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Damages - Loss of Future Earning Power - Duty of Court to Instruct Jury to Reduce Loss of Future Earnings to Present Worth

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Science has long recognized individual differences in the propensity to develop a craving for alcohol because of physiological and psychological factors.⁹ Inheritance is believed by some researchers to be a major factor, and in recent years nutrition has been found to have a decided effect.¹⁰

Subsequent to the discussion in the instant case, Dr. Roger Williams reported that his research indicates alcoholism is primarily caused by malnourishment of the hypothalamus, part of the mass of gray matter at the base of the brain, which regulates human appetites and cravings.¹¹ He also states that research indicates a test which will determine the propensity of a child to become an alcoholic as an adult. If the results of this test indicate the child will later in life be highly susceptible to a craving for alcohol, this condition may be remedied by supplying the growing child with the proper nutrients.

Much knowledge of alcoholism is available today that was not known at the time the rules governing intoxication were formulated. If the courts consider all available information on the problem when making their decisions, it is likely that in the future there will be a trend in the courts to recognize alcoholism as a disease for which the afflicted person should receive treatment, rather than as a vice for which he should be punished.

MERVIN A. TUNTLAND

DAMAGES — LOSS OF FUTURE EARNING POWER — DUTY OF COURT TO INSTRUCT JURY TO REDUCE LOSS OF FUTURE EARNINGS TO PRESENT WORTH. — Plaintiff brought action for injuries sustained in an automobile collision in Nebraska. The trial court instructed if the jury found for the plaintiff the loss of future earning power might be included in the items to be listed as damages.¹ The trial court did not instruct the jury that the loss of future earning power should be reduced to its present value; this instruction was not requested. A verdict of \$8,000.00 was rendered for the plaintiff. The Nebraska Supreme Court, two justices dissenting, *held* that it was not reversible error for the trial court to fail to instruct that damages due to the loss of future earnings should be reduced to their present worth when no instruction to that effect had been requested. *Wolfe v. Mendel*, 84 N.W.2d 109 (Neb. 1957).

It is generally agreed that some instruction should be given regarding the reduction of damages for loss of future earning power to its present worth.² Many of the courts feel that the absence of such instruction is not reversible

9. The Craving for Alcohol, A Symposium of World Health Expert Committees on Mental Health and Alcohol, Quarterly Journal of Studies on Alcohol, March 1955, p. 34.

10. Williams, *The Genetrophic Concept, Nutritional Deficiencies and Alcoholism*, Vol. 57 Annals of New York Academy of Science, (1953-1954) p. 794.

11. *Fiddler's Dreams*, Presidential Address of Dr. Roger Williams, 132nd Meeting of the American Chemical Society, Chemical Engineering News, Sept. 16, 1957, p. 116. Dr. Williams is director of the Biochemical Institute of Texas and president of the American Chemical Society.

1. The jury was instructed to award an amount that would reasonably compensate for damages sustained as a proximate cause of the accident.

2. See, e.g., *Chicago & N.W. Ry. Co. v. Ott*, 33 Wyo. 200, 237 Pac. 238 (1925). See Miller, *Assessment of Damages in Personal Injury Actions*, 14 Minn. L. Rev. 216 (1930). See also Restatement, Torts § 924 comment d (1939).

error,³ provided: The general instruction was fair as far as it went,⁴ the verdict is not excessive,⁵ and such instruction was not requested.⁶ The measure of the damage is a part of the substantive law of the case and is equally as important as the elements of recoverable damages.⁷ Failure to extend the instruction to include a rule whereby the present value might be ascertained, has been held not to be reversible error.⁸ Some courts hold that the present worth rule is too vague for the jury to understand and therefore do not follow it.⁹ Canadian and English courts generally do not follow the rule.¹⁰ In workmen's compensation statutes the rule is not applied as these statutes provide for the measure of damages by a fixed standard.¹¹

The dissenting judges hold that failure of the court to instruct that future earnings should be reduced to their present worth is reversible error. They urge an extension of a rule that has been laid down in prior Nebraska decisions that the trial court should by its own volition properly instruct the jury on all material issues presented by the pleadings and the evidence.¹² A strong minority supports the dissenters.¹³ The minority view has been firmly established by the United States Supreme Court in actions brought under the Federal Employers Liability Act,¹⁴ and in all actions brought under the act in state courts they must adhere to the United States Supreme Court rule.¹⁵

The cases cited do not settle the question at issue; on the other hand, it is believed that there should be an attempt at uniformity rather than distinguishing cases merely on the basis of precedent. It is therefore submitted that if the jury returns an amount of damages indicating a reasonable present value in the cases of mis-direction¹⁶ or non-direction,¹⁷ the verdict should be sustained. Where the verdict is excessive it should be reduced by remittitur.¹⁸

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3. See, e.g., *Chambers v. Chicago B. & Q. Ry. Co.*, 138 Neb. 490, 293 N.W. 338 (1940). Annot., 154 A.L.R. 802 (1945); 77 A.L.R. 1453 (1932).

4. See, e.g., *Chambers v. Chicago B. & Q. Ry. Co.*, *supra* note 3.

5. See *West v. Hines*, 107 Neb. 1, 184 N.W. 927 (1921) (by implication).

6. See, e.g., *Crimsley v. Atlantic Coast Line R.R.*, 189 S.C. 251, 1 S.E. 157 (1939).

7. *Daugherty v. Cline*, 224 N.C. 381, 30 S.E.2d 322, 324 (1924) (Concurring opinion).

8. *Missouri Pac. Ry. Co. v. Henderson*, 194 Ark. 884, 110 S.W.2d 516 (1937); *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.*, 191 F.2d 302, 311 (7th Cir. 1951) (dictum). There are many facets to consider in computing present worth. See *Reduction of Damages For Loss of Future Earnings to Present Worth*, 32 Neb. L. Rev. 583 (1953).

9. See, e.g., *Chicago & N.W. Ry. Co. v. Candler*, 283 Fed. 881 (8th Cir. 1922). Annot., 28 A.L.R. 1178 (1924) (future pain and suffering cases).

10. *Rowley v. London & N.W. Ry. Co. L.R.*, 8 Exch. 221 (1873). *Oleck, Damages to Persons and Property*, § 95 (1957).

11. N.D. Rev. Code § 65-0104 (1943). *Oleck, supra* note 10 § 184.

12. See *Platt Valley Public Power & Irrigation District v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955); *Borcherding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952).

13. E.g., *Lamont v. Highsmith Hospital*, 206 N.C. 111, 173 S.E. 46 (1934). Annot., 154 A.L.R. 803 (1945); 77 A.L.R. 1453 (1932).

14. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). 45 U.S.C. §§ 51-60 (1940).

15. *Chesapeake & Ohio Ry. Co. v. Kelly, supra* note 14.

16. For an example of a case of mis-direction, see *St. Louis, I.M. & S. Ry. Co. v. McMichael*, 115 Ark. 101, 171 S.W. 115 (1914).

17. For an example of a case of non-direction, see *Dierks Lumber & Coal Co. v. Tollett*, 178 Ark. 199, 10 S.W.2d 5 (1928) (pain and suffering case).

18. See *Cunningham v. Pennsylvania Ry. Co.*, 55 F. Supp. 1012 (E.D.N.Y. 1944); *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1, 150 N.W. 971 (1915). (These cases held the verdict excessive due to failure to reduce to present worth).