

Merely a Scratch?

A Bathtub Accident and Its Aftermath

BY FRANK GIBBARD

Idaho Springs began life as a mining town, and visitors there can still tour the historic Argo Mill and Tunnel. But from its early days, Idaho Springs also featured public mineral baths. An accident at one of those bathing establishments in the early 1900s led to a pair of celebrated tort and libel cases that reached the Colorado Court of Appeals.

The Tort Case

Sarah A. Stock worked as a cook in her husband's Idaho Springs restaurant.¹ On November 28, 1903, she entered an Idaho Springs public bathhouse. She paid 25 cents, and a boy showed her to a tub. She disrobed and began bathing. During her bath, she allegedly scratched or cut her right shin on a rough-edged piece of copper that protruded from the lining of the tub.

The tear in the tub was covered with dirt and verdigris.² Within 24 hours, Stock's leg began to swell. She claimed that she contracted blood poisoning as a result. She said she was confined to her bed for six weeks and became permanently disabled. Her complaint later asserted that her leg had been "practically ruined" and was left "a blackened, distorted, and diseased mass" from the accident.³

After Stock's injury, William Daniels, the bathhouse's owner, transferred his interest in the bathhouse to the Big Five Mining Company. Daniels was Big Five's president and manager. As part of the arrangement, Big Five assumed responsibility for any damages Stock might be awarded for her injuries.

Stock sued Daniels and others for negligence, seeking \$25,000 in damages. She argued the defendants were negligent by allowing the bathtub to be in a dangerous condition with the sharp tear in its copper lining, by allowing that tear to become contaminated with dirt and verdigris, by allowing the tub to "become and remain in a filthy condition, whereby and by reason of which this plaintiff suffered blood poisoning," and in employing attendants who had failed to properly clean the bathtub.⁴

In 1905, a Jefferson County District Court jury awarded Stock \$10,000 for her injuries.⁵ But then, the district court granted the defendants a new trial. This second trial resulted in a hung jury.

The case was tried for the third time in 1909. This trial featured what a newspaper account described as "much conflicting testimony."⁶ Notably, the bathtub was also brought into the courtroom for demonstrative purposes.⁷

The key issue was whether the scratch on Stock's leg had caused her to develop blood poisoning. In addition to Stock's statement, she presented testimony from her husband that blood poisoning had set in after her injury, as well as testimony from her mother attesting that when she saw Stock three months after her accident, both her legs were covered with red sores, with the right leg from the knee down being worse. But the defendants' doctors opined that Stock did not have blood poisoning at all but was instead suffering from eczema.

Dr. George S. Stemen, who treated Stock, also testified, but his testimony was not favorable to her case. Dr. Stemen stated he saw Stock about three months after the incident, and at that time, it was her left leg and not her right that she presented for his examination. He saw no blood poisoning in her left leg, and he never told her that she had a clear case of blood poisoning.⁸

Stock's personal physician, Dr. Finucane, gave similar testimony. He said that when he examined Stock shortly after the incident, it was her left leg rather than her right that she complained about, and there was no evidence of blood poisoning that he could recognize.⁹ Dr. Finucane's testimony caused "considerable merriment" in the courtroom when Stock's attorney asked him whether it was not a fact that all legs look alike, and he responded, "not to me."¹⁰

In the end, after 14 hours of deliberations, a jury awarded Stock \$2,000.¹¹ Given the weakness of her case, speculation arose that the jury had awarded this reduced amount as a compromise verdict. The defendants appealed.

The Libel Case

Meanwhile, following the original \$10,000 verdict, Daniels had made a report to Big Five's shareholders. This report included his remarkably vitriolic statement about what Colorado newspapers would later call "the somewhat famous 'bath tub' damage suit"¹² and "the celebrated 'bath tub' case."¹³

Daniels began by noting Big Five's restraint in the underlying litigation. He claimed the company could have raised concerns about Stock's character but declined to do so "further than seemed to be absolutely necessary."¹⁴ He

attributed this restraint to, among other things, sympathy for Stock “on account of her claim that she was abused and maltreated by her husband.”¹⁵ But Daniels assured his readers that “[n]o such care for a blackmailer will be observed on a new trial, if the case should ever come to trial again.”¹⁶

Daniels next stated that although Big Five’s indemnity policy likely did not cover Stock’s claim, he believed the policy would afford ample protection from the claim because the insurance company that issued it would seek to vigorously defend Big Five’s interests by prosecuting and punishing Stock for making a “false and fraudulent claim[.]”¹⁷ In Daniels’s view, “no matter what the final result of Mrs. Stock’s attack upon us may be, we should vigorously prosecute her, and . . . she should be sent to the penitentiary, as I believe she can be, by the evidence in hand.”¹⁸ Such a prosecution would “deter blackmailers from making fraudulent claims.”¹⁹

Daniels also felt “the prosecution should . . . extend to any witnesses against whom there is any evidence of perjury.”²⁰ He noted that Big Five’s attorney agreed with him on that point, but not with his opinions about prosecuting Stock for fraud or blackmail, and that the company’s secretary did not think anything should be done about criminally prosecuting anyone over the affair.

Daniels sent his statement to the company’s attorney and secretary. Several hundred copies of it were then printed in pamphlet form, and it was also printed in the *Daily Mining Record*, a Denver city newspaper with a circulation of about 20,000. Big Five paid for printing the pamphlets and paid advertising rates for publishing the report in the newspaper.

In response to the report, Stock sued Daniels for libel. Beyond a general denial, Daniels asserted defenses that his statements represented privileged communications and that the statements were true. A jury awarded Stock \$3,000 on her libel claim, and the defendants appealed.

The Libel Appeal

The court of appeals decided the libel appeal first.²¹ The court began its decision by complaining about the voluminous appellate record

and briefing. Judge Cunningham chided the parties for presenting him with an abstract of 747 pages, briefs aggregating 212 pages, and 110 assignments of error.²² He observed somewhat sarcastically that “the most important question presented is how the five members constituting this court can be expected to find time to read [the voluminous record] understandingly.”²³ A newspaper article later observed that Judge Cunningham’s comments came at a time when Colorado’s other appellate court, the Colorado Supreme Court, was six years behind on its work.²⁴

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The court quickly dismissed a challenge to the scope of cross-examination. It then turned to a more interesting question about the jury instructions and inconsistent defenses. Daniels had denied publication of the defamatory remarks. But the trial court told the jury that in determining whether publication had been established, it could consider the admission Daniels had made in his answer to Stock’s complaint. There he had admitted that he made the remarks, but argued they were privileged or justified. Daniels challenged this instruction and argued that the statements in his answer, contained in his

defense of privilege and justification, should not have been admitted at trial. He admitted that denying he had made the statements was inconsistent with his defense that the statements he made were privileged or justified, but he argued that Colorado law permitted him to plead inconsistent defenses.

Although Daniels’s counsel cited several cases concerning inconsistent defenses, the court of appeals concluded that both he and the bar generally had “taken these opinions too literally, and carried them beyond the point they were intended to cover.”²⁵ The court concluded that where inconsistent defenses flatly contradict each other, as in this case, the rule is less clear.²⁶ But, in any event, the rule permitting inconsistent defenses does not allow a defendant to “escape entirely the consequences of his own admissions.”²⁷ Here, Daniels could have pleaded justification or privilege without expressly admitting he used the language. Moreover, the trial court only told the jury that the admission in Daniels’s answer was competent evidence that could be considered against him, not that it could find publication solely from the language in the answer. The court concluded that any error in the challenged language of the instruction did not prejudice Daniels.

The court next considered Daniels’s assertion that he had not made his statements about Stock maliciously (i.e., with ill will), because the record showed he “had the best of feeling toward the plaintiff.”²⁸ The court treated this claim with incredulity, wondering whether Daniels made his cutting remarks about Stock in the spirit of St. Paul, who said that “whom the Lord loveth he chasteneth.”²⁹ If this was the language Daniels used when he had the best of feeling toward someone, the court remarked, it would be interesting to know what he would say about someone toward whom he actually had malice or ill will. In fact, a jury could have concluded that Daniels’s purpose was “to terrorize [Stock] and thus discourage her, if possible, from further litigating her claim.”³⁰ The jury also could have found that Daniels was responsible for widely circulating his bitter remarks about Stock.

Finally, the court held that the jury’s award of damages did not show passion or prejudice, and that the trial court’s rulings and instructions

were free from prejudicial error. It therefore affirmed the judgment in favor of Stock.

The Personal Injury Appeal

Stock did not fare as well in the defendants' appeal from the personal injury verdict. The first issue in that case involved testimony favorable to Stock from a witness at a prior trial who had since become unavailable. This witness had testified that she saw Stock in the bathtub after she was wounded, that she "examined the protruding piece of copper on the bathtub, and later saw the swollen and inflamed condition of [Stock's] leg."³¹ The trial court had permitted the witness's testimony from the prior trial to be read to the jury, but then disallowed testimony from two witnesses who would have testified that Stock offered to pay the witness \$300 for her testimony if she won the suit. Both rulings, the court of appeals concluded, were erroneous.

First, the witness whose testimony was read to the jury had not been "unavailable" for purposes of the rule permitting testimony from a prior trial to be read to the jury. The court of appeals concluded that Stock had shown insufficient diligence in attempting to locate the witness. Among other things, the witness had married, changed her name, and moved out of the county, but Stock's attorney had only searched for her by her previous name within Jefferson County. The failure to bring this witness to court was particularly prejudicial, given the defendants' related claim about the offer to pay the witness for her testimony.

As for that claim, the court of appeals noted Stock's objection that the impeaching testimony was incompetent, irrelevant, and immaterial, and that no ground for its use as impeachment evidence had been laid. But the court of appeals concluded that the testimony should have been allowed, given that it was only to be used to impeach the witness, who was absent from trial under circumstances where knowledge of the impeaching testimony had only been developed after her former testimony was given.


The court of appeals rejected several other minor challenges to the trial court's rulings before turning to the significant issue of whether

Stock had proved her theory that her injury in the tub caused the alleged blood poisoning she complained of. The court noted that Stock's leg was only "slightly scratched" and that she did not discover the flaw in the tub until her towel caught on it.³² Stock was the only witness who directly testified that the wound caused her blood poisoning, stating that Dr. Stemen told her that it was a "clear case of blood poisoning."³³ As noted, Dr. Stemen denied making such a statement. The court of appeals described the other witnesses' testimony, including the medical testimony, which did not support Stock's theory or claim that she contracted blood poisoning from the scratch.

Stock's attorney argued that she had used the phrase "blood poisoning" in a common, nontechnical sense. But the court of appeals rejected this argument, concluding that neither

the complaint nor the testimony at trial proved blood poisoning of any kind. Finally, the court noted Stock's statements to her physicians that it was her left leg that was injured in the tub, even though it was now the right leg that she claimed was disabled. For these reasons, the court of appeals reversed and remanded the case, noting that Stock could amend her pleadings if needed.

Aftermath

It is unclear whether there were any further proceedings in the personal injury case or whether another trial was held. The Big Five Mining Company was later rocked by allegations of embezzlement by its corporate secretary. By the time William Daniels died in 1921, leaving no estate, the Big Five Mining Company was bankrupt and heavily in debt. 



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NOTES

1. Stock's accident is described in a newspaper article, "Wan's Damages," *Idaho Springs Siftings* at p.1, col. 5 (Nov. 5, 1904).
2. *Daniels v. Stock (Daniels II)*, 130 P. 1031, 1032 (Colo.App. 1913). Verdigris is a form of rust or oxidation that forms on copper or brass surfaces.
3. *Id.* at 1035 (internal quotation marks omitted).
4. *Id.*
5. "Ten Thousand for Injury in Bath," *Rocky Mountain News* at p.6, col. 1 (Apr. 30, 1905).
6. "Scratch on Lady's Leg Worth \$2,000," *Colo. Transcript* at p.1, col. 4 (May 6, 1909).
7. Or so a newspaper story reported. But the court of appeals' decision suggests it was not the same bathtub. See *Daniels II*, 130 P. at 1034.
8. *Id.* at 1035.
9. *Id.*
10. "Scratch on Lady's Leg," *supra* note 6.
11. "Woman Recovers \$2,000 for Injured Leg," *Wkly. Courier (Fort Collins)* at p.1, col. 2 (May 5, 1909).
12. "'Bath Tub' Suit Is on Again," *Colo. Transcript* at p.1, col. 5 (Apr. 29, 1909).
13. "Bathtub Case Reversed," *Rocky Mountain News* at p.4, col. 2 (Mar. 11, 1913).
14. *Daniels v. Stock (Daniels I)*, 126 P. 281, 282 (Colo.App. 1912).
15. *Id.*

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 281.
22. *Id.* at 282.
23. *Id.*
24. "Appeals Judge Flays Lawyers for Long, Wordy Briefs," *Denver Daily News* at p.5, col. 3 (Apr. 9, 1912).
25. *Daniels I*, 126 P. at 283.
26. Judge Cunningham noted at the end of his decision that although his fellow judges concurred in his conclusion, they were "of opinion that a determination of the question pertaining to the right of a defendant to plead inconsistent defenses is not necessary to a decision in this case, and therefore express no opinion as to the correctness of the writer's views herein announced on that subject." *Id.* at 286.
27. *Id.* at 285.
28. *Id.* at 286 (internal quotation marks omitted).
29. *Id.*
30. *Id.*
31. *Daniels II*, 130 P. at 1033.
32. *Id.* at 1034.
33. *Id.* at 1035.