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DAMAGES

By EDGAR HUNTER WILSON*

During the period of this survey the appellate courts of Georgia have reaffirmed the following general principles of the law of damages: Exemplary damages may not be recovered in actions on contracts.[1] A jury finding as to the amount of damages will not be upset unless the amount is so small or so large as to indicate "gross mistake or undue prejudice."[2] "General damages are such that the law presumes to flow from any wrongful act, which the law denominates a tort, and may be recovered without proof of any amount."[3] The amount of general damages or injury to the person and for pain and suffering are left to the enlightened conscience of an impartial jury.[4] In an action for libel per se, general damages are recoverable without a showing of special damages and the measure is the conscience of the jury.[5] Actual malice and not implied in law malice is such an aggravating circumstance as will allow additional damages to deter the wrong-doer or compensate the wounded feelings of the injured party in a tort action.[6]

Several cases dealt with the measure of damages in particular situations. In *City of Atlanta v. Kenny*[7] the problem was the measure of damages for a building that collapsed as the result of excavations conducted by the city. The plaintiff alleged that the market value before the collapse was $20,400 and that the building was presently worthless. Damage was also alleged by reason of the abandonment by the tenant and the resulting loss of rent, diminution in rental value and the cost of removing debris. The court ruled that special demurrers should have been sustained to all of these allegations except those showing the actual diminution of market value, that being the correct measure.

Studebaker Corp. v. Nail[8] was an action by the purchaser of an automobile against the manufacturer for breach of warranty. The automobile had been repossessed some time prior to this action. The plaintiff contended that his measure of damages was the portion of the purchase price paid by him, but the court held that such was the measure only when the article warranted was totally worthless which was not true of this automibile. Where the defect has not been corrected and the property is not worthless, the proper measure is the difference between the market value at the

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1. Cain v. Tuten, 82 Ga. App. 102, 60 S.E.2d 485 (1950), applying GA. CODE § 20-1405 (1933).
2. Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456 (1950), applying GA. CODE § 105-2015 (1933).
3. Tyson v. Shoemaker, 83 Ga. App. 33, 57, 62 S.E.2d 586, 601 (1950), *rev'd on other grounds*, 208 Ga. 28, 65 S.E.2d 163 (1951).
4. 83 Ga. App. at 56, 62 S.E.2d at 600; Atlanta & W.P.R. Co. v. Gilbert, 82 Ga. App. 244, 60 S.E.2d 787 (1950).
5. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).
6. *Ibid.*, applying Ga. Code § 105-2003 (1933).
7. 83 Ga. App. 823, 64 S.E.2d 912 (1951).
8. 82 Ga. App. 779, 62 S.E.2d 198 (1950).

time of delivery and the purchase price—and, although the court does not so indicate, it would seem here, subject to an adjustment because only part of the purchase price had been paid.

In *Rose City Foods, Inc. v. Bank of Thomas County*[9] the bank held a bill of sale to secure debt on certain trucks. This action was in trover for the wrongful conversion of the property and the bank was asking for a money verdict under the provisions of Code Section 107-105. The court stated the measure of damages to be either the highest value of the property between date of conversion and trial or the value at the time of conversion with interest or hire but, in no event, could the recovery exceed the amount of the debt which the property secured.

The opinion in *Padgett v. Williams*[10] indicates that the usual instruction on the question of measure of damages for injury to an automobile is "the difference between the value of the property before and after the damage." However, when the owner, as here, makes repairs he may recover the reasonable value of the labor and materials used in repairing, the permanent impairment after repairs and hire while the automobile was out of use, so long as the total amount does not exceed the value of the automobile before injury, plus interest.

In *Herrman v. Conway*[11] the plaintiff had subcontracted to do certain lathing and plastering work for defendant, prime contractor. Plaintiff did part of the work and was wrongfully prevented by defendant from completing. Plaintiff's damages were measured by the difference between the contract price and the cost of completing the work plus the amount acutally expended by plaintiff for the part performed.

Several cases made it clear that a very careful distinction must be drawn between damages for the loss of "capacity to labor" and "earning capacity." In *Atlantic Coast Line R. Co. v. Ouzts*[12] the trial court had given the following instruction in this connection: "Gentlemen, damages are given as compensation for injuries done. Elements of damage where there is phyical injury are pain and suffering, physical and mental, past and future, continuing injury to health and other physical condition; loss of capacity to make a living." Later he charged: "The guide for fixing damages, if any, for pain and suffering, or diminished capacity to labor, as distinguished from earning capacity, is the enlightened consciences of impartial jurors. . . ." The Court of Appeals held that the first quoted instruction was not technically correct but no harm was done because the second instruction made the law clear. The cases hold that loss of capacity to labor is an element of pain and suffering and is measured only by the conscience of the jury, whereas damages for loss of earning capacity are special and must be established by sufficient data on which a jury may establish their finding.[13] *West v. Moore*[14] was cited by the court as authority for the proposition that diminution of earning capacity is an element of damages for pain and suffering. The *West* case seems to justify that posi-

9. 207 Ga. 477, 62 S.E.2d 145 (1950).
10. 82 Ga. App. 509. 61 S.E.2d 676 (1950).
11. 83 Ga. App. 888, 65 S.E.2d 41 (1951).
12. 82 Ga. App. 36, 60 S.E.2d 770 (1950); to the same effect, Tyson v. Shoemaker, 83 Ga. App. 33, 62 S.E.2d 586 (1950).
13. Railway Express Agency, Inc. v. Mathis, 83 Ga. App. 415, 63 S.E.2d 921 (1951).
14. 44 Ga. App. 214, 160 S.E. 811 (1931).

tion on the basis that worry and suffering may follow from the fact that the plaintiff knows his earning capacity is diminished. The opinion in that case is not as clear as might be desired, but if the above is a fair interpretation of the decision, the rule would be supportable. The objection of this writer is that nowhere in the opinion does it appear that the limitations of this rule are made clear to the jury. It is believed that a jury listening to an instruction like the one quoted above would think that they were being directed to compensate in damages for the money plaintiff will lose because of his reduced earning capacity[15] rather than simply awarding an amount for the mental anguish he will have suffered because of the impaired capacity. The distinction is too subtle and ill-defined for an assurance that the average jury would comprehend the true intent of the instructions.

In *Atlantic Coast Line R. Co. v. Ansley*[16] the trial court instructed that the jury might give additional damages because of aggravating circumstances in a tort action and in arriving at the amount they might consider "injury to his earning capacity" among other things. It was held that additional damages for aggravation pursuant to Code Section 105-2002 did not concern injury to earning capacity which must be proved by proper evidence.

In a trover action[17] for the conversion of an automobile the jury returned a verdict which stated a certain principal amount and indicated that interest at seven per cent was awarded in addition. The trial judge computed the interest and entered a judgment for the total amount. The defendant appealed on the general grounds and sought by brief to raise the point that such a verdict was illegal (*i.e.*, stating principal and interest separately). The court agreed that the form of the verdict was wrong and properly should have been for a total sum, although it was permissible for the jury to consider interest from the time of conversion in arriving at a total verdict. The defendant was not allowed to take advantage of the defect because there had been no special assignment of error. The court also pointed out that, even if a proper assignment or error had been entered, a reversal would simply be conditional on writing off the interest.

In *Railway Express Agency, Inc. v. Southern Gas Co.*[18] the plaintiff was suing for damage in shipment to certain heaters. It appeared from the evidence that the heaters were damaged but were not totally worthless as alleged. The jury returned a verdict for the total amount prayed for in the petition. Defendant claimed this was error because the damaged heaters clearly had some value. However, the judgment was sustained because there was evidence tending to show that the heaters in an undamaged condition had a market value greater that that alleged in the complaint, and therefore, the jury might have found that the heaters had some salvage value and still award the total amount asked for by plaintiff.

The courts also held: a verdict of $100 "nominal damages" sustainable in an action for trespass to realty where the evidence concerning damage

15. Indeed, this writer cannot be certain that such is not exactly what the courts intend to tell the jury.
16. 84 Ga. App. 89, 65 S.E.2d 463 (1951).
17. Smith v. Clayton, 83 Ga. App. 777, 64 S.E.2d 691 (1951).
18. 83 Ga. App. 808, 65 S.E.2d 61 (1951).

was conflicting;[19] a defendant counterclaiming for affirmative relief in damages must allege damages with the same particularity necessary if he were initiating the action;[20] a verdict of $11,000 for injuries sustained in a grade crossing accident was not excessive;[21] a plaintiff waives his right to general or nominal damages where the petition sets forth items of special damage which exactly equal the amount sought in the petition;[22] the evidence sustained a $5,000 verdict for injuries to the person and vehicle, and exclusion as evidence of amount of settlement with plaintiff's insurer to show value of the truck was not harmful error;[23] a covenant not to sue given to a joint tort-feasor in return for $4,000 was properly allowed in evidence to mitigate damages in an action against the other tort-feasor;[24] in a personal injury action where the defendant (son) had paid medical expenses of the plaintiff (mother) and taken a note from the plaintiff in return, the medical expenses were properly allowed in evidence for determining the amount of damages;[25] expenses of litigation are allowable as damages under Code Section 20-1404 when the defendant has acted in bad faith or caused the plaintiff unnecessary trouble and expense.[26]

19. Galloway v. Anderson, 83 Ga. App. 405, 63 S.E.2d 712 (1951). In Pruitt v. Satterfield, 207 Ga. 25, 59 S.E.2d 907 (1950), the evidence was insufficient to show any damages for the trespass.
20. Alpharetta Feed & Poultry Co. v. Cocke, 82 Ga. App. 718, 62 S.E.2d 642 (1950); Smith v. Monroe, 82 Ga. App. 118, 60 S.E.2d 790 (1950).
21. Atlanta & W.P.R. Co. v. Gilbert, 82 Ga. App. 244, 60 S.E.2d 787 (1950).
22. Stewart v. Western Union Tel. Co., 83 Ga. App. 532, 64 S.E.2d 327 (1951).
23. Royal Crown Bottling Co. of Gainesville v. Stiles, 82 Ga. App. 254, 60 S.E.2d 815 (1950).
24. Atlantic Coast Line R. Co. v. Ouzts, 82 Ga. App. 36, 60 S.E.2d 770 (1950).
25. Wheeler v. Wheeler, 82 Ga. App. 831, 62 S.E.2d 579 (1950).
26. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).