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Damages—Attorney's Fees

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DAMAGES

Attorney's Fees. In *Wells v. Aetna Insurance Co.*[1] the Washington court indicated an increasing friendliness toward the allowance of attorney's fees as damages. The plaintiff, Wells, had purchased a car from a used car dealer. The dealer had earlier made what the court called a "fictitious" sale to someone else, and had then assigned the conditional sales contract to a financing company, Hayden Mills & Associates, Inc. Apparently there was a record of this sale at the state license department, but no valid release was on file there. So when Wells applied for a new registration and a new title certificate, these were initially granted and later cancelled. Unable to get a license for the car he had purchased, and unable to sell it, Wells brought an action to quiet title, naming as defendants the dealer, the alleged purchaser, the alleged assignee of the conditional sales contract, and Aetna Insurance Co., which was the surety on the bond required of automobile dealers by RCW 46.70.070.[2]

At this point the procedure became somewhat involved. According to the court, Hayden Mills and Associates, Inc., the assignee of the prior conditional sales contract, "cross-complained" against the other defendants, and Aetna "interpleaded" plaintiff Wells and Hayden Mills.

Sometime during trial plaintiff amended his complaint to ask for $800 attorney's fees. These were allowed, and Aetna appealed from that portion of the judgment only.

The court held that Aetna, the surety, was liable to plaintiff for the $800:

> Plaintiffs were required to defend their right to the automobile against the claim asserted in the cross-complaint of Hayden Mills & Associates, Inc., as well as in the interpleader action of defendant. For this, they are entitled to reasonable attorney's fees. The fees are a loss occasioned be the action of the wrongdoer.[3]

The court did not stop there, however, but added:

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[1] 160 Wash. Dec. 884, 376 P.2d 644 (1962).

[2] "Before issuing a dealer license, the director shall require the applicant to file with said director a surety bond in the amount of ten thousand dollars for automobile dealers and two thousand dollars for miscellaneous dealers running to the state. Such bond shall be approved by the attorney general as to form and conditioned that the dealer shall conduct his business in conformity with the provisions of this chapter. Any retail purchaser who shall have suffered any loss or damage by reason of breach of warranty or by any act by a dealer which constitutes a violation of this chapter shall have the right to institute an action for recovery against such dealer and the surety upon such bond. . . ."

[3] 160 Wash. Dec. at 887, 376 P.2d at 645.

> We believe it apparent from the history of RCW 46.70.070 . . . that the surety on the bond of a "double-dealing" motor vehicle dealer is liable for the loss resulting from the perfidy of the principal . . . .[4]

There are, therefore, two independent grounds for the decision, either one of which would have been adequate. The first ground is the well-recognized rule that one who wrongfully involves another in litigation with a third party must pay the attorney's fees incurred in that litigation. The second ground is that the language of the statute requiring the surety to respond for "any loss or damage" authorizes the assessment of attorney's fees incurred in the instant action against the surety.

It is conceivable the the third-party litigation rule would justify the result in this case, but not by the reasoning which the court uses. The court states the rule in this fashion:

> [W]hen the natural and proximate consequences of a wrongful act by the defendant involve the plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the resonable expenses incurred in the litigation, including compensation for attorney's fees.[5]

According to the cases and other authorities, the wrongful act of the defendant which forces the plaintiff into litigation with others can be a tort,[6] or a breach of contract,[7] or the breach of a fiduciary duty like that which an agent owes to his prinicpal.[8] One so involved in litigation would normally be a defendant, but one who is forced to initiate litigation may still recover from the wrongdoer the attorney's fees incurred in that action.[9] The attorney's fees recoverable are not limited to fees for trial only, but include the costs of investigation and preparation, even where there is an eventual settlement.[10]

There are some limitations upon the application of the rule. The litigation with the third party must have been entered into or defended in good faith.[11] The act of the defendant which involved the plaintiff

[4] *Id.* at 887, 376 P.2d at 646.
[5] *Id.* at 887, 376 P.2d at 645.
[6] Seaboard Surety Co. v. Permacrete Constr. Corp., 221 F.2d 366 (3rd Cir. 1955); Turner v. Zip Motors Inc., 245 Iowa 1091, 65 N.W.2d 427 (1954); Prior Lake State Bank v. Groth, 259 Minn. 495, 108 N.W.2d 619 (1961); RESTATEMENT, TORTS § 914 (1939).
[7] Freed v. The Travelers, 300 F.2d 395 (7th Cir. 1962); Longview School Dist. No. 112 v. Stubbs Electric Co., 160 Wash. 465, 295 Pac. 186 (1931); Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 Pac. 591 (1921); Curtley v. Security Savings Society, 46 Wash. 50, 89 Pac. 180 (1907); RESTATEMENT, CONTRACTS § 334 (1932); 5 CORBIN, CONTRACTS § 1037 (1951).
[8] Tarnowski v. Resop, 236 Minn. 33, 51 N.W.2d 801 (1952).
[9] Bergquist v. Kreidler, 158 Minn. 127, 196 N.W. 964 (1924); Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960).
[10] Seaboard Surety Co. v. Permacrete Constr. Corp., 221 F.2d 366 (3rd Cir. 1955).
[11] Indiana Nat'l Life Insurance Co. v. Butler, 186 Ky. 81, 215 S.W. 949 (1919).

in litigation must have been a legal wrong to the plaintiff; an innocent act is not sufficient.[12] Finally, there must have been a causal connection between the defendant's wrong to the plaintiff and the litigation in which the plaintiff became involved. In a Washington case the defendant had sold to the plaintiff logs which later turned out to be subject to liens. Both plaintiff and defendant were involved in the suit to foreclose the liens. Plaintiff was not allowed to recover fees from defendant because defendant was adequately defending the title to the logs. Plaintiff's only reason for being a party was to cross-claim against defendant, so his attorney's fees were not caused by defendant's wrong.[13]

In explaining why it applied the third-party litigation rule in the *Wells* case, the Washington court emphasized that the plaintiff was forced to defend against a cross-claim made by one defendant against another defendant, and was required to interplead. Clearly, the rule as described above would not apply to either of these situations, since a plaintiff is not even involved in a cross-claim between one defendant and another defendant; and one required to interplead, if that is indeed what happened, is not forced into litigation by the wrongful act of the defendant.

The third-party litigation rule might apply on the facts of this case: A wrongful act of the defendant, namely, breach of an implied warranty of title as to plaintiff, involved plaintiff in litigation with others because he was forced to bring the action to quiet title against the purported vendee in the earlier "sale" and against the purported assignee of the earlier conditional sales contract. For the plaintiff to prevail, however, it would be necessary to establish that there has been a breach of warranty of title where a purchaser of an automobile has had difficulty in procuring certificates of registration and title from the department of licenses, even though a court finally decided that the purchaser did have title. Presumably, this proposition could be established,[14] but no such argument was attempted in the *Wells* case.

Perhaps realizing that it was somewhat questionable whether the third-party litigation rule would apply here, the court implied that the language of the statute requiring a bond for motor vehicle dealers[15]

[12] Dwarsky v. Vermes Credit Jewelry, 244 Minn. 62, 69 N.W.2d 118 (1955).
[13] Atkinson v. McCarthy, 142 Wash. 1, 251 Pac. 861 (1927).
[14] In White v. Mid-City Motor Co., 39 Tenn. App. 429, 284 S.W.2d 689 (1955) a car buyer was allowed to rescind because the dealer had breached the warranty of title in not delivering a title certificate at the time of the sale.
[15] For text of statute see note 2 *supra*.

authorizes assessment of attorney's fees, at least against the surety. Should the court choose to follow this line of reasoning in the future, it would bring about a significant change in the law.

It is well settled in Washington, as in the rest of the United States, that the successful litigant cannot generally recover for the actual attorney's fees which he has incurred, except to the extent that they are allowed by the statute on costs.[16] From previous Washington cases it also appears that the court has been unwilling to read into a statute allowing "damages" to the successful party the intent to allow actual attorney's fees, where that intent is not expressly stated. In *Percy v. Miller*[17] an administrator brought an action under what is now RCW 11.48.060. This provides that a person who embezzles or alienates property of a decedent before letters of administration are granted, "shall stand chargeable, and be liable to the executor or administrator of the estate, in the value of the property so embezzled or alienated, together with any damages occasioned thereby." The court held that this statute did not render the defendant liable to the administrator for attorney's fees incurred in the action to recover alienated funds. The language of the court specifically denies that the statute might authorize attorney's fees:

> The statute relating to costs and disbursements in itself provides what may be recovered under these heads in the particular action. This includes a limited attorney's fee, and is all that can be recovered as attorney's fees unless the statute expressly allows an additional recovery.[18]

This view has been affirmed in actions under the mandamus statute, RCW 7.16.260, which provides: "If judgment be given for the applicant he may recover the damages which he has sustained. . . ." In *State ex. rel. Macri v. Bremerton*[19] the court held that this statute did not authorize assessment of attorney's fees, saying, "in absence of contract, statute, or recognized ground of equity, a court has no power to award an attorney's fee as part of the costs of litigation."[20]

Other courts are divided as to whether a right to "damages" or similar language when given by statute allows assessment of attorney's

[16] Choukas v. Severyns, 3 Wn.2d 71, 103 P.2d 1106 (1940); Johnston v. Karkala, 172 Wash. 122, 19 P.2d 948 (1933); McCormick, Damages §§ 60, 61 (1935). There are of course other exceptions such as contract between the parties, or allowance out of a common fund, but these are outside the scope of this note.

[17] 115 Wash. 440, 197 Pac. 638 (1921).

[18] *Id.* at 447, 197 Pac. at 641.

[19] 8 Wn.2d 93, 111 P.2d 612 (1941).

[20] *Id.* at 113, 111 P.2d at 621. *Accord,* State *ex rel.* Pacific Bridge Co. v. Wash-

fees. Kansas,[21] Montana,[22] and Utah[23] interpret their mandamus statutes, which are quite similar to that in Washington, as allowing attorney's fees incurred in bringing the action. South Dakota[24] on the other hand, agrees with Washington as to the mandamus statute, the court of that state saying:

> We feel that if it had been the desire of the legislature to provide for attorney fees in this statute, that in addition to using the word damages, it undoubtedly would have used the term attorney fees.[25]

Some states have a mortgage satisfaction statute which provides that a mortgagee who refuses to enter satisfaction of a mortgage is liable to the mortgagor for "damages." Both Idaho[26] and Utah[27] have construed this statute as allowing attorney's fees. However, Arizona, under a statute allowing a suit against state officers for wrongful application of state funds, and allowing a successful plaintiff "all damages," has held that the statute does not authorize attorney's fees.[28]

If the *Wells* case indicates that the Washington court henceforth is going to read statutes allowing "damages" liberally, as allowing attorney's fees, the question arises how far the court will go. It might, of course, allow attorney's fees as damages in every civil action, whether brought under statute or not. If a litigant is given attorney's fees where the statute allows him "damages," why should he not be allowed attorney's fees when the common law allows him damages?[29]

The most limited view would be to restrict the allowance of attorney's fees to actions arising under statutes which have language identical to that employed in RCW 46.70.070, which uses the words, "any loss or damage." There are two other such statutes in Washington.[30] Such a limitation would be unfortunate, and would be unreasonable for two reasons. First, the variety of language used in other

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ington Toll Bridge Authority, 8 Wn.2d 337, 112 P.2d 135 (1941); State *ex rel.* Maltbie v. Will, 54 Wash. 453, 104 Pac. 797 (1909).

[21] Nolte v. Kansas City Long-Distance Tel. Co., 86 Kan. 770, 121 Pac. 1111 (1912).

[22] State *ex rel.* O'Sullivan v. District Court, 127 Mont. 32, 256 P.2d 1076 (1953).

[23] Colorado Development Co. v. Creer, 96 Utah 1, 80 P.2d 914 (1938).

[24] Calmenson Clothing Co. v. Kruger, 66 S.D. 224, 281 N.W. 203 (1938).

[25] *Id.* at 206.

[26] Cornelison v. United States Bldg. & Loan Ass'n, 50 Idaho 1, 292 Pac. 243 (1930).

[27] Swaner v. Union Mortgage Co., 99 Utah 298, 105 P.2d 342 (1940).

[28] U.S. Fidelity & Guaranty Co. v. Frohmiller, 71 Ariz. 377, 227 P.2d 1007 (1951).

[29] This is not an altogether frivolous suggestion, since respected writers have been sniping at the injustice and undesirable consequences of the present system for some time. See, for example, MCCORMICK, DAMAGES § 71 (1935); Ehrenzweig, *Shall Counsel Fees be Allowed?* 26 J. STATE BAR OF CAL. 107 (1951); Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy* 34 N.Y. ST. BAR J. 477 (1962); Note, 15 U. CINC. L. REV. 313 (1941); and sources therein cited.

Washington statutes which give a right to recover against an individual, or a surety, indicates that the choice of words in the instant statute was purely fortuitous.[31] Nothing should turn on the fact that the statute here in question uses the words "any loss" as an alternative to "damage." Second, even if the legislature did intentionally use the word "loss" disjunctively with "damage," it was merely being redundant, as is the court when it uses the familiar words, "clear, cogent and convincing." That damages and loss mean the same was early recognized by the Washington court. Three opinions, all written by Justice Gose, state substantially the same thing: " 'Damages,' in law, means an adequate compensation for the loss suffered or the injury sustained."[32] The Pennsylvania court has also recognized the identity of meaning in the two words, saying, "These words, 'damage,' 'loss,' 'injury' are used interchangeably, not simply in this particular statute, but generally."[33] The language of the statute ought not, therefore, to be used as the basis for limiting the operation of the rule that attorney's fees are authorized where a statute gives a right to damages.

What, then, will be the limitation? The obvious and most workable one would be to allow attorney's fees in any instance in which a statute gives a right to "damages," regardless of qualifying words. Since there are a number of such statutes in Washington,[34] this would be a major step toward eliminating what many think are inequalities in the present system. The *Wells* case provides the Washington court with a precedent which it can use to expand greatly the range of cases in which the prevailing litigant may be allowed his actual attorney's fees. Whether it will be so used must depend ultimately upon a policy decision by the court that such a rule would be desirable.

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[30] RCW 14.20.070 (aircraft dealers' licenses); RCW 46.80.070 (motor vehicle wreckers).

[31] RCW 5.56.060 (compelling attendance of witnesses) ("all damages occasioned"); RCW 7.16.260 (mandamus) and 7.16.320 (prohibition) ("damages which he has sustained"); RCW 11.48.060 (interfering with property of a decedent) ("any damage occasioned thereby"); RCW 16.65.250 (livestock market licensee) ("damages caused by failure to comply"); RCW 17.21.160-.180 (pesticide applicators) ("legal damages"); RCW 18.12.110 (auctioneers of jewelry and appliances) ("all damages"); RCW 19.28.120 (electric installers) ("all damages that may be sustained"); RCW 19.86.090 (consumer protection) ("actual damages sustained"); RCW 19.90.090 (unfair practices) ("actual damages, if any, sustained"); RCW 20.01.210-.230 (commission merchants) ("damages caused by such fraud"); RCW 22.08.170-.180 (grain and terminal warehouses) ("all damages suffered thereby").

[32] North Coast Ry. Co. v. Kraft Co., 63 Wash. 250, 262, 115 Pac. 97, 102 (1911). *Accord*, Myhra v. Chicago, Milwaukee and Puget Sound Ry. Co., 62 Wash. 1, 112 Pac. 939 (1911). Jones v. Nelson, 61 Wash. 167, 112 Pac. 88 (1910).

[33] *In re* City of Pittsburgh, 243 Pa. 392, 90 Atl. 329, 331 (1914).

[34] See notes 30 and 31 *supra* for a list of these statutes.