Torts -- Damages -- Aggravation of Pre-existing Injuries

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statutory allowance of a deduction by a candidate for reasonable campaign expenditures as expenses incurred for the production of income should be permitted. However, two decades have passed since *McDonald*; apparently the courts are themselves ready to take action.

**Brown Hill Boswell**

**Torts—Damages—Aggravation of Pre-existing Injuries**

On February 11, 1963, while the plaintiff in *Lockwood v. Mccaskill* was waiting for a traffic light to change, his automobile was struck in the rear by defendant's truck. He was unconscious momentarily and later suffered headaches accompanied by pain in his neck, back, hips and left leg. Because of this pain he was unable to return to the operation of his service station until May 1. During his absence an employee wrecked a customer's car, forcing plaintiff to pay damages in the amount of $1,200 dollars. Plaintiff, "basically . . . an insecure person . . . a perfectionist . . . a worrisome individual," brooded about his financial difficulties in meeting payrolls and other expenses. He had difficulty sleeping because of this worry, pain, and headaches. On the morning of May 20, more than three months after the accident, he suffered an attack of amnesia and was hospitalized until June 15, 1963. During his stay he suffered periods of confusion and depression.

At the trial plaintiff's psychiatrist testified to the effect that "the accident and resulting physical injuries would not have caused amnesia in a person with ordinary susceptibility to worry and insecure feelings, but that plaintiff is more than ordinarily prone to suffer from these mental conditions . . . ." It was further stated that the attack of amnesia was induced by a deep sense of insecurity, that . . . the injuries he suffered in the accident and the financial burdens and losses caused by his physical incapacity to work and

\[\text{37} \text{A MERTENS, op. cit. supra note 1, § 25A.17. See Diamond, The Shadow of McDonald, 23 Taxes 511, 515 (1945); 39 Ill. L. Rev. 298 (1945).}\]

\[\text{1} \text{262 N.C. 663, 138 S.E.2d 541 (1964).}\]

\[\text{2 Id. at 666, 138 S.E.2d at 543.}\]

\[\text{3 Id. at 670, 138 S.E.2d at 546.}\]
attend to his business threatened his security and produced mental stress and worry, and this mental state set the stage for the amnesia attack, which was precipitated . . .

by the employee wrecking the customer's car.

The court, in allowing recovery, held that

if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility . . . but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plaintiff notwithstanding the fact these damages were unusually extensive because of peculiar susceptibility.

The court was applying what is commonly called the "special sensitivity" or "thin skull" rule. According to this rule, once an impact upon the person of the plaintiff has occurred, the tortfeasor takes his victim as he finds him, even though, because of some peculiar bodily sensitivity, the injury suffered is much greater than that which would have been sustained by an ordinary individual. The wrongdoer is not allowed to mitigate his damages because his particular victim has a dormant or incipient disease or a pre-existing physical injury. Thus, when the impact arouses plaintiff's bony tumor, aggravates his spondylolistheses or peptic ulcer, lowers his vitality causing him to contract tuberculosis, or aggravates his speech impediment causing a notable increase in his

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4 Id. at 669, 138 S.E.2d at 546.
5 Id. at 670, 138 S.E.2d at 546.
6 The phrase seems to have originated in the language of Kennedy, J., in the English case of Dulieu v. White & Sons, [1901] 2 K.B. 669.
7 If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

Id. at 679.
12 Hazelwood v. Hodge, 357 S.W.2d 711 (Ky. 1961).
stuttering, the defendant is held liable even though such consequences could not have been reasonably foreseen.

Plaintiff in Lockwood is to be distinguished from the plaintiffs in the above cases because his pre-existing condition was mental rather than physical. He could be more accurately described as having "thin skin" in lieu of a "thin skull."

Quaere then, does the tort-feasor take his neurotic or psychotic plaintiff as he finds him? In other words, is there also a "thin skin" rule? The courts that have considered the plaintiff with the precarious emotional imbalance indicate that the answer should be in the affirmative. As stated by one court: "conceding plaintiff to be a neurotic nature—even conceding him to be psychoneurotic, such admission can be of little comfort to defendants. It is well settled that the tort-feasor takes his victim as he finds him. . . ." Thus courts have allowed recovery when plaintiff suffers a "traumatic neurosis" following a bump on the chin, "conversion hysteria" accompanying a fracture of the wrist and hand, a

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13 Neurosis or psychoneurosis is a form of maladjustment in which a person, although well in touch with reality, uses physical complaints and symptoms to express psychological needs which have arisen from conflicts that are hidden from the conscious mind. Neuroses are generally divided into four types: anxiety neurosis, hysteria, psychoasthenia, and mixed types. Palmer, Traumatic Neuroses, 15 Ohio St. L. J. 399 (1954).
14 A psychosis is a severe form of personality disease characterized by an extensive disorganization of the various functions. In the typical psychosis the individual has lost his contact with reality and reveals severe disturbances in all areas of his life. The psychotic reaction is a much more thoroughly and severely abnormal type of personality reaction than is the psychoneurosis.

ENGLISH & FINCH, INTRODUCTION TO PSYCHIATRY 43 (2d ed. 1957).
"psychoneurotic anxiety reaction" following a knee injury, and "reactive depression" accompanying a slight injury to the back.

One way of analyzing the "thin skull" cases is to view them as a proximate cause problem. In one of the leading cases in this field, Re Polemis & Furness, Withy & Co., the court reasoned that to determine whether an act is negligent, it is relevant to determine whether any reasonable person could foresee that the act would cause damage; if so, the fact that the damage that it caused is not the exact kind of damage one would expect is immaterial as long as the damage is traceable to the negligent act. This is sometimes referred to as the "causation" approach. Given a breach of duty which amounts to negligence, and damage directly resulting from that negligence, the fact that the damage which ensues is different from the damage that would be expected is irrelevant. Foreseeability is used here only to determine whether the tort-feasor was negligent in the first instance, but it is not at all determinative of the extent of the damages for which he will be liable once negligence is proven. The Lockwood court apparently adopted this rationale when it stated that "the measure of duty in determining whether a wrong has been committed is distinct from the measure of liability when the wrong has been committed."

Polemis was overruled forty years later by Overseas Tankship (U.K.) Ltd. v. Mort's Dock & Eng'r Co., commonly referred to as Wagon Mound. In Wagon Mound the court refused to follow the rule allowing damages for the direct but unforeseeable consequences of a wrongful act. The court reasoned that it would be unjust to hold a defendant liable in negligence for damages of a kind which he could not have reasonably foreseen, although he may have reasonably foreseen that some damage might occur. Liability was limited to the scope of the risk created by the defendant's conduct. This limitation would restrict liability within the scope of the risk originally created, and make foreseeability the test both for responsibility, i.e., liability for damages, and for negligence. Thus, if one has breached a duty of care because he should have foreseen

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23. 262 N.C. at 670, 138 S.E.2d at 546-47.
25. The name of the ship involved in the case.
a particular type of risk, he is negligent by his breach and liable for
the harm which he could have reasonably foreseen, but he is not
liable for results which occur outside of that risk—as to those re-
results, he is simply not negligent.

Whether or not the "thin skull" and "thin skin" cases are to be
considered an exception of the foreseeability test of Wagon Mound
will depend upon the meaning given to the phrase "damage . . . of
such a kind as the reasonable man should have foreseen." 26 For
example, "kind" could be interpreted as meaning either "personal"
or "physical" injury. If it is interpreted as meaning personal injury,
then, if defendant could foresee that some personal injury would
occur it may be argued that he would be liable for all physical and
emotional injury that did occur because it is of the same "kind" that
was foreseeable. However, if "kind" is interpreted as meaning
"physical" injury, then "psychic" or "emotional" injury is of a
different "kind" than that which could have been reasonably fore-
seen, and the "thin skin" cases would appear to be a exception to
the foreseeability rule.

The English courts deciding "thin skull" cases since Wagon
Mound have considered them an exception to the foreseeability rule.
As one court states, "Wagon Mound . . . did not have what I may
call, loosely, the thin skull cases in mind." 27

In the field of intentional torts it is generally agreed that when
a defendant is liable because he has intentionally inflicted harm, 28
his liability is not restricted to the harm intended; the range of
responsibility widens with the degree of culpability of his conduct. 29
However, in the "thin skull" cases there is no widening of respon-
sibility once the defendant is negligent, the doors are wide open for

28 Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (Dist. Ct.
App. 1960); St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So. 2d
670 (Fla. 1950); Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527 (1901);
Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930); Kopka v. Bell Tel.
Co., 371 Pa. 444, 91 A.2d 232 (1952); Lambert v. Brewster, 97 W. Va. 124,
125 S.E. 244 (1924).
29 "In determining how far the law will trace causation and afford a
remedy, the facts as to the defendant's intent, his imputable knowledge, or
his justifiable ignorance are often taken into account . . . . For an intended in-
jury the law is astute to discover even very remote causation." Derosier v.
New England Tel. & Tel. Co., 81 N.H. 451, 463-64, 130 Atl. 145, 152
(1925) (dictum). See cases collected in Bauer, The Degree of Defendant's
Fault as Affecting the Administration of the Law of Excessive Compens-
satory Damages, 82 U. PA. L. REV. 583 (1934).
plaintiff and defendant will be held responsible for all damage. Objection may be made to this rule on the ground that it imposes liability which may be far in excess of the slight dereliction in defendant's conduct. A defendant who was guilty only of a minor breach of duty may find his whole fortune exhausted because he was unfortunate enough to strike a particular "sensitive" plaintiff. To this objection the courts have answered that as between the wrong-doer and the innocent plaintiff, there may be good reason for letting the tort-feasor pay. Even though the defendant may have to bear an unreasonable loss, he at least caused that loss and rather he should suffer than an entirely innocent plaintiff.30

Assuming that the "he caused it, he should pay for it" reasoning is acceptable when applied to the "thin skull" plaintiffs, would it also be acceptable when applied to "thin skin" plaintiffs? It is submitted that it would not.

The "thin skin" cases are distinguishable in many ways. It is suggested that the problem of causation is much more obscure in the "thin skin" cases. Can it be said that defendant's negligence was a "substantial factor" in causing plaintiff's post accident condition; or, "but for" defendant's negligence plaintiff would not have become neurotic? According to the Freudian theory neurosis or psychosis have their roots in childhood conflict.38 The origin of neurosis lies in the emotional and mental conflicts which the individual has not resolved but has suppressed in the subconscious.34 In order for it to develop there must be a pre-existing emotional state or readiness for the neurosis. One author lists six factors36

30 E.g., Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). It would seem to beg the question to argue "If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence." Prosser, Palsgraf, Revisited, 52 Mich. L. Rev. 1, 17 (1953). "That obvious truism [referring to Prosser] could be urged by every person who might adversely feel some lingering effect of the defendant's conduct, and we would then be thrown back into the fantastic realm of infinite liability." Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963).

31 A "formula" used to determine actual cause. See Prosser, Torts 244 (3d ed. 1964).

32 The second formula for actual cause. Ibid.

33 English & Finch, op. cit. supra note 14, at 101-02.

34 Id. at 41; Smith, Cross-Examination of Neuropsychiatric Testimony in Personal Injury Cases, 4 Vand. L. Rev. 1, 37 (1950).

35 They are inheritance, age, enoch, sex, environmental factors, occupation and previous attacks. Pearson, Strecker's Fundamentals of Psy-
which are of significance in causing mental illness; another likens this pre-existing emotional state to a "vase" with an invisible flaw. Assuming these authorities are correct, the "thin skin" plaintiff is not "caused" to develop his neurosis as a new or original condition. He should be viewed as possessing a pre-existing "injury" and his condition following defendant's negligence should be considered as an aggravation of that pre-existing injury with the neurotic constitution being the major factor in plaintiff's injury.

If the tort-feasor is to take his "thin skin" plaintiff as he finds him, the pre-accident personality of the plaintiff should be closely considered to determine what part of the total injury represents the pre-existing one. The court should also determine whether the pre-existing condition was bound to worsen, in which event an appropriate discount should be made for the damage that would have been suffered in the absence of the defendant's negligence.

Secondly, it is submitted that the neurotic reaction precipitated by defendant's negligence is in many cases much more extreme than the physical reaction suffered by the "thin skull" plaintiff. It has been suggested that there is no relationship between the extent of the physical injury plaintiff sustained and the severity of the subsequent neurosis. One author who has made an extensive study in neurosis following accident cases concludes that they "demonstrate an inverse relationship of accident neurosis to the

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87 Smith & Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87, 120 (1943).
severity of the injury," in other words, the more severe the injury the less likely it is to precipitate a neurosis. It has also been suggested that it is not the physical nature of the injury that is important in precipitating the neurosis but rather the emotional and symbolic meaning given the injury. This is demonstrated by a recent Michigan case, in which defendant's truck ran into the rear of a soft drink truck driven by plaintiff. Plaintiff was not seriously injured, but the liquid dripping from the broken bottles caused him to think his gasoline tanks had ruptured. The dripping noise recalled a previous accident that he had witnessed in which two persons were burned to death in a gasoline fire. As a result plaintiff became psychotic and unable to work. He received a $150,000 dollar verdict.

Thirdly, it is difficult to determine the extent and duration of plaintiff's emotional condition. Present is the possibility that plaintiff is suffering only from a "compensation neurosis." Here, as in other forms of neuroses, plaintiff is not malingering, but sincerely believes in the reality of his symptoms. His symptoms, however, are produced primarily by his subconscious desire for compensation. Prognosis is poor until he receives some type of fiscal therapy, preferably in the form of a speedy settlement.

Today more than one-half of all hospital beds are occupied by mental patients. The National Committee Against Mental Illness estimates that one out of every ten Americans is now suffering from some form of mental illness, and with personal injury litigation assuming a greater proportion in the law, many "thin skin" plaintiffs will be coming before the courts. It would appear that serious questions of public policy are involved when an emotionally imbalanced individual is given a large verdict as a result of a slight physical injury inflicted by a stable, productive individual. It is suggested that letting the tort-feasor take his neurotic plaintiff as he finds him is not the way to solve our mental health problem.

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40 Miller, supra note 36, at 298. Miller also relates the incidence of accident neurosis to social status. Most of the people who "developed gross neurotic sequence were unskilled or semi-skilled workers." Id. at 298-99.
41 Palmer, supra note 13, at 399.
43 Smith, supra note 34, at 42-43.
44 PAGE, op. cit. supra note 39, at 150.
45 PEARSON, op. cit. supra note 35, at 1.
46 Id. at 4.
NOTES AND COMMENTS

The attitude of some courts in their consideration of "thin skin" plaintiffs is reflected by the lawyers' joke which defines "emotional trauma as a 'state of mind precipitated by an accident, stimulated by an attorney, perpetuated by avarice and cured by a verdict.'"47

THOMAS E. CAPPS

Torts—Products Liability—Sale Requirement

The decline of the requirement of a sale in the field of products liability parallels the decline of the requirement of privity.1 Both are being replaced by "strict tort liability."

Delaney v. Towmotor Corp.2 reveals the final stage of this development. The court in Delaney held a manufacturer of a defective fork lift strictly liable to an injured employee of a prospective buyer who had the lift on a demonstration loan directly from the manufacturer. In overcoming the defendant's argument of "no sale, no warranty," the court went beyond the recognition that a sale is not always a requisite of warranty and stated that products liability should no longer be characterized as warranty liability but rather as "strict tort liability."

In the past, products liability has been limited and confined by the uncertain nature and character of warranty—more specifically by the contractual barriers associated with it.4 Although the requirement of privity is said to be the major deterrent to new frontiers of products liability,5 the idea that warranty requires a "sale" also has been an obstacle. It is said that goods are warranted only when supplied under a contract to sell or a sale,6 generating the conten-


1 For a distinction between the two requirements, see, e.g., Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (elimination of the privity requirement having no effect on the force of the sale requirement); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (benefit of a privity exception having no effect upon the sale requirement).

2 339 F.2d 4 (2d Cir. 1964).

3 Id. at 6.


5 Frumer & Friedman, Products Liability § 3 (1964).

6 Uniform Sales Act § 15. Although North Carolina has not adopted the Uniform Sales Act, it could easily be indirectly applied since the act is recognized as a codification of the common law. McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934). Also, recent North Carolina cases state that warranty is an element in a contract of sale. See