GEORGE DAVID CORRIE AND MABEL LILLIAN CORRIE (*Plaintiffs*) ..... APPELLANTS;

AND

VERNON LETTON GILBERT (*Defendant*) ..... RESPONDENT.

1965

*Mar. 2, 3
Apr. 9

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Damages—Motor vehicle accident—Injury giving rise to phlebitis—Pre-existing disability—Both award of jury and that of Court of Appeal rejected by Supreme Court.*

As a result of a motor vehicle accident the female plaintiff suffered bruises to her right hip and her left shoulder, muscle injury to her neck and an injury to her left leg from which phlebitis developed. Some years before the accident the plaintiff had suffered from phlebitis of the left foot but this condition had cleared up and although she suffered from a vascular condition in this leg through the years it had been arrested, following an operation, to a point where she was able to lead a reasonably active life without discomfort. Liability for the accident was admitted by the defendant and the parties agreed upon the amount of the special damages. The trial and appeal were exclusively concerned with the assessment of general damages. The jury's award having been reduced by the Court of Appeal, the plaintiffs appealed to this Court.

*Held* (Abbott and Judson JJ. dissenting): The appeal should be allowed and the judgment of the Court of Appeal varied.

*Per* Martland, Ritchie and Hall JJ.: The damages were to be assessed upon the basis of the injury suffered by the plaintiff as it manifested itself at the date of the trial, making due allowance for the probable future developments but excluding such matters as remained in the sphere of possibility. Upon that basis the verdict of the jury was inordinately high.

In treating the prospects of an increase in the plaintiff's pre-existing disability and the probability of her receiving such an injury as she did in any event, as matters to be considered in reduction of the damages to which she was entitled, the Court of Appeal was giving weight to factors which should have been left out of account and an award based on such considerations should not stand. Further, the Court of Appeal had fallen into the error of substituting its opinion as to the weight to be given to the evidence respecting the plaintiff's present disability for that of the jury.

It was unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there was no doubt that under s. 46 of the *Supreme Court Act* it was empowered to give the judgment that the Court whose decision was appealed against should have given. Reviewing the evidence as a whole, and having regard to the fact that the mild permanent disability from which the

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1965

CORRIE v. GILBERT

plaintiff suffered before the accident had, owing to the blow which she received through the fault of the defendant, become a serious permanent disability due to phlebitis, the opinion was reached that an award of $8,000 would afford a more realistic compensation than either the $20,000 awarded by the jury or the $3,000 to which the Court of Appeal reduced it.

*Marcroft v. Scruttons, Ltd.*, [1954] 1 Lloyd's Rep. 395, referred to.

*Per* Abbott and Judson JJ., *dissenting:* The task of this Court was not to retry the issues but to determine whether there was any reversible error in the judgment of the Court of Appeal. No such error was found.

APPEAL from a judgment of the Court of Appeal for British Columbia allowing an appeal from a judgment rendered by Ruttan J. sitting with a jury and thereby reducing the general damages awarded by the jury in respect of injuries sustained by the appellant as a result of a motor vehicle accident. Appeal allowed and judgment of the Court of Appeal varied, Abbott and Judson JJ. dissenting.

*T. O. Griffiths,* for the plaintiffs, appellants.

*F. U. Collier* and *J. M. Miller,* for the defendant, respondent.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The Court of Appeal has thought this an appropriate case for the review of a jury's award of $20,000 for damages for personal injuries. A unanimous judgment has reduced these damages to $3,000. I agree with the reasons of Sheppard J.A. in their entirety.

I wish to repeat what I said in my dissenting reasons in *Roumieu v. Osborne*[1], that our task is not to retry the issues but to determine whether there is reversible error in the judgment of the Court of Appeal. I can find none.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia allowing an appeal from a judgment rendered by Ruttan J. sitting with a jury and thereby reducing from $20,000 to $3,000 the general damages which the jury had awarded in respect of injuries sustained by the appellant, Mabel Lillian Corrie, when the respondent backed his car into a stationary vehicle moving it backwards in such manner that its door struck Mrs. Corrie

[1] [1965] S.C.R. 145.

knocking her to the ground and causing bruises to her right hip and her left shoulder, muscle injury to her neck and an injury to her left leg from which phlebitis developed.

The defendant admitted liability for the accident and the parties agreed upon special damages at the sum of $543.17. The trial and appeal were exclusively concerned with the assessment of general damages.

Although the injuries to Mrs. Corrie's hip, shoulder and neck caused her pain and discomfort for some time, the matter with which this appeal is chiefly concerned is the condition of her left leg.

Some twenty years before the accident (*i.e.* in 1940) Mrs. Corrie had suffered from phlebitis of the left foot but this condition had cleared up and although she suffered from vascular disorders in this leg through the years they were confined to the superficial and communicating veins and an operation had been successfully performed in 1960 which, while not effecting a complete cure of this condition, had nevertheless arrested it to a point where Mrs. Corrie was able to lead a reasonably active life without discomfort.

Without reviewing the very lengthy medical evidence in detail, I adopt the following general description of the change in condition brought about by the accident which is contained in the reasons for judgment rendered on behalf of the Court of Appeal by Sheppard J.A. where he says:

> The general medical evidence is that prior to the accident she had a mild permanent disability; following the accident she had a serious permanent disability due to phlebitis which had affected some of the valves and created some turgidity.

Four doctors testified as to the condition of Mrs. Corrie's leg, only two of whom (Davis and Sutherland) had seen the leg before the accident, and although there is some difference between them as to the prognosis, they are all agreed that the phlebitis still present at the time of the trial was caused by the blow sustained in the accident.

In reducing the damage award, Mr. Justice Sheppard was clearly of the opinion that the jury had based its verdict in large measure upon the frightening "possibilities" attendant upon the post-traumatic phlebitis which Mrs. Corrie had developed as a result of the accident, and it was stressed on behalf of the respondent in this Court that in putting

1965

CORRIE
v.
GILBERT

Ritchie J.

the case to the jury Mrs. Corrie's counsel had over-emphasized these "possibilities" and that the learned trial judge had failed to give sufficient direction as to the necessity of leaving them out of account in assessing the damages to be awarded.

In the course of his charge to the jury, Mr. Justice Ruttan, who presided at the trial, after having stated that the case was to be decided "upon the balance of probabilities" went on to say:

> For example, in this case there has been a good deal of evidence given of the possibility of this poor lady's suffering loss of nutrition in her legs due to the disturbance of the flow of blood causing ulceration and eventually necessitating an amputation of the leg. I think I am fair in saying that both Dr. McConkey and Dr. Sutherland thought that such a development was only a possibility and a remote possibility at that. I think the evidence of both these doctors is that was not a probable development—it has only a remote possibility. That is an illustration of possibility against probability. Furthermore there was another possibility that was suggested, of sudden death that might be occasioned this lady due to pulmonary embolism. I will not go through all the medical way in which pulmonary embolism develops and causes death; I think you are as well versed in that as I am now, but you will remember that was a possibility put forward and suggested by counsel, both to the doctors, and in argument to you of a possible future development of this case for this lady. Once again I think that both doctors agreed that the possibility of death from a pulmonary embolism is just that, "a possibility" and not a very reasonable possibility or a very obvious possibility at that. The probability is that the lady may continue to suffer from the embolism; indeed, the evidence is, and I think this is a probability to be drawn from the evidence, that she has suffered from embolisms this year in April and again in August, but that these were, I will not say "minor embolisms" because the doctors say no embolism is a minor difficulty, but they were not grave. They are serious, they are painful, but they are not grave.

Dealing with the possibility of embolism again a little later in the charge, the learned trial judge said:

> I just give that as another illustration of a possibility, but as I see it, not a probability in the opinion of the experts.

It is, however, noteworthy that the learned trial judge treated these "possibilities" as being a factor in increasing nervous tension and in this regard he suggested:

> Mr. Griffiths did suggest to you, very properly, as he is entitled to, that even though these may be mere possibilities—that is, the possibility of ulceration and amputation or death from a pulmonary embolism, and even though they may be remote, none the less he says they exist presently in the mind of Mrs. Corrie, with her day to day as possibilities which may happen, and to that extent, increase her present nervous tension. Well, as a factor in her continuing nervous tension, you may consider it.

In my opinion the trial judge, having correctly instructed the jury that their verdict was to be based upon "probability", sufficiently illustrated the difference between "probabilities" and "possibilities" in relation to the present case and there was no misdirection in this regard. I do not, however, think that there was any evidence in the record to warrant the instruction to the jury that they might consider the serious "possibilities" as a factor contributing to the plaintiff's nervous tension. To so direct the jury was, in my view, having regard to the evidence, to invite speculation.

It is my opinion that the damages in the present case are to be assessed upon the basis of the injury suffered by Mrs. Corrie as it manifested itself at the date of the trial, making due allowance for the probable future developments but excluding such matters as remain in the sphere of possibility, and that upon this basis the verdict of the jury was inordinately high.

It is apparent, however, that the drastic reduction made by the Court of Appeal was also based upon other considerations because Mr. Justice Sheppard, having excluded from his reasoning all the more serious developments which *might* arise as a result of the phlebitis went on to say:

> *Further, her claim for disability is reduced to the extent that her previous disability would have increased irrespective of the accident.* The blow she suffered was not severe; the car in front had backed up only two or three feet and had had no great opportunity to accelerate. The plaintiff was not knocked flat on the sidewalk and her injuries did not at any time confine her to hospital or to bed. *As the blow was so slight as not to confine her to hospital or to bed there must be estimated the probability of her receiving an equivalent injury in any event, had the accident not happened.* Also, she had suffered from a varicose condition between 1942 and 1960 and this condition ordinarily requires a lifetime of treatment, that is, that it is liable to recur, according to Dr. Sutherland; and Dr. McConkey says that condition usually produces progressive trouble and some degeneration. Dr. Davis was unable to say whether her condition after the accident would have occurred in any event.
>
> Under those circumstances the allowance of $20,000 as the difference between her disability before the accident and after is so inordinately high as to indicate an error within *Nance v. B.C. Electric Railway Co.* [1952] 1 W.W.R. 665.

The italics are my own.

It appears to me with all respect that Mr. Justice Sheppard's finding that the plaintiff's "claim for disability is reduced to the extent that her previous disability would have increased irrespective of the accident" is open to serious question. In the first place the "previous disability" while

1965

CORRIE v. GILBERT

Ritchie J.

vascular in origin, was not at all the same thing as the disability which was caused by the accident, and in the second place, when the medical evidence is considered as a whole, the chance of her previous disability increasing is as much in the field of "possibility" as that of an embolism developing from phlebitis.

Furthermore, it appears to me that in making allowance for the "probability of her receiving an equivalent injury in any event, had the accident not happened", Mr. Justice Sheppard was giving weight to a factor which should not have been taken into consideration.

In this regard I refer to the following sentence from Mayne & McGregor on Damages, para. 102, p. 94 where it is said:

> It has never been seriously disputed that an admitted or established wrongdoer is liable for any increased injury to his victim by reason of an abnormal physical susceptibility.

The observations of Lord Justice Denning in *Marcroft v. Scruttons, Ltd.*[1], although *obiter dicta* in that case appear to me to be significant. He there said, at p. 401:

> This man was injured in an accident which was not in itself very serious. He fell about 10 ft. while working on board ship. He did not break any bones, and was not even cut as far as we know, although he may have been bruised. But at the time he had, unbeknown to him, a constitutional weakness which made it very serious for him, because the accident operating on that weakness produced in him a very severe nervous shock, trembling from head to foot. He stammered, and was quite unable to do his work. His constitutional weakness was such that, apart from the accident, any other disturbing factor might have produced a similar result. Any illness or worry, or even loss of work, might do it. None the less, in assessing damages we must, I think, disregard this factor, because a wrongdoer must take his victim as he finds him, with all his weaknesses, whether it be a thin skull or any other constitutional weakness.

In treating the prospects of an increase in the plaintiff's pre-existing disability and the probability of her receiving such an injury as she did in any event, as matters to be considered in reduction of the damages to which she is entitled, the Court of Appeal was, in my respectful opinion, giving weight to factors which should have been left out of account and an award based on such considerations should not stand.

In the course of his evidence, upon which the jury were entitled to rely, Dr. Sutherland, having stated that varicose veins is a different condition from phlebitis, went on to

[1] [1954] 1 Lloyd's Rep. 395.

describe the difference between the condition of the plaintiff's leg before and after the accident. As to her condition before the accident he said:

> Mrs. Corrie had a mild permanent disability in her leg as a result of the condition that she had and the operation that was done. After all, we did interrupt some veins which may have been partly functioning, may not have been. So that she would have a small permanent disability which would reduce her effectiveness a very small amount over a normal person who had never had either the disease or the operation.

As to her condition after the accident he said:

> The condition by the time of the second visit it was obvious that she had deep vein phlebitis . . . And this has gone from acute phlebitis now to the chronic phlebitis, so that she has pain in her leg all the time, she has tenderness all over the veins, the deep veins in her leg, she has swelling of her ankle and foot chronic now.

In the course of his reasons for judgment, Mr. Justice Sheppard described the effect on the plaintiff of her present disability in the following terms:

> Her actual disability was a limitation in walking and in her housework to the extent that she would not cause her leg to be overtired.

Dr. Sutherland describes this condition as follows:

> Yes. She has to pamper her left leg now. She can walk only so far and stand only so long until she has to get off her feet and get her foot up in the air . . . This is not what Mrs. Corrie told me. I am telling her this is what she must do. When she walks and gets pain in her leg and when she stands and gets pain in her leg she must get off it and get it elevated . . .

Later in his evidence Dr. Sutherland was asked:

> Q. . . . Would you describe it in terms of a general description?
> A. I think she has a severe disability in her left leg, yes.
> Q. Can you give us any indication as to whether or not you consider it to be permanent?
> A. It is permanent, yes.
> Q. Can you give us any indication as to whether it will improve or worsen in the future?
> A. It will get gradually worse.

Rule 36 of the British Columbia Court of Appeal Rules provides that:

> Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

And it was pointed out to us by counsel for the respondent that R. 4(1) of The Court of Appeal Rules provides that:

> All appeals to the Court shall be by way of rehearing . . .

In my opinion this does not mean that the Court of Appeal in reviewing an award of damages is at liberty to

1965

CORRIE
v.
GILBERT

Ritchie J.

disregard evidence which the jury was entitled to take into account in reaching its award, and in my respectful opinion, Mr. Justice Sheppard has fallen into the error of substituting his opinion as to the weight to be given to the evidence for that of the jury.

I am, however, as I have indicated, of opinion that no jury acting judicially, could have reached the verdict of $20,000 if they had confined themselves to the existing injury and its probable future development.

It is unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there is no doubt that under s. 46 of the *Supreme Court Act* it is empowered to give the judgment that the Court whose decision is appealed against should have given, and for the reasons which I have stated, I do not think the award made by either of the Courts below should be affirmed.

After reviewing the evidence as a whole, and having regard to the fact that the mild permanent disability from which the plaintiff suffered before the accident has, owing to the blow which she received through the fault of the respondent, become a serious permanent disability due to phlebitis, I have reached the opinion that an award of $8,000 would afford a more realistic compensation than either the $20,000 awarded by the jury or the $3,000 to which the Court of Appeal reduced it.

I observe that the formal judgments rendered at trial and in the Court of Appeal constitute an award of general damages to both of the appellants. As this award is made in respect of personal injuries sustained by the female appellant, I can see no ground upon which George David Corrie is entitled to share in it.

I would allow this appeal with costs and direct that the judgment of the Court of Appeal be varied by increasing the damages awarded from $3,000 to $8,000 and awarding these damages to the female appellant, Mabel Lillian Corrie.

*Appeal allowed with costs, damages increased,* ABBOTT *and* JUDSON JJ. *dissenting.*

*Solicitors for the plaintiffs, appellants: Griffiths, McLelland & Co., Vancouver.*

*Solicitor for the defendant, respondent: G. Roy Long, Vancouver.*