DAMAGES

By CHARLES A. MOYE, JR.*

There are three elements in all lawsuits: (1) Questions relating to pleadings; (2) questions relating to liability, and (3) questions relating to damages. The rules for determining liability are far more numerous, complex and varied than are the rules for determining damages, and have crystallized in numerous categories which we know as "torts," "contracts," etc. The rules relating to the element of damages have as their object the determination of the proper recompense to the plaintiff for the wrongful act of the defendant after liability has been determined. Since the majority of cases turn on questions of pleading or liability and since, assuming a finding of liability, damages can usually be determined by application of well-settled rules, there are relatively few cases on questions of damages. The cases decided by the appellate courts of Georgia during the survey period afford no striking exception. However, there has been some clarification of established principles and those cases in this category which seemed of greatest interest to the writer are discussed below.

An interesting group of cases decided by the court of appeals illustrating the high degree of finality to be accorded to jury determinations of damages consists of: *Atlantic Coast Line Railroad Co. v. Wegner;*[1] *Warren v. Gray;*[2] *Koon v. Atlantic Coast Line Railroad Co.,*[3] *Price v. Whitley Construction Co.;*[4] and *Draper Canning Co. v. Dempsey.*[5]

In the *Wegner* case, an action for false imprisonment, the plaintiff alleged special damages in the amount of $290; the jury brought in a verdict of $5,690, which would appear to include the $290. The defendant in its motion for new trial contended that the verdict included elements of special damages which should not be recoverable in an action for false imprisonment, but the court said that the "verdict was merely a general one, and it is not apparent what proportion of it was special and what proportion of it was general,"[6]

*Member of the firm of Gambrell, Harlan, Russell, Moye & Richardson. A.B. 1933, J.D., 1943, Emory University; Member Atlanta, Georgia and American Bar Associations.

1. 90 Ga. App. 267, 83 S.E.2d 58 (1954).
2. 90 Ga. App. 398, 83 S.E.2d 86 (1954).
3. 90 Ga. App. 877, 84 S.E.2d 703 (1954).
4. 91 Ga. App. 257, 85 S.E.2d 528 (1954).
5. 91 Ga. App. 593, 86 S.E.2d 678 (1955).
6. 90 Ga. App. 267, 276, 83 S.E.2d 58, 64 (1954).

and overruled that ground of the defendant's motion for new trial.

The plaintiff in the *Warren* case testified inconsistently as to the amount owed him by the defendant, and the jury's verdict was in the exact amount testified by the plaintiff in one instance, but in excess of that testified to by him on another occasion. The court overruled this ground of defendant's motion for new trial, stating that other evidence indicated the plaintiff's damage was in excesss of either amount testified to by him.[7]

In the *Price* and *Draper Canning Co.* cases, the court applied the well-settled rule that reviewing courts will not consider as grounds of error the contention that the damages awarded are excessive unless it is made to appear that such is due to undue prejudice, bias or gross mistake.

In the *Koon* case, where the plaintiff sued for property damage, loss of earnings and mental and physical pain and suffering (the defendant counterclaiming for property damages), the evidence was uncontradicted as to the plaintiff's property damages and loss of earnings. The jury returned the following verdict: "We, the jury find for the plaintiff in the amount of $600 for personal injuries only."[8] The court held the plaintiff's motion for new trial should have been granted because "the verdict was not responsive to the issues made by the pleadings and evidence and submitted to the jury for its consideration, and consequently is contrary to law."[9] The court pointed out:

> The jury resolved the question of the plaintiff's right of recovery by returning a verdict in her favor. Accordingly, under the uncontradicted evidence, she was entitled to recover something for each of the elements of damage claimed. The jury by its verdict limited the plaintiff's recovery to "personal injuries only." While, under an application of the comparative-negligence rule, raised by the pleadings, evidence, and instructions of the court in this case, the jury were authorized to reduce the amount of the plaintiff's claims by apportioning the damages, it was not authorized to exclude entirely the claim of damage to the plaintiff's automobile, as we think it did by the terms of its verdict.[10]

In *D'Englere v. Lander Motors, Inc.*,[11] the plaintiff automobile company purchased a truck from the defendant for the sum of $540 under an express warranty of title for purposes of resale. The plaintiff expended $131.20 in making certain repairs to the truck but the

7. 90 Ga. App. 398, 405, 83 S.E.2d 86, 91 (1954).
8. 90 Ga. App. 877, 84 S.E.2d 703 (1954).
9. 90 Ga. App 877, 879, 84 S.E.2d 703, 704 (1954).
10. 90 Ga. App. 877, 878, 84 S.E.2d 703, 704 (1954).
11. 90 Ga. App. 879, 84 S.E.2d 460 (1954).

truck was levied upon by the Bank of Albany, Georgia, as collateral for a loan to one other than the defendant, the bill of sale to secure debt being recorded in Dougherty County. The plaintiff sued for the purchase price of the truck, the cost of repairs, and legal expenses incurred in attempting to defend its title. In holding that it was not error to overrule defendant's special demurrers questioning plaintiff's right to recover for the cost of repairs, the court said:

> Regarding the allegations as to repairs and improvements to the truck, such elements of damage have never been passed upon in this State by our appellate courts under a breach of warranty by the seller. However, *Riggs Motor Co. v. Archer*, 240 S.W. 2d 75, a Kentucky case, held that repairs and improvements on a stolen automobile were a loss to an innocent purchaser directly and naturally resulting in the course of evidence and recoverable items of damage. Items somewhat analogous to some of those in this case will be found in *Watkins v. Muse*, 78 Ga. App. 17 (50 S.E.2d 90). It must be kept in mind that the plaintiff purchased this truck from the defendant for the purpose of resale under a warranty that the title was in the defendant and was free of all liens. The burden was not on the purchaser, the plaintiff in this case, to search the records throughout the State of Georgia to determine whether or not the purchased vehicle was encumbered with liens prior to the purchase.[12]

The same reasoning prompted the court to hold that it was not error to overrule the defendant's special demurrers objecting to court costs and counsel fees incurred by plaintiff in Dougherty County.

In *Nipper v. Collins*,[13] the court charged "that one item of damage that is recoverable on account of injury to the person where there is liability is a reasonable value of the lost earnings due to such injury prior to the date of trial," and "if the jury should find that the plaintiff has suffered injury to his person which will incapacitate him or reduce his earning capacity for a time extending into the future, the jury will determine the diminution of the capacity to earn money, for how long that loss or diminution will continue and the reasonable value of such lost earnings,"[14] but the record did not show the amount of the plaintiff's earnings at any time. In this situation the court of appeals reversed the lower court's action in denying a motion for a new trial, holding that the above-quoted charges were unauthorized by the evidence and prejudicial to the defendants.

In the *Draper Canning Co.* case, *supra*, the question was raised by

12. 90 Ga. App. 879, 890, 891, 84 S.E.2d 460, 466 (1954).
13. 90 Ga. App. 827, 84 S.E.2d 497 (1954).
14. 90 Ga. App. 827, 829, 84 S.E.2d 497, 499 (1954).

defendant's motion for new trial whether, when the court charges on damages attributable to diminished earning capacity, it must also charge in substance that in a plaintiff's declining years there may be a natural decrease in his ability to labor and to earn money. The court, after noting one line of cases holding that it is reversible error, in connection with a charge on diminished earning capacity, to fail to charge that earning capacity may be diminished by illness, old age and the like, and also a line of cases holding that such failure does not constitute reversible error, felt it necessary to distinguish the lines of cases. The court said that its examination of the manner in which the courts had dealt with the problem led it to conclude that the failure to charge on diminution in earning capacity due to illness, old age, etc., results in reversible error only "where the jury is charged in such a way as to lead them to reach a mathematical figure based solely on loss of earnings for life," but not "where the law as to future diminshed earnings has been charged in such way that the jury would not thereby be misled into using a precise mathematical yardstick indicated by the trial court."[15]

Burleyson v. Western & Atlantic Railroad Company,[16] illustrates the distinction in the measure of damages for maintaining an abatable nuisance and for a non-abatable trespass. In the former situation, where the nuisance is not of a permanent and continuing character, but is one which can and should be abated, the party injured has no right to assume that it will be maintained indefinitely, and his remedy is, not to recover in one action for all past and future damages, but to bring from time to time separate suits for the recurring injury sustained, instituting each within the period prescribed by the statute of limitations for taking steps to recover damages actually suffered up to the time the action is filed. Generally, the measure of damages for continuing an abatable nuisance is a diminution of the yearly rental values of the property damages during the existence of the nuisance and within the statute of limitations, plus any actual damage sustained, and *not* the diminution of the market value of the property. However, where the effect of a trespass upon land is such as to render it wholly and permanently worthless for the uses to which it is mainly adapted, the owner must bring a single action to recover all the resulting damages, past, present, and future. And, by way of *obiter dicta,* the court pointed to another related principle of the law of damages that where a nuisance is committed as to a portion of a tract of land, as by contaminating a well, the proper

15. 91 Ga. App. 593, 598, 86 S.E.2d 678, 682 (1955).
16. 91 Ga. App 745, 87 S.E.2d 166 (1955).

measure of damages is the diminution in market value of the entire tract caused by such nuisance rendering the portion permanently useless. The court here said that the petition, properly construed, was an action seeking damages for maintaining a continuing abatable nuisance, and that the portion of the petition seeking to recover permanent damages was properly stricken on demurrer.

In *Housing Authority of Savannah v. Savannah Iron & Wire Works, Inc.*,[17] the court considered the proper measure of damages for a leasehold interest taken by public authority where the public authority refused to bring condemnation proceedings after plaintiff had voluntarily relinquished the property and plaintiff was forced to resort to a *quantum meruit* proceeding. The question before the court was whether fair market value was the proper measure of damages under Code section 2-301 of the Georgia Constitution, which provides: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." The court held that fair market value was not an inflexible measure of damage in such a situation, stating:

> In determining just and adequate compensation, under the constitutional provision, market value and actual value will ordinarily be synonymous. If they are not, that value which will give "just and adequate compensation" is the one to be sought by the jury in rendering its verdict.

The court pointed out, however, that whether the measure of damages be "market" or "actual" value, it could not include "speculative, sentimental, whimsical or any other 'value' not capable of mathematictal calculation."[18]

Where an accounting firm was engaged by persons against whom the U. S. Government had assessed large tax deficiencies on the basis of a certain amount *per diem* and an "amount equal to seven and one-half per cent of any reduction and penalty in the proposed taxes and penalty as disclosed" by the report of the Internal Revenue Agency for the years 1915-1938, and 1939-1945, and it appeared the defendants would not cooperate with plaintiff accountants and prevented them from carrying out their part of the contract, and defendants did settle with the U. S. Government for a sum substantially less than set out in the above-mentioned report, and a verdict for plaintiff accountants was returned by the jury, the court held that the proper measure of damage was the value of the contract to plaintiff rather than the value of plaintiff's services. *Irwin v. Young*.[19]

17. 91 Ga. App. 881, 87 S.E.2d 671 (1955).
18. 91 Ga. App. 881, 886, 87 S.E.2d 671, 676 (1955).
19. 91 Ga. App. 773, 87 S.E.2d 322 (1955).

In act 237 of Georgia Laws, 1955, page 448, the legislature removed governmental immunity of municipal corporations, counties and other political subdivisions of the state as to actions on account of the negligence of duly authorized officers, agents, servants, attorneys or employees while operating motor vehicles in the performance of official duties, where insurance is carried covering such liability. The damage which may be recovered, however, cannot exceed the limits of the coverage of any such insurance policy and, although the existence of insurance may not be suggested at the trial, the court shall reduce the amount of the judgment or award to a sum equal to the applicable limits of insurance.