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

AND

ARTHEMISE LACHANCE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1909

* May 18.
* May 28.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Negligence—Operation of railway—Damages—Solatium doloris—Verdict—New trial.

The court refused to order a new trial or reduction of damages, under the provisions of articles 502, 503, C.P.Q., where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies J. dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.

Quære.—In an action under article 1056 C.C. can a jury award damages *in solatium doloris? Robinson* v. *The Canadian Pacific Railway Co.* ([1892] A.C. 481) referred to.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1), affirming the judgment of the Superior Court, District of Saint Francis, entered by Demers J. upon the verdict of the jury at the trial, awarding the plaintiffs $4,000 damages with interest and costs.

In their answers to the questions submitted to them the jury found that the defendants had been

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

(1) Q.R. 35 S.C. 494.

1909

CANADIAN PACIFIC RY. CO. v. LACHANCE.

guilty of negligence which was the cause of the death of the deceased, and awarded damages which they assessed and distributed as follows: $300 to one of the sons of the deceased, aged 20 years and 7 months at the time of the accident; $700 to another son aged 14 years, and $3,000 to the widow. At the time of the accident by which deceased lost his life he was in his sixty-third year and, during the last year of his life, he had earned $600 in his employment as a car-repairer in the defendants' railway yard at the City of Sherbrooke, Que.

The material questions for decision on the appeal are stated in the judgments now reported.

Lafleur K.C. and *Wells* for the appellants.

Panneton K.C. for the respondents.

THE CHIEF JUSTICE.—In my opinion this appeal should be dismissed with costs for the reasons given in the court below.

GIROUARD J. agreed with Duff J.

DAVIES J.—The substantial question upon this appeal was whether or not the damages awarded by the jury to the widow and younger son were so "grossly excessive" within the meaning of those words as used in article 503 of the Code of Civil Procedure for Quebec as to justify the granting of a new trial.

So far as the damages awarded to the widow ($3,000) and the younger son ($700) are concerned I will not, after reflection, dissent from the view entertained by the rest of my colleagues that they are not

so grossly excessive as to make it evident that "the jurors had been influenced by improper motives" in fixing those amounts, though they are certainly much more than if I were a juror I would feel justified in awarding. We have not before us in the record any notes of the charge of the trial judge, and I am therefore unable to say whether the jury were "led into error" in awarding the sums they did.

With respect, however, to the $300 awarded the eldest son, Albert, I am not able to agree with the rest of the court. At the time of the accident this son was twenty years and seven months of age, and there is no proof in the record that he sustained any damage by reason of his father's death.

At the time of the accident he was working in Sherbrooke on the street railway there receiving $1.50 a day. Subsequent to his father's death he went to Montreal and entered an architect's office accepting, in order to learn his chosen profession, a much smaller wage than he was receiving at Sherbrooke.

His voluntary action in giving up after his father's death his wages of $1.50 a day and accepting a smaller wage in order to learn the profession of an architect is no reason why he should be made to benefit by that death.

No evidence of any kind was called to our attention shewing that if the father had lived he would have contributed to his son's support, and I do not think the condition of life of the parties, the wages they were respectively earning and the general circumstances of the case justify us or justified the jury in assuming that to be a fact upon which no evidence was offered and which cannot be said to be a fair inference deducible from the facts as proved.

1909

CANADIAN PACIFIC RY. CO. v. LACHANCE.

Duff J.

Under the circumstances I cannot agree that this part of the verdict can be upheld.

IDINGTON J. agreed with Anglin J.

DUFF J.—The only question presented by the appeal which requires discussion is that involved in the contention of the appellants that the verdict should be set aside as awarding damages which are unreasonably excessive.

It is not necessary to consider whether (a point which received some attention during the argument) in an action based upon article 1056 of the Civil Code a sum of money may be given as damages *in solatium doloris*. The decision of this court in *The Canadian Pacific Railway Co.* v. *Robinson*(1), to the effect that in such an action compensation for mental distress is not recoverable was supported upon grounds which are no doubt to some extent shaken by the later judgment of the Privy Council in the same case(2); whether so much shaken as to justify us in treating the question as open for reconsideration in this court may be left for determination when a case arises in which the point actually requires decision. The jury may unquestionably take into consideration every other loss and every other disadvantage which are in the natural and ordinary course attributable to the death out of which the action arises and can fairly be appraised in money. Here the compensation awarded is not so much out of keeping with the circumstances of the parties as to justify the presumption that in computing it the jury have taken into

(1) 14 Can. S.C.R. 105. (2) [1892] A.C. 481.

account as an element of loss anything which does not fairly fall within that description.

I would dismiss the appeal.

ANGLIN J.—The defendants appeal from the judgment of the Court of Review affirming the judgment for the plaintiffs entered at the trial upon the findings of the jury. The appeal is taken upon the grounds that the jury erred in negativing contributory negligence and that the amount of the verdict is excessive.

During the argument the court expressed its view that the finding of the jury upon the question of contributory negligence had not been successfully attacked.

While the amount of the damages awarded by the jury is greater than I would have allowed if myself making the assessment, I cannot say that the verdict is so grossly excessive that a new trial should be ordered under article 502 of the Code of Civil Procedure, or the verdict reduced under article 503. If the only element for consideration in estimating the damages in this case were the actual wages or earnings of the deceased, the task of the appellants in impeaching the verdict would be less difficult. But for loss of his services at home—of his care and protection of his wife and family—of his assistance in husbanding the family resources—for the loss of these and other kindred and substantial benefits and advantages of which the death of the husband and father has deprived them, the plaintiffs were justified in asking compensation from the jury under article 1056 C.C., which declares them entitled to recover "all damages occasioned by such death." While I have not disregarded the construction put upon this article in *The Canadian Pacific Railway*

1909

CANADIAN PACIFIC RY. CO. v. LACHANCE.

Anglin J.

Co. v. *Robinson*(1), I express no opinion upon the question how far that decision should be deemed an authority since the judgment of the Privy Council in the same case(2).

It is only in very clear cases that I should feel warranted in interfering with the verdict of a jury on the ground that the amount of damages awarded is either excessive or inadequate. The able argument of counsel for the appellants has not made it clear to me that

> the amount awarded is so grossly excessive * * * that it is evident that the jurors have been influenced by improper motives or led into error. Art. 502, C.P.Q.

I would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Cate, Wells & White.*

Solicitors for the respondents: *Panneton & Leblanc.*

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(1) 14 Can. S.C.R. 105. (2) [1892] A.C. 481.