

1899

JOSEPH HESSE (PLAINTIFF).....APPELLANT ;

*Nov. 7,8,10.

AND

*Nov. 29.

THE SAINT JOHN RAILWAY COM- }
PANY (DEFENDANT) } RESPONDENT.ON APPEAL, FROM THE SUPREME COURT OF NEW
BRUNSWICK.*Negligence—Action for damages—Improper evidence—Misdirection—60 V.
c. 24 s. 370 (N.B.)*

By 60 Vict. ch. 24 sec. 370 (N.B.) "A new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against the Electric Street Railway Company for damages on account of personal injuries, the Vice-President of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal Exchange, and proved that they sold at about 50 per cent premium. The judge in charging the jury directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages.

Held, that on cross-examination of the witness by defendant's counsel the door was not open for re-examination as to the selling price of the stock ; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages.

The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury he might consider more fully the question of amputation. The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible.

Held, Strong C.J. and Gwynne J. dissenting, that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.

To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction.

APPEAL from a judgment of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action in this case was for damages as compensation for personal injuries to the plaintiff, caused as was alleged, by negligence of servants of the defendant company. The plaintiff recovered a verdict with \$25,000 damages, and a new trial was moved for on grounds of misdirection and improper reception and rejection of evidence. The Supreme Court of New Brunswick granted a new trial, and plaintiff appealed to this court.

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.

1899 The material grounds of objection to the proceed-
 HESSE ings on the trial are stated in the judgments given on
 v. this appeal.
 THE
 SAINT JOHN *Quigley Q.C.* (*Stockton Q.C.* with him) for the
 RAILWAY
 COMPANY. appellant.

Pugsley Q.C. and *McLean Q.C.* for the respondent.

THE CHIEF JUSTICE.—I dissent from the judgment of the court for the reasons given in the judgment of Mr. Justice Gwynne, in which I concur in all respects.

GWYNNE J.—After a protracted and much contested trial of fourteen days continuance during which the defendants disputed all liability and no less than thirty-eight witnesses were examined the jury, said to have been a special jury and a most intelligent one, unanimously rendered a verdict for the plaintiff with twenty-five thousand dollars damages. The defendants moved to set aside this verdict upon seventy-five separate items of objection stated in their motion paper of which forty were objections of alleged improper reception of evidence, eleven of alleged improper rejection of evidence, twenty-two for alleged misdirection, then for excessive damages, and finally upon alleged discovery of new evidence.

Upon one only of these several grounds of objection did a majority of the Supreme Court of New Brunswick concur in granting a new trial. That ground was one of those for alleged misdirection which did not however at all affect the liability of the defendants for the occurrence of the injury, but was pointed solely to the amount of damages which had been rendered by the jury which were contended to be excessive. The objection relates to the

observations of the learned judge in his charge to the jury in relation to certain evidence given by a Dr. Broderick, a surgeon employed by the plaintiff to attend him upon his receiving the injury which is the subject of this action. The matter testified by Dr. Broderick came out as part of the narrative of the disaster which had befallen the plaintiff, of the nature of his injury, his sufferings and their continuance until his foot was amputated, and so the evidence given constituted matter which, as part of the narrative of the disaster, could not have been withheld from the jury, and assuming the evidence so given to have been true, in the opinion of the jury, no reasonable objection can, I think, be taken to the observations made by the learned trial judge in relation to it.

1899
HESSE
v.
THE
SAINT JOHN
RAILWAY
COMPANY.
—
Gwynne J.
—

The matter arose in this way. The plaintiff upon the occurrence of the injury received by him placed himself in the hands of Dr. Broderick. He had however to be taken for treatment to the general hospital at St. John where, as was said, only five or six medical men were permitted as surgeons or physicians to attend a patient. Dr. Broderick was not one of these but the defendants had retained one of the hospital surgeons, Dr. Thos. D. Walker, jr., to consult with Dr. Broderick as to the treatment of the plaintiff. Dr. Broderick for reasons which he gave was of opinion that, and urged that, the foot should be amputated. Although not permitted to take part in the treatment in the hospital he was permitted to see the plaintiff as a friend or visitor, and he was present in the hospital when the hospital surgeons put the plaintiff's foot in plaster, and his testimony was that upon leaving the hospital upon that occasion with Dr. Thos. D. Walker whom he knew had been retained by the defendants to consult with him he, Dr. Broderick, in conversation with Dr. Walker upon

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 Gwynne J.

the plaintiff's case remarked that in his opinion it would be best that the foot should be taken off and that Dr. Walker replied that if Dr. Quigley (the plaintiff's attorney in the matter)

did not use it to work on the sympathies of the jury and would look at it from the standpoint of a surgeon, that it might probably be arranged that the foot might be taken off earlier—that that could be arranged between them.

Now the defendant's counsel in the motion paper for a new trial without stating what were the observations of the learned judge to which the objection of misdirection is taken, in one paragraph of the motion paper put a construction upon the judge's observations which, assuming that construction to be correct, is one which is put forward by the defendants themselves as affecting Dr. Walker if the evidence of Dr. Broderick was to be adopted as true, but not in any manner as affecting the plaintiffs right to a verdict, or the amount of damages recoverable by him so as to constitute good ground for a new trial being granted for misdirection. In the motion paper for a new trial it is not suggested that, nor in my opinion is there any foundation for the suggestion in argument that, the learned trial judge's observations on this head had a tendency to induce the jury to increase the amount of damages for which they should render a verdict against the defendants. The learned trial judge in his judgment upon the motion for a new trial has, with reason, in my opinion, repudiated any such construction being put upon his charge, and indeed no such construction can, I think, be put upon it without eliminating more than half of the charge for in a very plain manner as I think did the learned judge expressly draw the attention of the jury to the evidence which he submitted to them as that upon which they should render the verdict both as to liability and as to amount

of damages if liable, and in such evidence, the reference to which occupies more than half of the learned judge's charge, there is not a syllable which relates to Dr. Broderick's evidence, while the whole contention of the defendant is laid before the jury in a clear and exhaustive manner. The gravamen however of this charge is stated in paragraph "M" of the motion paper as follows :

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 Gwynne J.

In telling the jury that Dr. Walker did not contradict Dr. Broderick, he only says that he did not remember making statements whereas the evidence shows that Dr. Walker not only says that he has no recollection of having made such a statement but did not think that he had done so.

Now Dr. Walker having been called as a witness by the defendant, was asked if he had heard what Dr. Broderick had said took place in conversation between them and, having said he had, he was asked if Dr. Broderick had stated that conversation correctly as he, witness, remembered it, to which he replied that he *had no recollection of mentioning anything about damages or about Dr. Quigley*. Then on cross-examination, he was asked if Dr. Broderick had said that he thought it better to take off the foot, to which he answered that he thought he did. Then the words used by Dr. Broderick in his evidence having been repeated to him he was asked if he would swear that he did not use those words to which he replied "I won't swear it but I do not think I did," "I won't swear I didn't," and he repeated several times that he did not think he did but he would not swear that he did not. Upon re-examination the defendant's counsel put to him this rather leading question :

Did such a thought as that ever occur to your mind ? To which he answered :—No,

and further said that notwithstanding what he had said in his examination, he had no recollection of

1899
HESSE
v.
THE
SAINT JOHN
RAILWAY
COMPANY.
—
Gwynne J.
—

having made such a statement, and that he did not think he had made it. Now the learned judge in the course of his narrative of the plaintiff's injury, and his suffering, spoke of the evidence given by Dr. Broderick as not having been denied by Dr. Walker, but that he said he did not remember having said what Dr. Broderick said that he had said. This I must say does not appear to me to be what can be called an inaccurate summary of what Dr. Walker had said. If however the learned counsel for the defendant thought otherwise, and also thought that it was a point which it was material to the defendant should be corrected, the course open to him was plainly to have called the attention of the judge at the time to the matter so that it might have been corrected instead of keeping silent and taking the chance of a verdict in favour of the defendant, and if it should be against them, moving on such an objection for a new trial for misdirection. The ordinary rule in England is not to entertain a motion for misdirection upon a ground not drawn to the attention of the trial judge. This is said not to be the practice in New Brunswick, while that the law of England is the law of New Brunswick upon the subject is not denied; but the statute 60 Vict. ch. 25 of New Brunswick, sec. 370, does enact that a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action, and no such wrong or miscarriage can be said to have been occasioned in that trial of the action by anything involved in the objection upon which alone the majority of the Supreme Court of New Brunswick have proceeded. Indeed as already observed, the objection is in the motion paper rested upon this

that the learned judge's alleged misstatement of Dr. Walker's evidence injuriously affected him, not that it occasioned any wrong or miscarriage in the trial of that action.

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 Gwynne J.

Counsel for the respondents pressed before us two of the seventy-five objections which did not in the opinion of a majority of the Supreme Court warrant the setting aside of the verdict, but in neither of these cases can it in my opinion be said that the observations of the learned judge which are objected to have occasioned any wrong or miscarriage whatever in the trial of the action. First as to that which arose on the examination of the witness Robinson. In his examination of that witness it cannot, I think, for a moment be supposed that the plaintiff's experienced counsel, the late Judge Palmer, had any idea of eliciting from the witness statements which had been made to him by others which the learned counsel contemplated should be taken as evidence of the truth of such statements; his object was, I think, to give to the witness, who as president of the company had gone to the States for the purpose of obtaining evidence to test the correctness of the statements of the plaintiff in his claim for compensation, an opportunity of saying whether he had learned anything contradictory of such statements as presented to the defendant. The learned counsel, I think, felt that if the president had answered the questions he was proposing to put to him he must have said that he had heard nothing prejudicial to the plaintiff's claim. He would then possibly have asked why then the action was so persistently resisted. The learned judge said that the witness having thus been given this opportunity of telling what, if anything, he had heard prejudicial to the plaintiff's statement and having through his counsel objected to answer the jury might, *when considering the value of the plaintiff's*

1899
 HESSR
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 —
 Gwynne J.
 —

evidence, infer that if the president of the defendant company could have said that he had learned anything contradictory of the plaintiff's statement he would have availed himself of the opportunity given him to do so. It must be admitted that these observations were quite unnecessary for the plaintiff had Mr. Eccles in court and divers others, all of whom were called as witnesses and spoke as to the plaintiff's professional standing, his present means before the injury, and but for the injury his future prospects, all of which evidence was submitted to the jury from which they had the fullest opportunity of setting their value upon the plaintiff's evidence which was the sole point to which the judge's remarks which were objected to related without any reference to the inference which it was suggested might be drawn from the interruption of the examination of the president of the company; but however unnecessary the remarks of the learned judge may be said to have been upon this head of objection it cannot, in view of the evidence of Eccles and others upon the point in question, be said that the remarks objected to upon this head occasioned any wrong or miscarriage whatever in the trial of the action. Then upon the head of objections as to what the learned judge said as to the commission. The form of that objection for misdirection is

in telling the jury that the defendant company were bound to have had the commission returned and that the fact that the commission had not been returned was a matter which they could take into consideration when pronouncing upon the credibility of the plaintiff.

I cannot see here any ground for an objection for misdirection. The observations which are objected to point only to the value to be attached to the plaintiff's evidence, for his credibility is not assailed in the only manner known to the law, and as to setting a proper value upon his evidence there was most abundant

evidence given by Eccles and other witnesses. The utmost that can be said is that the remarks involved in this objection were unnecessary, and it cannot be said that the learned judge's remarks on this head can have occasioned any wrong or miscarriage on the trial of the action. In the argument before us, although no point founded upon the contention was taken in any of the 75 objections on the motion paper, it was pressed upon us, although it had appeared that the commission was withheld by the commissioner and not returned by the express order of the defendants given through their solicitor, and although the defendants persistently contended that the plaintiff was not entitled to see the commission, yet that they had subsequently at the trial offered that either party might put in whatever minutes they severally had of the evidence given which they might choose to put in, an offer not accepted by the plaintiff. What was intended by the passing of this offer does not appear very plain. Whether it should be taken as a condonation of the offence committed in ordering the commission to be withheld in contempt of the order of the court or otherwise it is difficult to say. It is sufficient, however, I think, to say that the only objection on this head which we have to consider is that as framed in the motion paper for the new trial as above stated, and, so considered, the remarks of the learned judge cannot be said to constitute misdirection, and even if they could can not be said to have occasioned any wrong or miscarriage in the trial of the action.

Now all the objections taken as affecting the liability of the defendant for the injury which the plaintiff suffered are dropped at the last moment in the argument before us in which the contention that the defendant is not so liable has been no longer contended, and for the reasons already stated all the objections as of mis-

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 —
 Gwynne J.
 —

1899
HESSE
v.
THE
SAINT JOHN
RAILWAY
COMPANY.
Gwynne J.

direction as affecting the amount of damages must, I think, fail. All that remains, therefore, is the naked objection that the damages are excessive. It may be admitted that in this country it is not a usual thing for verdicts for \$25,000 damages to be rendered in an action of this nature, but neither is it a usual occurrence for the loss of a foot to occasion such excessive injury as that occasioned to the plaintiff, and which I think the evidence shows to have been of the very gravest possible character, destructive of his sole means of practising his profession as an organist, and of supporting himself and his family. Under these circumstances I do not feel justified in saying that this jury, the constitutional tribunal for awarding damages in actions of this nature, have erred in awarding to the plaintiff for the injury he has received the sum of \$25,000, large as that sum may appear to be. That was a matter solely for the consideration of the jury which was a special one, and said to have consisted of most competent and intelligent persons. I am of opinion, therefore, that the appeal should be allowed with costs, and that judgment should be entered for the plaintiff, in the action, upon the jury's verdict with costs.

SEDGEWICK J.—I concur in the judgment of Mr. Justice King.

KING J.—None of the objections to the admission or rejection of evidence require to be considered except one, viz. : that as to the shares of the company selling at a premium.

This occurred in the testimony of Mr J. Morris Robinson, the vice-president of the company, who was called on behalf of the plaintiff. The evidence in itself was improper, but it is contended that the matter

had first been gone into by the defendants on the cross-examination of Mr. Robinson. What took place was this: Mr. Palmer, counsel for plaintiff, questioned Mr. Robinson as to the equipment of the road and then asked:

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.

Q. You know, I suppose, that the company put out some \$400,000 of bonds. Did they not?

A. Yes. \$500,000 or \$450,000.

Q. And also \$500,000 of stocks?

A. Yes.

King J.

Mr. Quigley in opening to the jury had said:

It is a matter of common knowledge that these defendants are making and were making at this time and are to-day making large sums of money out of the building and equipping of this road. This fact you can see because they have formed a company and issued a large amount of stock, but the investment is such a profitable one that the stock rose to the value of \$145 for every \$100; in other words really 50 per cent more. If meanwhile they have been converting these cars into death traps for young and old riding upon them, each one of us is equal to the realizing the sense of the outrage which has been committed against each one using the tram cars in this city.

Then the counsel for the defendants, when it came to the cross-examination, attempted to show that the proceeds of this large issue of bonds and stock had gone into the equipment of the road, but in this he wholly failed, and ended in proving what probably he would have preferred not to prove, viz.: that it had been divided up amongst the shareholders of the amalgamating companies according to a scheme agreed upon before the amalgamation.

Q. My learned friend Mr. Palmer asked you if this company had not issued stock and debentures to the amount which he named, and my learned friend, Dr. Quigley yesterday, in what I think may be the same connection, told the jury that the company made a large amount of money out of the stock and debentures. Is that true?

A. The stock is selling at quite a premium—

Q. He said that the company made an amount out of the issue?

A. That is not within my knowledge.

1899

HESSE

v.

THE

SAINT JOHN
RAILWAY
COMPANY.

King J.

Q. Is it not a fact that the proceeds of the debentures went into the new road and the erection of the power house and thorough equipment of it?

A. No ; that is not the case.

Q. I do not say all of it, but—

A. No, none of it. It was an amalgamation of two companies, and on the amalgamation certain stock and bonds were issued and divided among the shareholders according to the proportion agreed upon.

The original notes of the official stenographer and the printed case show, by a dash after the word "premium" that Mr. Robinson's answer to the first question was interrupted by counsel who, in another question, put before the sentence was completed, repeated in shorter form the question he had put before. Clearly, Mr. Robinson's unfinished answer was not responsive to the question, and, by interrupting him before he finished the sentence and drawing his mind to the real question, it is made sufficiently clear that the defendant's counsel was not accepting it as an answer to his question. The plaintiff's counsel would clearly not have been entitled to require that Mr. Robinson should be permitted to finish the sentence he had begun.

Upon re-examination the plaintiff's counsel drew attention to this answer, and went on at length into the matter of the selling price of the shares on the stock market at Montreal, proving that they had sold at 145 or 150. This evidence was objected to. I agree with Tuck C. J. that the door was not opened for such re-examination by the cross-examination of defendant's counsel, and the evidence must be considered as calculated to work substantial injury to defendants on the question of damages. The only real question remaining in reference to it is whether its natural effect was not neutralised by the observations of the learned trial judge in instructing the jury that the damages were to be assessed

upon the extent of the injury plaintiff received, independent of what these people may be or whether they are poor or rich.

Under the practice Act of the Supreme Court of New Brunswick, 60 Vict. c. 24, sec. 370,


a new trial is not to be granted on the ground of misdirection or of the improper admission or rejection of evidence * * * unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.

In *Mayne on Damages*, at p. 405, it is remarked that although juries are frequently cautioned not to let their verdict be influenced by the poverty of the plaintiff and the wealth of the defendant, yet the caution is probably seldom much attended to.

In view of the amount of the verdict in this case it is quite likely that the general observation of the learned judge did not remove the effect of the improper evidence as to the financial ability of the company to respond well in damages.

Next as to grounds of alleged misdirection :

(1) As to the inference to be drawn from the defendant's objection to Mr. Robinson's stating what he was told in Providence by a Mr. Eccles regarding plaintiff's standing, earning capacity, etc. :—About the time of action brought, the plaintiff's attorney informed Mr. Robinson (the vice-president of the company at St. John) that they could learn of the plaintiff's character and standing in his profession, etc., by inquiry at Providence, indicating several sources of information. Mr. Robinson went to Providence and made inquiries (amongst others) of a Mr. Eccles, who was not however, one of those indicated by plaintiff. Mr. Robinson called on behalf of the plaintiff, testified on direct examination that he had been recommended by a Mr. Torrance to Mr. Eccles, and that he had asked the latter as to plaintiff's standing as a musician, and as to his ability to earn money as an organist. He was then asked by plaintiff's counsel: "What information did you get" *i. e.* from Mr. Eccles. On objec-

1899

 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 —
 King J.

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 King J.

tion by defendant's counsel the question was disallowed, and I think properly, because it was mere hearsay, and could not possibly be held to be evidence in support of plaintiff's case. If plaintiff had mentioned Eccles as a person from whom information might be sought as to him, it might make Eccles's statements to Mr. Robinson evidence against himself, but it is quite a different thing when he seeks the benefit of the unsworn statements and opinions of third persons.

When the learned judge came to charge the jury he said:

As I said a moment ago that the onus is upon the plaintiff to make out what he earned, but at the same time, while that is true, you have also had it in evidence that these defendants were put in a position to make the fullest inquiry as to the man's circumstances, where he was living, his social status, and his professional status, and all that. You have the evidence of Mr. Robinson that he went to Providence, that he was recommended to Mr. Eccles as a man who could give the proper information, that he had an interview with him. He comes back, and while the information he received would not be evidence, if objected to, still you may fairly consider this, that when Mr. Robinson is given an opportunity to tell all that, it was objected to and was necessarily ruled out; but when you come to consider Mr. Hesse's evidence, may you not assume that if he (*i. e.* Mr. Robinson), heard anything unfavourable, would he not have told it? It is for you to consider this, and you can consider this as to the weight to be given to or attached to Hesse's evidence, and it is for you to consider all this when you come to pronounce on the credibility of the witness. and it is not amiss for you to look at the surrounding circumstances and those things, and from them receive what assistance you can in determining how far you can accept his statement. I think it is material at which you can look when you are considering his earning capacity.

The learned judge can scarcely have well considered his words. If the unsworn statements of Mr. Eccles to Mr. Robinson were not admissible as against defendant, the objection to such improper evidence cannot prejudice the case, or help out that of the plaintiff, by inferences favourable to his credibility or

in any other way. How can A's credibility be supported by the proper rejection of B's improper testimony? It would be quite a different thing to say that failure by defendant to produce available evidence would tend to give credit to the testimony of one who was giving an account of occurrences which, if an incorrect account, could be readily shown to be so by such other proof not adduced.

While I have no doubt of the error, I am doubtful as to how far it can have affected the result prejudicially, and this for this reason :

Mr. Eccles was himself a witness on the trial, called on behalf of the plaintiff, and while his statement made in Providence to Mr. Robinson was inadmissible, the jury were in possession of his testimony on the trial, and to the extent that it went, it was much in favour of the plaintiff, and the jury might very well have found the same support in Eccles's testimony, as they were told they might find by an inference drawn from defendant's exclusion of his unsworn statements in Providence. The two things are not entirely equivalent, but there is so much approach to equivalence that it is unreasonable to conclude that the direction on this point prejudicially affected the trial of the case.

I may only add that when Mr. Eccles gave his testimony what had previously taken place in the objection to and rejection of evidence of his statement to Mr. Robinson became an incident of no importance whatever; and if the learned judge referred to it at all, he might well have added that it had then no significance, inasmuch as the jury had Eccles's evidence before them, which was much more satisfactory than any mere statement of what he had said to another could possibly be.

1899

HESSE

v.

THE

SAINT JOHN
RAILWAY
COMPANY.

King J.

1899
HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 King J.

(2) Next, as to the direction respecting the withholding of the evidence taken upon commission. A commission was taken out on behalf of the defendant to examine witnesses in Providence, and other places in the United States touching the plaintiff's earning capacity, &c. The evidence was taken, and one of the judges of the court made an order for its return, but the attorney for the defendant directed the commissioner not to return it, and he did not.

On this the learned judge said :

However, it is not here,—and we cannot refer to it—good or bad, but there is this about it, that if Mr. Hesse was here as an impostor and did not receive that income, would it not occur to you that they having gone there and examined those witnesses, is it not an element which may be very fairly considered in determining about it in the absence of contradiction? People cannot play fast and loose. Either they were sincere in going there and getting this evidence, or there was some other motive; but I say to you, while you have not that evidence here, you may consider this when you come to pronounce upon the credibility of Mr. Hesse, because if he is here as an impostor and claiming that he received \$4,000 or \$5,000 a year and only received \$1,500, then it is an imposition upon you to try to get you to believe it and an imposition upon this court. And you must be satisfied upon that reasonably and when you come to consider the matter, I think it is fair for you to consider all those surrounding circumstances.

Now this really means nothing more than this, that if a defendant sets up that there is evidence contradicting the plaintiff's case available to him, if he is afforded the opportunity of getting it, and if he therefore is afforded such opportunity and gets the evidence of the witnesses, and afterwards does not produce it (it being presumably legal and proper evidence), the testimony of the plaintiff which was sought to be contradicted is thereby strengthened. This assumes that if the facts were otherwise than as represented, this could be shown (and so much may be assumed from what took place in getting and acting on the

commission), and, therefore, failure to contradict leaves the plaintiff's statement in undisputed possession of the field so far as this class of opposing testimony is concerned.

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 King J.

The learned judge did not refer to the offer of defendant's counsel at the close of the plaintiff's case to have a copy of the evidence taken upon the commission admitted as if it were the original. I think it very likely that if his attention had been drawn to this omission he would have made some reference to it; although I am not prepared to say that, under the circumstances, the offer wholly made up for the failure to adduce the evidence.

(3) The next objection seems to be a more serious one. On the happening of the accident, the plaintiff was taken to the General Public Hospital in St. John. The medical and surgical staff on that day consisted of Drs. Christie, Maclaren, Emery and T. Walker, jr. Dr. Christie was of opinion that the foot should be at once amputated, and (in his recollection) Dr. Maclaren had the same view. Dr. Emery thought it possible to save the foot, and Dr. Walker agreed with him. Dr. Christie says:

The other two were allowed to go on, because if they who had the man in charge (*i. e.* they who were acting as the staff physicians of the day) thought something could be done towards saving the limb we were not going to insist on doing anything to the contrary.

Dr. Christie adds that the patient appeared to him then to be a man about fifty, and that if he had known that he was in fact under forty he might have thought differently, adding that he was influenced very much by the appearance of the patient. He further says if he were to form a judgment upon the appearance presented by the plaintiff at the trial he should hesitate in advising as he did. The accident occurred on Sunday the 17th of July. On Wednesday Mr. Quigley

1899
 HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 King J.

wrote the company that he had been retained by Mr. Hesse to seek compensation for the injury, and suggested that they appoint a physician to co-operate with Dr. Broderick, the plaintiff's physician, so far as the rules of the hospital would permit. On Thursday the 21st, the company replied that they had appointed Dr. Thos. Walker, jr., to assist Dr. Broderick. By the rules of the hospital Dr. Broderick could not take part in the treatment or in consultations, as not being on the hospital staff, and so Mr. Hesse afterwards appointed Dr. Daniel, a member of the staff, to act as his immediate physician.

On the Thursday following another consultation was held, in which Drs. White, Thos. Walker, sr., Thos. Walker, jr., Christie, Daniel and Maclaren took part. Dr. Broderick was present but not as a consulting physician. As a result, the leg was put up in plaster.

On Sunday the 24th, owing to the progress of disease in the injured member, another consultation was held by Drs. White, T. Walker, jr., and one or two others, when it was decided to amputate at once, and Drs. White and T. Walker, jr., as respectively the surgeon and general practitioner of the day, performed the operation.

Dr. Daniel says that the ordinary rule among physicians is to save the limb if possible, and Mr. Quigley in opening to the jury said:

We were all very anxious that Professor Hesse's foot should be preserved if possible.

Notwithstanding this he alleged that

Dr. Walker for the company strongly resisted the amputation, hopeful that the foot would be saved, and thus a large sum of money saved to the company.

And we find the learned judge saying:

It has been put forward here on the one side that the amputation ought to have taken place upon the very day that the accident occurred.

He then refers to a conversation which Dr Broderick who had been in favour of an earlier amputation, says that he had with Dr. Walker, jr., in a street car after leaving the hospital on Thursday the 21st, in which Dr. Walker said (according to Dr. Broderick) that

if he could get Mr. Quigley to look at it from the standpoint of view as a surgeon and not use it as a means of appealing to the sympathies of the jury he might consider himself more fully the question of the idea of amputation.

This is Dr. Broderick's final version given upon re-examination. After referring to the facts at some length the learned judge continues thus :

It seems to me a very important thing indeed if Dr. Walker was there using his position and his voice as one of the hospital staff to keep the limb on when it ought to have been taken off. All I can say is that it is very reprehensible. That is what Dr. Broderick said, however, and it is for you to say whether you credit his statement or not.

When Dr. Walker on Sunday, the 17th, favoured trying to save the limb he had not been spoken to by the company, nor was he spoken to for three or four days after that. There was therefore no ground whatever for the suggestion that the company was responsible for the amputation not having taken place "upon the very day that the accident occurred." And as to what Dr. Broderick states as being said by Dr. Walker, following the Thursday consultation, it perhaps may fairly mean no more than that if he could be sure that Mr. Quigley would look at it from a surgeon's standpoint instead of using it, *i.e.* the amputation, as a means of appealing to the sympathies of the jury, he might reconsider his opinion, Dr. Broderick being so strongly in favour of amputation.

1899

HESSE

v.

THE
SAINT JOHN
RAILWAY
COMPANY.

King J.

1899

HESSE

v.

THE
SAINT JOHN
RAILWAY
COMPANY.King J.

The learned trial judge in his dissenting opinion at term, after quoting from his charge, says:

I cannot myself discover any statement here from which it could be reasonably or fairly inferred that the jury were instructed that they should consider the conduct of Dr. Walker as a reason for enhancing the damages against the company. * * * The remarks were only intended to apply to Dr. Walker as a physician and to his conduct in treating this man Hesse, not using his position as the physician of the company, but using his position as one of the consulting physicians to prevent early amputation for fear amputation might lead to increased damages against the company. It was in reference to his conduct in using his position as a member of the consulting staff that the remarks were made, as showing that he, although a medical man and there to advise, presumably in the best interests of the patient, allowed him to suffer for some days without amputation when, but for him, amputation would have taken place at an earlier day. And while it may not be clear from the evidence, it is apparent, I think, to any one who carefully peruses it, that amputation was delayed as long as it was through his instrumentality.

I cannot agree as to this appearing upon the evidence. At the time of the first consultation Dr. Walker was independent of the company. On the second and larger consultation, it does not appear that he did more than express his opinion, and, for all that appears, two-thirds of the consulting staff may have been of the like mind, certainly the majority were; and, further, it is not proved at all, in a way to be assumed as a fact, that it was not the most prudent and correct course, to endeavour to save the foot, down to the day on which it was in fact taken off. The operation was successfully performed, and the patient had a good recovery.

The learned judge's explanation of his charge shows that a matter which, in his view, could not affect, and ought not to have affected, the damages, was so laid before the jury that they would suppose that it was material to the case. Why was it declared to be most important? And why were the jury asked to pass upon

it? Manifestly the jury would consider it as bearing upon the contention of plaintiff that the amputation ought to have taken place on the very day on which the accident occurred. It is impossible to say that it was not calculated to affect the amount of the verdict. It was very important in this case to keep all irrelevant disputes out of it. There are besides expressions in the charge which cannot have been sufficiently considered, as, for instance, where the jury are told to ask themselves :

If I were Hesse, under the evidence, how much ought I to be paid if the company did me an injury ?

Suppose the contrary were put :

If I were the defendant, under the evidence, how much ought I to pay ?

It is perhaps impossible to prevent jurors looking at a case in this way, but at least they ought not to be invited to do so, and such direct resorts or appeals to the feelings and interests of the individual jurymen can only exercise a disturbing or misleading influence. In *Phillips v. London & South Western Railway Co.* (1) the form of the usual and well sanctioned direction in such cases is given, and it seems to me (with all respect to the very learned judge) that too many disturbing and confusing considerations got into the case, with the result of a verdict which, to say the least, is unusually large in this country.

The weakness of the plaintiff's case (if I may say so) was that his evidence was general and uncertain where it might be expected to be precise, and left the area for surmise and conjecture too large. The learned judge says in his charge that Hesse himself did not give the best information possible. Upon the whole then I think that the verdict cannot be sustained and that there should be a new trial.

1899
HESSE
 v.
 THE
 SAINT JOHN
 RAILWAY
 COMPANY.
 King J.

1899

HESSEv.
THESAINT JOHN
RAILWAY
COMPANY.King J.

A provision of the New Brunswick Statute, 60 Vict. c. 24 (sec. 371) enacts that a new trial may be ordered on any question in an action, whatever be the ground for the new trial, without interfering with the finding or decision upon any other question.

The verdict or finding of the jury in this case is for the plaintiff, with damages assessed at \$25,000. I think it competent under the above statute to order that the new trial be limited to the assessment of damages, the finding as to the liability of the defendant to the plaintiff in respect of the alleged cause of action not being interfered with; and in my opinion the judgment ought to be varied to this extent, and the appeal dismissed subject to such variation.

GIROUARD J.—I concur in the judgment of Mr. Justice King.

Appeal dismissed without costs.

Solicitor for the appellant: *R. F. Quigley.*

Solicitor for the respondent: *H. H. McLean.*
