DWYER v. CHICAGO, ST. P., M. & O. RY. CO.

(51 N. W. 244, 84 Iowa, 479.)

Supreme Court of Iowa. Feb. 1, 1892.

Appeal from district court, Plymouth county; Scott M. Ladd, Judge.

Action for personal injury. Judgment for plaintiff and the defendant appealed.

J. H. & C. M. Swan, for appellant. Joy, Hudson, Call & Joy, for appellee.

GRANGER, J. 1. The plaintiff is the administrator of the estate of Ann Dwyer, deceased, who was on the 9th day of July, 1889, struck by defendant's cars, as a result of which she died about 30 days thereafter. The petition specifies the injuries sustained, and adds: "All of which caused her great pain and suffering for a period of about thirty days, when she died from such injuries." A motion to strike out the words as to pain and suffering was overruled, and the court instructed the jury that, if it found for the plaintiff, to allow a "reasonable compensation for pain and suffering." The jury returned a general verdict for the plaintiff for $3,000, and specially found that $2,300 of the amount was for "pain and suffering," and $700 "as damages to the estate." An assignment brings in question the correctness of the court's action in permitting the jury to consider pain and suffering as an element of damage. The action was commenced after the death of plaintiff's intestate. If the action had been commenced in her life-time, it is unquestioned that pain and suffering caused by the injury would have been a proper element of damage; and this would be true if, after the commencement of the action, she had died, and her administrator had been substituted as party plaintiff, and prosecuted the suit to judgment. Muldowney v. Railway Co., 36 Iowa, 462. We come, then, to the important inquiry if such damages are permissible in such a case, where the action is commenced by the administrator. The only authority for maintaining such an action by the legal representative is by virtue of the statute. At the common law, the cause of action abated with the death of the injured party. The law authorizing the action is found in Code, § 2525. "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." We are cited to no case, in this or any other state, where the rule contended for by the appellee, and allowed by the district court, has been sustained. It is claimed, however, that the reason for this, as to other states, is because of the peculiarity of the statutes under which such actions are permitted to survive. In several cases this court has expressed its view as to the measure of damages in such cases, and in such a way that the appellant regards the law on this point as settled in its favor, while the appellee regards the language thus relied upon as merely incidental to other points determined, and in no way decisive of the question now before us. It is true that the precise question now before us was not involved for determination in any of the Iowa cases cited, and the language relied upon by the appellant has been used incidentally in the discussion of other questions; but it is not to be understood, because of this, that such language is without value in our deliberations on this question; for much of the language so used is in regard to questions so allied to this in its legal significance as to make them determinable upon quite similar considerations. For instance, the rule as to the measure of damage in cases of this kind has been considered, and, with the point before us in view, a rule excluding such damage has been adopted.

In Rose v. Railway Co., 39 Iowa, 246, it is said: "The action is brought by the administrator for the injury to the estate of the deceased sustained in his death. There is therefore no basis for damage for pain and suffering. * * * Compensation for the pecuniary loss to his estate is alone to be allowed." See, also, Donaldson v. Railway Co., 18 Iowa, at page 290, and Muldowney v. Railway Co., 36 Iowa, at page 468. In the latter case the action was commenced by the injured party, who died pending the suit, and his administrator was substituted; and it was held that pain and suffering were proper elements of damage because of the action having been commenced by the injured party; but the court guards the rule by saying: "A different rule would obtain if the action had been commenced after his death." It is thought that the expression may be accounted for on the theory that the case was determined under a different statute. Rev. St. § 3467, under which the action arose, is as follows: "No cause of action ex delicto dies with either or both of the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." With reference to the particular matter under consideration, it is difficult to trace a distinction between the statutes. The one says, in effect, that such causes of action shall survive the party, and the other that it does not die with the party. The effect of each is to create a survival, and the one, as plainly as the other, contemplates the existence of the cause of action before the death. It is not the effect of either, as seems to be thought by the appellee, to create a cause of action because of the death. The statutes deal with the "cause of action," and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied; to the injury to be repaired. If the action is brought by the injured party, the law attempts to remedy the wrong to him,—not specifically to his estate,—and that may include loss of property, time, and that bodily ease and comfort to which he is entitled as against the wrong-doers. If the action is brought to repair an injury to his estate, the law looks,

in fixing the rule of damage, to how the estate is affected by the act, and attempts to repair the injury. Loss of time and expenses paid, as a result of the wrong, presumably lessen the estate; but bodily pain and suffering in no manner affect it. It is an item of damage peculiar to the person, and not to pecuniary or property rights. Under our statute, these damages belong "to the estate of the deceased." Code, § 2526. This distinction is maintained throughout all the cases and authorities that have come to our notice. This court has repeatedly said that these actions are for "injury to the estate." See cases cited supra: Rose v. Railway Co., Donaldson v. Railway Co., Muldowney v. Railway Co. Mr. Sutherland, in his work on Damages, (volume 3, p. 282,) speaking in general of these statutes of survival of actions, says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages." In Railway Co. v. Barron, 5 Wall. 90, a like case, it is said, speaking of the wife or next of kin, who, under the Illinois statutes, are the beneficiaries in such a case: "They are confined to the pecuniary injuries resulting to the wife and next of kin; whereas, if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount." The language of the Illinois statute is different in phraseology from ours, but not to the extent of inducing a different rule in this respect. Under the statute of Minnesota, so similar to ours as to justify the same rule as to these damages, it is held that "no compensation can be given * * * for the pain and suffering of the deceased." Hutchins v. Railway Co. (Minn.) 46 N. W. 79. We conclude, without doubt, that the district court erred in its ruling on the motion and the instruction to the jury. Some other questions are argued which we have examined, the consideration of which would require extensive quotations from the evidence, and we think they do not involve reversible error, and it is unnecessary to discuss them. The cause is remanded to the district court, with instructions to deduct from the judgment entered the $2,300 allowed for pain and suffering, and give judgment for the balance. Modified and affirmed.

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MORGAN v. SOUTHERN PAC. CO. (No. 14,842.)

(30 Pac. 603, 95 Cal. 510.)

Supreme Court of California. Aug. 5, 1892.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Flora Morgan against the Southern Pacific Company to recover damages for the death of her child caused by defendant's negligence. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The facts fully appear in Morgan v. Pacific Co., 30 Pac. 601.

E. L. Craig, Foshay Walker, Horace Hawes, and R. B. Carpenter, for appellant. Charles G. Lamberson, Lamberson & Taylor, and J. W. Ahern, for respondent.

McFARLAND, J. The parties to this action are the same as in Morgan v. Pacific Co., 30 Pac. Rep. 601 (No. 14,841, this day decided), in which plaintiff recovered a judgment for $15,000 for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years. Nine days afterwards the child died from an attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of $20,000, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial. The evidence upon the issues of the alleged negligence of defendant's employes at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case, and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars;" and there was no evidence whatever introduced or offered upon the subject of damage. The jury, therefore, had nothing before them upon which to base damages except the naked fact of the death of a female child two years old; and it is apparent, at first blush, that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her, by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a solatium for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: Railroad Co. v. Vandever, 36 Pa. St. 298; Iron Co. v. Rupp, 100 Pa. St. 95; Railroad Co. v. Freeman, 36 Ark. 41; Railroad Co. v. Brown, 26 Kan. 443; Pennsylvania Co. v. Lilly, 73 Ind. 252; Donaldson v. Railroad Co., 18 Iowa, 280; Railroad Co. v. Paulk, 24 Ga. 356; Railroad Co. v. Miller, 2 Colo. 466; Kesler v. Smith, 66 N. C. 154; March v. Walker, 48 Tex. 372; Railroad Co. v. Levy, 59 Tex. 563; James v. Christy, 18 Mo 162; Hyatt v. Adams, 16 Mich. 180, Chicago v. Major, 18 Ill. 349; Railroad Co. v. Delaney, 82 Ill. 198; Blake v. Railroad Co., 18 Q. B. 93.

With respect to the decisions in this state we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. Beeson v. Mining Co., 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; * * * but, in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured or at least considered from a pecuniary standpoint. * * * If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in esti-

mating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." The Beeson Case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated. Cook v. Railroad Co., 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson Case. In McKeever v. Railroad Co., 59 Cal. 300, the point was not involved, and in Nehrbas v. Railroad Co., 62 Cal. 320, the point does not appear in any way to have been involved; and the dictum at the close of the opinion, as it refers to the Beeson Case, must be held as only intended to go to the length of the latter case. It is true, however, that in Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. 269, a decision in department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on Beeson v. Mining Co., supra, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents," but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson Case. But entirely contrary views were expressed in the latest decision of this court on the subject (Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303). In that case—which was for the death of an adult son—the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his mother;" and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words, 'sorrow, grief, and mental suffering, occasioned by the death of the son to his mother.' In thus directing the jury the court fell into error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of the deceased. * * * We have found no case in which damages for sorrow, grief, and mental suffering are allowed, under any of the statutes." And, further, that the statutory action is a new one, "and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury." The case was decided in bank. Justice Thornton delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must, therefore, have concurred in the one main reason for which the judgment was reversed. He may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly, although, as to one matter, it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in Beeson v. Mining Co., supra, as hereinbefore stated, that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest. We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred. There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant, and plaintiff is not appealing. The judgment and order appealed from are reversed, and a new trial ordered.

SHARPSTEIN, J. I concur.

DE HAVEN, J. I concur in the judgment and generally in the foregoing opinion. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of Shearman and Redfield on Negligence, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the

person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like." The sixth instruction given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of section 377 of the Code of Civil Procedure, that in actions of this character "such damages may be given as under all the circumstances of the case may be just," is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating, as they do, to the loss of future service, and necessarily based upon probabilities, and upon data which in many respects are uncertain, and therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

Hearing in bank denied.