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Torts—Gratuitous Medical Aid Not Compensable as Tort Damages

Marion A. Kobes

It would seem that a more steadfast faith in the ability of those who sit in judgment of the facts in civil cases, and in the judicial safeguards erected to insure the equality of such verdicts, would work to dispel at least some of the misgivings of the minority. There is no doubt that the awarding of punitive damages in a fraud and deceit action such as the instant case takes on an aura of criminal punishment being meted out in a civil court. There is the further possibility that the defendant may yet have another day in court, this time criminal, in which further penalties may be exacted. But this possibility may well be risked if the interests of both parties to an action such as the instant case are weighed with equal vigor, as the majority has done. It is decidedly less likely that grave injustice would be done to a defendant in the present situation if he were in fact subjected to monetary damages in excess of the actual amount realized by his fraudulent scheme, than if a plaintiff similar to the one in the instant case were rendered a sum equal to the amount actually parted with, but which in view of the expenses necessary to realize such a verdict could well be considered to be something less than "compensatory" in practical terms. The majority has recognized the value in providing such a plaintiff with a realistic measure of self-interest in order to induce him to initiate a claim which otherwise might be neglected. The net result of this view would seem to be a just one, fraught as it may be with some risk of dual punishment for the defendant or a judicial encroachment upon a legislative function (the imposition of punishment to deter crime). Clearly, then, the majority has struck a balance which is not as unworkable as might be feared.

A dutiful consideration of the public welfare recommends this holding which provides a powerful deterrent to any illegitimate enterprise based upon fraud and deception, which could otherwise afford to suffer its occasional day in court if only compensatory damages were to be involved in the few civil actions likely to be brought against it. Equally important and not to be overlooked, is the very real opportunity of creating a more favorable climate for the legitimate business community through the resultant removal of such enterprises.

J. P. M.

GRATUITOUS MEDICAL AID NOT COMPENSABLE AS TORT DAMAGES

Plaintiff is a practicing physician. In July, 1957, the auto driven by him was struck from the rear by an auto operated by defendant. For the resulting cervical whiplash injury, plaintiff received medical services from professional colleagues and physiotherapy by his nurse, in each instance without out-of-pocket expense. On appeal, it was held, affirmed, that the value of medical and nursing care and treatment rendered to the injured physician gratuitously was not recoverable as special damages irrespective of any moral obligation on

the physician's part to render gratuitous services in return if ever required. *Coyne v. Campbell*, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962).[1]

At common law, the so-called tort measure of damages was the amount necessary to put the plaintiff in the position he would have been in but for the act of the defendant. All expenses and loss of time became elements of damage to be recovered from the tort-feasor. Occasionally, the plaintiff's expenses are paid by others, or he receives gratuitous services. When this happens, the question may arise as to whether the plaintiff has suffered damage in respect to these items, inasmuch as his financial condition has not changed. Most jurisdictions hold that the receipt of such financial aid from collateral sources may not be used to diminish the amount of plaintiff's recovery, which will include the full amount of expenses.[2] The rationale of the collateral source doctrine is that a tort-feasor should not be allowed to escape the pecuniary consequences of his wrongful act merely because his victim has received benefit from a third party, since the defendant has caused the losses and should pay for them.

When the New York court first considered the problem in 1880, it adopted a rule which turned out to be completely opposite to the majority rule.[3] In considering the right to recover for loss of wages in an action for personal injuries, where it appeared that his employer voluntarily paid plaintiff's wages during the period of disability, the Court of Appeals in *Drinkwater v. Dinsmore* observed, obiter, that an injured plaintiff may normally recover his medical expenses, and stated that "the plaintiff must show what he paid the doctor, and can recover only so much as he paid or was bound to pay. The defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case, the doctor's bill could not be an element of his damage."[4] From this case the general rule in New York evolved that there can be no recovery for medical services and attention unless there has been an actual expenditure of money for such services and attention, or a liability therefore has been incurred, on the theory that the recovery must be such pecuniary damages only as the plaintiff has actually suffered. Alabama alone follows New York in this ruling.[5]

All courts agree that the damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance.[6] The rule is based upon the theory that the sums

1. The trial court ruled there could be no recovery for the value of these services, absent an obligation of payment, and accordingly, excluded evidence thereof. The correctness of this ruling was the sole issue in the Appellate Division. 15 A.D.2d 870, 225 N.Y.S.2d 258 (4th Dep't 1962).
2. See generally 68 A.L.R.2d 875 (1958).
3. Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).
4. Id. at 393.
5. Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 So. 363 (1891).
6. Farb v. Borsuk, 205 Misc. 448, 128 N.Y.S.2d 413 (Sup. Ct. 1954); Gardner v. State, 206 Misc. 503, 133 N.Y.S.2d 852 (Ct. Cl. 1954); Chernick v. Independent Am. Ice Cream Co., 66 Misc. 177, 121 N.Y. Supp. 352 (Sup. Ct. 1910).

paid for such insurance are in the nature of an investment, which, like other investments made by the plaintiff, ought not to inure to the benefit of the defendant wrongdoer.[7] Even in New York, there will be no deduction for payments received by the plaintiff in the form of insurance, sick leave, annual leave, disability compensation, or workmen's compensation.[8]

The Court in the instant case applied the strict New York rule and held that the plaintiff is entitled to recover only his pecuniary losses, of which gratuitous services were not an item.[9] The Court thus decided that the rule established in 1880 is still prevailing law in New York.[10] The Court seems to fear that if it required a defendant to pay the plaintiff the reasonable value of the services of the physician who treated him gratuitously, it would be requiring the defendant to pay the plaintiff the value of a gift and thus the plaintiff would be benefiting from his injury. The Court was not swayed by the argument that having accepted gratuitous services, the plaintiff is under a moral obligation to return the generosity. The majority replied that a moral obligation, without more, will not support a claim for legal damages. In any event such a moral obligation is not an injury for which tort damages, which must be compensatory only, may be awarded.[11] The Court also followed the New York doctrine when it refused to apply the rule applied to insurance cases. In such a New York case, the Court said it was error to permit defendants to establish on cross-examination that plaintiff was a member of a health insurance plan and that he was receiving increased disability pension benefits.[12] The Court distinguished the cases by saying that in the insurance case, the plaintiff had given value for the benefits he received—thus, the Court did not there pass on a situation where the injured plaintiff received wholly gratuitous services for which he had given no consideration and which he was under no legal obligation to repay. The dissenting judge, however, failed to see the distinction. He would not limit the rationale of the collateral source doctrine to cases where the plaintiff had previously paid consideration.

In the spring session of 1957, a bill was introduced in the New York State Senate[13] and Assembly[14] to amend the Civil Practice Act by adding a new provision, section 479-a. The proposed section would have regulated the effect of collateral payments on a recovery for personal injury.[15] The proposal

7. 26 Fordham L. Rev. 380 (1957).
8. Landon v. United States, 197 F.2d 128 (2d Cir. 1952); Seidel v. Maynard, 279 App. Div. 706, 108 N.Y.S.2d 450 (4th Dep't 1951); Lassell v. City of Gloversville, 217 App. Div. 323, 217 N.Y. Supp. 128 (3d Dep't 1926); Bethlehem Properties, Inc. v. McGovern, Inc., 161 Misc. 111, 291 N.Y. Supp. 217 (Sup. Ct. 1936).
9. Drinkwater v. Dinsmore, supra note 3.
10. Leon v. United States, 193 F. Supp. 8 (E.D.N.Y. 1961); DePaulis v. United States, 193 F. Supp. 7 (E.D.N.Y. 1961).
11. Cf. Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939)
12. Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 44 (1961).
13. N.Y. Senate Int. No. 264 (1957).
14. N.Y. Assembly Int. No. 361 (1957).
15. As proposed, it provided:
In an action for personal injuries the damage recoverable shall not be reduced

was passed by the Senate but was not acted upon in the Assembly Codes Committee. The Law Revision Commission argued that the New York rule should be changed for two basic reasons. First, the New York rule is too difficult to administer because the rule requires the courts to discriminate between those payments which will reduce damages and those which will be disregarded (such as insurance cases), and secondly, the New York rule fails to recognize and implement the deterrent function of tort damages by allowing some defendants to escape some of the unpleasant consequences of the wrongdoing by virtue of the accidental fact that the plaintiff has received gratuitous services.[16] The Law Revision Commission, therefore, strongly recommended that New York change its law to conform to the great weight of authority in the United States.

In supporting the New York rule, the Court argued that since the New York Legislature did not deem it wise to pass the proposed legislation in 1957, the Court would not now overrule the Legislature's decision and change one of the basic laws of the state. The Court seems to have forgotten, however, that this is a court-made policy which may be overruled by the Court at any time. But, merely because New York is one of only two states in the country which deny recovery for the value of gratuitous services, it does not necessarily follow that this policy is wrong. In the field of negligence, a principle of payment for gratuitous service is contrary to reason, logic, and the best interests of society. The law of damages has long been held to be twofold, *i.e.*, either compensatory or punitive. Any recovery in negligence should be based upon compensation for damages proximately caused by such negligence. The plaintiff has the burden of proving all losses. If the Court adopted the theory that gratuitous services are losses, the Court would be requiring the plaintiff to prove that which he might have lost but did not, and would be allowing the plaintiff to be paid for what could have been a loss but was not.

M. A. K.

GYMNASIUM'S CONTRACTUAL DISCLAIMER OF LIABILITY FOR NEGLIGENCE GIVEN EFFECT

Defendant corporation franchises a coast-to-coast system of gymnasiums providing exercise facilities and instruction. The right to use the facilities and to receive instruction during business hours is provided in a single page membership contract which contains a clause exempting Vic Tanney Gyms from liability for negligence. Plaintiffs, husband and wife, brought a negligence action for personal injury and sequential damages suffered as the result of a

by reason of the fact that the injured person has received payments of wages, salary, medical or other expenses, or other monies or aid, whether gratuitous or otherwise, from any person, unless the payment or aid was made or rendered by or on behalf of a person who was or may be liable to the injured person for causing such injuries or who was or may be liable to the injured person for the act or omission of the person who caused them.

16. N.Y. Leg. Doc. No. 65(G) (1957).