

# DAMAGES

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While there have been a few cases of general interest involving damage questions during the survey period, there have been none which substantially change the law of damages. The more interesting of these cases of general interest will be discussed in this article.

## PERSONAL INJURY

In *Mull v. Emory University, Inc.*,<sup>1</sup> an allegedly improperly administered diagnostic test by an employee of the defendant hospital resulted in damage to the tissue of plaintiff's arm. The plaintiff's petition sought damages for mental pain and suffering resulting from awareness of the possible future loss of her arm and of the danger to her which would accompany pregnancy by reason of injury to her circulatory system. The court of appeals held that such allegations of damage were not demurrable, stating:

Allegations as to probable adverse results from an alleged tortious injury or that there was a substantial medical possibility of such result, which probabilities and possibilities have caused the plaintiff mental pain and suffering are properly pleaded as such element of damage.<sup>2</sup>

In *Bibb Transit Co. v. Early*,<sup>3</sup> although the plaintiff did not in his pleadings seek damages for diminished earning capacity as special damages, a charge with respect thereto (based upon evidence at the trial) authorizing the jury to award damages for diminished earning capacity was found to be correct since the future effect of the injury sustained is not special damages which must be alleged, but general damages which necessarily follow from injuries received.

## ACTION FOR DECEIT

*Spindel v. Kirsch*,<sup>4</sup> was an action for deceit in inducing the plaintiff to enter a contract by fraudulent misrepresentations. The plaintiff sought actual damages which he alleged to be the necessity of selling his home in Virginia to enable him to move to Atlanta, and the necessity of raising capital which required him to liquidate some stocks which subsequently increased in value. Verdict was directed for defendants, and the court of appeals affirmed on the ground that the damages alleged were not the

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1. 114 Ga. App. 63, 150 S.E.2d 276 (1966).

2. *Id.* at 67, 150 S.E.2d at 293.

3. 113 Ga. App. 871, 150 S.E.2d 158 (1966).

4. 114 Ga. App. 520, 151 S.E.2d 787 (1966).

actual damages which plaintiff could recover, but were simply expenses incurred preparatory to entering the contract. The court said that in an action for deceit by one induced to enter a contract as a result of fraudulent misrepresentations,

the measure of damages is the actual loss sustained by the plaintiff, and if the contract is one of purchase and sale, the 'actual damages are the difference between the value of the thing sold at the time of delivery and what would have been its value if the representations made by the defendants had been true.<sup>5</sup>

#### UNLIQUIDATED DAMAGES

In an action for breach of contract where the damages were unliquidated, *Smith v. Maples*,<sup>6</sup> the trial judge charged the jury that the plaintiff was entitled to receive interest and that the award of such interest was discretionary with the jury. The allowance of interest in such a case is a matter within the jury's discretion [GA. CODE ANN. section 20-1408 (1965 Rev.) ], and the court of appeals affirmed the verdict only on the condition that the plaintiff write off all interest which he recovered since the court of appeals felt that the jury could only have speculated whether such interest was demanded or discretionary only.

#### EXPLANATION OF VERDICT BY JURY

In *Saint v. Ryan*,<sup>7</sup> the jury was instructed to reduce any amount of damages, if they found for plaintiff, by the sum of \$2,000, because of a payment already made to plaintiff by a joint tortfeasor under a covenant not to sue. A verdict for the plaintiff in the amount of \$3,000 was rendered, and judgment was entered. Subsequently, a motion to set aside the verdict and judgment was filed with accompanying affidavits from all twelve jurors to the effect that they thought their verdict would be reduced to \$1,000. The court of appeals in affirming the \$3,000 judgment said: "The instruction to the jury as to deducting the \$2,000 was clear and unambiguous. The verdict is clear and unambiguous and is not subject to explanation by the jurors."<sup>8</sup> The evidence was found to be weak but sufficient to authorize the verdict rendered.

#### CONDEMNATION

In *State Highway Dept v. Augusta Dist. of N. Georgia Conference of the Methodist Church*,<sup>9</sup> land was taken from a youth training center, and a

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5. *Id.* at 520, 151 S.E.2d at 788.

6. 114 Ga. App. 529, 151 S.E.2d 815 (1966).

7. 114 Ga. App. 489, 151 S.E.2d 826 (1966).

8. *Id.* at 490, 151 S.E.2d at 828.

9. 115 Ga. App. 162, 154 S.E.2d 29 (1967).

cabin which had previously been used for sleeping purposes was rendered useless because of its consequent proximity to the highway which was constructed. The jury awarded \$200 for the land taken and \$4,300 as consequential damages to the remaining property. The court of appeals affirmed, stating that while diminution in market value of the remaining property is generally used as the method of arriving at just compensation, there are exceptions to the rule where market value is not the fairest or most accurate method of measuring the loss, and

If, as in the case *sub judice*, the condemnee has designed and built an improvement on the property for a special purpose and has been deprived of its use, just and adequate compensation may include the cost of its value to condemnee for the particular purpose for which it was constructed.<sup>10</sup>

The supreme court in *Calhoun v. State Highway Dept'*<sup>11</sup> declared unconstitutional Ga. Laws 1966, p. 320, which had purported to eliminate from the measure of damages awarded in condemnation cases "any increase or decrease in the value of the property actually taken resulting from the improvements, or the anticipation thereof, in connection with which the right of eminent domain is being exercised." This was an element of damages in condemnation cases approved by the supreme court in *Hard v. Housing Authority of the City of Atlanta*.<sup>12</sup> The supreme court said: "It is beyond the power of the General Assembly to specify what evidence can or can not be introduced to prove just and adequate compensation"<sup>13</sup> and declared the 1966 act unconstitutional as "an attempt to invade the exclusive jurisdiction of the judicial department" and as offending "the constitutional separation of powers."<sup>14</sup>

#### INVASION OF RIGHT OF PRIVACY

In *Cabaniss v. Hipsley*,<sup>15</sup> the plaintiff was an exotic dancer whose photograph appeared for several weeks in an advertisement of Atlanta's Playboy Club which was published in *Gay Atlanta* magazine. The billing under the photograph was "Dawn Darling," a name which plaintiff had never used, and, in fact, plaintiff was not Dawn Darling, nor had she ever appeared at Atlanta's Playboy Club. In the plaintiff's action for invasion of her privacy against both *Gay Atlanta* magazine and Atlanta's Playboy Club, she was awarded general damages in the amount of \$10,000 and punitive damages in the amount of \$5,000. The court of appeals, in reversing, distinguished between causes of action involving injury to feelings, sensibilities, or repu-

10. *Id.* at 164, 154 S.E.2d at 30.

11. 223 Ga. 65, 153 S.E.2d 418 (1967).

12. 219 Ga. 74, 132 S.E.2d 25 (1963).

13. 223 Ga. 65 at 68, 153 S.E.2d 418 at 421.

14. *Id.* at 69, 153 S.E.2d at 421.

15. 114 Ga. App. 367, 151 S.E.2d 496 (1966).

tation for which general damages are recoverable without proof of special damages, and those causes of action which involve an appropriation of rights in the nature of property rights for commercial exploitation in which the measure of damages is the value of the use of the appropriated property. The court considered this case to fall in the latter category. The court of appeals thus reversed with direction that a judgment n.o.v. be entered for defendant *Gay Atlanta*, since its participation in publishing the photograph was merely passive with no advantage accruing to it from the use of the photograph. The court ordered that a new trial be granted as to Atlanta's Playboy Club stating "[I]f the jury concludes from the evidence that the use of plaintiff's photograph by defendant On The Town, Inc., in its advertising of the Atlanta Playboy Club, was unauthorized she would be entitled to recover its advertising value for the time and manner in which it was appropriated, as actual damages."<sup>16</sup> The award of punitive damages would depend, under GA. CODE ANN. section 105-2002 (1956 Rev.), upon whether there were aggravating circumstances either in the act or the intention.

#### ATTORNEY AND CLIENT

In *Bankers Health & Life Ins. Co. v. Fryhofer*,<sup>17</sup> plaintiff Fryhofer, an attorney, represented a policy holder of defendant for the purpose of securing compensation for disability. The defendant's agent convinced the insured that he did not need an attorney, and the plaintiff was discharged. The plaintiff sued for alleged unlawful interference with his contract of employment with the insured and was awarded \$2,500 as actual damages by the jury. The court of appeals reversed this judgment on the ground that the testimony upon which it was based was too conjectural and speculative, the testimony assuming that the plaintiff would have conducted a trial against defendant on behalf of the policyholder, and that the plaintiff would have received a verdict awarding \$2,500 as attorney's fees. The court of appeals held that if the plaintiff were to recover more than nominal damages, he would have to plead and prove, by competent evidence, the extent of his client's right to recover against the defendant.

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16. *Id.* at 368, 151 S.E.2d at 508-509.

17. 114 Ga. App. 107, 150 S.E.2d 365 (1966).