DAMAGES

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STATUTES

There were no acts of the 1963 General Assembly that directly affected the law of damages.

JUDICIAL DECISIONS

No new principles were enunciated in this area of the law during the period of the survey. There were, however, decisions reiterating and refining those already imbedded in our jurisprudence. Damages for loss of earning capacity and the elements constituting such damages still seem troublesome at the trial level, despite the clarification in *Hunt v. Williams*,[1] discussed in last year's survey.[2] Measurement of damages to property and recovery of lost profits and earnings were also recurring items in cases reaching the appellate level.

DAMAGES FOR LOSS OF EARNINGS AND FOR LOSS OF EARNING CAPACITY

It was pointed out in *Hunt v. Williams*[3] that the plaintiff may recover general damages for anguish and anxiety over forced idleness as an element of pain and suffering and may recover as separate damages, pleaded and proved, earnings that would have been received but for the injury and earnings that will be lost in the future by reason of the reduced capacity to work. Those separate items are not, the Court of Appeals said, to be recovered separately, but are nevertheless separate elements of a single recovery.

In *Altamaha Electric Membership Corp. v. Irvin*,[4] it was held that damages for mental pain and suffering, which would include the anguish and anxiety over reduced ability to work, and damages for physical pain and suffering may be pleaded in separate paragraphs

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1. 104 Ga. App. 442, 122 S.E.2d 149 (1961).
2. 14 MERCER L. REV. 48, 50-51 (1962).
3. *Supra* n. 1.
4. 106 Ga. App. 491, 127 S.E.2d 326 (1962).

and that a special demurrer charging that dual recovery would result from such pleading was without merit. The court said it must assume that the trial judge would make any necessary clarification in his charge on damages.

Porter v. Bland[5] and *Central Container Corp. v. Westbrook*[6] both involved the duty of the trial court to charge accurately and separately on rules respecting general damages for pain and suffering that are raised by the evidence. In *Porter v. Bland,*[7] the trial judge had failed to instruct the jury that it should take into consideration the diminution of the plaintiff's earning capacity in his declining years, the plaintiff having sought damages for permanent injury. The Court of Appeals ruled that his failure so to charge was error, even though there had been no request for the charge. The Court of Appeals ruled further that where different elements of damages are shown for which dissimilar measures are to be applied, each element of damages and the applicable rule for measuring each should be charged separately. *Central Container Corp. v. Westbrook*[8] necessitated reiteration of the distinctions pointed out in *Hunt v. Williams.*[9] The trial court had not properly distinguished the several aspects of damages for lost earnings and lost earning capacity, and, as a result, had erroneously charged the jury that the measure of damages for lost earnings, as well as for lost earning capacity, was its enlightened conscience. The Court of Appeals accordingly reversed, holding that damages for lost earnings must be pleaded and proved as special damages, and their proper measure is the evidence in the case.

Pleading Damages

A plaintiff who alleges only special damages must plead and prove them and may not be awarded damages for other items not pleaded, but shown by the evidence, in a general verdict. In *American Cas. Co. v. Griffith,*[10] the plaintiff's liability insurance carrier had denied coverage following an automobile collision in which the plaintiff was involved. The plaintiff settled claims against him for specifed sums of cash and non-negotiable so-called promissory notes to be paid only from the proceeds of any recovery obtained from the insurance carrier. The notes included a provision that the claims against the plaintiff did not hold the plaintiff liable except to the extent of recovery from

5. 105 Ga. App. 703, 125 S.E.2d 713 (1962).
6. 105 Ga. App. 855, 126 S.E.2d 264 (1962).
7. *Supra* n. 5.
8. *Supra* n. 6.
9. *Supra* n. 1.
10. 107 Ga. App. 224, 129 S.E.2d 549 (1963).

the insurance company. General and special demurrers to the plaintiff's petition for the principal amounts of the promissory notes, with the notes attached as exhibits, were overruled. The Court of Appeals reversed holding that under the terms of the plaintiff's policy with the defendant insurance carrier, the insurer was required only to reimburse the plaintiff for sums which the plaintiff was legally obligated to pay. The notes, attached to the petition, showed on their face that the plaintiff was not legally obligated for their principal amounts, and consequently he could not recover such amounts under the policy. As the cash sums paid by the plaintiff in settlement of the claims against him had not been pleaded, they could not be recovered under the petition, and accordingly the general demurrer was good.

As pointed out above, *Altamaha Electric Membership Corp. v. Irvin*[11] held that damages for physical and mental pain and suffering may be pleaded separately, with the trial judge assumed to point out in his charge that only one recovery may be had for pain and suffering, of which mental and physical are two separate elements.

Damages Allowable In Personal Injury Actions

Atlanta Veterans Transportation, Inc. v. Cagle[12] followed earlier decisions authorizing damages for mental pain and suffering experienced by a pregnant woman from anguish over a possible deformity of her child following physical injury, even though the child was subsequently born without defect. The court affirmed the trial judge's charge that the measure of damages in such a case is the enlightened conscience of the jury.

In *Southern Ry. v. Lambert,*[13] the plaintiff sought damages for permanent injury. There was no direct medical evidence that his injury was permanent, but there was detailed evidence of the nature of the injury and some evidence of lost earning capacity. The injury had been received 14 months prior to the trial, and at the trial the plaintiff and his wife both testified that he was still disabled. The Court of Appeals held that from this evidnce the jury could infer a permanent injury and that a charge of the damages allowable for a permanent loss of earning capacity was not error.

11. *Supra* n. 4.
12. 106 Ga. App. 551, 127 S.E.2d 702 (1962).
13. 106 Ga. App. 691, 128 S.E.2d 87 (1962).

Proof of Damages for Lost Profits and Professional Earnings

Globe Motors, Inc. v. Noonan[14] held insufficient to support damages for loss of profits testimony by the plaintiff's business associate that the plaintiff had a working arrangement by which he received 40 per cent of the net proceeds of his business and that the plaintiff would have been making about $10,000 a year except for the accident. The court recognized loss of definite earnings that would have been received except for the injury as a proper item of damages, but considered the evidence insufficient because there was none respecting the net profits which the business would have earned.

The plaintiffs in *Kroger Company v. Perpall*[15] were more precise in their proof and consequently more successful in their damage suit. In that case the defendant's truck rolled into the plaintiff's dental office and shattered their equipment. The plaintiffs alleged and proved their average daily earnings and expenses during the preceding year and asked for damages for the three and one-half and four days that they were unable to practice. The court pointed out that a professional man not earning a fixed salary can only show his average earnings for a reasonable period prior to the damage and base his recovery on such proof. The court considered the evidence of the plaintiffs sufficiently precise for that purpose. The court also found that three and one-half and four days were not unreasonable periods and showed due diligence of the plaintiffs in attempting to mitigate damages by restoring their offices to usable condition.

Damages for Injury to Property

In *Globe Motors, Inc. v. Noonan,*[16] the court held that the cost of repairing damaged personal property is an alternative measure of damages to diminution in value of the property, so long as the reasonable cost of repairs does not exceed the value of the property immediately prior to the damage. That seems somewhat in conflict with the statement in *Kroger Company v. Perpall*[17] that the measure of damages to personal property is the diminution in value. In the *Kroger* case the court assumed that an allegation of the cost of repair alone would be insufficient to support the claim for damages. It is not possible to reconcile the decisions on the basis that in the *Kroger* case the plain-

14. 106 Ga. App. 486, 127 S.E.2d 320 (1962).
15. 105 Ga. App. 682, 125 S.E.2d 511 (1962).
16. *Supra* n. 14.
17. *Supra* n. 15.

tiffs had failed to allege the value before the injury, because such value was specifically stated. It is suggested that as a matter of practical proof, the *Globe Motors* decision should be followed. It does not seem realistic in these days of bent fenders and twisted grills to adhere to the common law rule that diminution in value is the only proper measure of damages. In the usual claim for damages to personal property, particularly if the article of property is an automobile, the only evidence of the value after the accident is the testimony of the owner, who arrives at his estimate by subtracting the repair bill from his estimate of the value before the accident. The *Globe Motors* rule seems more realistic and more nearly adapted to awarding the plaintiff exactly the amount by which he has been damaged and no more. This is not to suggest that the diminution in value rule should be abandoned, and there are certainly numerous cases in which the injury to personal property, automobile or other, is irreparable.

Richmond County v. Sibert[18] followed earlier decisions in allowing damages to the owner of real property for an obstruction of the street in front of his property. Such damages are allowable for the special injury to the plaintiff's property by reducing his free access to and from different highways, which is different from the injury inflicted upon the general public by its loss of use of the street.

Punitive Damages

Co-Op Cab Company v. Arnold[19] followed the general rule that punitive damages may be awarded in a tort action only where there is evidence of wilful misconduct, malice, wantonness or that entire want of care which would raise the presumption of a conscious indifference to consequence. The court held that the evidence in that case as a matter of law would not support the jury's award of punitive damages.

Excessive and Deficient Verdicts

In *Atlanta Veterans Transportation, Inc. v. Cagle*,[20] the Court of Appeals held that it could not set aside a verdict as excessive unless there was an indication that it resulted from prejudice or bias or was inflicted by corrupt means.

In *Hogan v. Malcon*,[21] the court refused to set aside a verdict as insufficient. There was no evidence of special damages, and general

18. 105 Ga. App. 581, 125 S.E.2d 129 (1962).
19. 106 Ga. App. 160, 126 S.E.2d 289 (1962).
20. *Supra* n. 12.
21. 107 Ga. App. 241, 129 S.E.2d 808 (1963).

damages are a matter for the enlightened conscience of the jury. The court distinguished *Tallent v. McKelby*[22] in which the verdict was found insufficient, on the basis that in the *Tallent* case the verdict was less than the special damages which had been proved.

In *Malone v. City of Rossville*,[23] the court found a verdict for the defendant not to be an insufficient award of damages to the plaintiff in an unusual situation. The plaintiff had settled with one of two joint tortfeasors granting a covenant not to sue. The amount of that settlement was before the jury in the plaintiff's action against the second tortfeasor. The court held that the jury was authorized by the evidence to find that the amount of the settlement compensated the plaintiff fully for her injuries and that she was entitled to none from the second defendant.

Award of Costs on Appeal

In *Co-Op Cab Company v. Arnold*,[24] discussed above, the plaintiff-in-error succeeded in making a substantial change in the verdict, the court having required the defendant-in-error to write off the $200 awarded by the jury as punitive damages, and the costs of the appeal were cast upon the defendant-in-error.

22. 105 Ga. App. 660, 125 S.E.2d 65 (1962).
23. 107 Ga. App. 271, 129 S.E.2d 562 (1963).
24. *Supra* n. 19.