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Damages - The Compensatory Theory Favored over the Colateral Source Doctrine - Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891 (1962)

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older and majority view is more in conformity with the guarantees provided for in the due process clauses of the Federal and Illinois constitutions. It is a distortion of justice to allow these clauses to be used as tools to thwart the very principles upon which they are founded. Future decisions will either re-establish the older principles of justice or lead us further into a new understanding of the principles to which the present decision points. Time alone will determine the direction.

DAMAGES–THE COMPENSATORY THEORY FAVORED OVER THE COLLATERAL SOURCE DOCTRINE

The plaintiff, a doctor, suffered injuries when the defendant negligently struck the rear of his automobile; plaintiff received medical care from his colleagues and his permanently staffed nurse at no actual cost. In his bill of particulars the plaintiff listed $2,235 for medical and nursing care, alleging that he should recover for such collateral benefits. The lower court refused to allow recovery, and the New York Court of Appeals affirmed, holding that the value of medical and nursing care rendered the injured physician gratuitously was not recoverable as special damages, as it was the policy of the Court to allow only actual compensatory damages in recoveries. *Coyne v. Campbell*, 11 N.Y. 2d 372, 183 N.E. 2d 891 (1962).

The plaintiff based his theory of recovery on the New York Court of Appeals case of *Healy v. Rennert*[1] where plaintiff, a fireman, was allowed to recover although his medical and nursing bills had been paid by an insurance plan to which he had contributed, and even though his disability allowed him to receive a disability pension. The Court however, in the *Coyne* case, followed its ruling in *Drinkwater v. Dinsmore*,[2] where a plaintiff was precluded from collecting as damages lost wages which had been paid gratuitously by his employer, and again applied the compensatory theory of damages. The Court said that the *Healy* case did not cast doubt on the continued validity of the *Drinkwater* case, as the plaintiff contended, for there were factual distinctions between the two cases. It was pointed out by the Court that in the *Healy* case, the plaintiff paid a premium for the health insurance and had worked for eighteen years to earn eligibility for the disability pension, whereas in the *Coyne* and *Drinkwater* cases, the plaintiffs' benefits were wholly gratuitous. The dissenting opinion in the *Coyne* case stated that a tortfeasor should not be permitted to deduct from his damages the benefits which plaintiff received from another source gratuitously; in other words, it said that the collateral source doctrine should have been applied in this case.

[1] N.Y. 2d 202, 173 N.E. 2d 777 (1961).

[2] 80 N.Y. 390 (1880).

By the Court's rendering the judgment, New York remains one of the few jurisdictions which does not accept the application of the collateral source doctrine in cases where the benefits received are totally gratuitous. The collateral source doctrine is that where the plaintiff, in a personal injury action, receives collateral benefits from sources wholly independent of the defendant, such benefits cannot be declared by the defendant in mitigation of damages.[3] The litigation involving the issue of the collateral source doctrine arises in two main factual situations. First, where the plaintiff has received compensation from a source to which he has contributed, such as insurance policies, employment contracts, and disability pension plans; and second, where the plaintiff has received compensation gratuitously, either in wages from his employer, or in the form of medical and nursing benefits from governmental units or from the plaintiff's wife, family or friends. The *Healy* case, upon which plaintiff relied, involved the first of these situations whereas the *Coyne* case involved the second.

In the contribution situation, the courts, in the cases involving hospital and medical insurance, have reached almost unanimous agreement in that an injured person may recover for medical expenses due to injuries caused by the defendant, even though such expenses were paid by insurance.[4] The New Hampshire Supreme Court in *Clough v. Schwartz*[5] ruled that admission of hospital and medical bills into evidence by the plaintiff and the exclusion of defendant's proof of payment of those bills by plaintiff's group insurance plan did not constitute error. Similarly, the Supreme Court of Errors of Connecticut in *Roth v. Chatlos*[6] held that the defendant is liable for injuries of which he was the proximate cause, and that payment by third parties does not relieve or mitigate damages. In *Leon v. United States*[7] the plaintiff was allowed recovery of hospital bills which had already been paid by an insurance plan. Within the past decade both Kentucky[8] and Wisconsin[9] expressly overruled prior cases in arriving at a position where they now allow recovery, but only where the plaintiff has received collateral benefits from a source to which he has contributed.

Another situation where the plaintiff has contributed to the source

[3] Hudson v. Lazarus, 217 F. 2d 344 (D.C. Cir. 1954).

[4] Leon v. United States, 193 F. Supp. 8 (E.D. New York 1961).

[5] 94 N.H. 138, 48 A. 2d 921 (1946).

[6] 97 Conn. 282, 116 Atl. 332 (1922).

[7] 193 F. Supp. 8 (E.D. New York 1961).

[8] Conley v. Foster, 335 S.W. 2d 904 (1960); Sedlock v. Trosper, 307 Ky. 369, 211 S.W. 2d 147 (1948).

[9] Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872 (1953); Nelson v. Pauli, 176 Wis. 1, 186 N.W. 217 (1922).

from which he receives collateral benefits concerns pension plans. Here also, there is almost unanimous holding in the courts that the defendant is not allowed to mitigate damages in personal injury cases for the reason that the plaintiff is receiving or about to receive a pension. In the *Healy* case the plaintiff, who was due for normal retirement in two years at one-half pay, retired immediately on a disability pension at three-fourths pay due to the injury caused by the defendant; evidence to this effect was not allowed by the court. The Appellate Court of Illinois in *Devine v. Chicago*[10] ruled that excluding testimony of a widow on the question of how much, if any, pension she had received since her husband's death was proper. In *Bencich v. Market St. Ry.*[11] the Appellate Court of California ruled that evidence showing plaintiff retired upon a pension was not admissable for the purpose of reducing damages recoverable on account of loss of earnings.

In the gratuitous situations the courts, in the cases involving medical and nursing benefits rendered gratuitously from governmental units or from the plaintiff's wife, family or friends, have split, with the majority holding that the plaintiff can recover the reasonable value of such services. In *Crouse v. Chicago & N.W. Ry.*[12] the value of services rendered by the wife in nursing her husband for injuries sustained by him were recoverable by him in a personal injuries action. The Court of Appeals of Kentucky in *Cincinnati N.O. & T.R. Ry. v. Perkins*[13] ruled, in a situation where the plaintiff was not working at the time he was injured, that the plaintiff is allowed to recover for loss of wages while disabled, for it is the loss of the opportunity to seek employment, rather than the amount of wages lost, that determines recovery. In *Standard Oil v. United States*[14] the court said:

> In the United States the prevailing rule seems to be that an injured person may recover for wages lost and medical expenses incurred during his incapacity even though such amounts were supplied by insurance, a contract of employment, or gratuitously.[15]

In the minority rule jurisdictions no recovery is allowed in a personal injury action for medical, nursing and/or wages rendered gratuitously, since the plaintiff did not actually suffer an out-of-pocket loss.[16] In *Daniels v. Celeste*[17] the Supreme Judicial Court of Massachusetts said that in

[10] 172 Ill. App. 246 (1912).

[11] 29 Cal. App. 2d 641, 85 P. 2d 556 (1938).

[12] 102 Wis. 196, 78 N.W. 446 (1899).

[13] 205 Ky. 798, 266 S.W. 652 (1924).

[14] 153 F. 2d 958 (9th Cir. 1946).

[15] *Id.* at 963.

[16] DePaulis v. United States, 193 F. Supp. 7 (E.D. New York 1961); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).

[17] 303 Mass. 148, 21 N.E. 2d 1 (1939).

an action to recover damages for personal injuries, the reasonable value of necessary medical and surgical and of nursing care is an element of damage, but recovery may be had only if the plaintiff has paid for such services, or has incurred a liability to pay therefore, or will incur such a liability in the future. The recovery, it is reasoned, is purely compensatory. The injured person receives only what is commensurate with the actual out-of-pocket loss caused by the defendant and suffered by the plaintiff. The Supreme Court of Illinois in *Wicks v. Cuneo-Henneberry*[18] ruled that the plaintiff must have paid or become liable to pay the amount, and the charges for the services must have been reasonable.

The *Drinkwater* case is the supporting case for the theory of compensatory damages in New York and was upheld in the *Coyne* case. In the *Drinkwater* case the plaintiff received both his wages and nursing services gratuitously, and the court ruled that claims for such could form no part of plaintiff's damages because the plaintiff suffered no pecuniary loss.[19]

Although it is almost unanimous that the courts do not allow mitigation of damages in the contribution situation, the courts divide where the collateral source is gratuitous. The reason for this split is a difference in the rationale between the courts. The majority of courts do not allow mitigation of damages in either the contribution or gratuitous situations. These courts base their decisions on the collateral source doctrine. The rationale behind the doctrine is that a tortfeasor should not be able to benefit from that which was meant to help the plaintiff, or that he should not escape the consequences of his wrongful act because the plaintiff received a benefit from a third party.[20] The majority courts reason that in pension and insurance cases, the premiums are in the nature of an investment which should not inure to the benefit of the defendant wrongdoer.[21]

The decisions of the courts which do not allow mitigation of damages in contribution situations, but do allow mitigation of damages in gratuitous situations, are based upon the compensatory theory of damages. In the *Leon* case, the plaintiff, who was paid his full wages by his employer, was not allowed to collect damages for his loss of work during his disabled period, but the court allowed the plaintiff to recover the hospital bills which had already been paid by an insurance plan. These courts believe that where the plaintiff has received benefits from insurance policies

[18] 319 Ill. 344, 150 N.E. 276 (1925).

[19] The New York legislature attempted to reverse the *Drinkwater* case and thereby conform New York law to that of the majority, by introducing a bill in the New York State Senate and Assembly in 1956, but the bill was defeated.

[20] Cincinnati N.O. & T.P. Ry. v. Perkins, 205 Ky. 798, 266 S.W. 652 (1924); Pawlicki v. Detroit United Ry., 191 Mich. 536, 158 N.W. 162 (1916).

[21] Iehr v. City of New York, 219 N.Y.S. 2d 308, 30 Misc. 2d 953 (1961).

or pension plans to which he has contributed, the plaintiff actually paid out of his pocket in advance for such future benefits, and where the plaintiff has not contributed, such payments by the collateral source, usually the employer, are compensation for past services of the plaintiff.[22] Thus to permit recovery, these courts consider both pensions and insurance as something for which the plaintiff has paid over the years, with his services or the premium deductions serving as his compensatory loss.

The *Coyne* case highlights this difference in rationale among the courts and stands firmly on the compensatory theory of damages. There is an inconsistency in the decisions of these courts, upholding the compensatory theory, in that they allow full recovery in the contribution cases. Under this theory, it would seem that the plaintiff should be allowed to recover only the premiums or payments for the insurance plan or pension fund to which they contributed his out-of-pocket loss.

Benefits from a collateral source will aid either the plaintiff or the defendant. Whether the benefit given to the plaintiff was one of friendship, philanthropy, or contract, the interests of the parties and society are better served where the courts apply the collateral source doctrine and the plaintiff, to whom the gift was intended, is allowed the benefit.

[22] Poniatowski v. City of New York, 220 N.Y.S. 2d 854, 30 Misc. 2d 865 (1961); Devine v. City of Chicago, 172 Ill. App. 246 (1912).

DAMAGES–COMPUTATION BY USE OF A PER DIEM FORMULA

During the trial of a rear-end automobile accident case, plaintiff's attorney suggested to the jury that fair compensation for his client's pain and suffering could be computed by using a mathematical formula in which a given dollar value was assigned to each day of pain and suffering and then multiplied over the plaintiff's lifetime as computed on a standard mortality table. The defendant appealed the $20,000 verdict, assigning as error the use of a per diem argument for pain and suffering. The Appellate Court affirmed, holding that the per diem argument was logically suggested by the evidence and that per diem argument falls within accepted lines of advocacy. The Supreme Court reversed and ordered a new trial, ruling that although counsel might suggest a total monetary award for pain and suffering, the practice of counsel explaining to the jury a formula and suggested figures to arrive at a suggested amount of money for pain and suffering transcends the bounds of proper argument. *Caley v. Manicke,* 24 Ill. 2d 390, 182 N.E.2d 206 (1962).