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Damages--Tortfeasor Not Liable for Medical and Hospital Services Supplied by Plaintiff's Employer Under Insurance Plan Where Plaintiff Incurred No Expense--Sedlock v. Trosper

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DAMAGES—TORTFEASOR NOT LIABLE FOR MEDICAL AND HOSPITAL SERVICES SUPPLIED BY PLAINTIFF'S EMPLOYER UNDER INSURANCE PLAN WHERE PLAINTIFF INCURRED NO EXPENSE —SEDLOCK V TROSPER

In *Sedlock* v. *Trosper*,[1] a recent Kentucky case, the plaintiffs were Mr. Trosper and his nine year old daughter. The daughter sued by her father as next friend to recover damages for personal injuries alleged to have been caused by the defendant's negligence. Mr. Trosper, her father, sued in his own right to recover the value of medical and hospital services rendered his daughter in treating her injuries, and for other expenses, including time lost from work while caring for the child. It was established by the evidence that Mr. Trosper's employer, a coal company, in return for regular monthly payments in the sum each of $3.80, paid by Trosper, undertook to furnish the latter and his family with medical treatment and hospitalization, that the child was treated at the company's hospital, presumably by the company's physicians, and that Trosper incurred no liability therefor except $1.55 per day, that being the difference between the cost of the room the company had agreed to supply and the cost of the more desirable room actually occupied by the child.

Over the objection of the defendant, Trosper was allowed to prove that the reasonable value of the medical services supplied by the company was $300, and that the regular fee for a room in the hospital of the type occupied was $6.00 per day. The jury were instructed that in the event they should find for Trosper, they might award him the reasonable value of the medical and hospital services supplied not to exceed $690. This maximum sum apparently represented $300 medical expenses plus 66 days of hospitalization at $6.00 per day. The jury returned a verdict for Trosper in the sum of $500 upon which judgment was entered. The defendant appealed and the judgment was reversed.

To explain its action in reversing the judgment, the Court of Appeals gave the following reasons: "In an action for personal injuries the reasonable value of necessary medical services and hospitalization is an element of the damage, but recovery may be had only if the plaintiff has paid for such services or has incurred liability therefor. (Cases cited). These are special damages and their recovery is *purely compensatory*. The appellee incurred no expense as a consequence of the injury to his child other than the extra $1.55

[1] 307 Ky. 369, 211 S.W 2d 147 (1948)

a day for a private room and the instruction should have limited recovery for the hospital services to that item."[2] (Italics writer's)

The *Sedlock* case is important in that it solves a novel problem in the law of damages and establishes in Kentucky an exception to the heretofore almost indisputable general rule that a wrongdoer may not avail himself of the fact that a plaintiff carries insurance to off-set or mitigate damages. In so doing the Court reaffirmed the basic principle of Anglo-Saxon law that all damages other than those which are exemplary or punitive are awarded to compensate a plaintiff for *loss* that he may be made whole.[3] Unlike punitive damages, sometimes called smart money, which are properly awarded only in cases of gross wrongdoing, and which partake of the nature of punishment, compensatory damages serve the sole purpose of repairing a plaintiff's loss.[4] That recovery of the reasonable value of medical and hospital services necessarily incurred as a result of a wrong is exclusively an item of compensation has never been denied.

When, therefore, the Court of Appeals held in the *Sedlock* case that the plaintiff could not recover the value of medical and hospital services furnished his daughter where his employer was bound to furnish, and did furnish them without charge under a contract, the consideration for which consisted of the payment of monthly premiums in return for the risk assumed, it appears that the Court merely held that there can be no recovery for expenses alleged to have been incurred as a result of wrongdoing where the plaintiff is unable to prove that he incurred such expenses. Had the Court allowed the recovery sought by the plaintiff, the effect, considered from a legal standpoint, would have been to award special damages of a non-compensatory nature, inasmuch as the plaintiff sustained no legal detriment caused by the wrong for which he could be compensated. Such a recovery, if permitted, would resemble punitive damages because the defendant would endure a penalty and the plaintiff would thereby receive an unearned profit.

The general principle upheld in the instant case that where a plaintiff has sustained no loss, meaning that he has neither parted with property nor incurred liability, he cannot recover, has the support of much authority. In *Morris* v. *Grand Ave. Ry. Co.*,[5] a Missouri case, the court held that a plaintiff could not recover the value of a doctor's services where the evidence did not show that he paid or became liable to pay therefor. The court said that the case was not one justifying punitive damages and that the recovery should be restricted to compensation for loss sustained. Other cases hold that a minor may not recover the value of medical services rendered him

[2] *Id.* at 375, 211 S.W 2d at 150.

[3] 1 SEDWICK, A TREATISE ON THE MEASURE OF DAMAGES sec. 30 (9th ed. 1920).

[4] *Ibid.*, 25 C.J.S. DAMAGES secs. 2-3.

[5] 144 Mo. 500, 46 S.W 170 (1898).

because it is upon his father that the liability rests.[6] Conversely, where a court was able to find that a minor assumed personal liability he was allowed to recover.[7] Upon the same reasoning numerous cases deny recovery for medical expenses to a married woman where she neither paid for the same nor assumed personal liability, for in such circumstances her husband, not she, is liable for her necessaries including medical care.[8] From these decisions it clearly appears that either payment or assumption of legal liability by a plaintiff is a prerequisite to his right to recover special damages for medical care.

Had the facts of the *Sedlock* case been different in certain respects from those actually presented to the court the plaintiff presumably would have been allowed to recover under the rule applicable to ordinary insurance which indemnifies the insured for loss. Suppose, for instance, that plaintiff's employer maintained no hospital, but had agreed to indemnify the plaintiff for medical and hospital expenses incurred, rather than to furnish medical care itself. Assuming those facts, upon presenting his child to a doctor or hospital for treatment the plaintiff would have either expressly or by implication assumed liability to pay for any services rendered. Thus, the plaintiff could be said to have sustained a legal detriment or loss occasioned by the defendant's wrong. Under these circumstances the defendant could not successfully contend that the plaintiff had sustained no detriment or loss. Nor could he in order to avoid liability, avail himself of the fact that the plaintiff had by a contract, in which the defendant had no interest, arranged to shift his loss to his employer to be ultimately borne by the latter.[9]

The result in the hypothetical case above differs from that in the *Sedlock* case due to the fact that in the former the plaintiff had sustained a legal detriment. Therefore, the almost universally accepted principle that a wrongdoer should not secure the benefit of gratuities received by the plaintiff from third parties or, of benefits received by him under contract with such persons, should be controlling. This principle is evident in the decisions[10] and appears reasonable inasmuch as it does not concern the wrongdoer how the

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[6] Hobbs v. Lokey, 7 W W Harrison 408, 183 Atl. 631 (Del. 1936), Tyrrell Hardware Co. v. Orgeron, 289 S.W 1040 (Tex. 1927)

[7] Forbes v. Loftin, 50 Ala. 396 (1874), Aubel v. Sasso, 7 Cal. App. 57, 236 Pac. 319 (1925), Judd v. Ballard, 6 Vt. 668, 30 Atl. 96 (1894).

[8] Holmes v. Central of Ga. R. Co., 22 Ala. App. 355, 116 So. 323 (1928), Braun v Bell, 249 Mass. 437, 142 N.E. 93 (1924), Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930), Irwin v. McDougal, 211 Mo. App. 645, 274 S.W 923 (1925), Landskron v. Hartford Accident & Indemnity Co., 241 Wis. 445, 6 N.W 2d 178 (1942).

[9] Pittsburg, C. & S. Ry v. Thompson, 56 Ill. 138 (1870), Cornish v. N.J. St. Ry., 73 N.J.L. 273, 62 Atl. 1004 (1906)

[10] Perrot v. Shearer, 17 Mich. 48 (1868), Evans v Chicago M. & St. P.R. Co., 133 Minn. 293, 158 N.W 335 (1916), Bradburn v. Great Western R. Co., L.R. 10 Ex. 1 (1874)

plaintiff disposes of a loss which he has once sustained. Thus where the plaintiff has either paid or incurred liabiliy for services necessitated by the defendant's wrong cases are almost unanimous in holding that plaintiff may recover regardless of benefits received from third persons. Examples are numerous. Where a minor received medical services for which he was liable the fact that his parents paid for the same was held not to bar the child's recovery.[11] Similarly, where a husband incurred liability for medical services the fact that his wife may have paid the bill does not bar recovery by the husband.[12] Regarding recovery of wages lost due to absence from work occasioned by a wrongful act, the fact that the employer continues to pay wages gratuitously does not prevent recovery, probably because plaintiff sustains a legal detriment in losing the right to demand wages.[13] In all these cases the plaintiff has, at least, sustained a loss recognized by law, even though it be nominal, and therefore a legal basis exists for compensation.

The *Sedlock* case differs substantially from those above, for it would seem the plaintiff, Trosper, sustained no loss or detriment whatever with the exception of the $1.55 per day for a private room for which damages were allowed. Upon submitting his child to the care of the company hospital and its staff the plaintiff could be certain that no liability could be imposed upon him for the promised treatment. The fact that the plaintiff paid monthly premiums in return for the employer's promise to render such services cannot be regarded as an expenditure or loss for which the defendant's wrong was responsible because the payments were made before the particular wrong occured, and at a time when the particular injury could not have been foreseen.

McCormick, the noted writer on Damages, apparently takes the position that a plaintiff should be allowed to recover the value of medical services necessitated by a wrong even where he has neither paid nor become liable to pay for the same.[14] Where a husband is nursed gratuitously by his wife or minor child this position seems to have some validity since recovery can be justified on the ground that the husband suffered a legal detriment in being deprived of the *normal* services of his wife or child, to which he is entitled by law. In this sense he can be said to have paid for his care. But as applied to other situations wherein there is, in fact, no legally recognized loss the view of McCormick seems unsound.

The reason given for this position that payment or liability should not be a prerequisite to recovery is that the wrongdoer should not be allowed to benefit from the plaintiff's arrangements with

[11] Aubel v. Sasso, 7 Cal. App. 57, 236 Pac. 319 (1925).

[12] Bartlett v Vanover, 260 Ky. 839, 86 S.W 2d 1020 (1935).

[13] Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W 303 (1912), Quigley v. Pennsylvania R.R. 210 Pa. 162, 59 Atl. 958 (1904).

[14] MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES sec. 90 (1935).

third persons in which arrangements the defendant has no interest.[15] While this may be true in instances where it appears that the plaintiff sustains a loss or detriment which is ultimately borne by others, it is submitted that, where by reason of the plaintiff's arrangements with third parties prior to the wrong complained of, medical services themselves are furnished him without expectation of payment, all loss to the plaintiff is before its inception prevented. There is nothing for which the plaintiff can be compensated as he incurred no medical expenses at any time as a result of the wrong. Thus, as applied to a situation of this kind, McCormick's reasoning seems to ignore the fundamental principle that compensation is for a legal detriment incurred, and conversely, where there is no detriment suffered there is nothing whatever for which to compensate.[16]

The fact that in a layman's sense of the word the wrongdoer "benefits" from the fact that the plaintiff carried a peculiar type of insurance which, unlike other insurance, prevented expense, instead of reimbursing the plaintiff for expenses incurred, can only be regarded as incidental. To say with reference to the *Sedlock* case that the wrongdoer "benefits" from the fact that he need not compensate for a loss which has not accrued or, to put it differently, that he benefits by the fact that he need not pay what in law he does not owe, is in its very essence a legal absurdity and contradiction. When the principle that the wrongdoer should not benefit from acts of third parties is limited in is application to cases wherein the plaintiff sustains, as a result of the wrong, an initial detriment or loss which he shifts to others, it does not conflict with the principle of compensation, and seems both reasonable and meritorious. But to decide a case wherein it does not reasonably appear that the plaintiff sustained a legal detriment upon that principle is, in theory, to abandon compensation, substituting in its place punishment for the wrongdoer and unearned enrichment for the plaintiff. Despite this fact decisions awarding damages in the latter situation have made inroads upon the principle of compensation and have, although it is not admitted by the courts, increased the scope of punitive damages. Examples are those cases holding that there may be recovery for wages lost, or for loss of time although the plaintiff's employer continues to pay wages during his disability pursuant to a contract to do so.[17] In such cases the plaintiff is neither deprived by the wrongful act of his wages, nor of the right to demand them. Those courts which explain the result on the ground that recovery is for lost time, not wages, and that therefore the fact that wages are' continued does not bar recovery, indulge in obvious subterfuge in that the value of the time of one regularly employed must naturally be the

[15] *Ibid.*

[16] Morris v. Grand Ave. Ry. Co. 144 Mo. 500, 46 S.W 170 (1898), City of Waco v. Diamond, 46 S.W 2d 1049 (Tex. Civ. App. 1932).

[17] Nashville C. & St. L. Ry. Co. v. Miller, 12 Ga. 453, 47 S.E. 959 (1904), Mo. P.R. Co. v. Jarrard, 65 Tex. 560 (1886)

value of the wages he would have received, in the absence of special circumstances. The usual proof in such cases is proof of the wages the employee received when on the job.

Although the decision in the *Sedlock* case appears to deal correctly with the question whether expenses not incurred are recoverable in that it denies profits and strictly adheres to the principle that damages in such cases are compensatory, yet it is apparent that the wrongdoer incidentally enjoys under that decision the protection of the plaintiff's contract without contributing to its cost. Whether that is inequitable is a question which should be considered. One view is that there is no substantial injustice in the result because the wrongdoer's protection arises only as an incident of a contract made by the insured solely for his own benefit, and from which he cannot be said to have received less than that for which he contracted. Such insurance is not ordinarily purchased by the insured in anticipation of securing profits in case of tortious injury, but as protection against financial *loss* from injury or illness, resulting from any cause whatever. That being true, it is submitted that the decision in the *Sedlock* case will not discourage subscriptions to this type of insurance, whereby the medical services themselves are supplied, simply because the unique character of the plan renders profits in the rare event of tortious injury impossible of attainment. The insured who has been protected by his contract to the full extent of his financial misfortune should not complain that it has not made him rich. On the other hand, the wrongdoer did not purchase the insurance, nor did he cause the insured to purchase it, and it may be contended, therefore, that he should not be compelled to pay its cost.

If the legislature should decide that the problem is sufficiently important to merit legislation, and that the wrongdoer should share with the insured the cost of the insurance it might so provide. One solution might be a statute providing that the plaintiff may, where this type of insurance is present, recover from the wrongdoer the aggregate amount of all premiums paid prior to the injury, not to exceed the value of the medical services necessitated thereby, and less the value of all previous benefits received by the plaintiff under the policy. Obviously, however, a statute providing for this sort of equitable apportionment of the insurance cost would greatly increase the complexity of proof, and might place an unreasonable burden upon the courts.

The *Sedlock* case is interesting not only because it reaffirms the fundamental principle of compensation in an uncompromising manner, but because it offers a precedent for the solution of the damage problem in other controversies of the same type which must eventually appear in the courts. Apparently the question in the principal case is the first of its kind to have arisen in connection with the effect upon the insured's rights against a wrongdoer of medical and

hospitalization plans wherein the insurer agrees to furnish treatment rather than to reimburse the insured. While these plans are greatly in the minority in the field of insurance many are in existence, and it is not unlikely that their numbers will increase. Whether other courts will follow *Sedlock* v. *Trosper* is at present a matter of conjecture, but the answer should not be long postponed.

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