DAMAGES

By EDGAR HUNTER WILSON*

Probably the most important decision on the law of damages rendered by the appellate courts of Georgia during the period of this survey is *Brown v. Georgia-Tennessee Coaches, Inc.*[1] This case holds that a wife has a cause of action for the loss of the consortium of her husband caused by personal injuries to him. This is the first Georgia case allowing such a recovery to a wife and it places Georgia in opposition to the great weight of authority on this problem. Judge Felton, writing for the court, quoted in full the opinion in *Hitaffer v. Argonne Company, Inc.*[2] rendered by the United States Court of Appeals, District of Columbia. The District of Columbia decision is a detailed, scholarly and convincing case for giving the wife a cause of action. The damages recoverable in the wife's action for loss of consortium are compensation for loss of companionship, love, felicity and sexual relations. Judge Felton's opinion makes it clear, although it was not necessary to the decision of the case, that a wife cannot recover for the husband's loss of earnings and earning capacity. The right to recover for these losses is exclusively in the husband, leaving the wife a right of recovery for those items mentioned above for the loss of which the husband has no right of recovery.

In *Kuhr Bros., Inc. v. Sparks*[3] the plaintiff alleged that his house burned as the result of defendant's negligent installation of a furnace flue. Although there was no claim that either the plaintiff or members of his family received physical injuries, the petition alleged that the plaintiff suffered "agonizing fright and fear for the safety of his wife and four small children; that the natural consequence of the shock of such fear was mental anguish. . ." The Court of Appeals ruled that the lower court correctly sustained a special demurrer to these allegations of pain and suffering. Damages for pain and suffering resulting from ordinary negligence are allowed where there has been an actual physical injury to the person or the mental pain and suffering results in a physical injury to the person. If the conduct of the tortfeasor amounts to a wanton disregard of the safety of others, damages for pain and suffering are allowable without a showing of physical injury. The requirement of physical injury

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1. 88 Ga. App. 519, 77 S.E.2d 24 (1953).
2. 183 F.2d 811 (D.C. Cir. 1950).
3. 89 Ga. App. 885, 81 S.E.2d 491 (1954).

to support recovery of damages for mental suffering is said to be based on the fear of courts that without it the doors would be opened to fraudulent claims for damages.[4] Although eminent writers have criticized the rule as being the result of unnecessary caution,[5] the position taken by the Georgia courts represents the law in most jurisdictions.

Beverly v. Observer Pub. Co.[6] involved a libel action brought by an unsuccessful candidate for public office against his opponent and a newspaper. The petition contained a prayer for special damages in the amount of the salary and the fair value of other emoluments of the office and a prayer for punitive damages in the amount of $50,000. There were no prayers for general or nominal damages. Judge Felton, writing for the Court of Appeals, held that a general demurrer to the petition was properly sustained. The special damages claimed for loss of the public office are too remote and speculative. A claim for punitive damages as provided by Code section 105-2002 cannot stand alone. Since the claim for special damages failed and there was no claim for general or nominal damages, the claim for punitive damages was left without a foundation in other damages, and thus the petition fell under a general demurrer.

In an action brought by a wife for the wrongful death of her husband[7] the Court of Appeals held that the trial court erred in overruling a special demurrer to paragraphs of the petition alleging that the plaintiff's minor child was deprived of the association and guidance of her father which services were reasonably worth $3,000 per year. These facts may be considered in determining the value of the life but they cannot be recovered as separate items of damage.

Parks v. Parks[8] involved the question of awarding attorney fees under Ga. Code Section 20-140. That section provides for the recovery of reasonable attorney fees where the defendant (1) has acted in bad faith, (2) has been stubbornly litigious, or (3) has caused plaintiff unnecessary trouble and expense. In the instant case the jury awarded attorney fees upon an instruction only on (2). The Court of Appeals held that any one of the three grounds was sufficient to support an award of attorney fees and since there was evidence to support a finding of ground (2) the award would stand. Further, the court held that the award was valid despite the fact that there was not specific prayer for any

4. PROSSER, TORTS, 214 (1941).
5. MCCORMICK, DAMAGES, 321 (1935).
6. 88 Ga. App. 490, 77 S.E.2d 80 (1953).
7. Southern Railway Co. v. Turner, 89 Ga. App. 785, 81 S.E.2d 291 (1954).
8. 89 Ga. App. 725, 80 S.E.2d 837 (1954).

particular sum as attorney fees and no evidence offered to show the amount of reasonable attorney fees.

In *Georgia R. and Banking Co. v. Flynt*[9] the plaintiff sought to recover damages for the dimunition in value of his pasture land resulting from a fire alelgedly set by defendant's train. The only evidence regarding the dimunition of value was plaintiff's testimony as follows: "I would say it was damaged around $30.00 per acre for the 40 acres; I don't know the market value, I don't deal in pasture land. I couldn't say what the fair market value of the pasture land would be before the fire and after the fire." This evidence was not competent to establish the dimunition in value, and since it was the only evidence, the trial court erred in submitting to the jury the question of damages for dimunition of value of the pasture land.

The trial court in *Whitton v. Central of Georgia Ry. Co.*[10] charged the jury regarding damages for both "loss or impairment of earning capacity" and "impairment of capacity to labor" although the petition alleged only the latter. The Court of Appeals held that the plaintiff-appellant had no cause to complain of this error. The plaintiff simply received the benefit of an additional claim for damages. The court further held that, in the absence o fa request, the trial judge did not err in failing to specifically instruct the jury regarding the proper measure of damages for "impairment of the capacity to labor." Loss of capacity to labor is an element of pain and suffering and the trial court gave proper instructions regarding the measure of damages for pain and suffering.

In *Southeastern Air Service, Inc. v. Crowell,*[12] the Court of Appeals recognized the right of a wife to recover medical expenses which she had incurred and paid. The husband is liable for his wife's medical expenses, therefore, he is usually the proper party to recover, but when the wife has actually paid the medical bills she is entitled to recover in an action in her own name.

9. 89 Ga. App. 315, 79 S.E.2d 377 (1953).
10. 89 Ga. App. 304, 79 S.E.2d 331 (1953).
11. For a discussion of the differences between these two items of damages see Wilson, *Damages*, 4 MERCER L. REV. 52, 54 (1952).
12. 88 Ga. App. 820, 78 S.E.2d 103 (1953).