

Argued by
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STATE OF NEW YORK
SUPREME COURT
Appellate Division—Third Department.

MINERVA BROWN,
Plaintiff-Respondent,

—vs.—

PARAMOUNT PUBLIX CORPORATION,
Defendant-Appellant.

RESPONDENT'S BRIEF.

The appellant does not question that the photoplay "An American Tragedy" intends to portray the lives of the families of Chester Gillette and Grace Brown, appellant citing in his brief, *People vs. Chester Gillette*, 191 N. Y. 107.

The passage of a quarter of a century had to some extent palliated the sorrow of this mother, when, for commercial reasons, the defendant introduced at her very door-step, a photoplay that painted the plaintiff in a role and character peculiarly damaging.

We will consider the various points argued, in the same order as presented in appellant's brief.

POINT I.

The complaint is not defective as claimed by appellant, so far as not pleading words of the talking motion picture, and of pleading import, tenor and effect of what is contained in the picture.

Nearly everyone at sometime, has seen a moving picture. Until recently the entire play consisted in portraying the characters, motives and actions by picture representation alone, without dialogue. Recently the so called "Talkies" have inserted sound dialogue here and there, but we all appreciate that the drawing card for the public is what they see, and not what they hear. If this were not so, a book describing the play might just as well be read at home. The pictures themselves must of necessity convey the meaning. Frequently they are susceptible of more than one interpretation. Thus they draw the crowds.

Counsel complains that the complaint contains no description of the scenes. When we plead that "by the manner of said pictures and films," the defendant, "through the manufacture, use, lease and exhibition of said films and pictures," "purporting of and concerning the plaintiff," pictured her "an illiterate, unkempt, shovenly, neglectful and low-grade person; that she was

the wife of a mean, illiterate, unkempt, lazy, low-type or degenerate person; that she had neglected her daughter, the said Grace Brown, both educationally and morally, or had compelled her through lack of care, to seek her own livelihood as a mere child; * * * that by such illusions, innuendo and intimation, plaintiff was made to appear as poor-white-trash, and a disreputable, untidy, product of the hills without decent care for her daughter, and as contributing to the condition in which her daughter found herself," (Fols. 48-49), we have pled facts.

When we plead that plaintiff has pictured as an "illiterate" and "low grade person," as the wife of a person pictured as a "degenerate," and this union "contributing to the condition in which her daughter found herself." We plead in substance, that the mating of two such parents, one "low grade" and the other "degenerate", begot an offspring that was of loose morals, "contributing to the condition in which their daughter found herself."

We ask counsel, how can the face and pictures of a "low-grade" or "degenerate" person be described or pictured, other than by the use of those words? No word picture can adequately describe it. Let us take, for instance, the famous painting "Mona Lisa." It is commonly known to portray the feature and expression of a sensual woman. No word picture can describe that expression. The picture alone tells the story.

Appellant cites *Battersky vs. Collier*, 24 A. D. 89. In this case the court submitted but one of two alleged causes of action to the jury. There was a printed article claimed to be libelous which was not set forth. The court said that the defendant and the court were entitled to know "*What was written.*"

In the instant case we have not a single picture but the "story", the play is by a continual series of pictures which show character, disposition, motive and result.

As bearing upon whether the allegations in the complaint as to poverty alone constituted a cause of action, we have the following expression of the Court, in the cited case, *Battersky vs. Collier*, (Supra);

"That the imputation of poverty and squalor and alleged misery may be so put as to excite ridicule and so amount to defamation, has been held (*Moffatt vs. Cauldwell*, 3 Hun. 26; *Patch vs. Tribune Assn.* 38 Id. 368)"

In *Deddrick vs. Mallery*, 143 A. D., 819, cited by appellant, the plaintiff's complaint, in a slander action, contained two subdivisions—the first subdivision failed to allege that the slanderous words quoted were quoted in the presence of other parties. The second allegation alleged "That said defendant at such time, in the presence of other parties, called the plaintiff many other names of a vile and indecent character, thereby maliciously

and slanderously meaning to charge and make it believed that the plaintiff, Levi B. Deddrick, had been and was guilty of the crime or misdemeanor in that he (said plaintiff) had violated the Penal Law of the State of New York, relating to drunkenness." The court held that the first subdivision was defective in not alleging that the words were spoken in the presence of others, and held that the second allegation was defective in "that in an action for slander, the alleged slanderous words complained of as having been spoken by the defendant must be set forth in the complaint."

This is in no respect parallel to the situation in the instant case, where we have the libel presented through a series of pictures.

Appellant also cites *Crowell vs. Schneider*, 165 A. D. 690, where the plaintiff attempted to set forth an alleged cause of action for slander, without setting forth the exact language used. This well-known rule requires no comment.

In *McNamara vs. Goldan*, 118 A. D. 221, the defendant wrote a letter of and concerning the plaintiff, in which defendant referred to the plaintiff having written obscene letters. The Court held that the use of the word "obscene", without quoting the letters, was insufficient.

In *Durante vs. Contanti*, 130 Misc., 632, also a slander action, the Court held that the exact language relied upon should have been set forth, and not the substance of the same.

Kirby vs. Martindale, 103 No. Western, 648, is cited by appellant. This was an action in which the Martindale's Legal Directory referred to plaintiff, as being worth only from \$10,000.00 to \$20,000.00, when plaintiff claimed he was actually worth \$100,000.00. This action was instituted in 1905 and not in 1932. In the cited case, the Court held that the plaintiff should have pled "*in haec verba*" the language of the libel. This has always been the rule, as far as relates to printed or published matter, or to scandalous remarks. This case cites Bradstreet vs. Gill, 9 So. Western, 753, the opinion stating:

"But in that case, the plaintiff alleged the meaning and effect of the omission to properly rate him, and the manner in which it was understood by the subscribers to the publication."

Having referred briefly to the cases cited by appellant under this point, may we now examine more recent authorities that have to do with libel, as derived from photoplays or moving pictures. Counsel has not cited any cases under this point, but what relate to spoken words where the exact language may be obtained, and to printed articles where the plaintiff might readily obtain the exact language used. In the case of moving pictures a different situation entirely is presented, as we have no means of pleading exact language, although the characters and the action of the play may be more libelous and harmful than contained in a printed article.

We first call the Court's attention to *Merle vs. Sociological Research Film Corp.*, 166 A. D. 376. The plaintiff in this action alleged two causes of action. In the first cause of action demurrer to which was over-ruled, alleged,

“That the defendants thereby falsely, untruthfully, and maliciously charged, and intended to charge, the plaintiff with being in some way identified or connected with or related to the said white slave traffic or system or with said cadets or traffickers, with allowing or permitting the said trafficking in his establishment or in and around the building wherein his place of business was located, either for gain or otherwise, and that in the said building and in the plaintiff's said establishment there was grave and serious danger for the girls and women and for the young men employed therein that they might be approached or enticed or seduced or molested by these cadets or white slave traffickers and induced, corrupted, enticed or forced into a life of vice, crime, shame, and prostitution, and that in some way the plaintiff had knowledge or notice of this condition of affairs, and that he participated therein, or at least acquiesced in or countenanced the same.”

The Court stated, and this we believe may be accepted as the law today,

“A suit for libel based upon a moving picture production is a somewhat novel proceeding, but there is no doubt that if the production tends to bring a person into disreput it may give rise to such an action.”

A very recent case relating to a picture is Calahan vs. Israels, et al., 140 Misc. 295, decided in May, 1931, as follows:

“The theory of the complaint is that the libel consisted of a skillfully painted picture. The background was made up of many allusions, not in and of themselves libelous, to incidents, circumstances, and facts in the life and associations of plaintiff and his wife. In the foreground was set forth the libelous statements which expose the plaintiff to contempt, ridicule and disgrace, evil opinion and obloquy.

The background and shadows alone were not harmful. The distorted figure and false lights in the foreground were in and of themselves damaging. *The combination and setting, and the ruinous result of the finished picture, however, was the evil accomplished.* * * *

Under Rule 96, Rules of Civil Practice, in an action for libel, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter, and the plaintiff may state in gen-

eral terms that such matter was published concerning him.”

In the instant case the inference can properly be drawn, from the picture, that the union of the plaintiff, pictured as a low-grade person, to such a degenerate husband, resulted in the birth of Grace Brown, of degenerate morals, which produced her undoing, and eventually her death. Then Grace Brown is pictured as being allowed to go, almost as a little girl, uneducated, to a nearby city, where because of utter lack of care or attention on the part of her mother, neglected, she was permitted to room alone and to go her own way, an easy victim of her seducer. Then, too, we find the plaintiff exposed to contempt, ridicule, evil opinion and her respectability diminished. To deliberately send these films into the very neighborhood in which the plaintiff lives, time and again, for the purpose of gain, grossly misrepresenting the facts, is evidence of malice. Plaintiff will be prepared to show upon the trial of this action, that the plaintiff in the instant case had so carefully reared and educated her daughter, that the letters written by the daughter, Grace Brown to Chester Gillette, have been regarded by authorities as specimens of English literature. In the photoplay, the murderer is pictured as the hero, at the expense of the victim, and her family.

As applicable to the instant case, we quote the language of Mr. Justice Laughlin, in *Klaw vs. New York Press Co.*, 137 A. D. 686:

“In deciding whether or not an article is libelous, the scope and object of the entire article is to be considered together.”

In the cited case the Court quotes from *Stokes vs. Stokes*, 76 Hun 314, as follows:

“and the rule seems to be well stated by the learned judge in the court below that publications which tend to diminish the respectability of the person to whom they relate and to expose him to disgrace and obloquy, although they do not impute the commission of a crime, are libelous and actionable, although no special damages are alleged or proved.”

In *Hoeppner vs. Dunkirk Printing Co.*, 254 N. Y. 95, plaintiff sued to recover on the ground that the article reflected upon his ability as a football coach. This was a case decided in 1930 and Mr. Justice Crane, in writing for the Court, stated:

“The majority of the court, however, are of the opinion that the article goes further, and may be interpreted or taken as a criticism of the plaintiff’s work as physical instructor and coach of the football team and of his professional capacity and intelligence to properly train the players. If the words are susceptible of this meaning, it then becomes a question for the jury to say whether they were used in any such sense. ‘ * * * ’ We

are dealing with the allegations of a complaint, and not with proof after trial.”

Again, in *Zbysko vs. New York American, Inc.*, 228 A. D. 277, plaintiff, whom it will be remembered, was the famous wrestler of a few years ago, brought an action as the result of the publication of plaintiff's picture with that of a gorilla on the opposite side of the page. A portion of the opinion follows:

“That the defamatory words and pictures held up the plaintiff to public contempt, disgrace, hatred, infamy and reproach, caused him to be shunned and avoided and to be treated as an outcast by his wife, relatives, neighbors, friends, and business associates, and injured him in his professional calling and deprived him of his standing among good and worthy people.

There are no allegations of special damage to plaintiff.

We think that the publication is libelous *per se*, because its tendency is to disgrace plaintiff and bring him into ridicule and contempt, and that therefore it is actionable without alleging special damages. The rule is that any written article is actionable without alleging special damage, if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him

in the minds of others and deprived him of their society. It is not necessary that words impute disgraceful conduct to the plaintiff. If they render him contemptible or ridiculous, he is equally entitled to redress.

Where the language of the alleged libel is ambiguous and capable of an innocent, as well as a disgraceful, meaning, the question is for a fact finding, and may not be ruled as a law point."

Also,

Phelan vs. Rheinstein, 133 Misc. 853.

Campbell vs. Life & Casualty Co. of Tenn., 152 S. E. Rep. 18.

Cases cited by Mr. Justice Heath will be referred to under Point III.

It is very apparent that although the rules of pleading are not changed, as far as relate to allegations concerning a photoplay, yet the application of such rule must of necessity be different, else it would be impossible from the action of the play, and the appearance of the characters, to frame a proper allegation. In the case at bar, the plaintiff does not rely upon the dialogue which is interspersed only occasionally, and which can be artfully handled by the producer so as to avoid libel to prove the case, but the picture itself is depended upon.

Counsel argues that plaintiff has attempted to bolster up her complaint, by adding an affidavit

with reference to the dialogue. Such is not the case. At the time this motion was argued in the lower Court, counsel for the defendant appeared with a claimed copy of the photoplay, and requested the Court to attend a performance put on especially for the Court's benefit. The photoplay was later exhibited in the presence of the plaintiff in the City of New York, and the claim was made by the defendant that the dialogue itself made no reference to the education of Grace Brown, the deceased. The affidavit of the plaintiff in reply to such a claim was then filed, and its only purpose was to set forth the facts in contravention of the claim of the defendant. The affidavit was not filed for the purpose of bolstering up any of the allegations in the complaint.

The complaint contains the following allegation:

“And that a copy of said production, as exhibited to the public generally, is hereby referred to, as to all of the details, references and allusions therein contained, and made a part of this complaint.”

POINT II.

Reference to the motion picture production, as exhibited to the public, was properly incorporated as a part of the complaint.

Counsel complains because no copy of the production is actually attached to the complaint. Such a contention requires but little argument in reply.

As a production is generally made up of seven reels of film, it would not only require that the plaintiff obtain this mass of material, copyrighted, which is solely in the possession and ownership of the defendant, but to attach an elaborate electrical contrivance for sound purposes, which is only available in theatres especially equipped for the same.

On this point, appellant cites Dupont Auto Distributors, Inc., vs. Dupont Motors, Inc., 213 A. D. 313, where a contract was made a part of the complaint, but no copy attached. Also, Boiardi vs. Marden, Orth & Hastings Corp. to the same effect, and Dandler vs. Globe & Rutgers Fire Ins. Co., where an insurance policy was in the possession of the defendant, and was only referred to in the complaint.

The authorities mean no more than they actually hold. They all refer to contracts or written instruments. Even in the case of the insurance policy referred to in the Bandler case, plaintiff could readily have obtained the standard form of insurance contract elsewhere, and attached it to the complaint.

It would seem that a reasonable interpretation of the rule as expressed is that it relates to written instruments that can readily be printed or typed for annexation to the complaint. To hold otherwise, in the instant case, would be to demand the impossible, and our rules have never been carried to that extent.

An examination of authorities generally throughout the country fail to disclose any such far-fetched application, as is urged by appellant, and indicates that the rule relates only to written instruments.

Even as far as the rule relates to contracts, *Miller vs. Seiler*, 142 N. E., 719, holds that where the pleader had demanded from his opponent, a copy of the contract, this was sufficient to excuse the filing of a copy of the contract with the pleading.

Under this point counsel for appellant considers the two cases cited by Mr. Justice Heath in the opinion, namely *Morrison vs. Smith*, 177 N. Y. 366, and *Demos vs. N. Y. E. J. Pub. Co.*, 210 N. Y. 13.

The language of Mr. Justice Gray, in the *Morrison* case follows, in part :

“The principle upon which the rule of legal liability for damages rests is that no man possesses the right to lessen the comforts, or the enjoyment, or another and that, when he does so deliberately, wantonly and maliciously, it is, *prima facie*, evidence of malice and he is bound to make compensation for the mischief occasioned. Therefore, if by printing, or writing, bad actions, or vicious principles are imputed to a man and his respectability is diminished, his comfort and enjoyment are lessened by the attendant disgrace, contempt, or ridicule, and damage will be presumed.”

Justice Gray, also writing in the Demos case, states:

“The mere improbability of the meaning claimed for it would not control the question of the right of the jury to pass upon it; the question would be, *may* the alleged libel be understood as the plaintiff claims.”

Under this point in his brief counsel refers again to the “language” of the picture. It is of the picture itself of which plaintiff principally complains. It will be remembered that originally moving pictures carried no “language” at all, yet they carried very powerful messages. The picture itself, we argue, is more persuasive than words.

Section 1340 of the Penal Law of the State of New York, defines libel:

“LIBEL DEFINED. A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any deceased to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.”

The only reason we quote the same is for the wording of the definition.

POINT III.**No error was committed by the lower Court in refusing to dismiss the complaint.**

After the argument of the motion, appellant made the somewhat unusual request that the Court view the picture itself, before passing on the motion. This was done. Counsel urges that "The Court below disposed of the motion only upon the consideration of the picture itself."

It is unfortunate that portions of a film can be cut out without interfering with the continuity, making it very difficult of detection. The question has already arisen as to whether later copies of the film contained all of the matter as originally exhibited. It would appear, therefore, that what actually was presented in the original production properly becomes a question of fact. It is only fair in this respect to refer to the fact that it is a practice of the producers to retain title to films, and as they are rented or leased only to the exhibitors, it is impossible for the plaintiff to purchase or obtain scattered copies of the original films, as they are returned by the exhibitors to the producers at the close of each exhibition.

The appellant introduces what he calls a "synopsis," on pages 18 to 23 of his brief. This "synopsis" appears to be appellant's conception of certain portions of the photoplay, interspersed with fragments of the so-called dialogue. Inasmuch as neither this motion nor the action will be

determined by appellant's interpretation of the production, it will be unnecessary to refer to it here.

POINT IV.

It is respectfully submitted that the order of Mr. Justice Heath, made after a careful study of the law applicable to the case, and after viewing a photoplay at the request of defendant, should be affirmed, with costs.

Respectfully submitted,

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