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## Benefits Received from Third Parties in Mitigation

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DAMAGES—BENEFITS RECEIVED FROM THIRD PARTIES IN MITIGATION.—Action for personal injuries. Plaintiff appealed from the lower court's refusal to instruct the jury that the fair value of the nursing care rendered plaintiff by his wife was a proper element of damages. Held, affirmed. *Daniels v. Celeste* (Mass. 1939), 21 N. E. (2d) 1.

It was reasoned that the fair value of nursing care is recoverable only if the plaintiff has paid or incurred a legal liability to pay.<sup>1</sup> The court pointed out that, by reason of the marital relation, the plaintiff could not make a valid contract with his wife for such services.<sup>2</sup> Therefore, the plaintiff may not recover for services for which he is under no obligation to pay.

The case adopts a minority rule that benefits received from sources wholly independent of the wrongdoer may operate to reduce damages recoverable from the latter.<sup>3</sup> The court pointed out that the object of compensatory damages is to afford the equivalent in money for the actual loss caused by the wrong of another.<sup>4</sup> The conflict in cases has arisen in determining whether actual loss has occurred. The principal case holds that no loss is suffered where the plaintiff is under no obligation to pay for the services rendered. The issue was early raised in cases involving a wrongdoer claiming benefit of insur-

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<sup>16</sup> *Pennsylvania Co. v. Dolan* (1892), 6 Ind. App. 109, 32 N. E. 802; *Carnig v. Carr* (1897), 167 Mass. 544, 46 N. E. 117; *Fisher v. John L Roper Lumber Co.* (1922), 183 N. C. 485, 111 S. E. 857; *F. S. Royster Guano Co v. Hall* (1934), 68 Fed. (2d) 533.

<sup>17</sup> *Burns Ind. Stat. Ann.* (1933), § 28-4314.

<sup>1</sup> *Hunt v. Boston Terminal Co.* (1912), 212 Mass. 99, 98 N. E. 786.

<sup>2</sup> *Mass. G. L. (Ter. Ed.)*, c. 209, sec. 2: "A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband." This statute, although noted by the court, does not change the common law since there can be no valid contract between husband and wife for the performance of duties incident to the marriage relation. *Bohanan v. Maxwell* (1921), 190 Iowa 1308, 181 N. W. 683.

<sup>3</sup> *McCormick on Damages* (1935), sec. 90.

<sup>4</sup> "Rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims for the inclusion of new elements of damage." *Sullivan v. Old Colony St. R.* (1908), 197 Mass. 512, 83 N. W. 1091."

ance. The courts have unanimously refused this claim.<sup>5</sup> Decisions on other claims have not been so clear.<sup>6</sup>

The cases can be analyzed according to the relation between the plaintiff and the party bestowing the benefit by which the wrongdoer attempts to reduce his damages. This relationship may be one of contract, liability barred, gift, or duty.

The first two classifications are usually settled by denying such benefits to the wrongdoer. Benefits may be conferred in performance of contracts in the insurance situation and in the employer's continuance of an injured plaintiff's wages.<sup>7</sup> The result appears to be founded on the ground that the wrongdoer should not share in the benefits of a contract for which the plaintiff has paid all the consideration.<sup>8</sup> Where plaintiff's liability to a third party is barred, such as a discharge in bankruptcy, the courts have uniformly permitted recovery in damages from the wrongdoer on the theory that he must be given a chance to pay an honest debt.<sup>9</sup>

When a third party bestows a gift upon an injured plaintiff,<sup>10</sup> he intends such to be for the benefit of the particular donee, and not for the benefit of

<sup>5</sup> *Roth v. Chatlos* (1922), 97 Conn. 282, 116 A. 332 (Hospital expense allowed though covered by insurance); *Sherlock v. Alling* (1873), 44 Ind. 184 (Life insurance); *Regan v. N. Y. R.* (1890), 66 Conn. 124, 22 A. 503; and *Cunningham v. Evansville & T. H. R.* (1885), 102 Ind. 478, 1 N. E. 800 (Property insurance). See also: 18 A. L. R. 678 and 95 A. L. R. 575.

<sup>6</sup> The problem is similarly presented in cases involving recovery of damages for loss of time where the employer has continued the injured plaintiff's wages during his disability. The Massachusetts court concluded the issue in such cases by declaring the plaintiff's cause of action was not for loss of wages but for something apart, the impairment of the capacity to earn. *Doherty v. Ruiz* (Mass. 1939), 18 N. E. (2d) 542. The New York courts met the issue and refused recovery of damages where plaintiff's wages continued during disability, and held expressly to the idea that the plaintiff is entitled only to his pecuniary loss. *Drinkwater v. Dinsmore* (1880), 80 N. Y. 390, 36 Am. Rep. 624. One jurisdiction makes a distinction between wages continued according to a previous contract and wages continued as a mere gratuity of the employer, allowing recovery in the latter situation only. *Pensak v. Peerless Oil Co.* (1933), 311 Pa. 207, 166 A. 792. The majority view of the problem in this situation is represented by the leading case, *Ohio and M. R. Co. v. Dickinson* (1877), 59 Ind. 317, holding that damages are assessed according to uniform principles and are not to be affected by the mere accidental business relations of the party injured. For a review of the cases, see 18 A. L. R. 678 and 95 A. L. R. 575.

<sup>7</sup> See footnotes 5 and 6, *supra*.

<sup>8</sup> 1 *Sedgwick on Damages* (9th ed. 1909), sec. 67.

<sup>9</sup> *Mueller v. Kuhn* (1895), 59 Ill. A. 353 (Plaintiff's liability for medical expense barred by running of statute of limitations.) Even in Massachusetts, where plaintiff's liability for medical expense was barred by bankruptcy, recovery was allowed. The court said this was a "debt of honor." *Sibley v. Nason* (1907), 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173.

<sup>10</sup> The gift relation has occurred under various circumstances: 1. Gift of services by a friend or physician. Here, again, the majority favors recovery. *Brosnan v. Sweetser* (1891), 127 Ind. 1, 26 N. E. 555; *Varnham v. Council Bluffs* (1879), 52 Iowa 698, 3 N. W. 792; *contra*: *Goodhart v. Penn. R.* (1896), 177 Pa. St. 1, 35 A. 191, 55 A. S. R. 705. 2. Professional custom of doctors not to charge each other for services. *Indianapolis v. Gaston* (1877), 58 Ind. 224 (Recovery allowed); *contra*: *Rigby v. Aetna Casualty & Surety Co.* (La. A. 1933), 151 So. 119. 3. Indigent receiving care from county. In *Englewood v. Bryant* (1937), 100 Colo. 552, 68 P. (2d) 913 recovery was refused. It is submitted this is *contra* to the majority rule. 4. Charitable purse. *Citizens*

the wrongdoer.<sup>11</sup> The situation which has caused the most confusion is the one involving a duty relation. The question is whether the wrongdoer should be compelled to compensate for services which belong to the plaintiff as a matter of right.

The court in the principal case based its decision in part upon cases permitting a married woman to recover only where her separate estate is liable for services rendered to her as a result of a tortious injury. These cases are not authority for the decision of the principal case that the husband may recover for services rendered to him only where he has incurred liability. Such cases merely show that in the legislating away of the wife's common law incapacity to sue, there remains a presumption that the husband is primarily legally responsible for her support and care and that she can recover expenses incurred in fulfilling this duty only where her separate estate is liable.<sup>12</sup> It is significant that states which do allow the husband to recover for services for which he is under no obligation to pay, at the same time, accept the principle cited by the Massachusetts court that a married woman may recover for services rendered her only where her separate estate is obligated.<sup>13</sup>

The fundamental issue becomes one of application of the principles upon which the rule of damages is founded. A few courts surmount the difficulty by technical reasoning and hold that where the plaintiff, husband, is cared for by the wife, he loses the value of her ordinary services as a housewife and may recover for this loss.<sup>14</sup> One court permitted recovery on the ground that the wife had conferred an "extra service" for which the wrongdoer must compensate the plaintiff.<sup>15</sup> Another court allowed recovery on the ground that services between members of the family are not often paid for in cash, there being a tacit understanding or moral obligation that the recipient will reciprocate in kind.<sup>16</sup>

The difficulties of such complex legal reasoning could be resolved by the adoption of the generalized standard of the value of the necessary services rather than the theory of reimbursement for the specific outlay.<sup>17</sup> It is suggested that as a matter of policy, damages should not be reduced at the expense of circumstantial relation between the injured plaintiff and a benevolent third party.

W. S. H.

*Gas & Oil Mining Co. v. Whipple* (1904), 32 Ind. A. 203, 69 N. E. 577. (Fellow citizens recompensed plaintiff for property loss, which was held to be immaterial as affecting the amount of damages recoverable from the wrongdoer.)

<sup>11</sup> 1 Sedgwick on Damages (9th ed. 1909), sec. 67.

<sup>12</sup> *Cassidy v. Constantine* (1929), 269 Mass. 56, 168 N. E. 169.

<sup>13</sup> *Shelby County v. Castetter* (1893), 7 Ind. A. 309, 34 N. E. 687.

<sup>14</sup> *Houston & E. C. R. Co. v. Gerald* (Tex. Civ. A. 1910), 128 S. W. 166. This position is made stronger in the principal case by the fact that the plaintiff's wife was a registered nurse and utilized her professional ability in his care.

<sup>15</sup> *Missouri R. v. Holman* (1896), 15 Tex. Civ. A. 16, 39 S. W. 130.

<sup>16</sup> *Wells v. Minneapolis Baseball Assn.* (1913), 122 Minn. 327, 142 N. W. 706, Ann. Cas. 1914D, 922.

<sup>17</sup> *McCormick on Damages* (1935), sec. 90, p. 323.