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STUDENT NOTES

Permanent Injury: General or Special Damage

With the recent adoption of the West Virginia Rules of Civil Procedure, the function of the pleadings in an action is to give notice. Formulation of the issues for trial is now left largely to deposition and discovery practice under Rules 26 through 37, and pre-trial conferences under Rule 16. An exception to this concept of notice-pleading is Rule 9, which requires that some items be pleaded specially. The scope of this note is to examine one subdivision of the rule: "special damage." In particular, the examination of this subdivision will be directed to the inquiry of whether a permanent injury to the person is a special damage.

Rule 9(g) of the West Virginia Rules of Civil Procedure provides that "when items of special damage are claimed, they shall be specifically stated." Obviously, this subdivision of the rule recognizes a well-established distinction between general and special damage. Items of general damage need not be pleaded with particularity, but items of special damage must be specifically

stated.¹ Since the requirement of Rule 9(g) is the same as prior West Virginia practice,² an analysis of the earlier West Virginia decisions would seem to be appropriate.

From an examination of the cases decided by the West Virginia court, it appears that the issue of whether a permanent injury to the person is a special damage is an open question in this state. However, it may be germane to see what the West Virginia court has said with regard to the distinction between general and special damage, so that some indication may be derived as to the court's probable position on the issue of permanent injury.

The early case of *Pegram v. Stortz*³ laid down the distinction between general and special damage. In that case, the court adopted a broad, general test. It was held that general damages must not only be the natural and proximate result of the act complained of, but they must also be the necessary result of such act. On the other hand, special damages were held to be the natural consequences, but not the necessary consequences, of the act.

In *Yeager v. City of Bluefield*,⁴ the court said that the rule, where general damages are claimed, is that the declaration need not allege the particular injury which is sought to be proved. This was an action of trespass on the case against a city for personal injuries resulting from a defect in a street crossing. The declaration alleged that the plaintiff fell, and, as a result of the fall, he was "greatly injured, bruised, wounded and crippled." The court held that the declaration was not defective because it did not state the particular injury, namely, a broken leg. The court recognized that the rule was different where special damages were sought. The court, speaking through Judge Brannon, stated that if the plaintiff were engaged in any business requiring specially the use of the limb, and the injury rendered him incapable of performing that business, then the injury to that limb should be specified, as its result or consequences in the particular case would be loss of business.

The liberal approach taken by the court in the *Yeager* case, where general damages were involved, was seemingly limited in

¹ 2 MOORE, FEDERAL PRACTICE §9.08 (2d ed. 1961).

² Reporters' Original Note to Rule 9 of the W. VA. R.C.P.

³ 31 W. Va. 220, 6 S.E. 485 (1888).

⁴ 40 W. Va. 484, 21 S.E. 752 (1895).

*Waters v. City of Morgantown.*⁵ In the *Waters* case, the court said that general damages included only those damages which necessarily and immediately flow from the injury. In that case, the allegation in the declaration read as follows:

“ . . . on account of the accident . . . she suffered fractures in her right leg, right shoulder bone and right tenth rib; that muscles at the back of her neck and in her abdomen were torn loose and injured, and that by reason thereof she became sick, sore, lame and disabled and suffered and still suffers intense physical pain in the back of her head and in her abdominal regions”

The plaintiff introduced evidence tending to show that insanity resulted from the accident. The court held that the admission of this evidence was error in the absence of a specific allegation that insanity resulted from the injuries. The court cited with approval *Gumb v. Twenty-Third St. Ry. Co.*,⁶ wherein it was stated:

“When a plaintiff alleges that his person has been injured, and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury, (which are called general damages,) under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, (which are called special damages,) he must allege the special damages which he seeks to recover.”

A close comparison of the *Yeager* case⁷ with the *Waters* case⁸ shows that similar factual situations were involved. However, while the court held in the *Yeager* case that it was permissible to prove the particular injury (a broken leg) without alleging the particular injury, it was held in the *Waters* case that the particular injury (insanity) could not be proved in the absence of a specific allegation.

Although it would seem at first glance that these holdings may be inconsistent, careful inspection seems to negate this assumption. Certainly, the defendant should be given a fair opportunity to prepare his defense, and not be taken by surprise at the trial. In the *Yeager* case, from the allegation that the plaintiff was “crip-

⁵ 110 W. Va. 43, 156 S. E. 837 (1931)

⁶ 114 N.Y. 411, 21 N.E. 993, 994 (1889).

⁷ 40 W. Va. 484, 21 S.E. 752 (1895).

⁸ 110 W. Va. 43, 156 S.E. 837 (1931).

pled," and from the description of the facts creating the cause of action, the defendant could reasonably expect that the plaintiff might have suffered a break of some nature from the fall. On the other hand, it would surely be an extraordinary circumstance for the plaintiff to become insane as a result of a fall, as in the *Waters* case. The allegations that "muscles at the back of her neck . . . were torn loose" and that she "suffered and still suffers intense physical pain in the back of her head" would seemingly give no indication to the defendant that the plaintiff would seek to show that insanity resulted. Since insanity would not be a necessary consequence of a fall, it would seem that the court correctly held that this condition was special damage, requiring that it be specifically stated.

A recent federal district court decision⁹ is consistent with the requirement that the plaintiff's condition must be a necessary consequence of the defendant's wrongful act to be an item of general damage. In that case, the plaintiff brought an action against the United States under the Federal Torts Claims Act for injuries sustained when the plaintiff was hit by the closing doors of an elevator in a federal court house. It was alleged in the complaint that the plaintiff sustained "severe, permanent, painful and disabling bodily and personal injuries to her chest, breasts, back, sides, spine and spinal cord, nerves and nervous system, arms, hands and legs." The plaintiff introduced evidence showing that he had been stricken with cancer. Although the plaintiff's testimony concerning cancer was admitted without objection, the court recognized that cancer was an item of special damage.

The test for the distinction between general and special damage is easily stated. The difficulty arises in its application to a particular factual situation. In *Raines v. Faulkner*,¹⁰ the West Virginia court gave an indication of what it considered to be damages which necessarily flowed from a particular injury. This case involved an action for an assault and battery. The court held that humiliation, shame, dishonor, terror, mental pain and anguish to the plaintiff would naturally and necessarily flow from the nature of defendant's assault upon the plaintiff; therefore, these items of damage could be recovered under a general allegation of damages.

⁹ *Elgin v. United States*, 89 F. Supp. 195 (W.D. Mo. 1950).

¹⁰ 131 W. Va. 10, 48 S.E. 2d 393 (1947). The plaintiff also sought punitive damages, which were pleaded specially.

Although there are no West Virginia cases dealing with the pleading of permanent injury to the person, numerous other jurisdictions have passed on the issue. The cases are in conflict as to whether the permanency of injuries must be alleged in order to allow recovery therefor.¹¹ The courts¹² are confronted with two conflicting considerations in determining the question: (1) the consideration that the plaintiff should be permitted to recover all that he is fairly entitled to; and (2) the defendant should be given a fair opportunity to know the elements of the plaintiff's claim so as to be adequately able to prepare his defense, and not be taken by surprise. The cases,¹³ into which the problem has been presented, fall into three groups: (1) Apparently the majority rule is that damages for the permanency of the injury are recoverable under a general allegation of damages, without specifically pleading the fact of permanency.¹⁴ In many of these cases, this rule is expressly stated; other cases have tacitly allowed recovery of damages for permanent injuries in the absence of any specific allegation that the injuries complained of were permanent.¹⁵ (2) Other cases take the view that damages for permanent injuries may not be recovered under a general allegation of damages, without specifically pleading the fact of permanency.¹⁶ These cases go on the theory that damages for such injuries are in the nature of special damages, which must be specifically pleaded to allow recovery therefor.¹⁷ However, under this view, the word "permanent" need not be used in alleging the permanency of the damages.¹⁸ Any equivalent expressions are sufficient. Thus, an allegation that the plaintiff will be disabled the rest of his life has been held a sufficient allegation of permanency.¹⁹ (3) A third line of authorities holds that unless facts from which the permanency of the injury will necessarily be implied are alleged, there must be a special averment that the injuries are permanent in order to let in proof to that effect.²⁰ This is really a qualification of the

¹¹ Annot., 68 A.L.R. 490 (1930).

¹² *Pauly v. McCarthy*, 109 Utah 431, 184 P.2d 123, 128 (1947); see generally, Annot., 68 A.L.R. 490 (1930).

¹³ *Ibid.*

¹⁴ *Walton v. Light*, 181 Va. 609, 26 S.E.2d 29 (1943).

¹⁵ *McLean v. Lewiston*, 8 Idaho 472, 69 Pac. 478 (1902).

¹⁶ *Denton v. Ordway*, 108 Iowa 487, 79 N.W. 271 (1899).

¹⁷ *Pauly v. McCarthy*, 109 Utah 431, 184 P.2d 123, 128 (1947); see generally, Annot., 68 A.L.R. 490, 495 (1930).

¹⁸ Annot., 68 A.L.R. 490, 495 (1930).

¹⁹ *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 511, 26 N.E. 520 (1891).

²⁰ *Baldassare v. Pagliaro*, 86 R.I. 461, 136 A.2d 685 (1957).

second rule. Under this rule, the fact that permanency may possibly or even probably follow from the nature of the injury is not sufficient to allow recovery in the absence of a specific allegation of permanency.

Virginia has solved the problem by holding that permanent injuries may be recovered under a general allegation of damages. In *Walton v. Light*,²¹ the Virginia court recognized that the weight of authority is that damages for the permanency of an injury are recoverable under a general allegation of damages, without specifically alleging the fact of permanency. The court accepted this view and held that the plaintiff could introduce evidence of permanent injury under an allegation of "serious bodily injuries" in a notice of motion for judgment proceeding.

Rule 84 of the West Virginia Rules of Civil Procedure provides that the forms contained in the Appendix of Forms are sufficient under the Rules. The ad damnum clause in Official Form 9 is as follows: "As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses and medical attention and hospitalization in the sum of one thousand dollars." No mention is made in the form of permanent injury. In pleading the physical effects of the injury, the form mentions a particular injury, namely, a broken leg. The form goes on to provide "and was otherwise injured." Thus, it appears that the form contemplates the pleading of injuries both specifically and generally. Exactly what may be proved under the general allegation after pleading specific injuries remains to be seen. Unless the West Virginia court adopts the liberal spirit of the Rules, it may very well cause the plaintiff to be limited at the trial to the injuries which are specifically described, on the principle that the particular controls the general.²² Pleading generally the injury will also encounter the risk that the court may say that it authorizes proof only of those effects which would "necessarily and immediately" flow from the kind of blow or impact described. This has been the test used by the West Virginia court in the past where general damages are alleged.²³

²¹ 181 Va. 609, 26 S.E.2d 29 (1943).

²² McCORMICK, DAMAGES 35 (1935).

²³ *Waters v. City of Morgantown*, 110 W. Va. 43, 156 S.E. 837 (1931).

Obviously, the safest approach to follow when a permanent injury is involved is to plead that the injury is permanent. In actions for personal injuries, the very description in the complaint of the facts creating the cause of action comprises some description of the wound or injury to the plaintiff. How far that description of the wounding or breaking of the body gives notice, of itself, of a claim for permanent injury, obviously depends upon the seriousness of the particular bodily hurt as described. For example, where the plaintiff's claim is based upon a serious automobile collision, permanent injury might correctly be said to "necessarily and immediately" flow from the impact. On the other hand, where the facts showing the cause of action would not indicate to the defendant that the plaintiff might be permanently injured, the court may hold that a permanent injury would not "necessarily" flow from the impact; thus, any permanency of injury should be pleaded specifically to give the defendant notice.

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