St. John's Law Review

Volume 22, November 1947, Number 1 Article 9

Measure of Damages--Aggravation of Previous Injury, Disease, Disability or Latent Weakness

Helen Perlmutter

Anne G. Kafka

free from contributory negligence, has been injured by an instrumentality in the control of the defendant; it is to be applied when the occurrence that causes the injury is unusual and unforeseen. When these circumstances do not exist the rule does not apply. But when they are present the rule of *res ipsa loquitur* is a rule to be applied to enable the plaintiff to establish a prima facie case although he cannot say wherein the defendant was negligent.[30]

WILLIAM A. CAHILL.

MEASURE OF DAMAGES—AGGRAVATION OF PREVIOUS INJURY, DISEASE, DISABILITY OR LATENT WEAKNESS

I. *Introduction*

The law in some of its branches has been able to formulate systems for measuring damages which operate in a more or less mechanical manner. Such is the case, for example, in actions for conversion, breach of contract, misrepresentation and trespass *quare clausum fregit*. However, when the value of human life or its impairment is involved, so many factors enter into the problem, that it is quite impossible to develop any system which would be adaptable to every case and treat each one justly. This is true especially of certain tort actions, among them assault and battery, personal injuries and death by wrongful act. In order to do justice in these cases ". . . such imponderable factors as degree of fault of defendant, foreseeability of results and proximity or remoteness existing between defendant's act and the damages to plaintiff . . ."[1] must be considered, so that it is impossible that the law can work absolutely in this field. Theoretically the measure of damages for personal injuries is the money equivalent of the difference between the injured party's physical condition before and after the injury. Practically, however, many elements are involved. Plaintiff must be compensated, first, for special expenses incurred, then for physical and mental suffering; also for the value of time lost from work and for any lessening in his future ability to work. Besides these factors, it is necessary to

---

[30] Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 355 (1947); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); San Juan Light Co. v. Requena, 224 U. S. 89, 59 L. ed. 680 (1912).

[1] Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases*, 19 TENN. L. REV. 255, 263 (1946).

consider also the probable effect on the future health of the injured party.[2]

Evaluation of special damages presents no particular problem, for plaintiff must merely prove dollar for dollar actual expenses directly resulting from the injury. Pain and suffering, on the other hand, are among the most difficult factors to measure. The value of time already lost from work can be easily determined, but not so with future inability, either total or partial. Medical science at most can offer its opinion based on previous experience and knowledge of the particular plaintiff's physical condition. But this can be uncertain at its best. Even medical experts would find it impossible to say that an injury will shorten the life span of an individual for, let us say, five years, although they may be able to predict with relative certainty that the injury will be troublesome or handicap plaintiff to a greater or lesser degree in the future.

Some or all of these problems may present themselves when the injured party was in sound health at the time of the wrongful act. The situation becomes even more complex, however, when the person was already handicapped by illness, disease, disability or a latent weakness at the time the injury occurred. The problem lies in the difficulty of determining which conditions resulted directly from the previous disease, disability or latent disease, and which conditions have been caused solely by the wrongful act. In these cases it becomes important to distinguish between injuries resulting from the accident, those resulting from aggravation of previous injuries or diseases, and conditions which would have resulted in due course regardless of the wrongful act.

II. *Elements of Cause of Action*

The rule is well settled in all jurisdictions that the same duty is owed to the sick and infirm as to the healthy and strong.[3] The liability of a wrongdoer is not predicated on the condition of a perfect physical specimen only. One who wrongfully inflicts injury on another is responsible for all the direct consequences of his act.[4] This is true even if the consequences are more disastrous as a result of a previous condition than they would ordinarily have been.[5] The mere

---

[2] *Id.* at 255.

[3] Florida Motor Lines Corporation v. Wood, 156 Fla. 838, 24 So. 2d 581 (1946); Whatley v. Henry, 65 Ga. App. 668, 16 S. E. 2d 214 (1941); Simon v. S. S. Kresge Co., 103 S. W. 2d 523 (1937); Webber v. Old Colony St. Ry., 210 Mass. 432, 97 N. E. 74 (1912); Rawlings v. Clyde Plank & Macadamized Road Co., 158 Mich. 143, 122 N. W. 504 (1909); Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624 (1902).

[4] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891); Hanson v. Hall, 202 Minn. 381, 279 N. W. 227 (1938); Tullgren v. Amoskeag Mfg. Co., 82 N. H. 268, 133 Atl. 4 (1926).

[5] Beaumont Iron Works Co. v. Martin, 190 S. W. 2d 491 (1945); Matthews

fact that the peculiar physical condition of the plaintiff caused enhancement of the injury or the fact that an injury might not have resulted at all in a healthy person will not relieve a defendant from liability for a breach of duty to the plaintiff, but may only act in mitigation of damages.[6]

Proximate cause is another important element to be considered, since there exist special ramifications in connection with cases of this nature. The case of *Vosburg v. Putney*[7] is still the leading case in most jurisdictions. There one school boy kicked another who was at that time suffering from a minor knee injury. After the battery the injury developed into a serious bone infection, resulting in permanent disability. The defendant argued that the previous injury was the proximate cause of disability. However, the court held the wrongdoer liable for all injuries resulting directly from the wrongful act, whether or not they could have been foreseen. Testimony established that the kick was the exciting cause.

Furthermore, lack of knowledge of plaintiff's sensitivity would not decrease the obligation, for the defendant is liable for all actual consequences.[8] Therefore, actual foreseeability of consequences or knowledge of the peculiar condition of the plaintiff are not factors to be considered in determining the liability of the defendant or the measure of damages.

III. *Measure of Damages*

The measure of damages, as determined by a jury under a proper charge, consists of subtracting the condition which would have resulted in any event because of the weakened condition of the plaintiff from the condition which exists after the accident.[9] It is not necessary to have new and independent injuries in order for a good cause of action to exist, for the aggravation of an old injury or disease, or the activation of a latent disease is sufficient.[10] A case illustrating this proposition is *Schide v. Gottschick*,[11] in which the plaintiff was injured in an elevator accident, and the defendant claimed her present disability was due to previous injuries suffered in an auto accident. The instructions of the lower court were confusingly worded so as to indicate to the jury that they need not consider any aggravation of

---

v. Atchison, T. & S. F. Ry., 54 Cal. App. 2d 549, 129 P. 2d 435 (1942); Flood v. Smith, 126 Conn. 644, 13 A. 2d 677 (1940).

[6] United States Fidelity & Guaranty Co. v. United States, 152 F. 2d 46 (C. C. A. 2d 1945).

[7] 80 Wis. 523, 50 N. W. 403 (1891).

[8] *Cf.* Spade v. Lynn & B. R. R., 172 Mass. 488, 52 N. E. 747 (1899).

[9] Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases*, 19 TENN. L. REV. 255, 261 (1946).

[10] Louisville Taxicab & Transfer Co. v. Hill, 304 Ky. 565, 201 S. W. 2d 731 (1947); Owen v. Dix, — Ark. —, 196 S. W. 2d 913 (1946).

[11] 329 Mo. 64, 43 S. W. 2d 777 (1931).

previous injuries in assessing damages. The higher court pointed out that while plaintiff was not entitled to recover for conditions due entirely to previous injuries and diseases, the rule is that plaintiff may recover for the aggravation of existing ailments caused by negligent acts of the defendant, even if no new injuries result.

Concerning previous injuries and existing diseases, the jury must determine from all the evidence what portion of the plaintiff's pain and suffering is due to the injury in question and what portion is due to the previous injury or disease.[12] In *Arkansas-Louisiana Gas Co. v. Campbell*[13] it was said, "Even if the evidence showed that appellee had been injured by the Standard Oil Company and was still suffering of that injury [at the time of the second injury], yet if the appellant negligently injured her, she would be entitled to recover from it compensation for such injury." But, if the previous injury has entirely healed, or plaintiff has completely recovered from the disease, it is error to introduce evidence concerning it,[14] as was indicated in a Florida case, *Jacksonville Electric Co. v. Batchis.*[15] Here plaintiff was injured while she was a passenger in a street car, which stopped suddenly, causing her to be thrown violently against a seat. Plaintiff was in normal health on the day of the injury and the jury was properly instructed not to consider any previous illness or disease under which she may have labored in the past, and from which she had recovered at the time of the accident, in determining the compensation to which she was entitled.

There is a group of cases also where the injury was more serious because of plaintiff's abnormal physical condition before the accident. In *Beaumont Iron Works Co. v. Martin,*[16] for example, plaintiff suffered head injuries when a window pane fell to the sidewalk from defendant's building due to defendant's negligence. These injuries were more severe than would normally have followed from such a blow, since medical testimony established certain abnormal characteristics of plaintiff's pituitary gland. In *Matthews v. Atchison, T. & S. F. Ry.,*[17] a railroad switchman received disabling injuries to the left arm as a result of an engine foreman's negligence. The evidence established that previous to the accident plaintiff had an abnormal condition of the left elbow in that there was a limited range of motion and the elbow was not of normal shape, and that it was quite possible that no disability would have resulted had the arm been normal. Similarly, in *Flood v. Smith,*[18] a gardener received a shoulder blade fracture which aggravated a pre-existing thyroid condition. In

[12] Schwingschlegl v. City of Monroe, 113 Mich. 683, 72 N. W. 7 (1897); Tice v. Munn, 94 N. Y. 621 (1883).
[13] 203 Ark. 307, 156 S. W. 2d 255, 258 (1931).
[14] Glasgow v. Metropolitan St. Ry., 191 Mo. 347, 89 S. W. 915 (1905).
[15] 54 Fla. 192, 44 So. 933 (1907).
[16] 190 S. W. 2d 491 (1945).
[17] 54 Cal. App. 549, 129 P. 2d 435 (1942).
[18] 126 Conn. 644, 13 A. 2d 677 (1940).

all these cases the court held, according to the general rule, that plaintiffs can recover full compensation for all damage proximately resulting from defendant's negligence, even though plaintiffs' injuries were more serious than they would otherwise have been because of the pre-existing physical conditions.

A wrongdoer is liable for all the consequences of a dormant disease brought into activity.[19] In a particular case, *Larson v. Boston Elevated Ry.*,[20] where latent tuberculosis germs were present and solely by reason of the lowered resistance caused by the accident tuberculosis developed, the jury correctly found that tuberculosis was the direct result of the injury and assessed damages therefor. It has been said that, ". . . the established rule is that where the result of an accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the negligence which caused the accident is the proximate cause of the disability and the person responsible for negligence is liable for the entire damages which ensue."[21] However, latent ailments aggravated are compensable only where the connection between the injury and the subsequent disease is direct and immediate. It was held in a recent Kentucky case[22] that the evidence did not sufficiently establish that plaintiff's failing vision was due solely to the accident, but that it may just as well have resulted solely from a latent condition or from a nervous disorder from which he was known to be suffering and for which reason he had received a medical discharge from the United States Navy. The rule was stated in a New York case, *Searles v. Manhattan Ry.*,[23] as follows: "When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, plaintiff must fail if his evidence does not show that the damage was produced by the former cause." It would follow from this that if a disease was completely latent prior to the wrongdoing which activated it, that the defendant is responsible for damages for all the pain, suffering and disability which ensue, as opposed to his liability in the case of a disease or injury which was already active in which latter case there would be a certain mitigation of damages. In one case, *City of Rock Island v. Starkey*,[24] plaintiff, who was an hysterical subject and had had nervous diseases before the accident, received injuries in a fall on a defective sidewalk. The

---

[19] Owen v. Dix, — Ark. —, 196 S. W. 2d 913 (1946); Levy v. Indemnity Ins. Co. of North America, 8 So. 2d 774 (1942); Piper v. Spiro, 188 So. 665 (1939); Atlantic & B. R. Co. v. Douglas, 119 Ga. 658, 46 S. E. 867 (1904).

[20] 212 Mass. 262, 98 N. E. 1048 (1912).

[21] 38 AM. JUR., NEGLIGENCE § 82; Owen v. Dix, — Ark. —, 196 S. W. 2d 913 (1946); Levy v. Indemnity Ins. Co. of North America, 8 So. 2d 774 (1942); St. Louis S. W. Ry. v. Lewis, 91 Ark. 343, 121 S. W. 268 (1909).

[22] Louisville Taxicab & Transfer Co. v. Hill, 304 Ky. 565, 201 S. W. 2d 731 (1947).

[23] 101 N. Y. 661, 5 N. E. 66 (1886).

[24] 189 Ill. 515, 59 N. E. 971 (1901).

evidence tended to show something more than a mere latent tendency to a particular disease. The court held that if, prior to the injury, plaintiff had diseases which were aggravated by the fall, she might recover from the defendant, but its liability would be measured only by the damages which were the natural and proximate results of its negligence, or in other words, that defendant may show in mitigation of damages that part of plaintiff's suffering resulted solely from her previous condition.

The measure of damages where the aggravated disease developed from a discreditable condition due to improper habits of the plaintiff, such as alcoholism, is no different from the damages computed in cases involving existing disease or previous injury. In a leading New York case, *McCahill v. N. Y. Transportation Co.*,[25] in which delirium tremens was precipitated by an accident, the court held that the negligent act directly set in motion the sequence of events, which caused the death at the time it occurred, regardless of the fact that the decedent may have died of delirium tremens in the ordinary course of events. The question which arises in cases of this nature is whether the court should concern itself with the distinction between ordinary pre-existing unhealthy conditions and pre-existing conditions due to the improper habits of plaintiff's decedent. In a case in another jurisdiction, *Dickson v. Hollister*,[26] the court suggested by way of *obiter dictum* that such distinction might properly be made. This proposition was specifically repudiated by a later New York case, *Turner v. Nassau Electric R. R. Co.*,[27] which case set the precedent for subsequent cases, including the *McCahill* case aforementioned. The court therein said, ". . . it requires altogether too great a stretch of moral responsibility and necessitates the investigation of cause and effect, and would carry us into metaphysical and psychological speculation, to an extent outside the possibility of judicial inquiry. . . . When disease has supervened from *any* cause, any aggravation of that condition by the negligence of another is a cause of action for damages, provided such damages are solely set in motion and caused by the injury" (italics ours). The New York rule appears to be the prevailing rule throughout most jurisdictions. For example, in one case, *Jacque v. Locke Insulator Corp.*,[28] plaintiff's decedent had been a workman who had suffered from silicosis caused by inhaling poisonous elements. The higher court found that it was not reasonable to hold as a matter of law that a jury could not find that silicosis was a factor contributing to fatality, when it appeared that death was accelerated by this silicosis, even though a major contributing factor was a pre-existing aneurysm, the origin of which was syphillitic. An Alabama case, *St. Louis & S. F. R. R. v. Savage*,[29] held that

[25] 210 N. Y. 221, 94 N. E. 616 (1911).
[26] 123 Pa. 421, 16 Atl. 484 (1889).
[27] 41 App. Div. 213, 58 N. Y. Supp. 490 (2d Dep't 1899).
[28] 70 F. 2d 680 (C. C. A. 2d 1934).
[29] 163 Ala. 55, 50 So. 113 (1909).

evidence that plaintiff, who was injured in a train wreck, was an immoderate drinker, was properly considered inadmissible, since there was no evidence that the injuries might have resulted from excessive drinking. A third case, *Ramlow v. Moon Lake Ice Co.*,[30] involved an employee who sustained a fracture of the right leg and suffered an attack of delirium tremens two days later, which subsequently caused death. The fact that his system had been so weakened by his intemperate habits in the use of liquor that he was unable to withstand the effects of the injury did not shift the proximate cause of death from his injuries to his intemperate habits. Where a mere bruise, which would not have resulted in prolonged disability but for latent gonorrhea, activated the latent disease and resulted in disability, the claimant in *Hanson v. Dickinson*[31] was entitled to compensation. In all of these cases the courts found it unnecessary to consider whether the unhealthy conditions of the plaintiffs resulted from improper personal habits, intemperateness, or repugnant social diseases, but applied the same legal principles as in any ordinary case of previous ill health or physical weakness.

In both civil and criminal law, one who inflicts injury upon another already ill or dying is nevertheless responsible for the death, provided, of course, the death is directly related to the injury.[32] In *Mussman v. Steele*,[33] where a septicemia victim, on route to a hospital, was involved in an accident when the ambulance overturned due to the driver's negligence, the court held it a question of fact for the jury whether the negligence caused or hastened death by pneumonia. The charge pointed out that even if plaintiff would have died anyway, defendant would still be responsible for the death when it actually occurred. The measure of damages in these cases where death ensues is the same as in the ordinary wrongful death action, namely, pecuniary loss to the next of kin,[34] with the exception, however, that here the defendant is permitted to show in mitigation of damages that plaintiff's decedent's life would have been materially shortened by his pre-existing unhealthy condition.[35] This point was brought out in *Tullgren v. Amoskeag Mfg. Co.*,[36] in which case a master left his ill servant seven hundred feet from his home because of water on the road. Medical testimony established that death was

---

[30] 192 Mich. 505, 158 N. W. 1027 (1916).

[31] 188 Iowa 728, 176 N. W. 823 (1920).

[32] PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (1941); Baker v. State Industrial Accident Commission, 128 Ore. 369, 274 Pac. 905 (1929); Foley v. Pioneer Min. & Mfg. Co., 44 Ala. 178, 40 So. 273 (1906); Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 So. 902 (1888); State v. Smith, 73 Iowa 32, 34 N. W. 597 (1887); 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 428 (new ed. 1800).

[33] 126 Neb. 353, 253 N. W. 347 (1934).

[34] PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (1941).

[35] McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926); Chicago, R. I. & G. Ry. v. Groner, 51 Tex. Civ. App. 65, 111 S. W. 667 (1908).

[36] 82 N. H. 268, 133 Atl. 4 (1926).

possibly due to heart failure from over-exertion. The jury was instructed that it may consider the fact that the original illness was fatal in mitigation of damages, but that did not bar recovery. It has been held that mortality tables may be excluded in a case where the evidence is already sufficient to determine the probable duration of life.[37] However, if the jury is permitted to consider life tables in such a case, it must be under a charge making it clear to the jury that these tables are to be given weight only as one factor in relation to all the evidence.[38]

IV. *Burden of Proof and Charge*

The plaintiff must prove by a preponderance of evidence that the existing pain, suffering and disability are due to defendant's negligence or wrongful act.[39] It is not necessary for the plaintiff to prove just how much he would have suffered from his unfit state of health if the injury had not been received by him.[40] That is for the defendant to prove. The defendant must show that a certain specified portion of the pain, suffering and disability is due to an unhealthy condition of the plaintiff unconnected with his negligence. The defendant may prove this in mitigation of damages, but it is not a defense to him.[41]

It is a question of fact for the jury to determine what portion of damages is due to defendant's wrongful act and what portion is totally unrelated. It is proper for the court to instruct the jury that the defendant is responsible for all the ill effects which naturally and necessarily follow the injury with reference to the condition of health in which the plaintiff was at the time of the occurrence which is the basis of the law suit.[42] It is incorrect for the court to instruct the jury to find for the defendant if the jury is unable to separate damages and pain caused by the existing disease or injury from damages caused by the injury inflicted by the defendant.[43] The jury must apportion such damages in accordance with all the evidence and expert medical testimony presented at the time of trial. It was held error, in *Saunders v. Philadelphia Rapid Transit Co.*,[44] to permit the court to instruct the jury to find that the proximate cause of death

---

[37] McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926).

[38] *Ibid.*

[39] Arkansas-Louisiana Gas Co. v. Campbell, 203 Ark. 307, 156 S. W. 2d 255 (1941); Cull v. Union Ry., 192 App. Div. 649, 183 N. Y. Supp. 275 (1st Dep't 1920).

[40] Hahn v. Delaware, L. & W. R. R., 92 N. J. L. 277, 105 Atl. 459 (1918); Sherman v. Indianapolis Traction Co., 58 Ind. 623, 96 N. E. 473 (1911).

[41] Simon v. S. S. Kresge Co., 103 S. W. 2d 523 (1937); Hahn v. Delaware, L. & W. R. R., 92 N. J. L. 277, 105 Atl. 459 (1918).

[42] Jones v. City of Caldwell, 20 Idaho 5, 116 Pac. 110 (1911).

[43] Sherman v. Indianapolis Traction & Terminal Co., 48 Ind. 623, 96 N. E. 473 (1911).

[44] 240 Pa. 66, 87 Atl. 420 (1913).

was the aggravation of a pre-existing kidney condition resulting from an accident, where such theory of the case was not presented by the pleadings or evidence.

Because there are so many imponderable factors, courts hesitate to set aside a jury's appraisal of the damages, where there has been reasonable certainty of proof as to those damages.[45] However, the court will, on appeal, set aside a verdict when it feels that proof of such damages has not been established by a preponderance of the evidence.

V. *Conclusion*

The law in this field has remained relatively constant and uniform throughout most jurisdictions. Variation in outcome of these cases has resulted from changes and progress in the science of medicine rather than from changes in law. Since expert medical testimony is one of the most important factors here, damages may be more exactly measured as the study of medicine advances. For example, in 1888, in *Trapnell v. City of Red Oak Junction,*[46] where plaintiff fell on defendant's defective sidewalk and developed pains the next day, the pains ultimately developing into cancer, it was held as a matter of law that incipient cancer must have been present before the accident, on the theory that it was unlikely that such a blow would cause cancer. But in 1931, in *Sussman v. Sussman,*[47] where plaintiff developed cancer of the stomach some time after receiving stomach injuries, it was held a question of fact for the jury whether the injury was the proximate cause. It is quite possible that medical research in the field of cancer having made more accurate medical testimony possible, the results in these two cases, similar in their facts, were therefore exactly opposite.

Further variation of pecuniary estimates of damages result from the individual skill of attorneys in presenting the facts to the jury, as well as the peculiar makeup of each jury. It is for these further reasons that twelve reasonable men with almost identical facts come forth with strongly divergent verdicts. The most the court can do to arrange for stability is to give proper instructions and set aside verdicts which are obviously unjust, but the actual amounts of money awards will remain uncertain and unrelated to fixed standards. The economic standards of the time and community, including the then

---

[45] Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases,* 19 TENN. L. REV. 255, 265 (1941), wherein is stated, "Evaluation of proper monetary compensation in respect to parts of the human body damaged or destroyed cannot be accomplished with . . . precise accuracy, and courts are therefore timid about holding the jury verdict to be excessive except in the clearest . . . cases."

[46] 76 Iowa 744, 39 N. W. 884 (1888).

[47] 108 N. J. L. 384, 156 Atl. 496 (1931).

current value of the dollar, also play an important part in the determination of the verdict.

It can readily be seen from the above statements that although there has been relatively little change in the measure of damages as set down by the law in cases of aggravation of previous injury, disease, disability or latent weakness, a wide variation among actual verdicts must result.

HELEN PERLMUTTER,
ANNE G. KAFKA.