RAPHAEL DANIS (*Plaintiff*) .....APPELLANT;

AND

HERMAS SAUMURE (*Defendant*) .....RESPONDENT.

1956

*Feb. 1, 2
*Mar. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobile—Negligence—Pedestrian struck by car—Finding by jury exonerating driver—Whether perverse—Whether affidavits of jurors as to intention to give verdict in favour of pedestrian, receivable.

1956

DANIS
v.
SAUMURE

While attempting to cross a road, the appellant was struck by a car owned and driven by the respondent. The appellant sued for damages for personal injuries and the action was tried before a judge and jury. In answer to questions, the jury found that the respondent had satisfied them that there had been no negligence or improper conduct on his part. They also assessed the damages suffered by the appellant. The trial judge dismissed the action in accordance with these findings.

Before the Court of Appeal and this Court, the appellant contended that the verdict was perverse, and also sought to file affidavits signed by nine members of the jury purporting to show that the findings made by the jury were not the findings intended to be made by them and that they had intended to give the appellant a verdict for the amount of the damages assessed.

Held (affirming the judgment appealed from): That the appeal should be dismissed.

The jury's finding exonerating the respondent was not perverse.

This was not a case where affidavits from jurors should be received. Under s. 63 of The Ontario Judicature Act the duty of the jury was to answer questions and after answering them it could not award the appellant damages.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial and refusing to receive affidavits of the jurors.

L. Choquette, Q.C. for the appellant.

A. T. Hewitt for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by:—

THE CHIEF JUSTICE:—This action was tried before Mr. Justice Wilson and a jury and after a charge that was not objected to at the trial, before the Court of Appeal or before this Court, six questions were submitted to the jury, of which they answered only three. These questions and answers are as follows:—

1. Was the plaintiff's loss or damage sustained by reason of the defendant's motor car on the highway?

   Answer: Yes (√) or ~~No.~~

2. Has the defendant satisfied you that the injuries sustained by the plaintiff did not arise from the negligence or improper conduct on the part of the defendant?

   Answer: Yes (√) or ~~No.~~

   ~~7~~ ~~5~~
   10 2

3. If your answer to Question 2 is "No" was there any fault or negligence on the part of the plaintiff which caused or contributed to the accident?
Answer: Yes or No.

4. If your answer to question 3 is "Yes" and your answer to question 2 is "No", state fully particulars of every act of such fault or negligence of the plaintiff.
Answer:

5. If your answer to question 2 is "No" and your answer to question 3 is "Yes", apportion the degree, of fault or negligence.

Plaintiff	%
Defendant	%
Total	100%

6. At what amount do you assess the total loss or damage sustained by the plaintiff?

Special	$ 6,702.68
General	$ 5,100.00
Total	$ 11,802.68

In accordance with these findings judgment was given dismissing the action with costs. The Court of Appeal for Ontario dismissed an appeal by the plaintiff and he then appealed to this Court.

The plaintiff seeks to file and use nine affidavits,—one from the foreman, and the others from eight members, of the jury. All of these are practically in the same form but the one by the foreman indicates that the sum of $11,802.68 was about one-half of what the jury thought was the total of the damages proved. It might be immediately pointed out that it is difficult to accept this suggestion in view of counsel's answer to a question from the Bench that the item of $6,702.68 would not be one-half of the special damages.

The instructions of the trial judge were clear and undoubtedly the jury intended to answer, and did answer, Question No. 2 affirmatively. Furthermore, if as was intimated, it was considered by the jury that both parties were equally to blame, there is no explanation why no answers were given to Question No. 5. If one is to judge from the marks made, presumably by the foreman, on the

1956

DANIS v. SAUMURE

Kerwin C.J.

original list of questions handed the jury, there was considerable discussion among its members before the answers were arrived at. This is not a case where the written answers do not correspond to the actual decision arrived at by the jury, nor was there any slip, or error, in the answers given to any of the three questions.

Statements or affidavits by any member of a jury as to their deliberations or intentions on the matter to be adjudicated upon are never receivable. Halsbury (2nd ed.) Vol. 19, p. 317, note (i). The rule is set forth in the 9th edition of Phipson on Evidence, p. 199, Taylor on Evidence, 12th edition, Vol. 1, p. 599, and Wigmore on Evidence, 3rd edition, Vol. 8, s. 2352 et seq. As early as *Vaise* v. *Delaval* (1), an affidavit of a juror that the jury, having been divided, tossed up, and that the plaintiff had won, was rejected. Lord Mansfield said:—

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.

In *Cogan* v. *Ebden* (2), it had already been held that a verdict wrongly delivered by the formean of a jury might be amended. In *Jackson* v. *Williamson* (3), the King's Bench would not allow, after a delay, the admission of an affidavit by all the jurymen stating that they intended to give £61 instead of £30, although the question of delay may have had some effect upon the matter. Even though the rule has been criticized in certain Courts in the United States, it has been followed consistently in England and here, including the Court of Appeal in the present case. In *Ellis* v. *Deheer* (4), to which Mr. Justice Kellock referred on the argument, the Court of Appeal decided that it was not precluded from granting a new trial on the ground that the verdict as delivered by the foreman was not the verdict of the whole jury, but Lord Justice Banks, at p. 117, and Lord Justice Atkin, at p. 121, stated as undoubted law that evidence could not be received as to what occurred in the

(1) (1785) 1 T.R. 11.
(2) (1757) 1 Burr. 383; 97 E.R. 361.
(3) (1788) 2 T.R. 281; 100 E.R. 153.
(4) [1922] 2 K.B. 113.

juryroom. *McCulloch* v. *Ottawa Transportation Commission* (1), was a case of the foreman of a jury inadvertently interchanging the degrees of fault on the part of the parties, and reference might be made to the decisions of single judges in *Fletcher* v. *Thomas* (2) and *Knowlton* v. *Hydro-Electric Power Commission* (3).

It should be emphasized that the jury's duty was to answer questions. S. 63 of *The Ontario Judicature Act*, R.S.O. 1950, c. 190, provides:—

63. (1) Upon a trial by jury, except in an action for libel, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict.

(2) Judgment may be directed to be entered on the answers to such questions.

Therefore, in the present case, even if the jury had wished the plaintiff to recover a sum of money, the answer to Question No. 3 and the absence of any answer to Question No. 5 show the serious effect if it were permitted for a juryman, or any number of jurymen, to come forward later and state such desire.

At the hearing we found it unnecessary to call upon Mr. Hewitt to answer the argument that the judgment was perverse, as we agreed with the Court of Appeal that this has not been shown.

The appeal should be dismissed with costs.

RAND J.:—For the reasons given by the Chief Justice and Kellock J., I would dismiss this appeal with costs.

The judgment of Kellock and Locke JJ. was delivered by:—

KELLOCK J.:—In my opinion, this appeal fails. The jury's duty under s. 63 of the *Judicature Act* was to answer questions and not to give a verdict. By their answer to question 2, the defendant was completely exonerated.

Even assuming we are entitled to look at the affidavits tendered, they do not suggest any error in the answer to question 2 but merely that the deponents were laboring

(1) [1954] O.W.N. 203.
(2) [1931] O.R. 195 at 200.
(3) (1925) 58 O.L.R. 80.

1956

DANIS
v.
SAUMURE

Kellock J.

under the misapprehension that, notwithstanding the answer to that question, or any other question, they could give the appellant a verdict for the amount of the damages fixed.

This is not a case of error arising between the verdict which the jury had agreed upon and that which was actually rendered and formed the basis for the judgment delivered. The law is clearly laid down in *Ellis* v. *Deheer* (1), and prohibits what is here attempted. No case appears for the interference of the court on the ground that the verdict was perverse.

The appeal should be dismissed with costs if demanded.

Appeal dismissed with costs.

Solicitor for the appellant: *L. Choquette.*

Solicitors for the respondent: *Gowling, MacTavish, Osborne & Henderson.*

---

*PRESENT: Taschereau, Kellock, Estey, Locke and Abbott JJ. Estey J. died before the delivery of the judgment.

(1) [1922] 2 K.B. 113.