1957
*Oct. 29
Nov. 18

HARRY LANG AND MICHAEL JOSEPH (*Defendants*) ..... APPELLANTS;

AND

PATRICIA POLLARD AND MARY LOU MURPHY (*Plaintiffs*) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

Damages—Reassessment on appeal—No interference in Supreme Court unless exceptional circumstances shown.

Where a provincial Court of Appeal increases an award of damages made by a trial judge sitting without a jury the Supreme Court will not interfere with the amount fixed by the Court of Appeal unless very exceptional circumstances are shown. *Pratt v. Beamen,* [1930] S.C.R. 284 at 287; *Hanes et al. v. Kennedy et al.,* [1941] S.C.R. 384 at 387, applied.

APPEAL from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1) affirming a judgment of Richard J. as to liability but increasing the amount of damages awarded. Appeal dismissed.

J. Paul Barry, Q.C., for the defendants, appellants.

D. G. Rouse, for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Fauteux J. was delivered by

THE CHIEF JUSTICE:—At the conclusion of the argument on behalf of the appellants, and without calling upon counsel for the respondents, we were all of opinion that the appeal failed as to the question of liability; that is, we were satisfied that the accident was caused by the gross negligence of the driver of the automobile and that the

*PRESENT: Kerwin C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

(1) (1957), 9 D.L.R. (2d) 637.

respondents were neither *volens* nor contributorily negligent. Judgment was reserved on the appeal as to damages.

After considering all the evidence and the reasons for judgment in the Courts below, I have come to the conclusion that this Court should not interfere with the awards made by the Appeal Division. No question arises as to special damages but the majority of the Appeal Division came to the conclusion that the allowances made by the trial judge for general damages were so inordinately low as to be a wholly erroneous estimate of them, referring to *Nance v. British Columbia Electric Railway Company Limited* (1). The matter has also been considered in this Court in *Ross v. Dunstall; Ross v. Emery* (2), *Pratt v. Beaman* (3), and *Hanes et al. v. Kennedy et al.* (4). While in these last three cases a provincial Court of Appeal had reduced the damages awarded by the trial judge, the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in the various Provinces, that this Court will not, except in very exceptional circumstances, interfere with the amounts fixed by the Court of Appeal where they differ from the damages assessed by the trial judge. Mr. Barry referred to several cases where this Court did not agree with the amounts awarded by a Court of Appeal, but in all of them exceptional circumstances were to be found. In any event, facts differ so greatly that it is impossible to say that one case is precisely like another.

In the Appeal Division Mr. Justice Bridges, who finally agreed in the trial judge's estimate of the damages, stated that if he had been trying the case himself he would have allowed Miss Pollard $10,000 instead of $7,000 general damages. The majority, finding that the trial judge's estimates were so low as to require correction, concluded that for general damages a proper allowance to the respondent Patricia Pollard was $15,000 and that in the case of the respondent Mary Lou Murphy the $1,200 allowed at the

(1) [1951] A.C. 601, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665.
(2) (1921), 62 S.C.R. 393, 63 D.L.R. 63.
(3) [1930] S.C.R. 284, [1930] 2 D.L.R. 868.
(4) [1941] S.C.R. 384, [1941] 3 D.L.R. 397.

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trial should be increased to $3,000. In view of all the evidence as to the injuries suffered by the respondents, I am not prepared to interfere with these amounts.

The appeal should be dismissed with costs.

The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1), affirming the judgment of Richard J. as to liability but increasing the amount of general damages awarded to the respondents.

The respondents were both injured in an automobile accident. They were being carried gratuitously as passengers in an automobile owned by the appellant Lang and driven with his consent by the appellant Joseph and consequently under the New Brunswick statute in order to succeed in their action they had to establish that the appellant Joseph was guilty of gross negligence which caused the accident.

It was argued before us that the Courts below erred in finding that gross negligence had been shown and in failing to find that the respondents were guilty of contributory negligence. Both of these points were disposed of adversely to the appellants at the hearing and counsel for the respondents was called upon only upon the question of damages.

No question arises as to the special damages. The learned trial judge assessed the general damages of the respondent Pollard at $7,000 and those of the respondent Murphy at $1,200. The Appeal Division by a majority (McNair C.J. N.B. and Ritchie J., with Bridges J. dissenting) increased these amounts to $15,000 and $3,000 respectively.

The injuries suffered by the respondent Pollard are described as follows in the reasons of Ritchie J. (2):

> Miss Pollard, who at the date of the mishap was about 20 years of age, suffered a comminuted fracture involving the left femur, a fracture involving the right tibia, multiple lacerations and abrasions and some degree of shock. Treatment of the left femur fracture by traction was not successful so two plates were applied to it by operative procedure on September 22, 1954, and casts placed on both legs. Miss Pollard then was kept immobilized for about 3 months. She then, because union was not too evident, was placed in another cast and for a period of about one

(1) (1957), 9 D.L.R. (2d) 637. (2) 9 D.L.R. (2d) at pp. 646-7.

year the cast was removed at intervals of approximately 3 months and X-rays taken which showed delays in union and so required that a cast be re-applied. In August 1955, a brace was fitted to support the leg. Then an increased deformity developed to an extent that a re-operation was necessary. From the operations there will be a permanent scar, 10 or 12 inches in length, visible when shorts or a bathing suit are worn. A laceration on the forehead required sutures. Miss Pollard's stays in the Fredericton hospital in 1954 were from September 17th to November 30th, in 1955 from January 3rd to January 6th, from February 4th to February 8th, from April 4th to April 8th, July 5th to July 9th, on September 3rd and from April 29th to May 6th. The second operation performed at Moncton required a stay in the Moncton hospital from October 23rd to November 19th. Between September 18, 1954, and November 19, 1955, Miss Pollard's stays in hospital totalled 130 days, inclusive of the date of each admission and discharge. At the time of the trial, in December 1955, movement of the knee was hardly one-third of normal and Miss Pollard was undergoing physiotherapy treatment which was expected to continue for some months. Dr. E. W. Ewart of Moncton, who performed the second operation, anticipated further recovery but expressed the opinion Miss Pollard will always have some restriction of movement in the left knee and that he would expect some degree of limp.

To this it should be added that the evidence indicated a probability of the necessity of further surgical treatment to Miss Pollard's knee and that, in his reasons for judgment, the learned trial judge spoke of the probability of suffering and further surgical treatment in the future.

The injuries to the respondent Murphy are described as follows in the reasons of Ritchie J. (1):

> The injuries sustained by Miss Murphy included a fracture of the upper end of the right tibia, which, extending into the joint, caused fluid in the joint and consequent pain on bending the knee. The fracture was aspirated three times and compression applied to prevent a reformation. Miss Murphy then was allowed to use crutches. On November 6th a leg cast was applied and the leg immobilized until December 13th when X-rays revealed the fracture was healed. No permanent disability will result from the fracture but traumatic arthritis can ensue. Traumatic arthritis means pain. Miss Murphy testified that on rainy days she suffers from aches and pains in the injured leg and in her knee. While in the hospital she was very upset and nervous, had bouts of crying and was generally quite disturbed. Her hospital terms were from September 18th to October 7th, from October 13th to October 18th, from October 21st to November 26th and on December 13th, a total of 64 days, again computed inclusively. At the trial Miss Murphy complained of a "nervous stomach" which she did not have before the accident, and also said she did not sleep well and had a very poor appetite. She has returned to her home in Milltown because she does not feel she could live in a boarding-house and be up part of the night with stomach sickness.

I find nothing in the evidence or in the reasons for judgment to indicate that either the learned trial judge or the learned justices in the Appeal Division proceeded on any

(1) 9 D.L.R. (2d) at pp. 647-8.

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wrong principle or under any misapprehension as to the effect of the evidence. The difference between them was one of judgment as to what amounts should be awarded for the injuries described and their past and future effects. It is obvious that these amounts were not determinable by precise calculation. The learned justices who constituted the majority in the Appeal Division were of the opinion that the amounts assessed by the learned trial judge were much too low and substituted the amounts which they considered to be more in accordance with the severity of the injuries.

Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beamen* (1):

> The second ground of appeal is that the damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced, as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.* (2).

The principle appears to me to be equally applicable whether the first appellate Court has increased or decreased the general damages awarded at the trial.

I find myself unable to say that any sufficient ground has been shown for interfering with the judgment of the Appeal Division.

I would dismiss the appeal with costs.

RAND J.:—The question in this Court of damages awarded in a provincial appeal Court modifying those given at trial is not primarily whether they are "inordinately" high or low, or are such as would betray this Court into an

(1) [1930] S.C.R. 284 at 287, [1930] 2 D.L.R. 868.
(2) [1941] S.C.R. 384 at 387, [1941] 3 D.L.R. 397.

exclamatory astonishment. Assuming these tests to be appropriate to an appeal from the trial—and it was to an appeal from a verdict that the language of Viscount Simon in *Nance v. British Columbia Electric Railway Company Limited* (1) was directed—our duty is to give the judgment the Court from which the appeal is brought should have given. If it is clear that the Appeal Division here, in its initial determination that the damages allowed were too low, has not properly applied the governing principle, this Court must ordinarily restore the trial judgment; if it is not, a second question arises whether what it has done in its own assessment is itself beyond the other limit of the rule.

I share the views of Bridges J. on the quantum which, if sitting at the trial, he would in this case have awarded. But a difficulty is raised by the ground on which Ritchie J. puts the increased award: that the amount found by the trial judge was inordinately low. However necessary or helpful it may be, danger lurks in the uncritical use of adjectives or illustrative language for the purposes of judgment. What is "inordinate"? It is not necessarily the equivalent of "shocking" and in any event these terms, particularly the latter, stressing the subjective element, tend, in their application, to vary with the sophistication of the individual mind. That application may vary also with different subject-matter: what is "inordinate" or "shocking" in negligence might be ordinary in libel.

The amount allowed by the Judicial Committee in *Nance* followed from a thorough analysis of the significant factors to be taken into account in determining the probable ultimate benefit lost to the claimant through the accident; and estimating that, in terms of money, in the light of all those factors the amount allowed by a trained and experienced judgment was proportionate to the total circumstances. That amount was what a jury could not reasonably have exceeded; but it was, I think, the proportionment, the balanced relation of the damages found to the entire factual and legal situation so analyzed, that was significant and furnished the limitations of a proper finding. The word "unreasonable" is a calmer word and has had a longer and a wider currency than those mentioned, and used in

(1) [1951] A.C. 601 at 613, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665.

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damages in a setting of that proportionment gives, in my opinion, more promise of consistency and relative uniformity.

Could the majority in the Appeal Division, in the light of the framework of circumstances here, have found that the amounts allowed at trial were within the fair scope of "unreasonably" low? I am unable to hold they could not. Can it then be said that the new assessment is itself unreasonably high? And to this I must give a similar answer that I cannot say it is.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendants, appellants: J. Paul Barry, Saint John.

Solicitors for the plaintiffs, respondents: Hanson, Rouse & Gilbert, Fredericton.