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SPECIAL DAMAGES

R. M. Van Steenberg*

I. INTRODUCTION

Special damages have been defined as those which are the actual, but not the necessary result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions as distinguished from general damages which the law itself implies or presumes to have accrued from the wrong for which complaint is made. Hence special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case but which the law does not necessarily imply as distinguished from general damages which are such as might accrue to any person similarly injured. From a practical standpoint the distinction between the two types of damages is important in Nebraska as well as most other states because of the necessity of specifically pleading and proving special damages whereas this is generally not necessary as to general damages.

In ascertaining whether specific damages are recoverable in this field, the Nebraska attorney is faced with a research problem of considerable scope, for the Nebraska Supreme Court has not often ruled on many of the categories of special damages.[1] It is the purpose of this comment to review a few of the major categories of special damages, compiling, so far as possible, the present law of Nebraska concerning each.

II. MEDICAL BILLS — GENERALLY

A. Physician and Hospital.

It has always been held in Nebraska that medical and hospital bills are recoverable in a personal injury action. The prob-

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[1] The author believes the reason for this lack of judicial decision is historical. At the time the Supreme Court of Nebraska began trying

lem has always been the quantum of proof necessary to sanction recovery.

In *Oliverius v. Wicks,*[2] decided in 1922, the Supreme Court of Nebraska held that, where there was no evidence introduced touching the fair and reasonable value of the services of a hospital or physician, the singular testimony of the plaintiff that he had paid a specified amount was an insufficient basis for permitting the jury to assess a value. In so holding, the court stated:

> Service such as these are of a peculiar kind, and we do not think that the jury could, without the aid of testimony, have formed a reliable opinion as to their value.[3]

The *Oliverius Case* was not cited again until 1953, when the court held that the same rule applied to funeral expenses; that a receipted bill of an undertaker did not, in itself, constitute sufficient proof of value to be admissible over objection.[4]

However, in *Shields v. Buffalo Co.,*[5] decided in 1955, the Court softened the "Proof of Reasonableness" rule somewhat, stating:

> If proof is offered of what was paid for materials furnished and services rendered in conducting a funeral, and no objection is made thereto on the ground that the amount so paid is not the proper basis for recovery, it will be presumed that objection thereto on that basis is waived and that the amount so paid is the fair and reasonable value thereof.[6]

A number of state courts, and the Federal Courts, are even more liberal, holding that proof of expenses for medical or surgical treatment for personal injuries is presumptive evidence of the reasonable value of the services if unreasonableness in the amount does not appear from other evidence.[7]

As a practical matter, it would appear that the problem of proof of medical and hospital bills should, in most cases, be vir-

cases, many of the general rules regarding special damages had become so well established in other jurisdictions that they were already considered academic and, hence, unworthy of further litigation.

[2] 107 Neb. 821, 187 N.W. 73 (1922).

[3] 107 Neb. at 830, 187 N.W. at 76 (1922). However, the Supreme Court did permit the balance of the judgment to stand upon the condition that the plaintiff file a remittitur in the amount of the doctor and hospital bills.

[4] Becker v. Haysworth, 157 Neb. 353, 59 N.W.2d 560 (1953).

[5] 161 Neb. 35, 71 N.W.2d 701 (1955).

[6] 161 Neb. at 54, 71 N.W.2d at 714 (1955).

[7] See 82 A.L.R. 1325 for an exhaustive annotation on this subject.

tually eliminated by pre-trial conference, demand for admission, and discovery procedure. Nonetheless, the Nebraska rule appears to be that if doctor, hospital, and funeral bills have not otherwise been agreed upon as a proper item of damages, there must be proof that the amount paid or charged is reasonable if opposing counsel objects to the introduction of the statement for services or receipt.[8]

B. Home Nursing.

Although the author has found no Nebraska cases upon this specific item of special damages, the matter has been decided in a number of neighboring jurisdictions. It appears that the general rule is that the reasonable value of nursing at home is an element of damages recoverable in a personal injury case, even though such nursing is rendered by a member of the plaintiff's family without expectation of payment.[9]

The Wisconsin cases[10] specifically hold that a recovery allowed for the value of the wife's services for nursing a child at home cannot exceed the amount for which another could have been employed to do the same work. If this is the rule, it is conceivable that a difficult problem of proof and jury instruction might arise in this area. The value of personal, but non-professional, services such as these are subject to a wide variety of conjecture and would, in all probability, open the door to a wide variety of opinion; providing, of course, that such opinion is even admissible to establish this type of proof.

C. Prothesis.

Very little law on the subject of prothesis is readily available. Generally, it is said that the same rule should be followed

[8] This rule appears somewhat silly, for it is hard to conceive of any doctor, hospital administrator, or undertaker who would not testify that his bill is reasonable in all respects, and it would be a rare case, indeed, where counsel could find another member of the fraternity to refute it.

[9] Iowa: Strand v. Automobile Garage Company, 136 Iowa 68, 113 N.W. 88 (1907); Scurlock v. City of Boone, 142 Iowa 684, 121 N.W. 369 (1909); Legler v. Muscatine Clinic, 207 Iowa 720, 223 N.W. 405 (1929) ;
Minn: Wells v. Minneapolis Baseball and Athletic Assn., 122 Minn. 327, 142 N.W. 706 (1913);
Wisc: Johnson v. St. Paul S. W. Coal Co., 131 Wisc. 627, 111 N.W. 722 (1907); Callies v. Reliance Laundry, 188 Wisc. 376, 206 N.W. 198 (1925).

[10] Supra, note 9.

that is used in establishing damages to other personal property.[11] Apparently, no damages are permitted for the purchase of artificial limbs if their need is the result of the accident for which damages are sought. In other words, should your client lose a limb in a recoverable accident, his measure of damages is for the loss of the limb, pain and suffering, medical expenses, and other special damages; no additional recovery for the cost of an artificial limb.

III. REPLACEMENT HELP

No Nebraska cases directly in point upon this subject have been found. In Iowa, however, it has been specifically held that a plaintiff may recover, as part of his damages for personal injury, money expended in hiring a man to attend his business or wages which the plaintiff is obligated to pay a substitute during his confinement or incapacity.[12] However, to warrant recovery of such items, the Iowa Court requires proof of the fact that such help was necessary, and the reasonable value of the services must be shown.

While there is a conflict of authority as to whether the hiring of substitute help should be considered as an independent item of damages or should be considered in connection with proof of damages for the plaintiffs' loss of time and earnings, the weight of authority appears to follow the Iowa Court; holding that the cost of hiring a substitute during incapacity of an injured person is allowable as an independent item of damages in a personal injury action. Some jurisdictions hold that such cost must be alleged in the petition as a special item of damage and a failure to do so will result in the inadmissibility of the evidence pertinent thereto, while others, including Iowa, hold that evidence of such cost is admissible as proof of damage even though the cost is not separately set out in the petition.[13]

IV. THE COLLATERAL BENEFITS RULE

Simply stated, the Collateral Benefits Rule provides that where, because of an injury, the injured person receives something which he would not otherwise receive, then such addition should be considered by the Court or jury in assessing the amount of

[11] 25 C.J.S., Damages, § 48.

[12] Sexton v. Lauman, 244 Ia. 200, 57 N.W.2d 200 (1953).

[13] Sexton v. Lauman, note 12 supra, annotated at 27 A.L.R.2d 353.

his damages by reason of the injury. The problem may be readily seen in the following examples:

1. Suppose that A is injured and out of work for a period of 30 days, but receives his full wages while off work by reason of a sick or disability leave clause in his employment contract. In addition, he receives further compensation from medical and disability insurance. The result is that he is now receiving more compensation than he normally receives while working. Should the jury be advised of this fact and instructed to consider it in assessing dammages?
2. Suppose that a widow brings an action under the wrongful death statute for the loss of her husband. Should her recovery be affected by the fact that she is the beneficiary of an insurance policy, the sole heir of his estate, or the receipient of a pension or death benefit which accrues by reason of his death?

In Nebraska, there appear to be no cases directly in point. It is academic, however, that life, or hospital, or disability insurance is not considered in Nebraska, and, by the great weight of authority in the United States,[14] it is held that wages paid during a period of disability, either gratuitously or by contract, do not affect the plaintiff's recover against the responsible defendant. The reasoning in these cases is clear; a tort-feasor should not be able to take advantage of his own wrong in order to mitigate the damages in any way.

V. FUTURE EXPENSES

Subject to the well known rule prohibiting remote or speculative damages, virtually every jurisdiction permits recovery for all anticipated future expenses. Though no Nebraska case in point has been found, it is known that, as a practical matter, future medical and other type expenses are often pled and allowed, subject to proof of reasonable certainty and the requirements of the speculative damages rule.

The Supreme Court of Iowa has recognized the need for considering future expenses, stating:

> Future expenses reasonably necessary often form part of the measure of damages in serious injury cases.[15]

[14] 18 A.L.R. 678, 95 A.L.R. 575, 19 A.L.R.2d 557, 63 Harv. Law Rev. 330.

[15] Salinger v. Western Union Telegraph Co., 147 Ia. 486, 126 N.W. 362 (1910).

Were the rule otherwise, it is obvious that a seriously injured plaintiff would have to wait until he had completely recovered before recovering the maximum damages. The permanently injured plaintiff requiring continuous medical or other type of care would face a complete dilemma. Should he wait until a major portion of his expenses are ascertained, he might wait beyond the period of the statute of limitations; should be bring an action before the statute has run, he would be prohibited from recovering future expenses. Because any such result should be eliminated, it is clear that the existing rule is the proper one.

VI. FUNERAL EXPENSES

At common law and under the English rule, funeral expenses were held not to be recoverable in an action for wrongful death. This reasoning was based on one of two theories: First, that the defendant should not be required to pay funeral expenses since all persons utimately died, and there would be funeral bills anyway; Second, that since the wrongful death action is based upon the principle that only the next-of-kin have an action in cases where the deceased would have had an action had he or she survived, and had the deceased survived he or she should not have an action for personal funeral expenses, that therefore such damages should not survive.

In the United States, however, the majority view opposes the view of the English common law:

> Funeral expenses are generally held to be a legitimate element of damages, at least when paid by one of the beneficiaries who was under an obligation to pay them.[16]

Killion v. Dinklege[17] is the classic Nebraska case holding that funeral expenses are properly an item of damages. There, a minor son was killed and the father, as Administrator, brought an action for the benefit of himself and his wife, the deceased's mother. After fully discussing the various reasons why courts had or had not permitted recovery for funeral expenses, the Court held that, since it is the duty of parents to bury their deceased minor children and since there is a presumption that a minor child will live to majority, when the parents would not be called upon to pay the funeral expenses, the parent was entitled to recover the funeral expenses.

[16] Tiffany, Death by Wrongful Act, § 157, p. 185.

[17] 121 Neb. 322, 236 N.W. 757 (1931).

In *Kroeger v. Safranek*,[18] decided in 1955, an Administratrix sought damages, for the death of her husband, for the benefit of herself and a minor daughter. Although reversed and remanded on other grounds, the Court specifically recognized the majority rule of the United States in permitting the recovery of funeral expenses when they have been paid by the beneficiary or beneficiaries for whom the action is brought, or when the beneficiaries have legally obligated themselves to pay such expenses. This rule is also followed in Iowa, Kansas, Missouri, and North Dakota.[19]

The *Kroeger Case*[20] also pointed out that the best procedure for recovering funeral expenses is a separate cause of action brought for them, so that, if the jury should allow the recovery, the amount will be separate from other damages. This allows easy distribution to the beneficiaries who have paid such expenses, or legally obligated themselves to pay the same. In view of the statutory language, this would appear to be good law.

VII. CONCLUSION

The attorney will encounter little trouble with special damages if he remembers that any special loss incurred by reason of another's negligence may ordinarily be recovered, provided that the loss has been properly pled and proven in a manner sufficient to overcome the rule prohibiting the recovery of remote or speculative damages.

18 161 Neb. 182, 72 N.W.2d 831 (1955).

19 94 A.L.R. 441.

20 Supra, note 18.