

1895

The Law of the Telegraph Contracts -- Damages

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T H E S I S

T H E L A W O F T H E T E L E G R A P H
C O N T R A C T S + D A M A G E S

o o o

by

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1895

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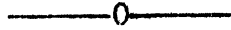
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P R E F A C E.



The object of this paper is to gather and group the laws, both statute and case, relating to the subject of the electric telegraph with the purpose of indicating as well as I am able the tendency of the law in New York state as to the effect of stipulations by the company against its liability for negligence of its servants in the transmission and delivery of messages. I intend also to prophesy the action of the Court of Appeals should it be called upon to determine the question of damages for mental suffering unaccompanied by any other injury or loss, and as the result of the telegraph company failing to transmit and promptly deliver a message.

E. L. D.

CHAPTER I.

INTRODUCTION

The law as applied to the electric or magnetic telegraph is of comparatively recent origin. The institution itself has existed but 60 years. In the short period of its life it has taken a foremost place in the affairs of man and has called into exercise a corresponding volume of legal principles.

The Electric Telegraph was conceived in the teeming brain of Samuel F. B. Morse. In a laboratory in the University of the City of New York some 1700 feet of iron wire was strung back and forth across the room and the famous word "Eureka" was ticked from end to end. This was in the year 1835. Nine years later, on the 27 day of May its practicability was proven when from Washington to Baltimore the wings of the lightning bore the words "What hath God wrought"?

From these small though significant beginnings the telegraph rapidly grew and extended, reaching an internal and trans-continental importance in 1858, August 16, when Her Majesty the English Queen in an electric spark from a-

cross the sea greeted the American people in the memorable letter, "The Queen is convinced that the President will join with her in fervently hoping that the electric cable which now connects Great Britain with the United States will prove an additional link between the nations whose friendship is founded upon their common esteem."

The infant of sixty years ago has indeed grown to colossal size. Its embrace is coextensive with the earth. Its system emanates from a common source connecting center with center, following up the great arteries of trade while its nerves singly and in groups follow the side courses and ramify, sending its fibers into the farthest parts of the earth. The importance of the electric telegraph is demonstrated in its remarkable growth. Not only is it practicable, nay almost essential to all public undertakings, but to private enterprise as well. The utility of our railroads, canals and steamship lines, and of the news papers, manufactories and mercantile life generally would be inestimably lessened but for its existence. Throughout the length and breadth of the land, in all its industries and among all classes

its essentiality is hourly and momentarily illustrated. The statesman and the manufacturer, the merchant and the farmer alike enjoy its usefulness. By its agency intelligence is ticked across the land and under the sea with the quickness of thought. Continents are within a moments reach and the circumference of the earth is but a touch.

CHAPTER II.

Sec. 1. Source of Laws. The birth of the electric telegraph into the affairs of life called forth the exercise of legal principles. It developed and extended and became the subject of legislative and judicial care. Laws were declared and the authority and power of the courts were called into activity to interpret and enforce them.

The regulation of the rights and obligations of the new industry called forth no new legal principles but rather the exercise and application of old and determined ones. Litigation arose and the courts dug deep into the

vast mines of the common law for solution of the problems which presented themselves. Their researches brought to light old and well known legal principles, but in the application of these principles the courts have widely differed.

Sec. 2. Definition. Many attempts have been made at defining this new servant of man with varying degrees of success. In a recent decision a North Carolina court gave the following description.— "The plaintiff —Western Union Telegraph Company — is a corporation invested with powers and has functions appropriate in kind and extent, to execute and facilitate the transmission of intelligence from one place to another by means of electricity. The chief instrumentality it employs for its purpose is a machine, apparatus or contrivance styled the electric telegraph, or the electro magnetic telegraph; an instrument that conveys intelligence with the velocity of lightning by means of signals, certain mechanical movements or sounds representing letters, words, ideas or expressions, produced by the application of electricity—electric fluid — conducted through and along iron wires

(a)
 for any distance, long or short. The above description, although imperfect as a scientific definition, is of value as having received the force of judicial sanction from a court of recognized standing.

Sec. 3. Legal Status. In adjudicating questions arising out of the relations necessarily existing between telegraph companies and their patrons the courts found it necessary to determine the legal status of the telegraph company. In reaching this determination the courts have proceeded along various lines of reasoning and have arrived at widely different conclusions.

(b)
 In one case the court says, "such companies hold themselves out to the public as encouraging in a particular branch of business in which the interests of the public are deeply concerned ---- . There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route --- the obligation to perform the stipulated duty is the same in both cases!"

(a) Pegram v. W. U. Tel. Co., 100 N. C. 28; 6 Am. St. Rep. 557.

(b) Parks v. Alta Cal. Tel. Co., 13 Cal. 422 at 424
 McAndrew v. Tel. Co., 33 Eng. Law & Eq. 180.

(a)

But in another case the court says the telegraph company is not a common carrier but a bailee performing through its agents a work for its employer. Thus has the pendulum swung between the two extremes. In the one elongation holding the company almost an absolute insurer of its undertaking, while in the other they are held only as bailees for hire.

Between these two extremes the courts generally have

(b)

paused, and in a famous case Judge Kent in an elaborate and acute discussion of the subject says, "It is clear that telegraph companies exercise a public employment, or

(c)

as said by Bigelow, C. J., a quasi-public employment"

This later position is sustained by the courts of most of the United States and of England, and carries with it the peculiar considerations attendant upon such employments.

(d)

Sec. 4. Basis of Liability. The status then of the telegraph company is that of a public agency and the

- (a) Birney v. N. Y. & Wash. Tel. Co., 108 Ind 341-58
- (b) True v. Int. Nat. Tel. Co., 60 Md. at 16.
- (c) Ellis v. Am. Tel. Co., 13 Allen, 226.
- (d) Graham v. W. U. Tel. Co., 10 Am. L. Reg. 319-24
Leonard v. N. Y. & C. Tel. Co., 41 N. Y. 544; Breese v. U. S. Tel. Co., 48 N. Y. 132. N. Y. & C. Tel. Co. v. Dryburg, 35 Pa. 298.

measure of its obligation and liability is based upon public policy rather than solely on contractual relation. Upon this fact is founded its right to the exercise of the power of eminent domain, which power can only be given to public agencies and for public benefit. A telegraph company is required by legislative enactment in most states to impartially serve all who apply in order of precedence except in cases of proper refusal on moral grounds or on grounds of public necessity. To this extent the telegraph company differs from the ordinary bailee for hire. It is delegated a franchise to use for public benefit, and its power to choose with whom it will contract is interfered with by the law. To this extent it partakes of the nature of a public agency. But still the telegraph company is not held to the responsibility of a common carrier of goods, that is to say it is not the absolute insurer of its undertaking except as prevented by an Act of God or the public enemy. This doctrine runs through the courts of a large number of the states and may be said to be settled law.

(a) Tel. Co. v. Griswold, 37 O. St. 301.

(b) W. U. Tel. Co. v. Ferguson, 57 Ind. 495.

(c) Tyler v. W. U. Tel. Co. 100 Ill. 421.

Sec. 5. Common Law Duty of Telegraph Companies. The duties and obligations imposed upon and required of the telegraph companies are to furnish the public with means of communication by electrical telegraph along the proposed route. The means of communication thus required must consist of reasonably substantial lines erected in a secure and workmanlike manner. The instruments employed must be reliable and safe and should be of a modern and improved type. The operators must be competent and skillful persons. The agents and servants should possess the intelligence and prudence of ordinary persons employed in like business. The company should establish uniform rates according to which messages will be sent. The operators and agents must preserve **secrecy** as to the contents of all messages received for its patrons, they must receive and use ordinary care in transmitting and delivering all messages fitted for sending. It is also incumbent upon telegraph companies to establish reasonable rules and regulations governing the actions of their employees and patrons. These duties the telegraph compa-

(a) Law of Telegraphs, S. & J. Sec. 123-30.

ny owes the public as distinguished from duties growing out of the contractual relations between themselves and their patrons, and a failure in fulfilling them is gross negligence.(a)

Sec. 6. Care and Diligence required of Telegraph Companies. The meaning and limitation of the term "ordinary care and diligence" are questions of great importance and have received due consideration in the courts. The degree of care and diligence required of the telegraph company has been variously enunciated in different jurisdictions. Thus "due and reasonable care", "a reasonable degree of care and diligence", "care and diligence adequate to the business which they undertake", "with care and attention", "a high degree of responsibility" are but the varied forms of expressing what is known in the law as "ordinary care" as applied to an employment of this nature. (b) The term "ordinary", if we measure its meaning solely with reference to the kind of care which a man of ordinary prudence would use in telegraphing for himself would indicate the correct measure of care, but

(a) Tyler v. W. U. Tel. Co., 14 Am. Rep. 46; Sweetland v. Ill. & Miss. Tel. Co., 27 Ia. 433.

(b) Thompson's Law of Electricity, Sec. 141.

as compared with most other kinds of business it would be called great care. The telegraph is only called into service in cases requiring special speed and promptness as well as careful expert action and painstaking. And the skill exercised must be commensurable with the importance of the mission. The telegraph company undertakes to exercise that measure of care and skill possessed and exercised by the average prudent man under like circumstances. He does not undertake that the task shall be performed successfully and without fault or error. He undertakes for good faith and integrity but not for infallibility, and his liability for damage is only that occasioned by negligence, bad faith or dishonesty. (a)

Sec. 7. Negligence. Any failure of the telegraph company to exercise ordinary care and skill in the transmission and delivery of messages makes it liable for the consequential damages, and such failure is known by the term negligence. Whether there are degrees of negligence distinguishable from one another is a much debated question. In the supreme court of Vermont, where the subject

(a) Cooley on Torts, p. 648.

(b) Pope v. W. U. Tel. Co., 9 Ill. App. 283.

was for the first time before the court, the Judge says, "It may be doubtful whether there is any difference in law between negligence and gross negligence. The tendency of judicial opinion is to deny it. And again a famous English case, and in a long line of cases following and citing this opinion, "There is no difference between negligence and gross negligence, the latter is the former with a vituperative epithet."

A person who undertakes to do some work to an article for a reward must exercise the care of a skilled workman and in the absence of such care he will be negligent. "Gross" therefore is a word of description and not a definition. The absence of the use of ordinary care by the telegraph company in performing the work of its patrons is called gross negligence. Here then stands the relation of the telegraph company to its patrons as fixed by the Common Law based upon the duty owed by the telegraph company in its corporate capacity to the public and as unqualified by conditions annexed to their undertaking by means of contract with the senders.

(a) Wilson v. Brett, 11 M. & W. 113; F. C. Woodward in Am. Law Rev. 2, 16.

(b) Gills v. W. W. Tel. Co., 17 At. 736-7.

(c) Grill v. Gendron Screw Co., D. C. 1 C.P. 600 at 62

C H A P T E R I I I .

Sec. 1. Right of Telegraph Company to Contract with its Patrons. The right of the telegraph company to limit its common law responsibility by express contract is well settled in law. (a) In the case of De Rutte (1 Daly C. P. 547, at 549) the court says, "They (the telegraph Co.) have the right to qualify their liability by special contract that they will not be answerable unless that condition (to have the message repeated) is complied with. Like common carriers they may limit their liability by a special acceptance brought home to the knowledge of those who employ them."

Owing to the peculiar and unavoidable difficulties with which the telegraph companies have to contend it is necessary to their continued existence that they guard against liability for unavoidable errors and delays.

The company has not always the telegraph at its will. Although the machinery and apparatus are in complete order yet at times a message can not be sent. The

(a) McAndrew v. Elec. Tel. Co., 33 Eng. L. & Eq. 180.

signal may be started but before it reaches its destination a surcharged atmosphere miles away from the operator may destroy or materially vary the tractibility of the conductor, the fluid may thus be diffused or varied in its practical operation without the power of man to foresee or prevent it. It is inevitable too that mistakes should be committed even by the most skillful persons in interpreting, transmitting and transcribing of words, and where the liability to do so is manifest and the risk is unavoidably incurred, it is reasonable that the telegraph companies should have the right to require as a test for their own security against loss, that a message should be repeated. Their compensation is small in proportion to the risk they incur.

Sec. 2. Usual Stipulations. The usual stipulations against liability used by the Western Union Telegraph Company, and most other Telegraph companies, in making contracts with the public are of two kinds. Those used for day and those used for night messages. Those relating to sending and repeating messages are as follows.—

No. 2.

THE WESTERN UNION TELEGRAPH COMPANY.

INCORPORATED

21,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.

THOS. T. ECKERT, President and General Manager.

Receiver's No.	Time Filed	Check
----------------	------------	-------

ND the following message subject to the terms }
back hereof, which are hereby agreed to. } _____ 189

To _____

No. 45.

NIGHT MESSAGE.

THE WESTERN UNION TELEGRAPH COMPANY.

21,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.

OS. T. ECKERT, General Manager.

NORVIN GREEN, President.

Receiver's No.	Time Filed	Check
----------------	------------	-------

END the following night message subject to the }
terms on back hereof, which are hereby agreed to. } _____ 189

To _____

Sec . 3. Effect of Stipulation. The effect of the attempt of the telegraph companies to provide against their liability by contract has been the source of much litigation and of many diverse opinions. There are chiefly three lines of cases on the subject.— First those holding the contract void because immoral or against public policy ^(a). Second, those holding that the telegraph company having taken the message is bound to do all in its power to transmit correctly, including repeating back, for, says the court, , "why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence.", but not holding the company liable for slight errors or delays. A third class of cases hold the stipulation that the message must be repeated to hold the company liable beyond the amount of the toll paid for unrepeatd messages, and when repeated to fifty times that amount for day messages, and to ten times the sum paid for night messages is a reasonable regulation which, when signed by the sender, forms a contract binding upon the company and ap-

(a) Tel. Co. v. Griswold, 37 O. St., 301, 311.

(a)
 on the sender. And the sender will be bound by the contract which he has signed even though he failed to read
 (b)
 the stipulations on the message blank, and this by the doctrine of estoppel in pais. But if, to the knowledge of
 of the company's agent the sender had not read the notice
 (c)
 or stipulations, he would not be estopped.

Sec. 4. Reasonableness of Stipulations. The agreement, then, under which the telegraph company undertakes to transmit the message for the sender, is expressed in the printed contract, the terms of which have received
 (d)
 judicial interpretation. In one case the court says, "The stipulations printed in the blanks used in this case have frequently been under consideration in the courts and have always, in this state, and generally elsewhere, been upheld as reasonable. A comprehensive review, however, discloses that the rule is limited by the restriction that it shall not relieve from liability for damage occasioned by their own wilfull misconduct or negligence

(a) McAndrew v. The Elec. Tel., 35 Eng L. & Eq. 180. Baxter v. Tel. Co., U. C. Q. B. Vol. 37, 470; Pearsall v. W. U. Tel. Co., 124 N. Y. 256 at 258.

(b) Redpath v. W. U. Tel. Co., 112 Mass. 71-73; Grinnell v. Same, 113 Mass. 299,307; Ricker v. W. U. Tel. Co., 7 Wend. 868; Wolf v. W. U. Tel. Co., 62 Pa. St. 83; Grace v. Adams, 100 Mass. 505; W. U. Tel. Co. v. Carew, 15 Mich. 525.

(c) Bruce v. Tel. Co., 18 N. Y. 152, 142.

(d) Riley v. W. U. Tel. Co., 109 N. Y. 231.

in failing to supply for public use reasonably substantial lines, approved instruments, and competent and skillful operators.

(a)
 But the telegraph company may protect itself against liabilities which would otherwise occur through carelessness of their numerous agents and the mistakes incident to the transaction of their peculiar business; and this they may do by notice brought home to the sender or by special contract.

(b)
Sec. 5. The New York Rule. The cases are not harmonious as to whether the telegraph company is protected by its stipulations against liability for failure to deliver promptly a message which has arrived at the receiving office. In New York the rule undoubtedly is that the telegraph company is protected by the contract or notice brought home to the sender if the delay or non-delivery of the unrepeated message is caused by its servant's negligence. (Riley v. W. U. Tel. Co.) or by its own negligence, not gross, but not that occasioned by its own frauds or wilfull misconduct.

(a) Bruce v. U. S. Tel. Co., 48 N. Y. 132; Sweetland v. Ill. & Co., 27 Iowa, 433.

(b) Riley v. W. U. Tel. Co., 109 N. Y. 251-6; Bennett v. W. U. Tel. Co., 18 N. Y. S. R. 777; Passmore v. W. U. Tel. Co., 78 Pa. St., 238, 243.

(c) Clements v. W. U. Tel. Co., ante. ; Grinnell v. same, ante.

Sec. 6. As to Cipher Messages. The telegraph company may by agreement with the sender absolve itself from liability for loss caused by any error that may occur in sending cipher or obscure messages. (a) But messages written in the peculiar terms used by stock or other dealers and brokers are not obscure or cipher messages within the meaning of the term. (b) Anddespatches relating to the buying or selling of merchandise, if they appear on their face to relate to such transactions, are not within the meaning of obscure messages. (c)

Sec. 7. Statutory Penalties. Any stipulation or contract made by a telegraph company with the sender of a message, by the terms of which contract the company seeks to avoid or lessen any statutory penalty or to fix any other liability in lieu of that prescribed by statute is void for such purpose. (d) The provision in the company's stipulations that it shall not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is

(a) Baldwin v. W. U. Tel. Co., 45 N. Y. 744.

Saunders v. Stuart, 1 Com. P. 326.

(b) Rittenhouse v. Ind. Line of Tel. 44 N. Y. 263.

(c) 23 Am. L. Reg., N.S., p. 91, Sec. 10.

(d) W. U. Tel. Co. v. Buchanan, 9 Am. Rep. 471; Tel Co v. Adams, 44 Am. Rep. 776 (Ind.); U. S. Tel. Co. v. W. U. Tel. Co., 56 Barb. 46.

filed with the company is a reasonable provision and valid. (a)

And the same is true even though the cause of action grew out of the negligence of the telegraph company. (b)

Sec. 8. Forwarding Companies. In the absence of stipulations against the liability for negligence of connecting lines the company which receives the message and takes toll for the same to the destination is held to undertake to deliver the same. (c) But a provision in the contract that the receiving company is made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination, is a reasonable provision and protects the company against the forwarding company's fault. (d) And where a telegraph company contracts with its patron against its liability and loss occurs through the negligence of the connecting company's agents, the negligent company is not protected by the former's contract. (e)

(a) Young v. W. U. Tel. Co., 65 N. Y. 163.

(b) W. U. Tel. Co. v. Dougherty, 26 Am. St. Rep. 38;

(c) Derutter v. N. Y. A & B. E.M. Tel. Co., 30 How. Pr. 403;

(d) Baldwin v. U. S. Tel. Co., 45 N. Y. 744; Stevenson v. The Montreal Co., 16 Up. Can. 530.

(e) Squires et al v. W. U. Tel. Co., 98 Mass. 232.

CHAPTER IV.

Sec. 1. Tolls. The companies in their regulations provide for three classes of rates in consideration of the prepayment of which by the sender or of the payment on delivery by the sendee the company contracts with the sender to deliver the message to the sendee, or in case of connecting lines to forward the message over such lines.

The first we will mention of these rates is where the ordinary fee is paid and the message is not to be repeated back to the point of starting. In consideration of this rate the company, in the absence of gross negligence, fraud, or willful misconduct can in no case be held liable for more than the sum paid for sending the message.

The second is where the sender contracts for having the message repeated back and pays in addition to the usual rate half as much more. In this case the company is liable to pay damages not exceeding fifty times the sum paid by the party for sending the message.

The third class is that in which the company by a contract in writing insures the correct transmission and prompt delivery of the message. The amount of risk is agreed upon by the parties and payment made according to the specified rate.

CHAPTER V.

Sec. 1. Actions. Actions against telegraph companies growing out of the transmission and delivery of messages will be found to arrange themselves under three heads. First, such as are brought to recover damages for breach of contract, express or implied, relating to the sending and delivery of messages.

Actions under this head subdivide into two classes: First those brought for damages ex contractu; second, those growing out of negligence, ex delicto.

All cases ex contractu, in all jurisdictions holding that the regulations are reasonable and that when they are signed by the sender they become a binding contract, the measure of damages in case of a failure to perform is limited by the terms of the stipulation so signed.

Within the limit of damages as fixed by the stipulations of the company, that is the actual damages sustained, whether it is a repeated message or is one sent under contract of insurance.

If the action is ex delicto and is based on gross negligence or willful misconduct of the company against which the stipulations of the company will not avail, the meas-

ure of damages is all loss which is occasioned by and which flows directly from the breach of the contract. They must be such as reasonable men under the circumstances of the case could have been supposed to have contemplated at the time of making the contract. They must be certain, both in their nature and in respect to the cause from which they flow.

Sec. 2. Mental Injury. The question whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone is one that has perplexed many, nearly all courts of last resort.

The doctrine of damages for injury to feelings or mental suffering has been properly applied and damages given in cases where mental suffering was an element in the case, and the gravamen was physical injury, where by the mere negligence of the defendant physical injury has been sustained. The reason for allowing such damages is that they can not be separated from and distinguished from the physical injury. Another class of cases in which such damages are given for mental suffering are those of breach of promise of marriage, also in cases of

wilfull wrong especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party, malicious prosecution, slander, libel and seduction. In those cases the wrong is of such a nature as to imply malice.

In these instances, except in case of breach of promise of marriage, which is sui generis, or of implied malice, the mental suffering is only taken into account to enhance the substantial damages sustained.

Sec. 3. Class of cases in which damages are not given. But even in cases where recovery may be had on other grounds it is frequently not allowable to give damages for accompanying mental anguish,— thus where a parent sues for greivous injury to a child, recovery for his mental suffering, though it may be severe and heart rending, can not be allowed to increase his damages for loss of services. The right of recovery in case of homicide has been given by statute, against the slayer, but there the recovery is limited to the party sustaining pecuniary loss (b).

(a) Oakland Ry. v. Fielding, 48 Pa. St. 320; Flemington v. Smithers, 2 Par. & P. 292.

(b) 2 Sedgwick on Damages, Sec. 630.

Where an action was sustained for injury to real estate by blasting, it was held that the plaintiff should not recover for mental anxiety for the safety of himself and family. (a) And even in cases where the mental shock was so great as to cause physical sickness and suffering it is held that damages can not be recovered. (b)

The cases above referred to are sufficient to show that the extreme policy of the law has been to make mental anguish an element of damages only when substantial damages are recoverable, or at least where punitive damages may be given. However this doctrine has not always obtained with regard to telegraph law. A contrary line of doctrine has grown up in some of the courts of our Southern states. (c) It originated in the So Belle case. In that case recovery was allowed against a telegraph company by the sendee where a message notifying the sendee of his mother's sickness and death was delayed so that he was unable to attend her bedside or funeral. The court held that the anguish suffered by the son through the negligent act of the telegraph company was an element

(a) Wyman v. Leavitt, 71 Me. 227.

(b) Lehman v. Brooklyn City Ry. Co., 47 Hun, 355.

(c) W. U. Tel. Co. v. La Belle, 55 Tex., 308.

of general damages and no special damages need be proven by defendant to enable him to recover. This doctrine was not immediately accepted by the courts and some three (a) years later was overthrown by the supreme court. Soon after however, the case of Stewart v. Tel. Co. (66 Tex. 560) reinstated the former doctrine. The ruling of the Texas court has been followed by the states of Indiana, Kentucky, Tennessee, North Carolina and Alabama. In each of these states the court has decided on the authority of the So Rell case, or on some case traceable directly to it.

I maintain that the doctrine of the Texas courts is erroneous. The English rule, through a long unbroken line of decisions has been that mental anguish, unaccompanied by any other injury can not be a ground of recovery. The same rule is held to obtain in several of our state courts, and with one exception has been the unbroken rule in the United States courts.(b)

Sec. 4. Authority of the SoRelle Case. Let us glance for a moment at the confessed authority on which

(a) Ry. Co. v. Levy, 59 Tex. 563.

(b) Beasley v. Tel. Co., 39 Fed. 181.

the So Belle decision was based. We find first the doctrine of Shearman & Redfield on Negligence (Sec. 756) cited as authority, which dictum is itself unsupported by (a) adjudged decision. Second, we find a case, in which the gravamen was the expulsion of a man from a train wrongfully and with violence, bruising him and soiling his apparel. Third was a case in which a railway employee, while coupling cars, fell into an open ditch, negligently constructed by the company. The train of cars passed (b) over his arm making amputation necessary. The only remaining authority was a seduction case where the court seemed to have forgotten that the action was in tort independent of contract and the damages were given as the measure of an outrage wilfully committed.

Such is the authority underlying the doctrine at its foundation, and the later cases have brought out no additional strength further than the weight of the judicial opinion adopting it. Nevertheless I contend that the (c) doctrine is unsupported in reason and public policy, while it must be confessed that such damages are frequent

(a) Huges v. Ry. Co., 43 Tex. 279.

(b) Ry. Co. v. Randell, 50 Tex. 261.

(c) Univ. Court, Smith v. W. U. Tel. Co..

ly as real and substantial as though the injury or loss was of a visible and computable nature. Yet in practice no one but the party concerned can tell whether there is really any suffering, and even the party himself may perhaps be unable to distinguish between grief caused by death of a relative or friend and the mortification and anguish brought about by the negligent act of the telegraph company. The very nature of the relief sought is beyond the accurate or approximate measurement of court or jury and should not be left to the prejudices of the one or the sympathies of the other.

In jurisdictions where the suitor for damages for mental suffering has been successful, the volume of litigation of that nature has increased to a great and unproportionate extent.

It may be stated as a reasonable proposition that when a given policy of the law gives rise to an unjust and extravagant volume of litigation, the justness of the policy is indeed questionable. Judge-made law should not go to the extent of requiring a degree of responsibility impracticable in the very nature of the business involved.

Sec. 5. Statutory Penalties. The second class of actions against telegraph companies are those brought to recover a penalty or enforce a liability to pay damages imposed by a statute. This action may be maintained against the owner of the telegraph line for refusing to send a message on request and compliance by the sender with the rules of the owner. The recovery is for the benefit of the person desiring to send the dispatch. (a)

Sec. 6. Criminal Prosecutions. The third class of actions are such as are brought to subject the company or its agents to criminal responsibility for acts done or omitted in violation of some statute. They may be brought against an operative or messenger who divulges the contents of a dispatch entrusted to his charge, except to the proper person, or against any person who connives with any employee of the telegraph company to divulge the contents of any dispatch (New York Penal Code, Sec. 641) or against any person who wilfully and without authority opens and reads or causes to be published any such telegram. (N. Y. Penal Code, Sec. 642)

(a) Trans. Corp. Law § 103

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