1943
*Feb. 26.
*Mar. 1.
*May 4.

W. G. DEUTCH AND SARAH DEUTCH (DEFENDANTS) .... APPELLANTS;

AND

JOHN ALEXANDER MARTIN (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Amount—Personal injuries—Jury's award—Unreasonable amount—Mistaken view of the case—Case as put to the jury—Consideration of verdict by appellate court—New trial directed as to amount.

The action was for damages for injuries to plaintiff caused by his being struck by an automobile owned by one defendant and driven by the other defendant. At trial, upon findings of a special jury, judgment was given for plaintiff for $165,000; which was affirmed by the Court of Appeal for Ontario. Defendants appealed.

Held: There should be a new trial, directed only to the amount of damages.

Per Rinfret, Kerwin and Taschereau JJ.: Plaintiff occupied a unique position in his business and was particularly helpful in dealing with workmen. He suffered greatly from his injuries and will have a permanent disability. But he was not totally incapacitated from exercising his calling, including the use of those special qualities that made him so valuable in a factory. A jury appreciating the evidence could not reasonably have awarded him $165,000, or, to use the words in *Tolley* v. *J. S. Fry & Sons Ltd.*, [1931] A.C. 333, at 341, " the jury took a biased or mistaken view of the whole case ".

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Taschereau JJ.

When an appellate court is considering whether a verdict should be set aside on the ground that the damages are excessive (there being no error in law), it is not sufficient, for setting it aside, that the appellate court would not have arrived at the same amount; its rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence; this is the rule in contract cases (*Mechanical and General Inventions Co., Ltd.* v. *Austin*, [1935] A.C. 346, at 378), and the same rule applies in cases of tort.

Per Davis J.: There must be a very plain case of error to induce an appellate court to interfere with the amount of compensation awarded by a jury in a case of personal injuries, and particularly so when a first appellate court has declined to interfere. But in the present case, though plaintiff's injuries were very serious and he was entitled to substantial damages, the amount awarded was so unusually large that one would naturally examine the record with great care, not only to see if there was some justification for it, but to see if the case was put fairly to the jury on the whole of the evidence. Two errors stood out very strikingly: (1) The case was in effect put to the jury as if plaintiff were such a complete physical wreck as a result of the accident that his earning capacity had gone forever, and, on the evidence taken as a whole, the case should not have so gone to the jury. (2) The case went to the jury on the basis (and on which it was plain that they arrived at so large an amount) that the amount of the financial success of a particular business venture of plaintiff, which extended over a period of only a few years, might properly be treated as a measure for estimating the annual amount which might reasonably be contemplated, but for his injuries, to be his future earnings; and this method of calculating loss of probable future earnings was not, on the evidence, justified.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) which (Henderson J.A. dissenting in part) dismissed the defendants' appeal from the judgment of Chevrier J., who, upon the findings of a special jury, gave judgment for the plaintiff for $165,000 damages by reason of personal injuries to the plaintiff caused by his being struck by an automobile owned by one defendant and driven by the other defendant. The question on which Henderson J.A. dissented in the Court of Appeal was as to the amount of damages awarded; and it is also with that question that this Court is mainly concerned in the present judgment.

D. L. McCarthy K.C. and *P. E. F. Smily K.C.* for the appellants.

T. N. Phelan K.C. and *B. O'Brien* for the respondent.

THE CHIEF JUSTICE.—I concur in the judgment granting a new trial.

(1) [1942] O.W.N. 583; [1942] 4 D.L.R. 529.

1943
DEUTCH
v.
MARTIN.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The respondent was struck by a motor car owned by the appellant W. G. Deutch and driven by the appellant Sarah Deutch, on a highway in the Province of Ontario. In an action brought to recover damages for the injuries sustained thereby, the appellants did not satisfy the jury that the driver of the motor car was not guilty of any negligence which caused or contributed to the accident, and the respondent's damages were assessed at $165,000. The Court of Appeal declined to interfere, with Mr. Justice Henderson dissenting in part, as he was of opinion that there should be a new assessment of damages.

There can be no real dispute as to the responsibility of the appellants and I can find no substance in the objections suggested, rather than argued, to the charge of the trial judge, even if such objections were open to the appellants in this Court. The only question is whether, the charge being unimpeachable, the finding of the jury as to the amount of damages can stand. It is not, of course, sufficient that an appellate court would not have arrived at the same amount. In contract cases, where there is no error in law, "the rule of conduct for the appellate court, when considering whether a verdict should be set aside on the ground that the damages are excessive, is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence" (*per* Lord Wright in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin et al.* (1), referring to *Praed* v. *Graham* (2). The same rule applies in cases of tort.

The respondent occupies a unique position in his business and is particularly helpful in dealing with workmen. He undoubtedly suffered greatly from the injuries he sustained and will have a permanent disability; but he is not totally incapacitated from exercising his calling, including the use of those special qualities that make him so valuable in a factory. However, I have come to the conclusion that a jury appreciating the evidence could not reasonably have awarded him the sum of $165,000, or, to use the words of Viscount Hailsham in *Tolley* v. *J. S. Fry*

(1) [1935] A.C. 346, at 378. (2) (1889) 24 Q.B.D. 53, at 55.

and Sons Ltd. (1), "that the jury took a biased or mistaken view of the whole case".

There should be a new trial directed only to the amount of damages. As liability was disputed at the outset, the respondent should have his costs of the action down to and including the trial. The appellants are entitled to tax their costs of the appeals to the Court of Appeal and to this Court and to deduct the same from whatever sum may ultimately be awarded the respondent. The costs of the new assessment of damages should be in the discretion of the presiding judge.

DAVIS J.—There must be a very plain case of error to induce an appellate court to interfere with the amount of compensation awarded by a jury in a case of personal injuries, and particularly so when a first appellate court has declined to interfere. But the amount awarded in this case, $165,000, is such an unusually large amount that one naturally examines the record with great care, not only to see if there was some justification for such an amount, but to see if the case was put fairly to the jury on the whole of the evidence. Two errors stand out very strikingly to my mind in this case. In the first place, the case was in effect put to the jury as if the injured man, the plaintiff, were such a complete physical wreck as a result of the accident that his earning capacity was entirely cut off for the rest of his life. He was a man of about fifty-one years of age at the time of the accident. No one denies that the injuries to his legs are very serious and that he is entitled to substantial damages. But on the evidence taken as a whole the case should not have gone to the jury as if on account of the injuries to his legs he had become a physical wreck, with any earning capacity gone forever. The second error as I see it was that the case went to the jury —and I think it is plain that it was on this basis that the jury arrived at the large amount they did—on the basis that the amount of the financial success of a particular business venture of the plaintiff which extended over a period of only a few years might properly be treated as a measure for estimating the annual amount which might reasonably be contemplated, but for his injuries, to be his future earnings. The evidence does not justify this method of calculating loss of probable future earnings.

(1) [1931] A.C. 333, at 341.

1943
DEUTCH
v.
MARTIN.
Davis J.

I should allow the appeal and direct a new trial limited to the issue of damages. The respondent is entitled to his costs of the action down to and including the first trial. The costs of the appellants in the Court of Appeal and in this Court should be deducted from the amount of damages ultimately awarded the respondent. The costs of the new trial should be in the discretion of the trial judge.

Appeal allowed and new trial ordered, but limited to the issue of damages.

Solicitors for the appellants: *Smily, Shaver, Adams, DeRoche & Fraser.*

Solicitors for the respondent: *Phelan, Richardson, O'Brien & Phelan.*