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Recent Cases

TORTS—LIABILITY FOR SUBSEQUENT INJURY PROXIMATELY CAUSED BY PRIOR WRONGFUL ACT

*Bowyer v. TE-CO., Inc.*¹

The plaintiff, a business invitee at the defendant's establishment, fell as a result of the defendant's negligence in maintaining the entrance to his building. This fall broke the plaintiff's right ankle, leaving it in a painful and weakened condition for a period of eleven months, at the end of which time plaintiff broke his left ankle due to the right ankle's inability to support him while stepping from the ground to a porch attached to the front of his granary. The doctor treating the plaintiff testified that the plaintiff was adhering to prescribed treatment in attempting to use his left ankle to support him. The defendant appealed from a judgment awarding the plaintiff damages based in part on the second injury, which obviously was to a different part of the body than was the first injury. On appeal, *held*, affirmed on the condition that the plaintiff file a remittitur.

Missouri decisions have recognized the liability of the original tort-feasor in cases where the second accident increases the injury of the originally injured member during the period of recuperation. The only restrictions upon imposition of liability in such a case seem to be that the second accident must not be the result of the negligence of the injured party or of a third person.²

Prior to the instant case, Missouri decisions would allow evidence of a second injury to a different part of the body, which was attributable to a prior injury, only for the purpose of showing the extent of the first injury.³ The thought seemed to be that to allow recovery for the subsequent injury to a different part of the body would in effect make the defendant an insurer of the plaintiff until he saw fit to bring an action on the original injury.⁴ The legal reason was that the subsequent injury was the product of a new and independent cause, and was, therefore, not proximately caused by the original injury.⁵

1. 310 S.W.2d 892 (Mo. 1958).

2. *Conner v. City of Nevada*, 188 Mo. 148, 86 S.W. 256 (1905); *Papic v. Freund*, 181 S.W. 1161 (St. L. Ct. App. 1916); see *Annots.*, 20 A.L.R. 524 (1922), 9 A.L.R. 255 (1920).

3. *Croak v. Croak*, 33 S.W.2d 998 (St. L. Ct. App. 1931); *Powers v. Kansas City*, 224 Mo. App. 70, 18 S.W.2d 545 (K.C. Ct. App. 1929); *Papic v. Freund*, *supra* note 2.

4. *Powers v. Kansas City*, *supra* note 3; *Annot.*, 76 A.L.R. 1285 (1932).

5. *McCleary*, *The Restatement of the Law of Torts and the Missouri Annotations*, 2 Mo. L. REV. 28 (1937).

This view imposed an intolerable burden on the innocent plaintiff in the earlier cases. He was left in a situation where, oftentimes, while attempting to carry on a normal life under the circumstances, he would, without fault himself, or without negligence on the part of third persons, suffer injuries due to his previously weakened condition. Rather than making the original tort-feasor the insurer, the prior rule made the injured person a victim of circumstances over which he had no control and left him without any possibility of being compensated for his actual disability.

In an earlier negligence case⁶ the plaintiff recovered for a subsequent injury, the court expressly overruling all basis for the earlier doctrine. This case, however, was not as clear a departure as first appears, since the injury, though different from the first, was confined to the same member of the body. However, in accepting the final or subsequent injury as ". . . the culmination of a series of injuries, beginning with the original, each in sequence thereafter being the result of the one immediately preceding," the court indicated a willingness to accept a broader view of liability in future cases.⁷

The principal case allows recovery for the second injury where the evidence supports a finding that the second injury was the natural and proximate consequence of the defendant's negligent act causing the prior injury, notwithstanding the fact it is to a different member of the body. It follows a decision in a workmen's compensation case and is based upon a theory of liability now accepted by the Restatement of Torts.⁸ Damages resulting from intervening causes will not be recoverable;⁹ nor will damages be recoverable when the subsequent injury is caused by the plaintiff's or third persons' negligence.¹⁰

The decision in the *Bowyer* case seems logical and applies causation principles as found in similar cases decided during the past fifty years; but it broadens their scope by applying them to a situation heretofore thought outside the limits of liability.¹¹

JACK O. EDWARDS

CRIMINAL LAW—INSTRUCTIONS ON THE DEFENSE OF INSANITY

*State v. Swinburne*¹

The defendant was tried and convicted of statutory rape. His sole defense to the charge was based on insanity. The trial court instructed the jury that they

6. *Creech v. Riss & Co.*, 285 S.W.2d 544 (Mo. 1955).

7. *Id.* at 561.

8. *Manley v. American Packing Co.*, 253 S.W.2d 165 (Mo. 1952); RESTATEMENT, TORTS § 460 (1934): "If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's bodily efficiency not been impaired."

9. *Adams v. Smith*, 360 Mo. 1082, 232 S.W.2d 482 (1950).

10. *Connor v. City of Nevada*, *supra* note 2.

11. *Creech v. Riss & Co.*, *supra* note 6.

1. 324 S.W.2d 746 (Mo. 1959) (en banc).

should acquit the defendant if they were "reasonably satisfied by the greater weight or preponderance of evidence" that the defendant was insane. The defendant objected to this instruction, alleging that to instruct that the jury must be reasonably satisfied by the preponderance of the evidence that the defendant was insane places upon the defendant a burden of proof greater than that required by law. On appeal, *held*, reversed and remanded. The court agreed with the defendant, asserting that the instruction was so worded that it required the defendant to prove insanity beyond a reasonable doubt rather than by a preponderance of evidence, since one could be swayed by the preponderance of the evidence and yet not be reasonably satisfied.

Missouri and the majority of states require the defendant to prove the affirmative defense of insanity by the preponderance of the evidence.² However, in the principal case the trial judge in addition to the use of the words "reasonably satisfied" and "reasonable satisfaction" in the third paragraph of the challenged instruction also inserted in the first paragraph of that instruction the conjunction "and" between the phrase setting forth the State's burden of proving guilt beyond a reasonable doubt and the hypothesis submitted with respect to defendant's mental state.³ With this insertion the instruction, when read literally, required the defendant to prove insanity beyond a reasonable doubt. Except for this addition, the first paragraph is identical with the instruction approved in the second appeal of *State v. Barton*.⁴ The result of this insertion was to create a situation in which the jury could be confused as to what standard should be used in determining the defendant's sanity.

2. See *State v. Cockriel*, 314 Mo. 699, 285 S.W. 440 (1926). The court stated the law to be that the burden of sustaining the defense of insanity rested on the defendant and that it was an issue of fact for the jury under proper instructions. *Accord*, *State v. Johnson*, 211 Iowa 874, 234 N.W. 263 (1931); *Scott v. Commonwealth*, 250 Ky. 70, 61 S.W.2d 1078 (1933); *State v. Walker*, 193 N.C. 489, 137 S.E. 429 (1927); *Glover v. State*, 125 Tex. Crim. 605, 69 S.W.2d 136 (1934); *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452 (1936). It is held by some courts, however, that the prosecution has the burden of proving sanity of the accused at the time of the offense as one of its essential elements. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934); *State v. Joseph*, 96 Conn. 637, 115 Atl. 85 (1921); *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925); *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936).

3. "The court instructs the jury that if you find and believe from the evidence that the defendant, Carl George Swinburne, at the time of the commission of the act charged in the information, if you should find and believe beyond a reasonable doubt from the evidence herein that he did commit such act, *and* was so perverted, deranged, defective or deficient, in one or more of his mental and moral faculties as to cause him to be incapable at the time of understanding that such act was wrong and in violation of the law, you should acquit him upon the ground of insanity . . ." *State v. Swinburne*, *supra* note 1, at 748. (Emphasis added.)

4. 363 Mo. 991, 995, 255 S.W.2d 752, 754 (1953) (en banc). "The Court instructs the jury that if you find and believe from the evidence that the defendant at the time of the commission of the act charged in the information, if you should find and believe beyond a reasonable doubt from the evidence herein that he did commit such act, was so perverted, deranged, defective . . . you should acquit him . . ."

It is difficult, as evidenced by the principal case, to set out separate and distinct burdens of proof in the same paragraph without creating the possibility of confusion. Perhaps a solution to this problem would be to segregate the two burdens of proof in separate paragraphs, the first paragraph setting forth the burden of the state, and the second setting forth the burden of the defense as to insanity.

A search of the cases reveals that other jurisdictions are about equally divided on the question of the propriety of using the words "reasonably satisfied" and "reasonable satisfaction," some stating that they place upon the defendant a greater burden than created by law,⁵ and others considering them as merely being synonymous with the words "by the preponderance of the evidence."⁶ The court's action in the principal case in condemning the use of the words "reasonably satisfied" in the third paragraph of the State's instruction on insanity⁷ seems to be in line with the trend in other jurisdictions.

Early Missouri cases⁸ did allow the use of "reasonably satisfied" and "reasonable satisfaction" standing alone or accompanied by "preponderance of the evidence." The use of these words seems to have been disapproved first in the case of *State v. Barton*.⁹ In that case the words "reasonably satisfied" were not accompanied by the term "preponderance of the evidence" and the court held that the words placed a greater burden upon the defendant than that required by law.¹⁰ However, it was not clear from the opinion whether the court condemned those words only when standing alone or also when accompanied by the phrase "preponderance of the evidence." The court in the principal case resolved all doubts in this area when it condemned all use of "reasonably satisfied" and "reasonable satisfaction" when applied to the affirmative defense of insanity.

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5. *Grammer v. State*, 239 Ala. 633, 196 So. 268 (1940); *Herring v. State*, 141 Tex. Crim. 281, 148 S.W.2d 416 (1941).

6. *Walker v. State*, 208 Ga. 99, 65 S.E.2d 403 (1951); *Commonwealth v. Winter*, 289 Pa. 284, 137 Atl. 261 (1927).

7. "From all this it follows that although you may believe and find that the defendant did commit the act charged against him, yet if you are *reasonably satisfied* by the greater weight or preponderance of the evidence you further find that at the time he did it he was in such an insane, deranged, defective or deficient condition of mind that he did not know he was doing wrong, and did not comprehend the nature and character of the act, then such act was not, in law or in fact, malicious . . ." *State v. Swinburne*, *supra* note 1, at 748. (Emphasis added.)

8. *State v. Scott*, 359 Mo. 631, 223 S.W.2d 453 (1949) (en banc); *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425 (1947); *State v. Douglas*, 312 Mo. 373, 278 S.W. 1016 (1926); *State v. Porter*, 213 Mo. 43, 111 S.W. 529 (1908). In the last cited case, "reasonable satisfaction" stood alone when the court instructed the jury that, "this defense, when established, is one the law recognizes; and should insanity be proved by the evidence in this case to the *reasonable satisfaction* of the jury, it will be their duty to acquit the defendant altogether." 213 Mo. at 55. (Emphasis added.)

9. 236 S.W.2d 596 (Mo. 1951) (en banc).

10. See also *State v. Eaves*, 362 Mo. 670, 243 S.W.2d 129 (1951).

