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DAMAGES

HENRY SUMMERALL, JR.*

Although most of this year's cases merely illustrate the application of settled principles, our Supreme Court clarified or established several important points of the law of damages in the period covered by this Survey. In perhaps the most important of these cases, the Court denied recovery of interest in highway condemnation awards. Also, the statutory penalty for usury was clarified and applied. Impairment of earning capacity as an element of damage for personal injury was squarely recognized for the first time. Municipal corporations were held liable for neither medical expenses nor for loss of consortium and services sustained by husbands of women injured through a city's negligence. And a factually interesting case illustrates the elements of damage recoverable by an insured for his liability insurer's wrongful refusal to defend.

Interest Upon Highway Condemnation Awards

Despite its earlier assumption to the contrary,[1] the Supreme Court held in *South Carolina State Highway Department v. Southern Ry. Co.*,[2] that interest is not recoverable as an element of just compensation in highway condemnation cases where property is taken before payment therefor is made. This holding is contrary to the overwhelming weight of authority elsewhere, supported by the reasoning of the earlier South Carolina case of *Haig v. Wateree Power Co.*,[3] allowing the recovery of interest when property is taken before payment is made. The reasoning of the majority opinion was based on the absence of express statutory authority allowing recovery of interest in highway condemnation cases, fortified by the presence of such express authority in other condemnation statutes.[4] However, in the opinion of dissenting Justice Oxner, it is not properly a statutory question, but

*Henderson, Salley & Cushman, Aiken, South Carolina.

1. In South Carolina Highway Dept v. Miller, 237 S. C. 386, 117 S. E. 2d 561 (1960), (discussed in 14 S.C.L.Q. 30).
2. 239 S. C. 1, 121 S. E. 2d 236 (1961).
3. 119 S. C. 319, 112 S. E. 55 (1920).
4. State Authorities Eminent Domain Act, CODE OF LAWS OF SOUTH CAROLINA § 25-27 (1952); Public Works Eminent Domain Law, CODE OF LAWS OF SOUTH CAROLINA § 25-110 (1952).

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rather a constitutional one, since the provision[5] forbidding the taking of private property without payment of just compensation therefor is self-executing.

The decision seems unnecessarily harsh for the landowner whose property is taken before payment is made and who is therefore deprived of both the use of his land and of the money representing its value without any compensation whatsoever for such deprivation. Since the Court has put the question on a statutory basis, the General Assembly should take action to correct the injustice arising in this situation, at least to the extent of allowing recovery of interest in highway condemnation proceedings where property is taken before payment is made, as is provided for under the other condemnation statutes.

Penalty For Usury

The forfeiture provision of South Carolina's usury statute[6] allowing recovery of double the amount of usurious interest actually received was applied and construed in *Atlantic Discount Corp. v. Driskell.*[7] The borrower had received the amount of $425.00 from the lender and had signed a promissory note for $576.00 at the rate of $32.00 per month for eighteen (18) months, the difference being represented by the charges for credit, life insurance, the documentary stamps, recording fee, and $134.51 interest in advance. The lender brought suit for an equitable foreclosure of its chattel mortgage; the borrower counterclaimed for double the amount of interest, which was clearly usurious. The issue was whether the total amount of interest on the loan had been "actually received" by the lender at the inception of the transaction so as to fall within the language of the statute. The Master held in the affirmative, but the Greenville County Court on appeal held that the entire amount of the interest had not been "actually received", but that the installment payments made by the borrower must be prorated among principal, interest and costs, so that only the interest portion of the installments actually paid by the borrower could be said to have been "actually received" by the lender. The Supreme Court up-

5. S. C. CONST., art. I § 17 (1895).
6. CODE OF LAWS OF SOUTH CAROLINA, § 8-5 (1952). The legal and maximum rates of interest are prescribed in Section 8-3 of the CODE OF LAWS OF SOUTH CAROLINA, 1952.
7. 239 S. C. 500, 123 S. E. 2d 832 (1962).

held the County Court's view of the matter, distinguishing two earlier cases[8] in which interest had been usuriously discounted at the time of the loan and thus was held to have been actually received by the lender.

Impairment of Earning Capacity

In a case of interest to the practitioners of negligence law, the Court ruled squarely in *Matthews v. Porter*[9] that impairment of earning capacity is a recoverable element of damage for personal injuries. The Court further held that to recover for such element of damage, it is not necessary that the person be employed at the time of his injury, and that proof of past earnings is admissible and relevant. Although the question had not been squarely presented to the Court previously,[10] the decision is in line with the apparently unanimous authorities elsewhere.[11] The same general considerations should be applied to the recovery for impairment of future earning capacity as apply to the recovery of other elements of prospective damage, such as future medical expenses, future pain and suffering, and loss of expected profits under contract.

Damages For Liability Insurer's Unjustified Refusal to Defend

Fuller v. Eastern Fire & Casualty Ins. Co.[12] was an action in contract to recover damages for the defendant insurer's breach of its obligation under an automobile liability policy to defend a tort action brought against its insured, the plaintiff here. The question as to the existence of the contract obligation is treated in the *Insurance* portion of this Survey. Because of the insurer's failure to defend under its contract of insurance which was held to be valid, the insured had to retain his own counsel, and after an adverse judgment, the insured's automobile was seized and sold in satisfaction. The propriety of the award of four elements of damage was in issue, namely: 1) the fair market value of the sold automobile, assessed by the jury at $1,119.15; 2) loss of its use, for which the jury awarded $145.00; 3) attorney's fees incurred in the defense

8. Carolina Savings Bank v. Parrott, 30 S. C. 61, 8 S. E. 199 (1888); Peoples Bank of Dillon v. Perritt, 114 S. C. 362, 103 S. E. 711 (1920).
9. 239 S. C. 620, 124 S. E. 2d 321 (1962).
10. In Campbell v. Hall, 210 S. C. 423, 43 S. E. 2d 129 (1947) the appellant's objection was general, that the verdict was excessive; Haselden v. Atlantic Coast Line Ry. Co., 214 S. C. 410, 53 S. E. 2d 60 (1949) arose under the Federal Employers' Liability Act.
11. 15 AM. JUR., DAMAGES, § 91 et seq.
12. 240 S. C. 75, 124 S. E. 2d 602 (1962).

of the negligence action in the amount of $600.00; and 4) Court costs of $10.25.

The trial judge eliminated the element of attorney's fees by order *nisi,* because the complaint failed to allege such as an element of damage and there was no evidence as to the value of the legal services rendered. However, in suits to recover damages for an insurer's unjustified refusal to defend. reasonable attorney's fees are recoverable.[13] The Supreme Court reversed the jury's award of $145.00 for loss of use of the insured's automobile because there was no evidence as to the reasonable rental value. The lesson here for the practitioner is that to recover for loss of use, there must be evidence of the reasonable rental value of a substitute automobile, and not merely of the fact of deprivation of use. The Court held the plaintiff entitled to recover the fair market value of his automobile, but reduced the amount recoverable therefor to $1,100.00 because apparently the only evidence in the record as to its value was the plaintiff's testimony that his automobile was worth that sum. The Court also held the plaintiff entitled to recover the court costs taxed against him in the negligence suit.

This case illustrates in a particular factual setting the application of the general principles governing actions for breach of contract in general and for breach of an insurer's obligation to defend in particular, which principles are thus stated by the Court:

> The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach. (citing cases) Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach. (citing cases)

One somewhat unusual procedural matter in the *Fuller* case deserves comment. The trial judge very appropriately

13. Annot. 49 A.L.R. 2d 727 et seq. Under the rule in such cases in South Carolina, once the nature and extent of the legal services rendered have been established by competent evidence, the reasonableness of the amount of the fee becomes a question for the Court. Carolina Veneer & Lumber Co. v. American Mut. Liability Ins. Co., 202 S. C. 103, 24, S. E. 2d 153 (1943).

directed the jury to find a special verdict dividing the actual damages into the various component elements. This procedure enabled the Court on appeal to analyze the disputed items of damage separately and therefore very clearly and thus enabled the Court to segregate and eliminate the improper elements and affirm the case *nisi,* without the necessity of ordering a new trial which would of necessity be upon all issues[14] as in the usual case where the verdict for actual damages is in a lump sum figure and includes both proper and improper items of damage. To follow the procedure here used by the trial judge in cases where the propriety of particular items of damage is disputed would conserve considerable judicial effort and would sharpen the issues in these cases.

Measure of Actual Damages for Fraud in the Sale of Property

In sharp contrast with the mountain stream clarity with which the issues were presented to the Supreme Court in the Greenville County *Fuller* case, *supra,* is the Richland County case of *Aaron v. Hampton Motors, Inc.,*[15] where the Court was called upon to rule upon a question as to measure of damages as muddy as the Congaree River. The *Aaron* case, a tort suit to recover damages for fraud in the sale of a used automobile, involved the question of the proper measure of actual damages in such cases. The appellant's exception suggested a complicated formula whereby the measure of damage would be the sum of the installment payments made by the plaintiff on the purchased used car, plus the trade-in allowance on his older car, less the reasonable value of his use of the purchased automobile. The Supreme Court refused to accept such a confused idea and affirmed the trial judge's general charge. The Court stated the proper measure of damages very clearly and simply:

> Punitive damages having been eliminated, the measure of respondent's actual damage was the difference between the represented value and the actual value of the 1958 Plymouth at the time of his purchase of it. *Turner v. Carey,* 227 S. C. 289, 87 S. E. 2d 871; *Warr v. Carolina Power & Light Co.,* 237 S. C. 121, 115 S. E. 2d 799. Inconvenience is no more proper as an element

14. South Carolina Elec & Gas Co. v. Aetna Ins. Co., 233 S. C. 557, 106 S. E. 2d 276 (1958).
15. 240 S. C. 26, 124 S. E. 2d 585 (1962).

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of damage in such case than it would be in an action for breach of warranty. Cf. *Cannon v. Pulliam Motor Co.*, 230 S. C. 131, 94 S. E. 2d 397.

The Court characterized the evidence in the *Aaron* case as "quite vague and indefinite; it seems fair to say [continued the Court] that none of the evidence was expressly or specifically directed to that issue." Upon the record, the Court was unable to conclude that the award of $2,350.00 actual damages for fraud in the 1959 sale of a used 1958 Plymouth was "so shockingly excessive" as to require a reversal.

In this and other fairly recent cases (see the *Turner* and *Warr* cases cited in the quotation above) the Court has adhered firmly to the so-called contract or "benefit of the bargain" measure of actual damages for fraud in the sale of property, under which the measure is the difference between the actual value of the property at the time of the sale and the value the property would have had if it had been as represented. This rule contrasts with the so-called tort or "out-of-pocket" rule, followed by a minority of jurisdictions, under which the measure is the difference between the consideration given and the actual worth of the property received.[16] There was formerly some confusion as to the proper measure of damages,[17] but the later cases have followed the "benefit-of-the-bargain" rule, which is the more liberal in most cases and which is in line with an older South Carolina case.[18]

Damages For Libel

Brown v. National Home Ins. Co.[19] is an important case in the very technical field of libel, but since the issue of damages is so inextricably intertwined with the question of liability, the case is discussed in the Torts section of this survey. It is sufficient here to remark that the case holds that where a defamatory statement is not libelous *per se*, but merely libelous *per quod*, damages for embarrassment and humiliation *alone* are not recoverable. However, if there

16. See PROSSER, TORTS § 91 at page 568 (2d ed. 1955) where the two rules are discussed.
17. See Culbreath v. Investor's Syndicate, 203 S. C. 213, 26 S. E. 2d 809 (1943) where the Court stated both rules, but made no choice between them.
18. 46 S. C. 426, 24 S. E. 313 (1896).
19. 239 S. C. 488, 123 S. E. 2d 850 (1962).

had been proof of pecuniary loss, such as impairment of credit or of a business relationship, damages for such things as mental suffering, wounded feelings, humiliation and embarrassment, would be recoverable, in effect being "tacked on as 'parasitic' " to the other damages.[20]

Measure of Actual Damages for Pain and Suffering

Harper v. Bolton[21] is a case which has excited much discussion and which deserves special study by the practitioners of negligence law. Although the case involves principally procedural matters, the Court made the following comments on the substantive law which deserves quoting since they may well become the standard jury instruction on the valuation of pain and suffering:

> Pain and suffering is recognized by Courts of this State as a very material element of damages on which a recovery may be bottomed. *Campbell v. Hall et al.,* 210 S. C. 423, 43 S. E. 2d 129. Damages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial Judge. *Wright v. Gilbert et al.,* 227 S. C. 334, 88 S. E. 2d 72. Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject only to correction by the courts for abuse.

Excessive Damages for Personal Injuries

No case in this year's Survey period was reversed on the grounds that the damages awarded were excessive, although in one case,[22] the disproportion between jury's award of $500.00 actual damages and $15,000.00 punitive damages in an automobile negligence case was relied upon as one factor indicating confusion in the minds of the jurors, for which reason the case was reversed and remanded for new trial. In that case the federal court of appeals felt that so great

20. See PROSSER, TORTS p. 594 (2d ed. 1955).
21. 239 S. C. 541, 124 S. E. 2d 54 (1962).
22. Barnett v. Love 294 F. 2d 585 (4th Cir., 1961).

a discrepancy between the amounts of the actual and punitive damages added weight to its conclusion that the jury was confused, particularly in view of the plaintiff's serious and permanent injuries and the jury's expressed uncertainty on the issue of liability. However, such disproportion alone would not compel reversal, since under the South Carolina law disproportionate awards for actual and punitive damages are permitted.[23]

Awards of actual damages for personal injuries were held not excessive in these three cases:

Bruno v. Pendleton Realty Co.,[24] wherein $1,300.00 was awarded a sixty year old tailor who had fallen on the defendant's sidewalk, fracturing the base of his fifth metatarsal and spraining an ankle ligament, and being caused to endure pain, to wear a cast for four weeks and to incur a physician's bill of $85.00.

Gaskins v. Ryder Truck Lines Inc.,[25] tried by the federal district judge without jury, wherein $20,000.00 was awarded the plaintiff injured in a highway collision who had sustained out-of-pocket expenses of nearly $5,000.00 and suffered amnestic trauma to his skull and facial scars and who had been hospitalized three or four times and undergone grave spinal surgery and who had a permanent disability in his back rated at 20 to 25 percent at the time of trial.

McClure v. Price,[26] wherein $20,000.00 was awarded a woman who in a highway collision sustained lacerations, bruises and sprains and a fractured cheekbone with an ugly permanent scar and who returned to work three weeks after her injury at the direction of her physician in order to relieve mental anxiety but who was unable to work properly, suffering dizziness, loss of memory, and spells of nervousness and headaches.

Miscellaneous

The identical legal question arose by way of a demurrer to the complaint in *Brazell v. City of Camden*,[27] and by way

23. Two examples where quite disproportionate verdicts were affirmed: Beaudrot v. Southern Ry. Co., 69 S. C. 160, 48 S. E. 106 (1904) wherein the actual damages were $2.50 and the total verdict was $1,016.66; Hall v. Walters, 226 S. C. 430, 85 S. E. 2d 729 (1955) wherein $1000.00 actual damages and $25,000.00 punitive damages were awarded.
24. 240 S. C. 46, 124 S. E. 2d 580 (1962).
25. 299 F. 2d 236 (4th Cir., 1962).
26. 300 F. 2d 538 (4th Cir., 1962).
27. 238 S. C. 580, 121 S. E. 2d 221 (1961).

of a motion to strike certain allegations from the complaint in *Hollifield v. Keller.*[28] Taking the two cases together, the Court's holding is that Code Section 47-70 which allows recovery of actual damages against municipal corporations under certain circumstances does not extend to allow the husband of a wife injured by a city's negligence to recover either his medical expenses on her behalf or for his loss of consortium and of her services. The Court gave a strict construction to the statute and in effect held that such husband is excluded from the group of persons, covered by the statute, who have received damages in their property.[29] The *Brazell* case involved a claim for medical expenses and for loss of consortium and is the more concise of the two opinions, while the *Hollifield* case involves only claims for loss of services and consortium and is the more exhaustive and better documented of the two opinions.

In *Noland Co., Inc. v. Graver Tank & Manufacturing Co.,*[30] the federal court remanded the case for consideration of a claim for loss of anticipated profit due to a breach of contract, pointing out that the proper element of damage is the plaintiff's loss of net profit, rather than gross profit.

In *Brunson v. Sports,*[31] an action to impress a trust upon a tract of land and for an accounting, the Court applied the well-established rule that when there is no evidence showing a rental value in an amount different from that actually received, the rents actually received govern.

28. 238 S. C. 584, 121 S. E. 2d 213 (1961).
29. CODE OF LAWS OF SOUTH CAROLINA § 47-70 (1952) provides in part: "Any person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way or by reason of a defect or mismanagement of anything under control of the corporation within the limits of any city or town may recover in an action against such city or town the amount of actual damages sustained by him by reason thereof if such person has not in any way brought about any such injury or damage by his own negligent act or negligently contributed thereto."
30. 301 F. 2d 43 (4th Cir., 1962).
31. 239 S. C. 58, 121 S. E. 2d 294 (1961).