y. Supp. 496 (1st Dept. 1930), *aff'd* 255 N. Y. 624, 175 N. E. 341 (1930). In Pennsylvania, if persons are likely to come into contact with a dangerous article, the one responsible for its existence is under an affirmative obligation to impose an adequate measure of protection for their benefit. *Maize v. Atlantic Refining Co.,* 352 Pa. 51, 41 A. 2d 850 (1945). The standard thereby imposed is every reasonable precaution experience and knowledge of the danger can suggest. *MacDougall v. Pennsylvania Power and Light Co.,* 311 Pa. 387, 166 A. 589 (1933).

The modern rules of implied warranty are, like the negligence theories, the products of metamorphosis. Formerly, in most jurisdictions, without deceit or warranty, the rule of *caveat emptor* applied, *Seixas v. Woods,* 2 Cai. R. 48 (Sup. Ct. N. Y. 1804), 2 Am. Dec. 215, and privity of contract was necessary to recover. *Chysky v. Drake,* 235 N. Y. 468, 139 N. E. 576 (1932). Today, however, privity is no longer a prerequisite to recovery for breach of warranty, *Baxter v. Ford Motor Co.,* 168 Wash. 456, 12 P. 2d 409 (1931), so that the remote vendee who found a fragment of a dead mouse in a tobacco container was allowed recovery for breach of implied warranty. *Foley v. Liggitt and Myers Tobacco Co.,* 241 N. Y. Supp. 233 (Sup. Ct. 1930), 136 Misc. Rep. 368. While a plaintiff's action in deceit was held to be a valid

cause of action against a manufacturer who allegedly advertised his cigarettes as healthful and harmless to the respiratory system, *Cooper v. R. J. Reynolds Tobacco Co.*, 234 F. 2d 170 (1st Cir. 1956), it is also true that advertising can create an implied warranty by the manufacturer for breach of which the remote vendee was allowed recovery. *Huscher v. Pfost*, 122 Colo. 301, 221 P. 2d 931 (1950); *Decker v. Cappe*, 139 Tex. 609, 164 S. W. 2d 828 (1942). Although Pennsylvania denies recovery for breach of implied warranty for any special purposes of the vendee, nevertheless to such vendee there is an implied warranty of merchantability: that the article is properly made (that due care was exercised in the manufacturing process) and that it is fit for the general purposes for which it was manufactured. *Franz Equipment Co. v. Leo Butler Co.*, 370 Pa. 459, 88 A. 2d 702 (1952).

The instant case, it would seem, is correctly decided. The law must undertake to protect the rights and lives of those subject to it. Medical authorities agree that smoking actually does cause lung cancer among some users. Notwithstanding knowledge of possible danger to some smokers, cigarette manufacturers continue to advertise their products as "nonharmful" or rendering "no ill effects" to smokers. This practice is unfair and unjust. In *Green v. American Tobacco Co.*, (S. D. Fla., 1960; verdict for defendant, now on appeal to appellate court), the jury's verdict required both negligence and breach of warranty against the cigarette manufacturer for liability. The essential difference between warranty liability and negligence liability is that "excusable ignorance" of a defect or of the properties of a product is immaterial with respect to warranty liability. In the principal case, both issues are for the jury, with possible recovery on either issue. That the cigarette manufacturer should be liable to the remote vendee based on a single jury issue, whether it be negligence or breach of warranty, is a proposition necessary to protect the individual and increase the responsibility of the cigarette manufacturer. In *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69 (1960) the court ruled that in view of the realities of present day mass marketing, a remote manufacturer who puts an article in the stream of trade and creates demand for it by advertising should be held to guarantee his product to the ultimate consumer. Such is sufficient for a jury verdict for breach

of implied warranty of merchantability. Regarding the negligence issue, authority indicates that a product that would not ordinarily fall within the inherently dangerous products classification may be found to be inherently dangerous so as to render the privity requirement inapplicable where it has been advertised as danger-free. *Crist v. Art Metals Works, supra.* It is submitted that liability of the cigarette manufacturer for causing lung cancer may be based on either of the above two propositions.

WALTON J. MCLEOD.

TRIAL — DAMAGES — Pain and Suffering — Propriety of Per Diem or Other Mathematical Formula in Determining Value. — In an action to recover damages for injuries sustained in an automobile accident plaintiff's counsel was permitted, over defendant's objection, to introduce to the jury on a blackboard his own opinion as to the value of pain and suffering. The evaluation was made by multiplying a suggested *per diem* compensation by the number of days of past and future pain and suffering. HELD: Reversed. Counsel's statements of his opinion as to the *per diem* value of pain and suffering had no foundation whatever in the evidence. Such argument, to be permitted, must either be based on facts in the record or inferentially drawn from facts admissible in evidence. (Use of the blackboard for other purposes was sanctioned). *Harper v. Bolton,* __ S. C. ___, 124 S. E. 2d 54 (1962). Petition to appear *amicus curiae* (rehearing) denied, limiting the decision to the facts in the case.

No restriction is placed on the use of a blackboard to illustrate points which are evidentiary, and control of both oral and visual argument rests in the sound discretion of the trial judge. *Haycock v. Christie,* 249 F. 2d 501 (D. C. Cir. 1957); *Johnson v. Charleston and Western Carolina Ry.,* 234 S. C. 448, 108 S. E. 2d 777 (1959). In denying use of the *per diem* formula, South Carolina adopts the minority rule[1] as set out in *Botta v. Brunner,* 26 N. J. 82, 138 A. 2d

1. Ten jurisdictions prohibit use of the per diem argument. Conn. Gorczyca v. New York, New Haven and Hartford Ry., 141 Conn. 701, 109 A. 2d 589 (1954); Del. Henne v. Balick, 51 Del, 369, 146 A. 2d 394 (1958); Mo. Faught v. Washam, 329 S. W. 2d 588 (Mo. 1959); N. D. King v. Railway Express Agency, 107 N. W. 2d 509 (N. D.

713, Annot., 60 A. L. R. 2d 1331 (1958). It is well established in South Carolina that counsel may, in the course of argument, not only make reference to the *ad damnum* clause, but also has the duty to justify its elements. The distinction made between reference to the total amount and reference to a *per diem* amount is ultimately based on the idea that "actual compensation in money is possible only where the injury is to an interest of substance." III Pound, *Jurisprudence* 57 (1959). In other words, there is no evidentiary basis for converting pain and suffering into money, since it has no market value. *Gorczyca v. New York, New Haven and Hartford Ry.*, 141 Conn. 701, 109 A. 2d 589 (1954); *Henne v. Balick*, 51 Del. 369, 146 A. 2d 394 (1958). Since there is no standard by which the amount of damages can be fixed, the only criterion is "fair and reasonable compensation." *Botta v. Brunner, supra;* 25 C. J. S. Damages § 93, What is fair and reasonable compensation must be determined by the traditional trier of facts and cannot be established by any arithmetical calculation. *Braddock v. Seaboard Air Line Ry.*, 80 So. 2d 662 (Fla. Dist. Ct. 1955); *The Mediana,* Law Reports A. C. 1900 at p. 116. In addition, the *per diem* formula permits counsel to introduce testimony not otherwise admissible in evidence, since no witness could testify as to the value of pain and suffering, *Certified T.V. and Appliance Co. v. Harrington*, 201 Va. 109, 109 S. E. 2d 126 (1959), and to instill in the minds of the jurors impressions not based on the evidence. *Stassum v. Chapin,* 324 Pa. 125, 188 A. 2d 111 (1936). It is doubtful that a charge by the judge to the effect that counsel's suggestions were mere argument would remove these impressions, and an additional inequity results because defendant's counsel must either endorse the formula by using it to prove lesser damages or suffer the adverse effect of it in full. *Botta v. Brunner, supra.* "Certainly no amount of money per day could compensate a person reduced to plaintiff's position (twenty-six years old, complete motor and sensory paralysis from waist down) and to attempt such evalution . . . leads only to monstrous verdicts." (Plain-

1961); N. J. Botta v. Brunner, 26 N. J. 82, 138 A. 2d 713 (1958); Pa. Stassum v. Chapin, 324 Pa. 125, 188 A. 111 (1936); S. C. Harper v. Bolton, Smith's Advance Sheet, Feb. 7, 1962; W. Va. Crum v. Ward, 122 S. E. 2d 18 (W. Va. 1961); Wis. Affett v. Milwaukee and Suburban Transport Corp., 11 Wis. 2d 604, 106 N. W. 2d 274 (1960); Va. Certified T.V. and Appliance Co. v. Harrington, 201 Va. 109, 109 S. E. 2d 126 (1959), but Virginia Senate bill 74, Jan. 17, 1962, would allow use of the *per diem* argument.

tiff was awarded $70,000 for pain, suffering and disability.) *Ahlstrom v. Minneapolis, St. Paul and Sault Ste. Marie Ry.*, 244 Minn. 1 at 30, 68 N. W. 2d 873 at 891 (1955).

The majority of jurisdictions which have ruled on the question allow use of the *per diem* formula[2] and their basic suppositions, while similar to the minority's, lead to a different conclusion. "In personal injury cases the exclusion of opinions of value is perhaps reasonable, not because of the opinion rule, but because there are no precise grounds, i.e., the injury is not capable of being stated in terms of money . . . Nevertheless, so long as the law gives compensation in the shape of money, there is an inconsistency in excluding estimates in money." 7 Wigmore, Evidence § 1919. Evaluation of pain and suffering is impossible, yet this is precisely the task imposed upon the jury. *Yates v. Wenk*, 363 Mich. 311, 109 S. W. 2d 828 (1961). For this task, the jury should have some guide, as an award for pain and suffering should not be a figure pulled from the air, *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4 (6th Cir. 1956), and even though there is no evidentiary basis to support a monetary award, the record may show that there was and will be pain and suffering, and upon this basis counsel has a right to state what he thinks would be proper damages. *4-County Electric Power Ass'n. v. Clardy*, 221 Miss. 403, 73 So. 2d 144 (1954). The very absence of a standard is reason for giving counsel full latitude in exploring and discussing this element of damages. *Caley v. Manicke*, 291 Ill. App. 2d 323, 173 N. E. 2d 209 (1961). Counsel's statements are merely argument, and the jury is free

2. Fourteen state jurisdictions allow use of the *per diem* argument, Ala. McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Fla. Ratner v. Arrington, 111 So. 2d 82 (Fla. 1958); Ill. Caley v. Manicke, 291 Ill. App. 2d 323, 173 N. E. 2d 209 (1961); Ind. Kindler v. Edwards, 126 Ind. App. 261, 130 N. E. 2d 491 (1955); Ky. Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S. W. 2d 637 (1944); Mich. Yates v. Wenk, 363 Mich. 311, 109 N. W. 2d 828 (1961); Minn. Boutang v. Twin City Bus Co., 248 Minn. 240, 80 N. W. 2d 30 (1956); Miss. 4-County Electric Power Ass'n. v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); N. Y. Haley v. Hockey, 199 Misc. 512, 103 N. Y. S. 2d 717 (1950); Nev. Johnson v. Brown, 345 P. 2d 754 (Nev. 1959); Okla. Missouri-Kansas-Texas Ry. v. Jones, 354 P. 2d 415 (Okla. 1960); Tex. J. D. Wright and Son Truckline v. Chandler, 231 S. W. 2d 211 (Tex. Civ. App. 1950); Utah, Olson v. Preferred Risk Ins. Co., 11 U. 2d 23, 354 P. 2d 415 (1960); Wash. Jones v. Hogan, 56 Wash. 2d 23, 351 P. 2d 153 (1960); Although the question has not been ruled on in California, the argument is undoubtedly allowed there. I Belli, Modern Trials § 31. Federal Jurisdictions: Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4 (6th Cir. 1956). Probable to favor *per diem*: Md. Harper v. Higgs, 225 Md. 24, 169 A. 2d 661 (1961); Ohio, Miller v. Loy, 101 Ohio App. 405, 140 N. E. 2d 38 (1956).

to accept or reject his opinions. *J. D. Wright and Son Truckline v. Chandler,* 231 S. W. 2d 211 (Tex. Civ. App. 1950). Juries automatically discount "lawyer talk" to some degree, and judges automatically instruct that counsel's argument is not evidence. *Yates v. Wenk, supra. Per diem* argument is no more speculative than suggesting a total amount. *Louisville and Nashville Ry. v. Mattingly,* 339 S. W. 2d 155 (Ky. 1960). "It is by no means impossible to arrive at a reasonably objective award for pain and suffering. What would enable the injured . . . to find amusement, entertainment and distraction to mitigate the day to day pain and suffering the evidence showed." Roscoe Pound, 16 NACCA L. J. 237.

In dealing with a question as subjective as the present one, the result must be more important than the rationale. The basis of the minority rule goes far back in the history of the law to a time when all opinions as to value were excluded from presentation to the jury, so that, at one time, even opinions as to the value of real estate were not allowed. Gradually, juries were given the help of "experts" so that their determinations could be more equitable. However, for the area of human pain there are no experts. Pain has no value, even though the courts have chosen to make it compensable. The question resolves to how to determine how much compensation will be given, and to answer this question empty rationalization and partisan differences must be carefully avoided in an attempt to gain a measure of predictable and consistent justice. The minority rule severely restricts counsel's ability to justify pain and suffering as an element of damages, and it limits his right to argue his case freely, while the abuse which is sought to be controlled is already controlled both by the trial judge and by appellate review. More unfortunate, the minority rule leaves the jury with absolutely no standard in a subjective inquiry, a state which seems likely to lead to gross inconsistency. The majority rule allows counsel to establish a frame of reference which, to be practical, brings the inquiry to a plane which is not totally metaphysical and does not necessarily (or even probably) lead to an excessive award. Until such time as pain can be accurately measured, evaluation will be by estimation. This estimation will necessarily be beneficially controlled and will approach reality through the application of some objective standard, one which places the inquiry on a

level which the juror can comprehend and discuss, such as the *per diem* standard.

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