76 SUMMERFIELD v. WESTERN UNION TEL. CO.

(57 N. W. 973, 87 Wis. 1.)

Supreme Court of Wisconsin. Jan. 30, 1894.

Appeal from superior court, Douglas county; Charles Smith, Judge.

Action by Fred G. Summerfield against the Western Union Telegraph Company for damages for delay in transmitting a message. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for damages for delay in the delivery of a telegram. Plaintiff resided on a farm about 10 miles from the village of Iron River, Wis. His mother lived at Lisbon, N. D., with plaintiff's brother J. W. Summerfield. Defendant had an office at each of these places. October 23, 1892, J. W. Summerfield left at defendant's office at Lisbon a message addressed to plaintiff, care of Burt Clark, Iron River, reading as follows: "Mother is dying. Come immediately. J. W. Summerfield." The fees for the transmission of the message were paid, but the evidence tended to show that the message was negligently delayed, and was not delivered to Clark until October 28, 1892, and plaintiff did not receive it until after noon of that day. Plaintiff's mother died on the 26th day of October. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in due time, and that, by reason of his failing to receive the message until after his mother's death, he was deeply "mortified, grieved, hurt, and shocked, and suffered intense anguish of body and mind, and was thereby thrown into a state of nervous excitement and tremor, which rendered him sick, and impaired his health and strength, and that he still suffers from the effect of the same." Upon the trial, objection was made to the reception of any evidence under the complaint, because it did not state facts sufficient to constitute a cause of action, which objection was overruled, and exception was taken.

The court charged the jury, among other things, as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that, if it had been delivered with reasonable promptness, the plaintiff could and would have responded thereto, and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's deathbed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering and damages, if any, to his nervous system, caused by the shock of such mental suffering." A verdict for the plaintiff for $652.50 was rendered, and, from judgment thereon, defendant appealed.

Catlin & Butler, Carl C. Pope, and La Follette, Harper, Roe & Zimmerman (Geo. H. Fearons, of counsel), for appellant.

Mental anguish alone, caused by the negligent failure of a telegraph company to promptly transmit and deliver a message, will not sustain an action for damages by the addressee. Wyman v. Leavitt, 71 Me. 227, 230; Bovee v. Danville, 53 Vt. 183, 190; Canning v. Williamstown, 1 Cush. 451, 452; Paine v. Railway Co., 45 Iowa, 569, 573, 574; City of Salina v. Trosper, 27 Kan. 544, 564; Keyes v. Railway Co., 36 Minn. 290, 293, 30 N. W. 888; Clinton v. Laning, 61 Mich. 355, 361, 28 N. W. 125; Kennon v. Gilmer, 131 U. S. 22, 26, 9 Sup. Ct. 696; Ewing v. Railway Co., (Pa. Sup. 1892,) 23 Atl. 340; Railway Co. v. McGinnis, 46 Kan. 109, 113, 26 Pac. 453; Commissioners v. Coultas, 13 App. Cas. 222, 225.

McHugh, Lyons & McIntosh, for respondent.

"Mental anguish and suffering occasioned by the failure to deliver a telegraph message are proper elements of damage in an action against the telegraph company by the person injured, and constitute grounds for recovery, though no pecuniary loss is shown." Telegraph Co. v. Newhouse, (Ind. App.) 33 N. E. 800; 8 Suth. Dam. 260, 645; 37 Cent. Law J. 61; Womack v. Telegraph Co., (Tex. Civ. App.) 22 S. W. 417; Bell v. Railway Co., L. R. 26 Ir. 428; Railroad Co. v. Griffin, (Tenn.) 22 S. W. 737; Beasley v. Telegraph Co., 39 Fed. 181; Telegraph Co. v. Stratemeier, (Ind. App.) 32 N. E. 871; So Relle v. Telegraph Co., 55 Tex. 310; Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. 163; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574; Chapman v. Telegraph Co., (Ky.) 13 S. W. 880; Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. 351; Willson v. Railroad Co., (Wash.) 32 Pac. 468.

WINSLOW, J., (after stating the facts.) The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent nondelivery of a telegram, constitutes an independent basis for damages. At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. Cooley, Torts, 271; Wood's Mayne, Dam. (1st Amer. Ed.) § 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by Cooper, J., in his learned opinion in the case of Telegraph Co. v. Rogers, (Miss.) 9 South. 823, as follows: "(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are com-

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated at University of Michigan on 2020-05-22 14:40 GMT / https://hdl.handle.net/2027/mdp.35112105421509
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google

pensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case,—certainly no well-considered case,—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the supreme court of Texas, in So Relle v. Telegraph Co., 55 Tex. 308, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been followed with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the federal courts. All of these cases will be preserved in the report of this case, and the citations need not be repeated here. The question is substantially a new one in this state, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in Walsh v. Railway Co., 42 Wis. 32, that, in an action upon breach of a contract of carriage, damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action, founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case. The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule. Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, (that for mental distress alone, in such a case as the present, damages are not recoverable.) The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in Telegraph Co. v. Rogers, (Miss.) 9 South. 823; Connell v. Telegraph Co., (Mo. Sup.) 22 S. W. 345; Telegraph Co. v. Wood, 57 Fed. 471. See, also, Judge Lurton's dissenting opinion in Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574. In the last-named opinion the following very apt remarks are made: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves we see no such reasons. We adopt the language of Gantt, P. J., in Connell v. Telegraph Co., supra: "We prefer to travel yet awhile super antiquas vias. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under chapter 171, Laws 1885, (Sanb. & B. Ann. St. § 1770b.) damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence or

Generated at University of Michigan on 2020-05-22 14:40 GMT / https://hdl.handle.net/2027/mdp.35112105421509
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from UNIVERSITY OF MICHIGAN

their operators, servants, or employes in receiving, copying, transmitting, or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way, new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of Candee v. Telegraph Co., 34 Wis. 471, or to effect some other object, is not a question which now arises; but it seems clear to us that, had a radical change in the law relating to the kinds of suffering which should furnish a ground of damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries to the feelings alone have been sustained in this court, and the following cases are cited: Wightman v. Railway Co., 73 Wis. 169, 40 N. W. 689; Craker v. Railway Co., 36 Wis. 657; Draper v. Baker, 61 Wis. 450, 21 N. W. 527. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous. Judgment reversed, and action remanded for a new trial.

CASSODAY, J., dissents.

Generated at University of Michigan on 2020-05-22 14:40 GMT / https://hdl.handle.net/2027/mdp.35112105421509
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from
UNIVERSITY OF MICHIGAN

7 /

CAHILL v. MURPHY. (No. 14,047.)

(30 Pac. 195, 94 Cal. 29.)

Supreme Court of California. March 26, 1892.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Mary Cahill against Daniel Murphy for slander. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. J. H. G. Weaver, for respondent.

FITZGERALD, C. This is an action for slander. The complaint alleges, in substance, that on or about the 21st day of September, 1889, and for a long time prior thereto, plaintiff, with her children, occupied certain rooms in an hotel of which the defendant was owner and proprietor; that one of these rooms was situated on the ground floor of the hotel, and used by her for the purpose of carrying on and conducting a general merchandising business; that on said last-mentioned date, the soot in the chimney leading from the room used as a store became ignited, causing an alarm of fire to be given; and it is further alleged, upon information and belief, that the fire was communicated to the soot in the chimney from a fire in the stove situated in said store. The slanderous words, out of which this action arose, are alleged to have been falsely and maliciously spoken by the defendant of and concerning the plaintiff, and are laid as follows: "This is twice you [the plaintiff meaning] have tried to burn us [the said hotel meaning] out to get your fourteen hundred dollars insurance. But I will report you [the said plaintiff meaning] to the insurance company to-morrow morning, and have your insurance taken away from you." It is further alleged that the defendant, by the use of these words, intended to convey the meaning that the plaintiff willfully and maliciously communicated the fire to the soot in said chimney, and that by so doing she was guilty of an attempt to commit the crime of arson, and that they were so understood by those in whose presence they were uttered, to the damage of plaintiff's character and business in the sum of $10,000. A demurrer was interposed to the complaint, which, upon the grounds stated, was properly overruled. Defendant thereupon answered, specifically denying the material allegations of the complaint, and, upon the issues thus joined, plaintiff had verdict and judgment for $1,200.

The only error complained of, which we deem it necessary to consider, relates to the ruling of the court upon defendant's objection to the following question propounded to plaintiff on her examination in chief as a witness, and after she had testified, without objection, that she had "a family of four children." "Question. How many of them are dependent upon you for support?" (Objected to on the ground that the question 'is incompetent and immaterial.' The objection was overruled by the court, and defendant excepted.) Answer. Three are dependent upon me at present." It is claimed that the effect and purpose of this testimony was to arouse the sympathies and sentimental feelings of the jury, to the prejudice of defendant's case, by the introduction of an element that did not belong to it, and which the jury could not properly consider in the assessment of damages. In Rhodes v. Naglee, 66 Cal. 681, 6 Pac. 863, the ruling of the court below permitting the plaintiff, against defendant's objection, to prove that he was a married man, and had a family, was held not to be erroneous. And in Dixon v. Allen, 69 Cal. 527, 11 Pac. 179, the mother of the plaintiff was allowed to testify as to the number of her children, their ages, and the death of her husband. The rule laid down by this court in those cases rests upon the principle (although not stated) that, as mental suffering entitled the plaintiff to compensation in cases of this character, such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon her by the slanderous charge. It was therefore competent in this case, on the question of damages, to prove the number and ages of plaintiff's children; but that they were dependent on her for support was irrelevant, and not within the issues raised by the pleadings; therefore erroneous. But was it such a material error as would justify a reversal? The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary. It was competent, as we have stated, for the plaintiff to prove the number and ages of her children, and, if it appeared from the evidence that they were minors, the presumption would be that they were naturally and legally dependent on her for support. The effect, therefore, of such evidence would be the same as if proven by direct testimony. The evidence upon which the verdict was founded shows that the slanderous words charged were spoken wantonly and maliciously. The plaintiff was therefore entitled to recover of the defendant exemplary or punitive damages, and the assessment of such damages was almost entirely in the discretion of the jury. In view, therefore, of the enormity of the charge, and the situation of the parties, the plaintiff being a defenseless woman, coupled with the amount of damages awarded by the jury as compared with the sum sued for, we are satisfied that the jury was not influenced by this evidence prejudicially to the defendant's case. The verdict might well have been for a much larger sum, and yet not obnoxious to the ob-

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated at University of Michigan on 2020-05-22 14:40 GMT / https://hdl.handle.net/2027/mdp.35112105421509
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google

jection that it was excessive. In this case we think the evidence immaterial, and its admission by the court a mere technical error. People v. Fick, 89 Cal. 144, 26 Pac. 759. The judgment and order should be affirmed, and we so advise.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

Generated at University of Michigan on 2020-05-22 14:40 GMT / https://hdl.handle.net/2027/mdp.35112105421509
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google

Digitized by Google

Original from
UNIVERSITY OF MICHIGAN