

## CARTER v. WELLS, FARGO &amp; CO.

(Circuit Court, S. D. California. December 10, 1894.)

No. 561.

**NEW TRIAL—INADEQUACY OF DAMAGES.**

Where, in an action for personal injuries, the jury finds, in effect, that the plaintiff has been injured through the negligence of the defendant, without any contributory negligence on his own part, and the evidence, without conflict, shows that his injuries were substantial, yet the jury awards him practically no damages at all, the verdict will be set aside and a new trial awarded.

This was an action by James A. Carter against Wells, Fargo & Co. for damages for personal injuries. The jury gave a verdict for the plaintiff for one dollar. Plaintiff moves for a new trial.

Wellborn & Hutton, for plaintiff.

Pillsbury, Blanding & Hayne and Graves, O'Melveny & Shankland, for defendant.

ROSS, District Judge. This action was brought to recover damages in the amount of \$10,000 for personal injuries alleged to have been sustained by the plaintiff by the negligence of the defendant. The verdict of the jury in favor of the plaintiff necessarily included a finding that the defendant was negligent, and that there was no contributory negligence on plaintiff's part, as set up in defense of the action. There was much evidence in the case tending to show that there was no negligence on the part of the defendant, and, further, that there was such contributory negligence on plaintiff's part as should prevent a recovery by him; and, had the verdict been in favor of the defendant on either or both of those propositions, there would be no interference with it by the court, for the evidence in respect to those matters was substantially conflicting, and the issues in respect thereto were for the determination of the jury, under appropriate instructions from the court, which were given. But the verdict being, in effect, that plaintiff was injured by the defendant's negligence, without contributory negligence on his own part, he was manifestly entitled at the hands of the jury to substantial damages. The evidence was without conflict that the collision which caused the plaintiff's injury threw him from a scaffold eight or ten feet high (on which he was at the time working, for two dollars per day) to the ground, his head and shoulder striking on a large rock, from which he was picked up in an unconscious condition; and that, after regaining consciousness, he was carried to the county hospital, where he remained about five weeks, two weeks of which time he was confined to his bed. These facts of themselves entitled the plaintiff, under the verdict, to substantial damages, and not to the merely nominal sum of one dollar. The head and neck of the plaintiff were, at the time of the trial, much bent to one side, and his walk was that of a paralytic. The defendant introduced many witnesses who testified that his appearance and movements were about the same prior to the injury complained of as they were at the time of the trial, and that they could see no difference in them. This testimony on the part of the defendant was

controverted by many witnesses for the plaintiff. The exhibition, however, that was made of the plaintiff's person in court, and the tests that were there made by Dr. Hughes, amounted, I think, to ocular demonstration of the fact that the plaintiff could not possibly have at that time stood upon the plank and performed the work the evidence without conflict showed that he was doing at the time of the accident.

Accepting, as the court must for the purposes of this motion, the facts to be that the plaintiff, without fault of his own, was injured by the negligence of the defendant, it cannot permit a verdict to stand that awards him damages in name only. While the court should and always will be careful not to usurp the functions of the jury, it is, nevertheless, its duty to protect parties from improper verdicts, rendered through misconception, prejudice, passion, or other wrong influences. *Lancaster v. Steamship Co.*, 26 Fed. 233; *Gaither v. Railroad Co.*, 27 Fed. 545; *Muskegon Nat. Bank v. Northwestern Mut. Life Ins. Co.*, 19 Fed. 405; *Kirkpatrick v. Adams*, 20 Fed. 292. In *Field on Damages* (page 886) it is said:

"It is less usual for the court to interfere with the finding of the jury for inadequate than for excessive damages, though it has the power to do so. \* \* \* But a verdict may generally be set aside for inadequacy, upon the same grounds that warrant the court in interfering where they are excessive."

To the same effect is *Gaither v. Railroad Co.*, 27 Fed. 545.

And in *Sedgwick on Damages* (volume 2, p. 656) it is said:

"The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is that a new trial will not be granted for smallness of damages. But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose. So where, in a case for negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict, damages one farthing; a new trial was granted on payment of costs; and Lord Denman said: 'A new trial on a mere difference of opinion as to amount, may not be grantable; but here are no damages at all.'"

In the present case the amount awarded the plaintiff by the jury was practically no damages at all; yet the jury at the same time found, in effect, that the plaintiff was injured through the negligence of the defendant, without any contributory negligence on his own part. The evidence, without conflict, showed that his injuries by the fall were such as, under those circumstances, entitled him to substantial damages. For these reasons the motion for a new trial is granted.

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ROSS v. CITY OF FT. WAYNE,

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 147.

**MAINTENANCE—WHAT CONSTITUTES—ASSIGNMENT OF CAUSE OF ACTION.**

One who, having an interest in the subject-matter of a suit, buys up the interest of the plaintiff pending suit, and thereafter prosecutes the suit himself, is not guilty of maintenance.

On rehearing. For former opinion and statement of facts, see 63 Fed. 466.

WOODS, Circuit Judge. The court did not overlook the question of the insufficiency of the bill for the failure to aver that the alleged invention had not been "patented or described in any printed publication in this or in any foreign country." The court below had declared the bill amendable in that respect, as it clearly was, if defective, and we deemed it an immaterial question. If we had considered it, and had come to one conclusion or the other, our decision upon the appeal would have been the same. The question upon which the judgment of the court below turned was the question which we deemed it important to decide. We do not think it necessary to consider minutely whether the bill was defective in particulars which were amendable. Now, as before, our opinion is that the facts stated in the bill made "a case for equitable relief."

But finally it is urged that the logical effect of our conclusion is "to set aside the doctrine of maintenance and its effects, and to open wide a door to what have heretofore been considered undesirable practices." The case comes from Indiana, where, as elsewhere in this country, the doctrines of the common law in respect to maintenance are not in full force. *Stotsenburg v. Marks*, 79 Ind. 193, and cases cited; *Allen v. Frazee*, 85 Ind. 283; *Board of Com'rs v. Jameson*, 86 Ind. 154; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865. In *Board of Com'rs v. Jameson*, it is said:

It is clear, however, that the rule does not and cannot prevail in this state in its full extent since the Code of 1852, for it makes radical changes in the common-law rule upon the subject of assignment of choses in action. The common-law rule is limited in its operation by several provisions of the Code, but we deem it unnecessary to notice them. Many of the courts where the Code system prevails have denied its force altogether, and the tendency of modern decisions in America is to restrict, rather than enlarge, the operation of the rule. *Mathewson v. Fitch*, 22 Cal. 86; *Cain v. Monroe*, 23 Ga. 82; *Allard v. Lamirande*, 29 Wis. 502; *Bentinck v. Franklin*, 38 Tex. 458; *Roberts v. Cooper*, 20 How. 467; *Stoeyer v. Whitman*, 6 Bin. 416; *Coughlin v. Railroad Co.*, 71 N. Y. 443; *Orr v. Tanner*, 17 Am. Law Reg. (N. S.) 759. The rule has often been criticized by the English courts; even as early as *Master v. Miller*, 4 Term R. 320 (vide page 340), unfavorable criticism was made. But our decisions, as we have seen, declare the rule to be in force in this state, although the extent to which it prevails has not been defined. It may, however, be safely assumed that the rule is narrowed, rather than extended, since to hold otherwise would be to oppose the letter and spirit of our Code, as well as the general principles of what Austin calls our "judge-made law." *Patterson v. Nixon*, 79 Ind. 251.

Besides, it appears in this case that Ross had an interest with Walker in the patent and in the cause of action when the suit was commenced, and it was therefore not forbidden him by the law of maintenance, however broadly applied, to acquire the title and interest of Walker pending the suit. Petition denied at cost of appellee.