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Damages: Recovery for Impairment of Housewife's Earning Capacity

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Whatever rationale may be given for the misapplication of the law in the past, the decisions now clearly indicate that conviction for each previous felony must precede the commission of a new offense if the latter is to be counted in sentencing under the fourth felony statute.[17] Thus there is little excuse for erroneous application of the Florida statute today.

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DAMAGES: RECOVERY FOR IMPAIRMENT OF HOUSEWIFE'S EARNING CAPACITY

Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla. 1952)

Appellee, a housewife and occasional clerk in her husband's store, was injured when appellant's bus collided with her car. In the trial of her action for personal injuries she introduced no evidence of any past earnings or of the value of her contribution to her husband's business. The court instructed the jury that if a preponderance of evidence established her right to recover for her personal injuries she was entitled, in addition, to compensation for her diminished earning capacity. Judgment below was awarded to the housewife, and the bus company appealed on the ground, inter alia, that the instruction was improper inasmuch as the lack of evidence of diminished earning capacity would render any determination by the jury speculative. HELD, the instruction was proper, since no proof is necessary for recovery by a housewife of damages for impairment of her earning capacity.

The decision is in accord with the law of many other jurisdictions.[1] The impairment of a woman's earning capacity is an injury to a personal right, for which the measurement of damages cannot be controlled by earnings from prior employment[2] but " 'is left to the en-

[17]State v. Bell, 160 Fla. 874, 37 So.2d 95 (1948); *Ex parte* Cantrell, 159 Fla. 426, 31 So.2d 540 (1947); Mowery v. Mayo, 159 Fla. 185, 31 So.2d 249 (1947); Joyner v. State, *supra* note 16.

[1]*E.g.*, Davis v. Renton, 113 Cal. App. 561, 298 Pac. 834 (1931); Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892); Consolidated Coach Corp. v. Wright, 231 Ky. 731, 22 S.W.2d 108 (1929); Matloff v. Chelsea, 308 Mass. 134, 31 N.E.2d 518 (1941); Wolfe v. Kansas City, 334 Mo. 796, 68 S.W.2d 821 (1934); Bliss v. Beck, 80 Neb. 290, 114 N.W. 162 (1907).

[2]*E.g.*, Davis v. Renton, *supra* note 1; Gotsch v. Market St. Ry., 89 Cal. App.

lightened consciences of an impartial jury.' "[3] Evidence of past earnings, if any, however, is admissible to afford some basis for an estimate of damages.[4]

A distinction must necessarily be drawn between loss of time and earnings and impairment of earning capacity.[5] The former is concerned with actual monetary losses resulting from not working and is an item of special damage which requires evidence tending to show what the probable future loss of earnings would be.[6] The latter, being an injury to a personal right and one which necessarily results from a substantial personal injury,[7] requires evidence as to the nature of the injury and its probable duration, and some showing of a previous capability to earn.[8]

There is authority contrary to the instant case.[9] These cases generally say that such damages are too speculative for a jury to determine,[10] or they do not make a distinction between loss of earnings

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477, 265 Pac. 268 (1928); *cf.* Mississippi Power & Light Co. v. McCormick, 175 Miss. 337, 166 So. 534 (1936); Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932); El Paso Elec. Ry. v. Murphy, 49 Tex. Civ. App. 586, 109 S.W. 489 (1908); *see* Texas & Pacific Ry. v. Humble, 181 U.S. 57, 67 (1901).

[3]Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 508, 16 S.E. 49, 52 (1892); *cf.* Guffey Petroleum Co. v. Dinwiddie, 182 S.W. 444 (Tex. Civ. App. 1915).

[4]Birmingham Elec. Co. v. Cochran, 242 Ala. 673, 8 So.2d 171 (1942); Birmingham Fuel Co. v. Taylor, 202 Ala. 674, 81 So. 630 (1919); Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604 (1936).

[5]Clawson v. Walgreen Drug Co., 108 Utah 577, 162 P.2d 759 (1945); *see* Knittel v. Schmidt, 16 Tex. Civ. App. 7, 40 S.W. 507, 509 (1897).

[6]*Accord,* Ganz v. Metropolitan St. Ry., 220 S.W. 490, 495 (Mo. 1920); Shaw v. Pacific Supply Co-Op., 166 Ore. 508, 113 P.2d 627 (1941); *cf.* Smith v. Whittlesey, 79 Conn. 189, 63 Atl. 1085 (1906); Bliss v. Beck, 80 Neb. 290, 114 N.W. 162 (1907); Turner v. Great Northern Ry., 15 Wash. 213, 46 Pac. 243 (1896); *see* Wolfe v. Kansas City, 334 Mo. 796, 803, 68 S.W.2d 821, 825 (1933).

[7]*Accord,* Birmingham Elec. Co. v. Cleveland, 216 Ala. 400, 113 So. 403 (1927); Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604 (1936); Shaw v. Pacific Supply Co-Op., 166 Ore. 508, 113 P.2d 627 (1941).

[8]Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892); Louisville v. Tompkins, 122 S.W. 174 (Ky. 1909); Bliss v. Beck, 80 Neb. 290, 114 N.W. 162 (1907); El Paso & N.E. R.R. v. Sawyer, 56 Tex. Civ. App. 195, 119 S.W. 107 (1908); 4 SUTHERLAND, DAMAGES §1248 (3rd ed. 1904).

[9]*E.g.,* Amsdill v. Detroit Motorbus Co., 233 Mich. 150, 206 N.W. 494 (1925); Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S.W. 583 (1908); Zimmerman v. Weinroth, 272 Pa. 537, 116 Atl. 510 (1922); Johnston v. N.Y. & L.B. R.R., 65 N.J.L. 421, 47 Atl. 586 (Sup. Ct. 1900); Lee v. Standard Oil Co., 105 W. Va. 579, 144 S.E. 292 (1928).

[10]*E.g.,* Davidson v. St. Louis Transit Co., *supra* note 9; Johnston v. N.Y. & L.B.

and impairment of earning capacity.[11] The argument that such damages are too speculative is not sound when other elements of damages for personal injury are considered.[12] Such items as mental anguish, pain and suffering, and mutilation afford a jury no concrete basis upon which to return a verdict; yet these are firmly established as elements of personal injury damages.[13] The courts in these jurisdictions, though usually recognizing an exception to the rule requiring proof of damages when a minor child who is too young to have an earning capacity[14] is involved, fail to appreciate that a housewife is in an analogous situation.

One jurisdiction reached the same result as that reached in the instant case by saying that impairment of earning capacity is a part of pain and suffering; there is pain and suffering from the knowledge that one's ability to earn a living has been decreased.[15] This approach is somewhat illogical. If there is mental pain it should come within the element of mental anguish as a basis for recovery. The physical inability to work is a personal injury in itself, apart from the mental anxiety that might accompany such injury.[16]

Recovery in the instant case was based on an injury to a personal right. Our Court has recognized that even though a married woman generally is not the providing spouse a disaster may strike, leaving her the breadwinner. This is predicated upon a logical application of the law to a vital social problem and is in accord with the better-reasoned decisions of other jurisdictions.[17]

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R.R., *supra* note 9; Zimmerman v. Weinroth, *supra* note 9.

[11]*E.g.*, Wolfe v. Kansas City, 334 Mo. 796, 68 S.W. 821, 823 (1933) (discusses the distinction); Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S.W. 538 (1908); Lee v. Standard Oil Co., 105 W.Va. 579, 144 S.E. 292 (1928).

[12]*Cf.* Birmingham Ry. v. Coleman, 181 Ala. 478, 61 So. 890 (1913) (pain and suffering); Atlantic C.L. R.R. v. Tomlinson, 21 Ga. App. 704, 94 S.E. 909 (1918) (pain and suffering); Hargis v. Knoxville Power Co., 175 N.C. 31, 94 S.E. 702 (1917) (mental suffering); *accord*, Birmingham Elec. Co. v. Cleveland, 216 Ala. 455, 113 So. 403 (1927).

[13]See note 12 *supra*.

[14]Wolczek v. Public Serv. Co., 342 Ill. 482, 174 N.E. 577 (1931); Zimmerman v. Weinroth, 272 Pa. 573, 116 Atl. 510 (1922).

[15]Powell v. Augusta & S.R.R., 77 Ga. 192, 3 S.E. 757 (1887).

[16]Houston Elec. Co. v. Seegar, 54 Tex. Civ. App. 255, 117 S.W. 900 (1909).

[17]*E.g.*, Davis v. Renton, 113 Cal. App. 561, 298 Pac. 834 (1931); Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943); Wolfe v. Kansas City, 334 Mo. 796, 68 S.W.2d 821 (1934).