THE CANADIAN PACIFIC RAILWAY (DEFENDANTS) ..... APPELLANTS;

AND

FRANKLIN SEAFORD JACKSON (PLAINTIFF) ..... RESPONDENT.

1915

*Oct. 27.
*Nov. 29.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Damages—Verdict—Excessive award—Personal injuries—Complete reparation—Loss of prospective earnings—Pain and suffering—Evidence—Mortuary tables—Practice—New trial.

Where, from the amount of the damages awarded and the circumstances of the case, it does not appear that the jury took into consideration matters which they should not have considered, or applied a wrong measure of damages, the verdict ought not to be set aside or a new trial directed simply because the amount of damages awarded may seem excessive to an appellate court. Duff J. dissented on the ground that a jury appreciating the evidence and making due allowance for the risk of accident, apart from negligence, in the hazardous pursuit in which the plaintiff was employed, could not have given the verdict in question.

Per Idington and Anglin JJ.—The evidence of a witness testifying in regard to estimates based on mortuary tables in use by companies engaged in the business of annuity insurance is admissible, *quantum valeat*, notwithstanding that he may not be capable of explaining the basis upon which the tables had been prepared. *Rowley* v. *London and North Western Railway Co.* (L.R. 8 Ex. 221), and *Vicksburg and Meridian Railroad Co.* v. *Putnam* (118 U.S.R. 545), referred to.

Judgment appealed from (8 West. W.R. 1043) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming (on

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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an equal division of opinion) the judgment entered at the trial, by McCarthy J. upon the verdict of the jury in favour of the plaintiff.

The circumstances of the case are stated in the judgments now reported.

O. M. Biggar K.C. and *Geo. A. Walker* for the appellants.

Frank Ford K.C. and *G. M. Blackstock* for the respondent.

THE CHIEF JUSTICE.—The respondent, an engine-driver in the employ of the appellant company, was severely injured whilst in the performance of his duty. The jury found the appellant

> guilty of negligence from the fact that the mail crane was in faulty condition and that the plaintiff was injured by it in the performance of his duty.

They awarded the plaintiff $27,000 damages.

I have no hesitation in saying that in my opinion the amount of the damages is too large. There is, however, a general consensus of authority that it is for the jury alone to fix the amount of damages to be awarded in an action and that under ordinary circumstances the verdict should not be set aside merely on the ground that the damages appear excessive. Where the damages are manifestly so unreasonable that no body of twelve men could have honestly given such a sum, or where it is shewn that in arriving at the amount the jury took into consideration something which they ought not to have taken, or failed to take into consideration something which they ought to have taken, there may be ground for the court to set aside the verdict. It is not, however, a ground

for interference that the damages seem to the court too large and more than would to most people have seemed ample.

One might assume that the jury have not sufficiently taken into account the accidents of life, and that they probably misapprehended the effect of the figures in the actuarial tables produced, but, with all respect, I do not think that is sufficient to justify us in granting a new trial on the ground that the jury have gone beyond a figure which any jury of reasonable men properly informed as to the question which they were to decide could have reached.

In *Thoms* v. *Caledonian Railway Co.*(1), Lord Kinnear said:—

> Now it is impossible to read the account of this man's history and his present position without seeing that no amount of damages could ever be considered as real compensation for the personal injury he has suffered. It is obvious that that is not a consideration which can be pressed to any logical conclusion because the result of it would be that the defender, in a case of personal injury, might be ruined, and yet the pursuer not compensated. And, therefore, that cannot be treated as a ground for any exact or logical estimate of damage, but I think it is a consideration which may fairly lead us to think that, upon a question of this kind a larger latitude, within the bounds of reason, is to be allowed to a jury than upon matters which are capable of anything like exact calculation.

The same might well be said of the respondent in the case as it comes before us.

This court held in *Fraser* v. *Drew*(2), that where a case has been properly submitted to a jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

(1) [1912-13] Ct. of Sess. 804. (2) 30 Can. S.C.R. 241.

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The case of *The Canadian Pacific Railway Co.* v. *Roy,* decided in this court in November, 1913, might be consulted with advantage. On that appeal the only question pressed was as to the amount of the damages.

That the damages were excessive, was the only ground for setting aside the judgment that was urged by the appellant at the argument before us. I do not think the damages, though undoubtedly high, are so excessive as to warrant the interference of this court on that ground. I do think, however, that the trial judge did not direct the jury as fully as was desirable as to the measure of damages which the plaintiff was entitled to recover. True, he told them that they were not to award punitive damages, but the instruction would, I think, have been more intelligible to lawyers than to a jury of laymen. I cannot help thinking that the amount of the damages awarded indicates that the jury did not properly appreciate the considerations on which they had to assess these damages.

There is yet another serious objection to this judgment being allowed to stand. Although, as I have said, the amount of the damages was the only question discussed, on the hearing before this court, the notice of appeal by the defendants to the Appellate Division of the Supreme Court of Alberta claims that there was no evidence of negligence on the part of the defendants.

Now there was, I think, misdirection by the learned judge at the trial. After referring to the

order of the Board of Railway Commissioners, dated the 20th November, 1908, which provides that

such crane must be erected at a distance of not less than 7′ 1¾″ * * * in position,

(*i.e.*, from the centre of the track), he continues—

that briefly is the allegation of negligence on the part of the plaintiff that this crane was erected or allowed to be closer to the track than the order of the Board of Railway Commissioners provided. That question I must leave to you, whether or not that crane was permitted to be closer to the centre of the track than the order provides for. That is the question which you must determine.

And further on he says:—

The defendants in this case would be liable for the acts of their servants or workmen if they did construct this crane closer to the track than the order of the Board of Railway Commissioners provided.

It may perhaps be assumed that the order was passed for the protection of railway employees in the position of the plaintiff, though, of course, unless this were so, he could advance no claim founded upon it. The judge, however, did not instruct the jury that they must not only find a breach of the statutory duty, but also that this was the cause of the accident.

The failure to give such a necessary instruction was the main reason why the Privy Council directed a new trial in the case of *Grand Trunk Railway Co.* v. *McAlpine*(1). At page 846 the judgment reads:—

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. * * *

In the last passage quoted from the charge of the learned judge

(1) [1913] A.C. 838.

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in the present case, he did not point out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed.

In precisely the same way in the present case the jury, instructed as they were, may have concluded that the breach by the defendants of the order of the Board of Railway Commissioners, of the 20th November, 1908, rendered them liable whether this fault caused the injury to the plaintiff or the contrary.

Though, for these reasons, I am of opinion that there was misdirection of the jury, yet as the appellant has not raised the point I do not think this court should send the action for a new trial on this ground. The respondent ought to have had an opportunity to argue that the verdict shews, as perhaps it does, that the jury were not misled by the misdirection and that no substantial injustice has been caused thereby.

Though I find much that is unsatisfactory about the conduct of this trial and its results, I cannot say that there is sufficient ground for setting aside the judgment. I have not come to this conclusion without much hesitation, and I think it would be unfortunate if the case were to be regarded as any precedent for awarding such enormous damages in similar actions in the future.

IDINGTON J.—This is an appeal on the ground of excessive damages. There is nothing else put forward

to support it except the untenable objection to evidence admitted to shew how much an annuity might be purchased for. This practice of using such evidence to help a jury in arriving at a reasonable estimate has been in daily use for many years in our courts.

The objection that because a man called to testify what his company held to be the market price could not vouch for the accuracy of the tables upon which it and such life companies proceed, therefore the evidence was inadmissible, seems to me as unsound as it would be to object to the evidence of actuaries resting their estimate upon the basis of the "Carlisle Tables," for example, because none of them can vouch personally for the accuracy of the figures upon which such tables rest. The truth is the evidence which was adduced was of little value and made nothing of by the learned trial judge or the jury so far as we can see, but that is quite another thing and furnishes no ground for setting aside the trial, which seems to have been eminently fair.

It is impossible to say there was a miscarriage of justice by reason of anything connected therewith.

To come to the real ground of appeal resting upon excessive damages it may be admitted the damages are large and possibly larger than we as a jury would have assessed.

But can we say they are such as to demonstrate that the jury must necessarily have proceeded upon an erroneous basis or been moved by some indirect motives in arriving thereat?

The almost uniform course of this court has been to refuse to interfere with the mere assessment of

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damages when maintained by the local court having usually an immense advantage over us in the way of fairly appreciating the damages which must be measured in light of many local conditions.

But I must respectfully decline to accept the suggestion of counsel for appellant, and apparently some of the judges below, that the possibilities of a permanent investment producing eight per cent. per annum forms a proper basis of estimating the value of this verdict simply because that may be a fair rate of interest at the present moment.

We all know, if we can recall the economic history of other provinces, that this will not continue. And some other arguments put forward by counsel and in a measure countenanced in the court of appeal seem to me untenable.

It seems, for example, assumed, as matter of course, that the earnings of the respondent at the time of the accident must be taken as basis for life. They are properly taken in ordinary cases as basis of estimating pecuniary loss of a temporary character. But in the case of a young man only thirty-two years of age, when probably earnings would increase, being disabled for life, there is no rule of law preventing the jury from contemplating the possibilities of the future in that regard.

Again, it was even suggested that the pain and suffering of him injured could not enter into the basis of the estimate of compensation. I dissent entirely from any such proposition. Physical and mental pain and suffering have always, by law, entered into the basis of such estimates, and when these must endure for a lifetime, or the victim be reduced to the deplorable condition of the respondent, it is hard to place

the limit of an adequate compensation therefor. And the possible need of attendance to help and comfort him in decay may also be considered.

It is quite true that in cases resting upon the "Fatal Accidents Act," pain and suffering are excluded from the basis of the estimate for damages. In such cases the estimate must be confined to the mere monetary considerations bearing upon the case of survivors who have suffered in a monetary sense as well as otherwise by the death of him upon whom they were dependent for the deprivation of what they might reasonably have hoped to enjoy.

No such rule obtains in the case of him suffering and suing for such damages as caused thereby.

We may yet hear it urged that a man reduced to the impotent condition in which respondent, a young man with the prospects before him of increasing his earnings and savings and thereby adding to the comfort of his life and enjoyment thereof, when so reduced ought to be treated as a helpless creature who can enjoy life no longer and hence might as well be kept, or keep himself in some asylum or house of refuge for a few cents a day, and thereby ameliorate the sad condition of the unfortunate offender in the like position the appellant is now in.

I prefer resting as usual upon the broad common sense of an intelligent jury as being more likely to fix justly the amount which the wrongdoer should pay than to look for justice in anything which might be determined in a very logical way either thus or otherwise.

The appeal should be dismissed with costs.

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DUFF J. (dissenting).—With respect I am unable to concur in dismissing the appeal. While the charge of the learned trial judge is not in any way open to exception I have been unable to satisfy myself, after considering the whole of the evidence, that a jury appreciating the evidence and making due allowance for the risk of accident (negligence apart) in a hazardous pursuit, would have given the verdict now before us.

There is, of course, no difference of opinion as regards the principle; which is well settled. The facts are carefully considered in the judgment of Mr. Justice Beck and it is unnecessary to repeat what he has said.

I think there should be a new trial.

ANGLIN J.—Having regard to all the circumstances of this case—the plaintiff's earning capacity prior to his injury, his comparative youth, the pain and suffering to which he was subjected, his probable total incapacity for work in the future, and the inconvenience, discomfort and unhappiness which his condition is likely to entail during the rest of his life—it is, in my opinion, not possible to say that the verdict in this case is so execessive that it is apparent that the jury must have been influenced by views and considerations to which they should not have given effect; *Johnston* v. *Great Western Railway Co.*(1); *Cox* v. *English, Scottish and Australian Bank*(2). If the only element of damage were the plaintiff's actual pecuniary loss, it might be argued with great force that an attempt had been made to award him full and

(1) [1904] 2 K.B. 250. (2) [1905] A.C. 168.

complete compensation; and when the loss to be compensated for has a money value capable of precise ascertainment there is no good reason why that should not be done. But with such other elements of damage, as I have indicated, present, which must be taken into account, while the jury should not attempt to give full compensation, it is almost impossible to say that an amount awarded short of what would distinctly shock the conscience, is so great that a new trial should be ordered purely on the ground of its excess.

The admission of evidence as to the expectation of life of a person of the plaintiff's age and as to the cost of an annuity equal to his income is made a ground of appeal. The objection is based on the alleged lack of qualification of a witness who gave this evidence and the misleading character of the evidence itself.

Standard mortuary tables shewing the expectancy of life and the cost of an annuity at given ages are admissible in evidence; *Rowley* v. *London and North Western Railway Co.*(1); *Vicksburg and Meridian Railroad Co.* v. *Putnam*(2). The appreciation of the value to be put upon such tables in any particular case may always be affected by appropriate cross-examination and by directing the attention of the jury, by other relevant evidence and by argument, to considerations calculated to lead to the conclusion that the plaintiff's expectation of life should be regarded as less than the average and that his continued receipt during the full period of his expectation of life of the income which he enjoyed when injured was subject to many contingencies.

If a witness called can verify a mortuary table pro-

(1) L.R. 8 Ex. 221. (2) 118 U.S.R. 545.

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duced in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability or correctness in order to render his evidence, *quantum valeat,* admissible. No doubt such tables are not conclusive and the jury should be warned to take into account the contingencies to which the continued receipt of his income by the plaintiff would have been subject had he not met with the injury for which he sues. In the present case those contingencies were called to the attention of the jury by the learned trial judge by reading a passage from a judgment in which they were referred to. He was not asked further to emphasize them or specially to warn the jury against attaching too much weight to the evidence now objected to. No doubt its value had been fully discussed by counsel for the defendant in his address. No objection was taken either at the trial, in the notice of appeal to the Appellate Division, or in the appellant's factum in this court to the accuracy or sufficiency of the charge itself. At bar counsel suggested non-direction only; *Creveling* v. *Canadian Bridge Co.*(1). Misdirection upon any aspect of the case was not even hinted at.

The verdict is, no doubt, large, but a case has not been made for interfering with it or for ordering a new assessment of damages, which, if an experience not uncommon should be repeated, might not result favourably to the defendants.

The appeal fails and should be dismissed with costs.

(1) 51 Can. S.C.R. 216.

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Brodeur J.

BRODEUR J. — The only question in this case is whether a new trial should be granted because the amount granted by the jury for damages is excessive.

It is a railway accident. The plaintiff (respondent) was a locomotive engineer, an employee of the appellant company. He seems to have been incapacitated for life. He was earning a sum of about $2,100 a year. There was not much evidence given as to the damages which should be granted and the verdict was for the sum of $27,000.

I am inclined to think that the amount is excessive, and if I had been on the jury I would certainly not have given so large a sum. But the charge to the jury seems to have been fair and it was for them to decide as to the amount.

I am sorry that we have to accept their verdict. It is to be expected that some day legislation will be passed in the provinces, where it does not exist now, by which those verdicts could be reduced by the courts of appeal.

In the circumstances, I cannot do otherwise than to dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *Geo. A. Walker.*

Solicitors for the respondent: *Mahaffy & Blackstock.*