Per Diem Arguments in New York - Where and How

by Michael G. Bersani

Yes, you can make per diem arguments in some courts in New York, and where you cannot, you may nevertheless be able to convey per diem logic to the jury.

What is a per diem argument? Generally, it is as an argument advanced during plaintiff's summation which relates a small unit of time (e.g., seconds, minutes, hours, days) to pain and suffering, asking the jury to consider a certain amount of compensation for each unit, and then, by mathematical computation, to arrive at a value for the entire duration of the pain and suffering.

Many jurisdictions have banished per diem arguments, usually out of fear that they are deceptive; what starts out as a small per-unit amount ends up, after calculating thousands or millions of such small units, as an astronomical damages verdict. See, Ann., Per Diem - - Fixing Damages for Pain and Suffering, 3 ALR 4th 940, 947-948. From a plaintiff's perspective, however, the argument merely spotlights the multitude of moments, hours and days plaintiff is condemned to suffer, and asks for fair compensation for them. By contrast, a mere "lump sum" request for damages collapses a life-time of suffering into a single figure, thus obscuring the long string of pain-laden minutes, hours and days. The majority of States allow per diem arguments, but unfortunately all four New York Appellate Divisions have embraced the minority view. see, Ann., Per Diem - - Fixing Damages for Pain and Suffering, 3 ALR 4th 940; Braun v. Ahmed, 127 A.D.2d 418, 515 N.Y.S.2d 473 (2nd Dep't 1987); Halftown v. Tripled Leasing Corp., 89 A.D.2d 794, 453 N.Y.S.2d 514 (4th Dep't 1982); DeCicco v. Methodist Hospital of Brooklyn, 74 A.D.2d 593, 424 N.Y.S.2d 524 (2nd Dep't 1980); Bischert v. Limousine Rental, 33 A.D.2d 355, 308 N.Y.S.2d 200 (3rd Dep't 1970); Paley v. Brust, 21 A.D.2d 758, 250 N.Y.S.2d 356 (1st Dep't 1964). The New York Court of Appeals has discussed, but not decided the issue. Tate v. Colabello, 58 N.Y.2d 84, 445 N.E.2d 1101, 459 N.Y.S.2d 422 (1983).

The per diem argument is fair game, however, in Federal Courts sitting in New York State. In Maleski v. Long Island Railroad Co., 499 F.2d 1169 (2nd Cir. 1974), the Second Circuit refused to prohibit per diem arguments, but instead left the decision "largely to the trial judge's discretion." For obvious reasons, however, it is advisable to seek permission of the Federal Court judge before presenting a per diem argument.

Although per diem arguments are prohibited in New York State Courts, plaintiff's counsel may be able to bring the jury so close to the brink of per diem logic that, in deliberation, the jury will plunge in. Nothing prohibits the attorney from telling the jury how many minutes, hours, etc. a plaintiff will suffer, as long as she does not state a "specific monetary value for each unit" of time. Feldman v. Town of Bethel, 106 A.D.2d 695, 698, 484 N.Y.S.2d 147, 150 (3d Dep't 1984). Plaintiff's counsel can also suggest a lump-sum figure for future pain and suffering. By combining these two permissible forms of comment, and using figures that are easily recognizable multiples of each another, plaintiff's counsel may be able to suggest per diem logic to the jury.

Although this formula is untested in New York, it has passed muster elsewhere. For example, in an Illinois case, the court held that plaintiff's counsel had not made a per diem argument when he told the jury that plaintiff had 49 years to live, and then asked them to award her $49,000 dollars for her future pain and suffering. See, Watson v. City of Chicago, 464 N.E. 2d 1100, 124 Ill.App.3d 248 (Ill. App. Ct. 5th Div. 1984). Consider whether the result would have been different had counsel used units of time smaller than a year (e.g., telling jury that plaintiff has $3,543,675 minutes to live and then asking them to award her $3,543,675).

This brings us to an interesting issue; is a "per year" argument really a per diem argument at all? Indeed, the phrase per diem, which derives from Latin, literally means "by day". In Tate v. Colabello, supra, the Court of Appeals defined per diem arguments as those which break down pain and suffering into "small units of time". Arguably, a year is not a small unit of time. The few Courts that have examined "per year" arguments appear divided (see, e.g., Warp v. Whitmore, 123 Ill App 2d 157, 260 NE2d 45 (1970) (asking jury for $100 per year for number of years of her life expectancy permitted); Caylor v Atchison, T.& S.F.R. Co., 190 Kan 261, 374 P2d 53 (1962) (asking jury for $130 per year not permitted).

The distinction between a year and smaller units of time is not trivial. In order to prove permanent future pain and suffering a plaintiff is allowed to, and in fact must, present evidence of the plaintiff's life expectancy, i.e., the number of years remaining in her life. Future life expectancy would be meaningless to the jury unless it considered, either consciously or subconsciously, a certain amount of compensation per year. Further, when the jury is asked to consider a per-year evaluation of pain and suffering, there is no danger, as with small units of time such as seconds, minutes or days, that what starts out as a small per-unit amount ends up, after calculating thousands or millions of such small units, as an astronomical damages verdict. See, Ann., Per Diem - - Fixing Damages for Pain and Suffering, 3 ALR 4th 940, 947-948.

Unfortunately, since no New York cases speak to "per annum" arguments, nor to the "easy multiple" approach (e.g., 49 years, $49,000), counsel who present such arguments do so at their own (and their clients') risk. Hence, where damages can be best presented with a per diem argument, plaintiff's counsel should consider filing suit in Federal Court (if subject matter jurisdiction can be obtained).