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Pleading--Special Damages--Statement of Amount of Special Damages in the Pleadings

Charles E. Goss
University of Kentucky

PLEADING—SPECIAL DAMAGES—STATEMENT OF AMOUNT OF SPECIAL DAMAGES IN THE PLEADINGS—Two plaintiffs instituted actions against defendant for injuries sustained by them while riding as guests in defendant's car. Plaintiff Stamper's complaint recited that medical expenses and loss of time resulted from injuries sustained in the accident. The respective amounts claimed for these special damages were not stated, there being an overall prayer for $10,000. Stamper received judgment for $4,000 in the trial court. A major question upon appeal, as stated by the Court was,

> [W]hether or not CR 9.06 requires a party not only to state the *nature* of his claimed special damages but also the *amount* thereof.

The Court reversed the judgment of the trial court and ordered a new trial upon the grounds of erroneous instructions, but *Held:* That failure to state the special damages in the *amount* in the pleadings does not foreclose proof and recovery of such item. Two judges dissented. *Lee* v. *Stamper*, 300 S.W. 2d 251 (Ky. 1957).

Damages for purposes of this comment are those damages which are "actual and compensatory", in that they measure loss or detriment to a plaintiff. Such actual damages are of two types, general damages and special damages.

> . . . If the damages result necessarily from the injury or wrong complained of, they are called 'general damages', and will be embraced by the general statement of the facts and the demand of relief; but if such damages be the natural, although not the necessary, result of such injury . . . they are termed 'special damages' and must be specially stated in the petition.[1]

While the above distinction might seem artificial, the practical requirements of pleading and notice have induced the courts to generally adopt the distinction and require that instances of special damages be specifically alleged and stated apart from items of general damages.[2] While certain damages might readily be *expected* to result from a wrongful act, other instances of damages might follow from the existence of exterior factors peculiarly within the knowledge of the injured party. In the latter case, if the defendant is to be apprised of what he must meet, he must necessarily be informed of the existence of such extraordinary circumstances. There seems no better time to inform him of such factors than during the pleading stage. The need for such information is obvious, and that need is provided for in Rule 9.06 of the Kentucky Rules of Civil Procedure which requires

[1] Newman, Pleadings 438, quoted in Louisville & N. R. Co. v. Roney, 32 Ky. L. Rep. 1326, 108 S.W. 343 (1908).
[2] 15 Am. Jur., Damages sec. 305 (1938).

that "When items of special damage are claimed, they shall be specifically pleaded."

A question arises, however, whether the plaintiff should not only plead the *nature* of the special damages received, but also the *amount* to which he deems himself entitled. Some courts considering the question have held that items of special damage such as loss of time and medical expenses must be expressed in terms of dollars and cents.[3] Other courts have held that, so long as the nature of the special damage is alleged, the amount need not be stated.[4]

Under the code practice, Kentucky courts were very diligent in their application of the rule that the plaintiff must state the amount as well as the nature of such damages.[5] The leading case in this series is *Jesse* v. *Shuck*.[6] In that case the Court held that an allegation of special damages (medical expenses) in which the amount was left blank amounted to no allegation of special damages and afforded no basis for a judgment as to that allegation.

In the *Shuck* case and the cases that followed, the Court advanced two reasons for the rule: 1) Notice. The amount of damages should be stated so as to insure that the defendant will receive *notice* of the extent of recovery desired so that he might prepare his evidence and assemble witnesses to refute any claims over and above what he thinks the plaintiff is entitled to.[7] 2) Admission. A statement of the amount of damage will give the defendant an opportunity to either admit or deny the averment.[8] This, it was reasoned, would dispose of certain issues of special damages in those cases in which the defendant is willing to *admit* the accuracy of that averment.

The question arises whether the above justifications for the rule are valid under the new rules. To resolve this, it is necessary to discuss the above justifications in light of the theory of modern pleading.

[3] Griffin v. Russel, 144 Ga. 275, 87 S.E. 10, L.R.A. 1916 F. 216 (1915); Neville v. Mitchell, 28 Tex. Civ. App. 89, 66 S.W. 579 (1902); Young v. Howell, 236 S.W. 2d 247 (Tex. 1951).

[4] Turney v. Southern Pac. Co., 44 Or. 280, 75 P. 144 (1904); Detrich v. Metropolitan St. Ry. Co., 125 Mo. App. 608, 102 S.W. 1044 (1907); Shown v. Taylor, 88 N.E. 2d 783 (Ind. 1949); Olson v. Johnson, 267 Wis. 462, 66 N.W. 2d 346 (1954).

[5] Lexington & E. Ry. Co. v. Fields, 152 Ky. 19, 153 S.W. 43 (1913); Louisville & N. R. Co. v. Moore, 150 Ky. 692, 150 S.W. 849 (1912); Blue Grass Traction Co. v. Ingles, 140 Ky. 488, 131 S.W. 278 (1910); Lexington Ry. Co. v. Britton 130 Ky. 676, 114 S.W. 295 (1908); Jesse v. Shuck, 11 Ky. L. Rep. 463, 12 S.W. 304 (1889).

[6] 11 Ky. L. Rep. 463, 12 S.W. 304 (1889).

[7] Ibid.

[8] Lexington Ry. Co. v. Britton, 130 Ky. 676, 684, 114 S.W. 295, 297 (1908).

1. *Notice*

Under the theory of the common law and code systems of pleading, there was reasonable justification for requiring the amount of special damages to be pleaded. Under those systems, the pleadings were viewed as the chief means for narrowing the issues in the case, and for notifying the defendant of exactly what facts he must controvert upon trial of the case. However, under the new rules, the emphasis has changed since those days of issue and fact pleading to a more general requirement of notice pleading. Such notice pleading only requires the plaintiff to inform the defendant of the general nature of the claim against him, additional means having been provided whereby the parties might obtain the related facts through the use of various discovery procedures. Those discovery procedures are the pretrial conference, deposition upon oral examination or written interrogatory, production of documents, and written interrogatories to the parties.[9] Professor Moore, in referring to the use of the discovery procedures as a method of obtaining facts not contained in the pleadings has said,[10]

> The Federal Rules, unlike the common law system of procedure, are not grounded on the supposition that the pleadings are the only or chief basis of preparation for trial. . . . It is recognized that pleadings have not been successful as a fact-sifting mechanism and that attempts to force them to serve that purpose have resulted only in making the pleadings increasingly complicated.

Thus, it would seem that, to require the statement of the amount of special damages, would be contrary to the spirit of the new rules. The Kentucky Court in the principal case recognized this and pointed out that such information is readily available by use of the discovery procedures. However, Judge Sims, dissenting, objected to the use of discovery in such cases saying,[11]

> The defendant should not be required to go to the trouble and expense of ascertaining by interrogatories or by discovery the amount of specific damages plaintiff is seeking to recover from him, but the duty is on plaintiff to set them out with certainty in his complaint as he knows, or should know, what his special damages are.

This statement does not seem to consider that, even if the amount of special damages is alleged in the complaint, the defendant will probably request, by interrogatory or other discovery process, an itemized statement of the particular expenses incurred such as hospital bills,

[9] Ky. R. Civ. P. 26-37.
[10] 4 Moore, Federal Practice 1012 (2d ed. 1951).
[11] Lee v. Stamper, 300 S.W. 2d 251, 255 (Ky. 1957).

anesthetics, medication, etc.[12] A summation of such specific items reveals to the defendant the amount of the special damages actually incurred. This would make a statement of the amount in the pleadings unnecessary.

Even if the amount of damages is stated in the pleadings, the question arises whether such statement gives the defendant "notice" of the amount of special damages plaintiff is seeking. The plaintiff will customarily ask for more special damages than he expects to recover to allow for damages that might arise after the commencement of the action. This problem and its solution will be discussed later.

The use of such discovery procedures would seem to be the most desirable method of obtaining the amounts of special damages sustained for two important reasons:

1. A rule requiring the plaintiff to state in his pleadings the amount of his special damages could easily be extended to the point where an infinitesimal itemization would be required. The spirit of the new rules is to prevent such detailed and complicated pleadings, and discovery devices are provided for obtaining such evidentiary matter.

2. Their use would enable the defendant to obtain an *accurate* statement of the amount of special damage sustained. An accurate statement would be more likely to induce him to *admit* that issue and thus dispose of it.

2. *Admission*

Since the plaintiff is limited in his recovery to the maximum amount pleaded as special damages,[13] he will customarily frame his damages in an amount far in excess of the actual amount he expects to recover so as to allow for medical expenses and loss of time expected to arise in the future. In fact, this practice has been urged upon the profession by the Kentucky Court.[14] Certainly, this would lessen the supposed advantage to be gained from stipulating the amount of the special damages in the pleadings. No defendant is willing to admit the truth of an exaggerated statement of damages, so such statement must be an accurate one. If the information is obtained by way of discovery through use of the interrogatory to the parties, the added efficacy of

[12] In Henry Pratt Co. v. Stoody Co., 16 F.R.D. 175, 177 (1954) the court required the plaintiff to state the amount of special damages incurred. However, it refused to go further and require the plaintiff to set out the specific items of expenses incurred, saying these were evidentiary matters which could be obtained by discovery.

[13] Id. at 254.

[14] Blue Grass Traction Co. v. Ingles, 140 Ky. 488, 495, 131 S.W. 278, 281 (1910).

the oath will insure an accurate statement of such amount. Further, the interrogatory will usually request an itemized statement of such expenses, which will further increase the chances that the issue will be admitted since the itemized account may be easily checked.

This reasoning is not invalidated by the fact that, at the time of the suit, certain special damages might not be accurately determinable. It is enough to say that the response to the interrogatory will be verified only to the extent of damages and expenses incurred up to that time. This statement will not foreclose recovery upon damages that arise after the suit is started. Future damages, such as permanent disablement and loss of time and medical expenses expected to be incurred after the action is started will seldom, if ever, be the object of admission by the defendant. It is easy to see that this division of special damages into present and future damages will enable defendant, if he so desires, to admit that portion of the claim relating to present damages and reject the remainder.

Conclusion

An examination of the requirement that special damages must be stated in the amount makes it clear that the rule serves no practical purpose. Such a statement gives the defendant neither notice of the claim against him nor a practical opportunity to admit the truth of the claim. It seems that the court reached the correct decision in light of the compelling maxim that a rule without a reason is valueless.

Addenda

It would seem that the Court, had it chosen to do so, could have avoided the damages question. It does not appear that the defendant made any objection to the omission of the amount of special damages in the trial court. If he felt himself prejudiced by the omission, he had ample opportunity to move for more definite statement. If he desired the information in good faith, he had several methods available to him, through discovery, to obtain an accurate statement of the damages. He should not be heard to say, on appeal, that he was prejudiced by the failure to state the amount of damages. Having failed to object to the omission of a statement of the amount of special damages, he has waived it.[15]

Charles E. Goss

[15] Lexington & E. Ry. Co. v. Fields, 152 Ky. 19, 22, 153 S.W. 43, 45 (1913).