North Dakota Law Review

Volume 39 | Number 2 Article 11

1963

Damages - Injuries to the Person - Impairment of Earning Capacity - Collateral Source Rule

Maurice E. Cook

the crime when committed. Alibi evidence differs from an affirmative defense such as insanity by attempting to cast doubt on the defendant's presence rather than to escape criminal liability.[19] A defendant is presumed to have been sane, but he cannot be presumed to have been present without denying him his presumption of innocence. While some courts have held that the burden of proof is upon the defendant with respect to alibi,[20] this has usually meant the burden of introducing evidence in its support.[21]

North Dakota is among the most liberal jurisdictions on the matter of alibi.[22] It has no disclosure statute, and has had no case law on the subject since 1924.[23]

RICHARD BOARDMAN

DAMAGES—INJURIES TO THE PERSON—IMPAIRMENT OF EARNING CAPACITY—COLLATERAL SOURCE RULE—Plaintiffs, members of the U. S. Air Force, were involved in an automobile accident and brought suit to recover damages for personal injuries. The Supreme Court of New Hampshire, in a unanimous decision, *held* that plaintiffs were entitled to recover for loss of earning capacity even though they continued to receive their pay from the government during the period of disability. *Bell v. Primeau*, 104 N.H. 227, 183 A.2d 729 (1962).

The measure of damages in personal injury cases may be stated generally as that amount which will compensate for all the detriment proximately caused by the wrongful act or breach of duty.[1] Specifically, in actions of tort for personal injuries, damages are recoverable for loss of capacity

19. 20 Am. Jur., **Evidence** § 153 (1939).
20. People v. Weiss, 367 Ill. 580, 12 N.E.2d 652 (1937); Commonwealth v. Choate, 105 Mass. 451 (1870).
21. State v. Brauneis, 84 Conn. 222, 79 Atl. 70 (1911); State v. Thornton, 10 S.D. 349, 73 N.W. 196 (1897).
22. A recent example of the liberality on alibi in North Dakota courts is found in State v. MacDonald (N.D. Dist. 1963) in which Redetzke J. instructed, "It is sufficient to justify an acquittal if the evidence on that point raises a reasonable doubt as to the presence of the accused at the time and place of the commission of the crime."
23. See State v. Gates, 51 N.D. 695, 200 N.W. 778 (1924).

1. See, **e.g.**, N.D. Cent. Code § 32-03-20 (1961).

to earn during the period of disability.[2] Conflict has arisen, however, where the injured party has suffered no actual expense or loss because of contributions or indemnification from a collateral source. The rule of law adopted in many jurisdictions in such cases has come to be known as the "collateral source rule."[3]

The "collateral source rule" provides that damages may not be mitigated on account of payments received by the plaintiff from sources other than the defendant[4] and has been applied in such situations as donations,[5] gratuitous medical attention,[6] indemnification by insurance[7] and where monies were received from a governmental agency during the period of disability.[8]

In those jurisdictions that do not follow the "collateral source rule" it has been criticized as being anomalous and illogical. Consequently the measure of damages in those jurisdictions is that amount actually spent by the plaintiff in taking care of his injuries.[9] However, in those jurisdictions following the "collateral source rule" it is felt that one whose acts have caused injury to another should not reap the benefit of the fact that the injured party's damages are in some way mitigated from a collateral source.[10]

In North Dakota the case of *Ostmo v. Tennyson* applied the "collateral source rule" principle where a defendant was not allowed to take advantage of the fact that a truck, damaged through his negligence, was repaired at no cost to the plaintiff.[11]

---

2. Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529, 536 (1941); Wilson v. Oscar H. Kjorlie Co., 73 N.D. 134, 12 N.W.2d 526, 529 (1944) "The general rule is that one who is injured in his person through the fault of another may recover for loss sustained through being deprived of his earning power."

3. Bell v. Primeau, 104 N.H. 227, 183 A.2d 729, 730 (1962); see Schwartz, **The Collateral Source Rule**, 41 B.U.L. Rev. 348 (1961).

4. Bell v. Primeau, 104 N.H. 227, 183 A.2d 729, 730 (1962).

5. See McLaughlin v. City of Corry, 77 Pa. 109 (1875).

6. See Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N.W. 706, 708 (1913). **Contra**, Evans v. Pennsylvania Railroad Company, 255 F.2d 205, 210 (3d Cir. 1958).

7. See Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 376 (1927).

8. See Cunnien v. Superior Iron Works Co., 175 Wis. 172, 184 N.W. 767, 770 (1921) Sums paid to defendant under Federal Vocational Rehabilitation Act not deducted from damages.

9. See Kane v. Reed, 48 Del. 266, 101 A.2d 800, 802 (1954).

10. See Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 376 (1927).

11. 70 N.D. 558, 296 N.W. 541, 545 (1941); see Gillis v. Farmers Union Oil Co. of Rhame, 186 F. Supp. 331 (D.N.D. 1960). Recovery was allowed for medical services rendered to the plantiff, a member of the U.S. Army, at no cost to the plaintiff.

In general the "collateral source rule" has found favor with many courts and has been liberally applied in a variety of situations. A reason for this favor, it is submitted, is the basic proposition that the duty of the wrongdoer is to answer for the damages wrought by his wrongful act, and that such damages are measured by the whole loss so caused.[12]

For these reasons, and in light of the fact that *Ostmo v. Tennyson* seems to have brought the spirit of the "collateral source rule" to North Dakota, it is felt that this principle should not be overlooked in computing damages and should be applied in North Dakota litigation.

MAURICE E. COOK

INSURANCE—SUICIDE—INSURER HAS TO PROVE SUICIDE MORE PROBABLE THAN ANY OTHER THEORY—A life insurance policy provided that in the event that death was caused by suicide the policy would be void. The insured's body was found amid circumstances which showed death could have been a suicide and the insurance company defended on that ground. The trial judge's instruction to the jury, consistent with a well established rule in Iowa,[1] was, in effect, that the insurer had to produce evidence sufficient to exclude every other reasonably probable theory as to the cause of death. On appeal the Supreme Court of Iowa, abrogating the above mentioned rule, *held*, three justices dissenting and one justice dissenting in part, that evidence showing suicide was more probable than any other theory was sufficient. *Bill v. Farm Bureau Life Ins. Co.*, 119 N.W. 2d 768 (Iowa 1963).

The law of England imposed a severe penalty for the taking of one's own life.[2] The resulting hardship on the

12. Francis v. Atcheson, T. & S. F. Ry., 113 Tex. 202, 253 S.W. 819, 822 (1923).

1. See, e.g., Wilkinson v. National Life Ass'n, 208 Iowa 246, 225 N.W. 242 (1929); Green v. New York Life Ins. Co., 192 Iowa 32, 182 N.W. 808 (1921); Mickalek v. Modern Bhd. of America, 179 Iowa 33, 161 N.W. 125 (1917); Wood v. Sovereign Camp of Woodmen of the World, 166 Iowa 391, 147 N.W. 888; Stephenson v. Bankers Life Ass'n, 108 Iowa 637, 79 N.W. 459 (1899).

2. Blackstone relates that the law of England required the forfeiture of all of the deceased's goods and chattels to the Crown and required an ignominious burial on the public highway with a stake driven through the body. 4 BLACKSTONE, COMMENTARIES 190 (Lewis' ed. 1897).