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Damages

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DAMAGES

A. Evidence of Damages

In *Nelson v. Coleman Co.*[1] the court confronted the question of the competency of the evidence used to prove damages. The plaintiff was seeking to recover for the destruction of his house and personalty allegedly caused by the negligence of the defendant in the manufacture of a furnace. The plaintiff sought to prove his damages by listing each item destroyed and its value. The list put the value of the destroyed property at $11,198.20, and the jury returned a verdict of $8,375.00. The defendant objected to the introduction of the list, alleging that it was hearsay because the plaintiff's wife had helped compile the list, but had not testified with respect to its accuracy. The defendant reasoned that the testimony was hearsay because the husband was testifying as to the value that the wife had placed on the different items. The supreme court affirmed the lower court holding that the list was admissible. In *Howell v. State Highway Department*[2] the court had held that a landowner could give his estimate of the amount of damage that he had sustained when the highway department took part of his land to widen a road in front of his house. The *Nelson* court found an analogy between the *Howell* case and the present factual situation. In *Howell* the plaintiff had been allowed to state the value of the land. In *Nelson,* therefore, the statement by the husband with respect to the value was sufficient and the list did not have to be verified by the wife. The court, citing *American Jurisprudence,*[3] further held that the value to be placed on the destroyed items was the value to the owner, absent any fanciful or inflated value, and was not limited to its actual replacement value or its secondhand value.

In *Gause v. Livingston*[4] the court held as prejudicial error the testimony that the father of the minor plaintiff had been blind for 25 years and that the mother was the sole supporter of six children. This testimony had no relevancy to the issue of damages suffered by the minor plaintiff. This was not

1. 249 S.C. 652, 155 S.E.2d 917 (1967).
2. 167 S.C. 217, 166 S.E. 129 (1932).
3. 22 AM. JUR. 2d *Damages* § 150 (1965).
4. 159 S.E.2d 604 (S.C. 1968).

a suit to recover for the loss of the daughter's services, in which case the evidence might be relevant to show the value of these services. The authorities also appear divided with respect to whether the same testimony would be admissible if the father had been the plaintiff and had also been blind.[5]

B. Computing Pecuniary and Compensatory Damages

Two federal cases decided during the survey period dealt with "work life expectancy," an area apparently of novel impression in South Carolina. In *Ray v. United States*[6] the district court defined "work life expectancy" as the same as the person's life expectancy. The defendant contended that the plaintiff could not be expected to work beyond the age of 62, the Social Security retirement age. The defendant also relied on the fact that most workers at the factory retired at the age of 65. The court refused to consider this evidence. In interpreting the South Carolina statute establishing the mortuary table and authorizing its use,[7] the court stated:

> By the language of the statute, this court is guided to the conclusion that the legislature did not, does not, intend that either social security benefit ages, retirement ages, or *other collateral assumptions or calculations* should be written into the formula used.[8]

The court cited *Cuneo v. Philadelphia Transportation Co.*[9] in support of its proposition that the Social Security retirement ages should not be taken into consideration and *Clifford v. Southern Railway*[10] as holding "that a jury may find what a person is capable of earning in a year and then find out what their earning capacity would be for a lifetime."[11] The *Clifford* case, however, added that the "jury is to exercise a great amount of common sense . . . as for instance, it is

5. *See* 22 AM. JUR. 2d *Damages* § 318 (1965).
6. 277 F. Supp. 952 (D.S.C. 1968).
7. S.C. CODE ANN. § 26-12 (Supp. 1967). The applicable code section reads as follows:
> When it is necessary, in any civil action or other mode of litigation, to establish the life expectancy of any person from any period in his life, whether he be living at the time or not, the table below shall be received in all courts and by all persons having power to determine litigation as evidence (along with other evidence as to his health, constitution and habits) of the life expectancy of such person.
8. 277 F. Supp. at 954 (emphasis added).
9. 405 Pa. 532, 176 A.2d 896 (1961).
10. 87 S.C. 324, 69 S.E. 513 (1910).
11. 277 F. Supp. at 954.

a matter of human experience that as a person grows older their earning capacity decreases."[12] In this respect the court in *Ray* followed the *Clifford* decision precisely. In fact, the court determined that the plaintiff would earn a normal wage until age 65 and made the collateral assumption that the plaintiff would earn a more limited salary until the age 70.[13]

In *Brooks v. United States*,[14] decided prior to the *Ray* case, the district court was also confronted with a question of work life expectancy. Unlike the novel treatment which was later given this question in *Ray*, in *Brooks* the court dealt with the issue summarily.

The plaintiff brought both wrongful death and survival actions. The decedent was 33 years old at the time of his death and had a life expectancy of 38 years. The court recognized that persons employed in the plaintiff's capacity normally retired at age 68. Based on this fact, the court held that his work life expectancy would end at age 68, three years before his life expectancy would have ended. The court stated that "it is the probable duration of the plaintiff's earning capacity — his 'work expectancy' — over which the estimate of prospective annual earnings must be spread and not his life expectancy."[15] The *Brooks* court, therefore, obviously used "other collateral assumptions or calculations" which the court in *Ray* allegedly refused to consider.

The only conclusion that can be reached from a reading of the two cases is that Social Security retirement ages alone will not be a factor in limiting work life expectancy, but if the employer *normally* retires personnel at a certain age, this factor may be used.

The major question decided by *Brooks* was the allowance of a deduction for future income taxes from estimated future earnings. The *Ray* court, however, in reaching the same result gave this question of apparent novel impression only summary treatment. The *Brooks* court, arguing that future income taxes were not too speculative, stated:

12. 87 S.C. at 330, 69 S.E. at 515.
13. 277 F. Supp. at 955.
14. 273 F. Supp. 619 (D.S.C. 1967).
15. 273 F. Supp. at 629.

> [A]ssuredly, the incidence of future income taxes is no more "guess work" and no more difficult of exact calculation than possible future advancement, wage increases and inflation, all matters to be taken into account in calculating future income. Nor is it to be forgotten that mathematical precision in fixing damages is not demanded.[16]

Indeed, it is strange for the law to say that a 33 year old man will live exactly 38 more years, but not deduct a single cent for future income taxes because it is too speculative. These cases, however, put South Carolina in the minority position on this question.[17]

The court recognized that many cases denying a deduction for future income taxes were cases involving personal injury. Other factors, moreover, were present in these injury cases that were not present in a death case. The *Brooks* court, therefore, left open the question of whether to allow a deduction for future income taxes in personal injury cases.

The *Ray* case, however, involved a personal injury and a deduction was allowed for future income taxes. On the facts in the *Ray* case, therefore, the question left open by *Brooks* has been decided.

C. Admissibility of a Covenant not to Sue

In *Powers v. Temple*[18] the South Carolina Supreme Court, facing a novel issue, held that a covenant not to sue and the consideration paid therefor could not be admitted into evidence before the jury. The plaintiff, after the defendant in the present action had answered, gave a covenant not to sue to the other joint tortfeasor for a consideration of $6,500. The present defendant was allowed to amend his answer so as to plead the execution of the covenant. The court, noting that there was practically no dispute among the states as to the fact that such credit should be allowed, stated:

> There is considerable conflict, however, as to the proper manner of allowing such credit, that is, whether the credit should be allowed by the jury in

16. *Id.*
17. *See* Annot., 63 A.L.R.2d 1393 (1959).
18. 250 S.C. 149, 156 S.E.2d 759 (1967). For a full discussion of this case see 19 S.C.L. REV. 896 (1967).

> assessing the injured party's damages, or by the court. We are convinced from a study of these authorities that the sounder and preferable method, at least where there are no fact questions concerning the covenant for the determination of the jury, is for evidence thereabout to be excluded from the consideration of the jury, and for credit to be given by the court.[19]

The admission of the covenant not to sue was held error although the jury had been instructed to deduct from the verdict the amount of the consideration given for the covenant. The error, however, was held not to be prejudicial to the plaintiff.

Powers demonstrated the dispute with respect to the method by which the credit should be allowed — by the judge or by the jury. There is also dispute over who is prejudiced by admitting the evidence concerning the covenant.[20] Plaintiffs argue that to admit the covenant would give the jury the impression that the other defendant was the negligent party. Defendants generally argue that there is no way to ascertain if the jury allowed the credit and therefore the judgment is higher than it legally should be. In South Carolina, it is now settled that a covenant not to sue is not to be admitted into evidence and the credit is to be allowed by the judge.

Another issue decided in the *Powers* case was that it is prejudicial to require the plaintiff to admit that she received her salary while she was recovering from her injuries. While this precise question on the collateral source rule had not previously been decided in South Carolina, several cases bearing a strong analogy to the present case lend strong support to the court's decision.[21]

19. *Id.* at 155, 156 S.E.2d at 761. For a general discussion of this area see Annot., 94 A.L.R.2d 352 (1964).

20. *See, e.g.*, Husky Refining Co. v. Barnes, 119 F.2d 715 (9th Cir. 1941) (defendant appealed when jury verdict did not affirmatively show that the jury had allowed the deduction); Steele v. Hash, 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963) (plaintiff appealed from alleged error in admitting the covenant into evidence).

21. Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957) (rental value of car was recoverable even though car was furnished gratuitously); Joiner v. Fort, 226 S.C. 249, 84 S.E.2d 719 (1954) (evidence that hospital expenses had been paid by an insurance company properly excluded); Jeffords v. Florence County, 165 S.C. 15, 162 S.E. 574 (1932) (evidence that damage to automobile had been paid by insurance company properly excluded).

D. Miscellaneous

In *Middlebrook v. Curtis Publishing Co.*,[22] an invasion of the right of privacy case, the court stated as a matter of dictum that South Carolina does recognize the invasion of the right of privacy as a tort and that the establishment of malice would justify punitive as well as actual damages.

Concerning adequacy of awards, *Jones v. Hamm*[23] held that $7,500 was not excessive for a 39 year old school teacher when she suffered from severe headaches, back pains and nervousness. There was also medical testimony that she would continue to suffer pain and discomfort.

Ray v. United States[24] held that $12,000 for loss of future earnings for a 58 year old woman making $60.80 per week for the period from age 62 until the end of her life expectancy at age 75 was adequate. For the period from her present age, 58, until age 62, $9,062.00 was held adequate. The court also awarded $9,500 for pain and suffering, present and future, and $10,000 for disfigurement.

Brooks v. United States[25] awarded $3,500 for approximately one hour and fifteen minutes of pain and suffering, $45,000 for loss of companionship, and $20,000 for mental shock and suffering. These awards were in addition to loss of future wages and pension.

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22. 281 F. Supp. 1 (D.S.C. 1968).
23. 283 F. Supp. 199 (D.S.C. 1967), *aff'd per curiam*, 392 F.2d 193 (4th Cir. 1968).
24. 277 F. Supp. at 955.
25. 273 F. Supp. 619 (D.S.C. 1967).