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DAMAGES - MEASURE OF DAMAGES FOR PERSONAL INJURY - INABILITY TO ENJOY LIFE AS AN ELEMENT OF DAMAGE

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DAMAGES — MEASURE OF DAMAGES FOR PERSONAL INJURY — INABILITY TO ENJOY LIFE AS AN ELEMENT OF DAMAGE — Plaintiff sustained injuries to his spine and nervous system when defendant's dam burst and caught the automobile, in which plaintiff was riding, in a surge of water. *Held*, an instruction was erroneous which included, as an element of damage, plaintiff's inability on account of his injuries, to enjoy life in the manner to which he was accustomed. *Northern Indiana Public Service Co. v. Robinson*, (Ind. App. 1939) 18 N. E. (2d) 933.

The question whether it is proper to instruct a jury to compensate plaintiff for loss of enjoyment of life has received little attention from courts and text-writers. The few courts which have passed directly upon this question are not in agreement. In Wisconsin and West Virginia the courts have expressly approved such an instruction,[1] while in Indiana and Kansas the courts have expressly disapproved it.[2] But in spite of the relatively few decisions on the propriety of instructing a jury as to this element of damage, appellate courts have often considered "enjoyment of life" when determining whether or not a verdict is excessive.[3] Also, instructions have been approved which direct the

[1] Benson v. Superior Mfg. Co., 147 Wis. 20, 132 N. W. 633 (1911); Warth v. County Court of Jackson County, 71 W. Va. 184, 76 S. E. 420 (1912). See also Nees v. Julian Goldman Stores, Inc., 109 W. Va. 329, 154 S. E. 769 (1930); Kramer v. Chicago, M., St. P. & P. R. R., 226 Wis. 118, 276 N. W. 113 (1937).

[2] City of Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65 (1890); South Bend Brick Co. v. Goller, 46 Ind. App. 531, 93 N. E. 37 (1910); Hogan v. Santa Fe Trail Transportation Co., 148 Kan. 720, 85 P. (2d) 28 (1938), two justices dissenting, noted in 52 HARV. L. REV. 838 (1939).

[3] "The total loss of the left hand by a boy ten years of age takes a great deal of usefulness and enjoyment out of his prospective life. The loss of earning power is by no means the extent of the injury." Haynes v. Waterville & O. St. Ry., 101 Me. 335 at 337, 64 A. 614 (1906). See also Gibbard v. Evans, 87 W. Va. 650, 106 S. E. 37 (1921); Haeussler v. Consolidated Stone & Sand Co., 3 N. J. Misc. 159,

jury to give compensation for elements of damage that go to make up what may be broadly termed "the joy of living." These elements include loss of companionship, society, and comfort; [4] loss of ability to engage in avocations; [5] personal inconvenience and the sense of loss due to immobility; [6] incapacity for the proper exercise of physical functions and powers; [7] loss of prospects of marriage; [8] loss of ability to labor and make a living and the apprehension of such loss.[9] The principal case disapproved the instruction to compensate for loss of enjoyment of life on the grounds that this element of damage is too uncertain,

127 A. 602 (1925). "She will be deprived of the privileges and enjoyments common to people of her class." Budek v. City of Chicago, 279 Ill. App. 410 at 429 (1935). Cf. Chicago, I. & L. Ry. v. Stierwalt, 87 Ind. App. 478 at 496, 153 N. E. 807 (1926), where the court said: "The jury was entitled to take into consideration his personal suffering, and the fact that he has been deprived of most of the privileges and enjoyments common to men of his class." This view is approved in the principal case, 18 N. E. (2d) at 936. Thus it would see that in Indiana a jury can consider loss of enjoyment of life in setting damages, but it is error if it is instructed to do so.

[4] Indianapolis St. Ry. v. Robinson, 157 Ind. 414, 61 N. E. 936 (1901); Indianapolis & M. Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 N. E. 1042 (1908); The Little Silver, (D. C. N. J., 1911) 189 F. 980.

[5] It was deemed proper for the jury to consider the inability of the plaintiff to enjoy "boyhood games and pastimes" in Kasiski v. Central Jersey Power & Light Co., 4 N. J. Misc. 130, 132 A. 201 (1926). Effect of the injury on "ability to engage in pastimes," Bassett v. Milwaukee Northern Ry., 169 Wis. 152, 170 N. W. 944 (1919). "Worry over inability to pursue a customary avocation," May v. Farrell, 94 Cal. App. 703, 271 P. 789 (1928). Loss of ability to play the violin was held to be a proper element to consider in assessing damages in Scally v. W. T. Garratt & Co., 11 Cal. App. 138, 104 P. 325 (1909), and in Haucke v. Beckman, 96 N. J. L. 409, 115 A. 653 (1921). See also the dissenting opinion of Justice Wedell in Hogan v. Santa Fe Transp. Co., 148 Kan. 720, 85 P. (2d) 28 (1938).

[6] Rice v. City of Council Bluffs, 124 Iowa 639, 100 N. W. 506 (1904); McDermott v. Severe, 202 U. S. 600, 26 S. Ct. 709 (1906); Arizona Eastern R. R. v. Bryan, 18 Ariz. 106, 157 P. 376 (1916).

[7] 8 R. C. L. 470 (1915). The law assumes that every physical function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise thereof. Alabama G. S. R. R. v. Hill, 93 Ala. 514, 9 So. 722 (1891). For example, recovery may be had for the loss of child-bearing power, and this is true though the woman is not and may never be married. See Normile v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030 (1905). An instruction which allowed the jury to consider the inability of the plaintiff to enjoy "the natural and ordinary uses of a healthy mind and body" was held proper in Reed v. Jamieson Investment Co., 168 Wash. 111, 10 P. (2d) 977, 15 P. (2d) 1119 (1932).

[8] Where a five-year old girl was injured, the court held it proper for the jury to consider the "effect the injury of disfigurement will probably have on the prospects of her marriage when she reaches the age of womanhood. . . ." Smith v. Pittsburgh & W. Ry., (C. C. Ohio, 1898) 90 F. 783 at 785.

[9] An instruction to compensate for loss of ability to labor was upheld as a "specie of mental pain" wholly distinct from loss of earnings. City of Atlanta v. Hampton, 139 Ga. 389, 77 S. E. 393 (1913). "Consciousness that his earning capacity is injured for life" held a proper instruction. Brush Electric Light & Power Co. v. Simonsohn, 107 Ga. 70, 32 S. E. 902 (1899).

too speculative,[10] and varies with the mental reactions of the particular plaintiff.[11] Other reasons which have been advanced for disapproving such an instruction are that it is too difficult to measure [12] and that it is a matter of sentiment.[13] It is submitted that these objections are not consistent with modern damage principles. Difficulty in ascertaining damages must be kept distinct from the right of recovery.[14] The rule against uncertain and contingent damages applies only to the right of recovery by preventing compensation for injuries that are not the proximate consequence of defendant's wrongful act.[15] But once the right of recovery is clear, then the difficulty of ascertaining the amount of damages is no obstacle.[16] Compensation for psychological injuries makes it necessary for the law to measure, in terms of money, elements of damage that defy absolute measurement.[17] Yet the measurement must be made, and the courts must place reliance upon the jury to arrive at the most intelligible estimate which the nature of the case will permit—with power in the courts to set aside excessive verdicts as a safeguard.[18] To the objection that "enjoyment of life" is sentimental and varies with the mental reactions of the particular plaintiff, the reply can be made that physical and mental pain, universally held to be proper elements of damage, are similarly variable.[19] All these objections to recovery for

[10] Principal case, 18 N. E. (2d) 933 at 935. To the same effect are South Bend Brick Co. v. Goller, 46 Ind. App. 531, 93 N. E. 37 (1910); and Hogan v. Sante Fe Transp. Co., 148 Kan. 720, 85 P. (2d) 28 (1938).

[11] "Inability to enjoy life, unhappiness resulting from impaired freedom of action, lack of personal enjoyment, are all intangible things and depend to a great extent upon mental reactions. For such damages there is no standard of measurement known to the law, and this item should not have been included in the instruction. . . . The jury should not be permitted . . . to assess damages on a basis which must depend wholly upon sentiment or the mental reactions of a particular plaintiff." Principal case, 18 N. E. (2d) 933 at 936.

[12] City of Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65 (1890).

[13] Indianapolis Street Ry. v. Ray, 167 Ind. 236, 78 N. E. 978 (1906).

[14] See Straus v. Victor Talking Machine Co., (C. C. A. 2d, 1924) 297 F. 791 at 802.

[15] 17 C. J. 756 (1919) and cases cited.

[16] See 52 HARV. L. REV. 838 (1939).

[17] 17 C. J. 869 (1919) and cases cited. "In truth the admeasurement of suffering in terms of money is a clumsy device, but it is the best device which the law knows, and it is a device which the law will employ until some better is discovered." Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499 at 513, 111 P. 534 (1910).

[18] "The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury and not the detailed verbal accurracy of the instructions." MCCORMICK, DAMAGES 319 (1935). See Justice Christiancy's interesting discussion on this point in Allison v. Chandler, 11 Mich. 542 at 554-555 (1863).

[19] Mental suffering differs "in degree with individuals, with their sex, circumstances, and positions in life. But so do men differ in sensing physical pain; so do they differ in the mental suffering occasioned by physical pain alone. No one would pretend to say that the actual physical suffering of a crushed leg is the same in case of a sodden, phlegmatic tramp as it would be with a high-strung, nervous, active man of affairs. Yet the law has scales by which it measures the compensation for suffering of

psychological injuries as being "too remote, uncertain, and difficult of ascertainment" have been termed "pious incantations" which lose their charm when it is recalled how far courts have already gone in making injured feelings a matter of recovery.[20] As new conditions arise, the human mind becomes educated to higher and subtler conceptions of injury.[21] The courts have already given extensive protection to the feelings and emotions, and the law on this subject is growing rapidly.[22] Thus, there appears to be no theoretical reason why "loss of enjoyment" as an element of damage should not be given recognition, provided it answers the needs of our complex society. Whether it answers such needs is strictly a matter of policy, and it may be wise social policy to say that "loss of enjoyment" must go without compensation lest the resulting burden of liability hamper activity. Certainly such a reason for denying recovery for "loss of enjoyment" is more logical and more consistent with accepted principles of damages than to say, as in the principal case, that this element is objectionable because it is "speculative."

Robert M. Warren

this kind, and measures it, of course, in terms of money." Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499 at 513, 111 P. 534 (1910).

[20] Goodrich, "Emotional Disturbance as Legal Damage," 20 MICH. L. REV. 497 at 509 (1922). Mental suffering "is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the 'physical' pain of a broken leg, which never has been denied compensation; nor is there any physiological reason for regarding 'physical pain' as any less a 'mental' phenomenon." Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 MICH. L. REV. 874 at 875 (1939). See also Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 (1936).

[21] 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 475 (1906). Gone are the days when a court could say: "The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. . . . The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries." Chapman v. Western Union Tel. Co., 88 Ga. 763 at 772-773 (1892).

[22] Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 (1936). See ante, notes 4-9.