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# Damages

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# DAMAGES

## A. *Personal Injuries*

During the survey period, three cases of importance involving the question of excessive awards for personal injuries were decided by the South Carolina Supreme Court. In all three the court, following established legal principles, refused to set aside the verdicts.

In *Cabler v. L. V. Hart, Inc.*,[1] the plaintiff sustained a whiplash injury when the defendant's truck collided with the station wagon she was driving. The issue of damages was tried before the trial judge without a jury and plaintiff was awarded a judgment in the amount of $25,803.00. The defendant appealed, "contending that the award was so excessive as to show that it was without support in the evidence, and capricious." Justice Lewis stated that

> if there is testimony upon which the lower court could have based the amount of its award, we must affirm the judgment. We have no power to review and award or verdict for mere excessiveness or undue liberality.[2]

In assessing the amount of damages, the court considered that at the time of the accident, the plaintiff was 44 years of age and had a life expectancy of 28.67 years. She was a housewife with two young children with responsibilities as a homemaker and a mother. In addition, she assisted her husband upon occasion in his insurance business. Medical testimony revealed that her injuries resulted in fifteen to twenty percent permanent disability of the whole body, aggravated pre-existing conditions of degenerative arthritis and lower back trouble known as spondylolisthesis, causing great pain and discomfort which would "diminish the joys and pleasures of a normal life especially with a family." Since the plaintiff was not regularly employed, the measure of damages could not be directly equated to loss of earning capacity. Based on these considerations, the trial judge made his award in the case. On review, the supreme court found that there was no evidence that the "trial judge was actuated by partiality, prejudice or other considerations outside the record."[3]

1. 164 S.E.2d 574 (S.C. 1968).
2. *Id.* at 575.
3. *Id.* at 576.

The defendant also challenged the judgment on the ground that it exceeded any amount previously awarded in similar cases. The court, citing *Haselden v. Atlantic Coast Line Ry.*,[4] affirmed.[5] The court reasoned that in comparing verdicts involving personal injuries, the nature and extent of the pain and suffering was a substantial element in assessing damages. In addition to asserting that each case has to stand on its own facts, the court considered existing economic conditions at the time of the injury and the decreased or impaired purchasing value of the dollar in comparing the present verdict with past verdicts for similar injuries.

In *Young v. Warr*[6] the plaintiff received a permanent paraplegia-producing injury to his spine and lumbar area when the station wagon in which he was a passenger collided with the rear end of a tractor trailer. The action was based on the negligence of the deceased driver, and the case was submitted to the jury which returned a verdict in favor of the plaintiff for $500,000 actual damages. The defense moved for a new trial absolute, a new trial *nisi* or for judgment *non obstante veredicto*. The presiding judge ordered a new trial unless the plaintiff filed a remittitur of $100,000 within ten days. The plaintiff filed the remittitur within the time limit, but the defendant nonetheless appealed upon the ground that the amount of the verdict was excessive. The supreme court held that only the trial judge has the power of setting aside a verdict absolutely or reducing it by granting a new trial *nisi* when it appears that the verdict is excessive in the sense that it merely indicates undue liberality on the part of the jury.

In affirming the decision of the trial judge, the court considered that the plaintiff was a 23-year-old married man with a life expectancy of 47.64 years. At the time of the accident, he was a member of the United States Navy earning $345 per month plus benefits and was enrolled in an advanced electronics school where he ranked at the top of his class. As a result of his injuries, he was hospitalized for eleven months, could not learn to walk again and would be confined to a wheel chair for the remainder of his life. He had lost control of his bladder and bowel functions as well as his ability to have marital relations. The pecuniary losses to the plaintiff were substantial

4. 214 S.C. 410, 53 S.E.2d 60 (1949).
5. Cabler v. L. V. Hart, Inc., 164 S.E.2d 574 (S.C. 1968).
6. 165 S.E.2d 797 (S.C. 1969).

and the embarrassment, humiliation, pain and suffering, and resulting depression were patent.

On cross-examination the appellant tried to show that the plaintiff was still receiving his Navy pay until June 17, 1965, and subsequently received compensation from the Veterans Administration totaling $700 per month. The appellant alleged that the trial judge committed error in sustaining the plaintiff's objection to such evidence. It is well established under the "collateral source rule" that a tort-feaser cannot benefit by his own wrongdoing and cannot mitigate his damages because of compensation received by the injured party from an independent source.[7] In invoking this rule in *Young*, the court relied on the persuasive authority of *Bell v. Primeau*[8] and *Gunnien v. Superior Iron Works Co.*[9] Both cases held that servicemen could recover for loss of earning capacity although they continued to receive compensation from the government.

The third case in this category is the celebrated decision of *Mickle v. Blackmon.*[10] On May 29, 1962, Janet Mickle was a passenger in an automobile which was involved in a collision with an automobile driven by Larry Blackmon. Janet was impaled on the gearshift lever of the automobile which penetrated to her spine at breast level causing complete and permanent paralysis of her body below the point of injury. The trial court awarded an apportioned verdict of $468,000 for the plaintiff against Cherokee, Inc., for negligence in removing stop signs at the intersection while widening the road, and $312,000 actual damages against Ford Motor Company for negligently designing the automobile in which the plaintiff was riding. No damages were assessed against Blackmon. Cherokee and Ford appealed, urging that the $780,000 awarded as actual damages was "so grossly excessive as to require a new trial."[11] The supreme court declined jurisdiction to review issues of fact in a law case, but in examining the facts as presented in the trial record, Justice Brailsford noted that at the time of the wreck, Janet Mickle was 17 years of age, was active, very athletic and enjoyed a good social life. As a result of the collision, she suffered immediate and permanent paralysis

7. *Id.* at 806, *quoting* 25 C.J.S. *Damages* § 99(1) (1966).
8. 104 N.H. 227, 183 A.2d 729, 7 A.L.R. 3d 512 (1962).
9. 175 Wis. 172, 184 N.W. 767, 18 A.L.R. 667 (1921).
10. 166 S.E.2d 173 (S.C. 1969).
11. *Id.* at 194. Justice Bailsford recognized that the verdict was probably the highest personal injury award in the history of South Carolina. *Id.* at 195.

of her body below the point of injury. The paraplegia was so complete that she was totally unable to help herself or control her bodily functions. The plaintiff required continuous care, and it appeared that she would live out a normal life expectancy. The court considered that because her mother and father were respectively thirty-two and thirty-eight years older than she, the plaintiff would be without the help of her parents for a period of thirty to thirty-five years of her life. Calculating the cost of a practical nurse at the present rate of $14.00 per eight hour shift over a period of thirty-two years, the plaintiff would require $458,560 to provide adequate care for herself. Justice Brailsford concluded that the record amply justified the award.

Acting Associate Justice Legge vigorously dissented on the issue of damages and felt that the verdict should be set aside for three reasons. First, an award of $780,000 invested at six percent would yield $46,800 annually, which is more than necessary to support the plaintiff with all the necessities and comforts of life. He suggested that a figure of $600,000 invested at four percent, which is the average interest rate on government obligations, would yield an annual income of $24,000 which would amply support the plaintiff "even under our presently inflated economy."

Secondly, if reasonable investments of the proceeds were made, the principal would remain intact upon the plaintiff's death and would pass by will or devise to persons for whose benefit the award was not intended.

Finally, Justice Legge expressed his conviction that the verdict was the product of prejudice against the corporate defendants and sympathy for the plaintiff. This situation, he reasoned, was engineered by plaintiff's counsel in his closing argument wherein he referred to the defendants' great wealth and ability to pay.

An interesting adjunct to this case came subsequent to the trial when Janet Mickle married and gave birth to a normal baby without ill effects. The court held that this was insufficient ground on which to support a new trial since the prognosis that her disability was permanent had not changed and that it is a well documented medical fact that paraplegia does not incapacitate a woman from giving birth. In dismissing this as an issue, Justice Legge's analysis was prehaps more penetrating when he said:

> It may be argued that this happy circumstance tended to alleviate the plaintiff's mental anguish resulting from her injuries; but, however that may be, we do not take it into account in our scrutiny of the verdict, for the simple reason that it was not within the jury's knowledge or within the scope of its inquiry.[12]

B. *Breach of Warranty*

The common law position in an action for breach of warranty is that the usual measure of damages is the difference in the actual value of the item at the time of delivery and the value of the item if it had been as represented.[13] In *Draffin v. Chrysler Motor Corp.*[14] the trial court, in its order *nisi*, allowed a verdict to stand in excess of the value of an automobile involved in a suit for breach of a manufacturer's warranty. The cause of action arose in 1965, before the Uniform Commercial Code[15] went into effect on January 1, 1968; thus, the Code was not applicable to this action.

The plaintiff purchased the automobile from the dealer for $3,491.90. The jury was properly instructed as to the measure of damages in such an action and yet returned a verdict in favor of the plaintiff for $9,000. The trial court reduced this figure to $3,981.90. The supreme court reversed and remanded, stating that

> a verdict in excess of the value of an automobile, in an action on breach of warranty, must be set aside. The verdict conclusively shows disregard by the jury of the instructions of the court, or failure to heed instructions as to the measure of damages.[16]

C. *Wrongful Death*

The case of *Zorn v. Crawford*[17] involved the death of a fifteen-year-old girl caused by the collision of the automobile in which she was a passenger with an oncoming vehicle that swerved into her lane to avoid running into the rear of the defendant's improperly lighted tractor. The jury awarded $250,000 actual damages to the parents for the wrongful death of their daughter. The defendant contended that the verdict was so excessive as to

12. *Id.* at 200 (dissenting opinion).
13. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 176 (1935).
14. 166 S.E.2d 305 (S.C. 1969).
15. *See* S.C. CODE ANN. §§ 10.2-714,-715 (1966).
16. Draffin v. Chrysler Motors Corp., 166 S.E.2d 305, 306-7 (S.C. 1969).
17. 165 S.E.2d 640 (S.C. 1969).

indicate that it was the result of passion or prejudice on the part of the jury. Accordingly, he moved for a new trial absolute or, in the alternative, for a new trial *nisi*. The trial judge denied both motions. On appeal, the court reversed and remanded.

The South Carolina wrongful death statute[18] provides that damages in such an action are to be assessed in accordance with the loss sustained by the beneficiaries of the decedent, and the court in *Zorn* pointed out that there was no evidence that the deceased girl had any earning capacity thereby leaving no tangible factor of damage. As a consequence, the parents suffered no pecuniary loss as a result of their child's death, and damages were limited to the intangible elements of shock, grief, sorrow, wounded feelings, loss of companionship, and deprivation of the use and comfort of the deceased's society. The court, reasoning that "the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries," rationalized that the amount awarded cannot be without limitation and that "[t]here must be some semblance of a basis for justifying the verdict."[19]

Since the measure of damages in a wrongful death action is measured by the loss to the beneficiaries, it was argued in *Jones v. Dague*,[20] that in assessing the award, consideration should be given to the life expectancy of the beneficiaries. In that case, a fifteen-year-old girl was killed when the automobile in which she was a guest-passenger overturned. The jury found for the plaintiff and awarded $25,000 actual damages. On appeal, the defendant contended that the weight of authority properly allows the life expectancies of the beneficiaries to be taken into account in measuring the beneficiaries' damages in a wrongful death action.[21] While indicating that it might agree if the issue was properly presented, the court reluctantly relied on the rule in *Trimmier v. Atlantic & C. A. L. Ry.*[22] which disallowed a consideration of the beneficiary's life expectancy. In affirming the lower court's decision, Justice Lewis concluded:

> Although defendants state in their brief that the rule adopted in Trimmier and Turbyfill is unsound, they have not sought permission to argue against these cases

18. S.C. CODE ANN. § 10-1952 (1962).
19. Zorn v. Crawford, 165 S.E.2d 640 at 645, 646 (S.C. 1969).
20. 166 S.E.2d 99 (S.C. 1969).
21. *See* 25A C.J.S. *Death* § 121 (1966), which states that evidence of the beneficiaries' life expectancies is admissible if the beneficiaries were dependent on the decedent. *See also* 22 AM. JUR. 2d § 162 (1965).
22. 81 S.C. 203, 62 S.E. 209 (1908).

> in accordance with the procedure set forth in Rule 8, Section 10, of the Rules of this Court. While there is some doubt as to the soundness of the rule adopted in Trimmier and Turbyfill, we think the plaintiff is entitled to the application of the principle of stare decisis to the present situation, in the absence of a request in the prescribed manner that these cases be overruled.[23]

D. *Impairment of Future Earning Capacity*

A substantial element of damages where permanent injuries are sustained is the award for impairment of future earning capacity. In the case of *Steeves v. United States*[24] the court faced the problem of assessing the impairment to the future earning capacity of an eleven-year-old child. The late Professor McCormick stated that "since the attempt is to value future capacities, a child with no present earning power at all may recover in advance for the anticipated loss of earning power after he becomes of age."[25] In this action arising under the Federal Tort Claims Act, medical evidence showed that the plaintiff, a military dependent, suffered a five percent disability of the whole person due to peritonitis resulting from the negligence of government physicians in treating him for appendicitis. Using the mortality table in the South Carolina Code,[26] it was determined that the plaintiff had a life expectancy of 56.80 years and 49.46 years from the reaching of his twenty-first birthday. The court admitted testimony of an actuarial expert's opinion that "based on the race, sex and completion of college" the plaintiff is in a class of persons who would earn $413,496.00 in his lifetime. The plaintiff urged that a figure of $20,674.80 would constitute a proper award. This figure is arrived at by taking five percent of $413,496.00 and is based on the work-life expectancy of the plaintiff discounted at four and one-quarter percent. The court rejected in part the positions of the plaintiff and felt that an award of $9800 was just and proper for loss of future earnings and impairment of future earning capacity.

E. *Convenant Not To Sue*

In *McCombs v. Stephens*,[27] the plaintiff was involved in a three-car collision and brought an action against the defendant

23. Jones v. Dague, 166 S.E.2d 99, 103, (S.C. 1969).
24. 294 F. Supp. 446 (D.S.C. 1968).
25. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 86 (1935).
26. S. C. CODE ANN. § 26-12 (1962).
27. 166 S.E.2d 814 (S.C. 1969).

after entering into a covenant not to sue with the driver of the third automobile. On appeal, the defendant alleged that the trial judge committed reversible error in allowing the evidence concerning the covenant to go before the jury. The court reversed the decision of the trial judge, relying on the recent case of *Powers v. Temple*[28] as to the correct method of crediting a defendant for amounts paid to a plaintiff under a covenant not to sue. The court held that where there are no factual questions concerning the covenant, the jury should assess the amount of damages against the defendant and the court should then give credit for the covenant after the size of the award has been determined. This would eliminate possible prejudice to the defendant and would afford certainty in the allowance of credit.

F. *Apportionment of Damages*

Judge Lanneau D. Lide once described as "really unique . . . the South Carolina rule that where joint tortfeasors are sued, the jury may sever the actual damages and apportion them . . . ."[29] In *Rourk v. Selvey*,[30] called by Justice Brailsford the first case in the court's history to confront it squarely with "a plaintiff, burdened by the operation of this rule[,] . . . having standing to impeach it, [and] seeking relief,"[31] the court put an end to the practice. Denying that any appellate tribunal in this state had ever upheld jury apportionment of damages in similar circumstances, the court distinguished holdings in eleven cases dating back to 1784.[32]

28. 250 S.C. 149, 156 S.E.2d 759 (1967).
29. Lide, *Some "Uniques" in South Carolina Law*, 1 S.C.L.Q. 209, 214 (1950). Judge Lide thought this rule to be "firmly established in this State," and so did everyone else — as the court concedes. Rourk v. Selvey, 164 S.E.2d 909, 910 (S.C. 1969).
30. 1964 S.E.2d 909 (S.C. 1969).
31. *Id.* at 913.
32. The trial judge must have been surprised to learn that "[t]he error was in the instructions to the jury and not in the verdict . . . ." 164 S.E.2d at 914. Adhering to the doctrine of *stare decisis* while at the same time ending a 185-year-old practice called for imaginative judicial analysis, and Justice Brailsford got the job done as artfully as possible. Yet the court's opinion is inevitably strained and self-conscious. But more important than the court's technique is the question of whether the practice in fact *deserved* to be ended. On that score the court was content to call the rule "unjust and illogical because it deprives a plaintiff of the right [to pursue] for the full amount of damage sustained . . . all wrongdoers whose actionable conduct has [proximately contributed to his] indivisible injuries . . . ." 164 S.E.2d at 914. In the present case the jury assessed $5,000 against defendant Keller and $45,000 against defendant Selvey. If the same $50,000 verdict, unapportioned, is returned on re-trial, the plaintiff will be able to pursue Keller alone for the full amount. By contrast comparative negligence statutes (not enacted in South Carolina, but see the *Survey of Insurance, infra* at 619) are based on the

The earliest decision[33] — the one most frequently supposed to have established apportionment — was called unreliable since its report was not written until much later.[34] A similar statement in the second such case[35] was attributed to "the reporter's preoccupation with this subject . . . ."[36] Several appeals of apportioned verdicts were,[37] or could have been,[38] disposed of on other grounds; still other precedents dealt with apportionment of damages in the limited context of "*respondeat superior* actions against a master and servant, which are not in point and will not be reviewed . . . ."[39] In short, the court found "scant authority for the doctrine allowing apportionment of damages among joint tort feasors, which has been regarded as settled law in this state."[40] So the rule — if there was one — permitting such apportionment by a jury is now extinct in South Carolina.[41] This jurisdiction may have been its only common law refuge.[42]

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notion that damages *should* be proportioned to fault when more than one party contributed to the harm. *See* Lambert, *The Case for Comparative Negligence*, 2 TRIAL LAWYERS Q. 16 (1965).

33. White v. M'Neily, 1 Bay (1 S.C.L.) 11 (1784).

34. Such a view of the early South Carolina reports, if strenuously applied, might prove significant.

35. Whitaker v. English, 1 Bay (1 S.C.L.) 15 (1784).

36. 164 S.E.2d at 911.

37. Boon v. Horn, 3 Strob. (34 S.C.L.) 159 (1848); Rhame v. City of Sumter, 113 S.C. 151, 101 S.E. 832 (1920); Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961).

38. Bevin v. Linguard, 1 Brev. (3 S.C.L.) 503 (1805).

39. 164 S.E.2d at 912 (footnote omitted). In this category the court cited Mullikin v. Southern Bleachery & Print Works, 184 S.C. 449, 192 S.E. 665 (1937); Thomas v. Southern Grocery Stores, Inc., 177 S.C. 411, 181 S.E. 565 (1935); Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 140 S.E. 443 (1927); Jenkins v. Southern Ry., 130 S.C. 180, 125 S.E. 912 (1924).

40. 164 S.E.2d at 913. For example, the verdict in Mickle v. Blackmon, discussed *supra*, was jury-apportioned between the two tort-feasors.

41. Except, perhaps, in *respondeat superior* actions and cases where the damages wrought by the joint tort-feasors are separately assessable in fact. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 (3d ed. 1964) (cited by the court).

42. *See generally* 52 AM. JUR. *Torts* § 123 (1944).