1966
*Dec. 7
1967
Jan. 24

ROBERT JACKSON and WALTER KERN (*Defendants*) ..... APPELLANTS;

AND

ALBERT MISSIAEN and MARY MISSIAEN (*Plaintiffs*) ..... RESPONDENTS.

ROBERT JACKSON and WALTER KERN (*Defendants*) ..... APPELLANTS;

AND

HELEN BAST, an infant by her next friend, ANTHONY BAST and ANTHONY BAST (*Plaintiffs*) ..... RESPONDENTS.

AND

ALBERT MISSIAEN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages—Collision of motor vehicles—Personal injuries—Assessment of general damages increased by Supreme Court of Canada—Applicable principles.

On appeal to this Court from judgments rendered by the Supreme Court of Alberta, Appellate Division, in two actions arising out of a motor vehicle collision, the Court, at the conclusion of argument on the question of liability, retired and on returning gave judgment as follows:

In this Court it is not questioned that the collision out of which this appeal arises was caused in part by the gross negligence of the driver of the appellants' car.

The question whether or not the respondent Albert Missiaen was guilty of contributory negligence is one of fact and we find ourselves unable to say that we should interfere with the concurrent findings in the Courts below absolving him from blame. The appeals will therefore be dismissed with costs.

In the first action, a cross-appeal by the respondent Albert Missiaen (referred to hereunder as AM) as to the amount of general damages awarded to him was then fully argued and judgment was reserved.

Held: The appeals should be dismissed; in the first action the cross-appeal should be allowed and the judgment at trial varied by substituting for the sum of $12,000 general damages awarded to the respondent AM the sum of $22,000.

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*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Spence JJ.

The sum of $12,000 at which the trial judge assessed the general damages of AM included (i) loss of salary from one year after the accident to the date of trial, (ii) his prospective loss of salary, (iii) the prospective payments to a housekeeper plus the cost of feeding her, (iv) damages for pain and suffering, (v) damages for loss of the amenities of life. Assuming that the life expectancy of AM at the date of the trial was only three years, the shortest period suggested in the "guess" of a medical witness, the total of items (i), (ii) and (iii) exceeded by more than $3,000 the total award of general damages and nothing remained to compensate him in regard to items (iv) and (v), that is to say for the fact that from a healthy and active old age the accident had turned him into an invalid, practically never free from pain.

In these circumstances, the amount at which the general damages were assessed was so inordinately low as to be a wholly erroneous estimate. The proper amount was not susceptible of precise calculation. It was the duty of the Court to endeavour to deal with the matter as would a properly instructed jury acting reasonably, not attempting to award "a perfect compensation" but seeking to fix an amount reasonably proportionate to the gravity of the injuries suffered. The Court was of the opinion that the general damages should be increased by $10,000.

APPEALS and CROSS-APPEAL from judgments of the Supreme Court of Alberta, Appellate Division, dismissing appeals and a cross-appeal from judgments of Farthing J. in two actions brought as a result of a motor vehicle accident. Appeals dismissed; cross-appeal in the first action allowed.

W. B. Williston, Q.C., and *R. B. Tuer*, for the appellants.

Arnold F. Moir, Q.C., and *John A. Weir*, for the respondents, A. Missiaen and M. Missiaen.

Adrian G. Smith, for the respondents, H. Bast and A. Bast.

The judgment of the Court was delivered by

CARTWRIGHT J.:—On June 1, 1963 at about 10 p.m., an automobile owned by the appellant Kern, driven with his consent by the appellant Jackson and in which Helen Bast was a passenger was in collision with an automobile owned and driven by the respondent Albert Missiaen in which the respondent Mary Missiaen was a passenger. Albert Missiaen, Mary Missiaen and Helen Bast all suffered personal injuries.

As a result of the collision two actions were brought, the first by the Missiaens against Jackson and Kern and the second by Helen and Anthony Bast against Jackson, Kern and Albert Missiaen.

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These two actions were tried together by Farthing J. who found that the collision was caused by the gross negligence of Jackson, absolved Albert Missiaen from blame and awarded damages against Jackson and Kern jointly and severally as follows:

To Albert and Mary Missiaen, special damages	$ 8,624.49
To Albert Missiaen, general damages	$12,000.00
To Mary Missiaen, general damages	$ 5,000.00
To Helen Bast and Anthony Bast, special damages	$ 1,605.80
To Helen Bast, general damages	$10,000.00

The second action as against Missiaen was dismissed with costs but it was ordered that the plaintiffs should recover from Jackson and Kern the costs which they were required to pay to Missiaen.

In each action Jackson and Kern appealed as to the findings in regard to liability and as to the quantum of general damages.

In the first action Albert Missiaen cross-appealed asking that the amount of the general damages awarded to him should be increased. The Appellate Division of the Supreme Court of Alberta dismissed the appeals and the cross-appeal with costs.

In the first action, Jackson and Kern appeal to this court and Albert Missiaen cross-appeals asking that the award of general damages to him be increased.

In the second action, Jackson and Kern appeal; there is no cross-appeal, Helen Bast and Anthony Bast ask that the judgment of the Appellate Division be affirmed.

At the commencement of the hearing in this Court we requested counsel to deal first with the question of liability. Counsel for the appellants did not argue that the concurrent findings of gross negligence against Jackson should be disturbed but submitted that the greater part of the blame should be placed upon Albert Missiaen. At the conclusion of the arguments of all counsel on this branch of the matter the Court retired and on returning gave judgment as follows:

In this Court it is not questioned that the collision out of which this appeal arises was caused in part by the gross negligence of the driver of the appellants' car.

The question whether or not the respondent Albert Missiaen was guilty of contributory negligence is one of fact and we find ourselves unable to say that we should interfere with the concurrent findings in the Courts below absolving him from blame. The appeals will therefore be dismissed with costs.

The cross-appeal of Albert Missiaen as to the amount of general damages awarded to him was then fully argued and judgment was reserved.

The findings of the learned trial judge as to the physical results of the injuries suffered by Albert Missiaen are amply supported by the evidence and are as follows:

> At the time of the accident on 1st June, 1963 he was 82 years of age and in remarkably good health. He was working every day. He did his own gardening and that of three of his sons, and looked after their cottages at Pigeon Lake. A few months before the accident he had no trouble passing a medical exam for his driver's licence. His most serious injuries are those affecting his legs. Before the accident he said he could walk "miles and miles". Now his left leg is tired and the right hurts in the hip where it was dislocated. He can only walk with two sticks and only about 100 feet at a time. He can't tie his shoe laces. He always has to sleep with a cushion under his left knee. Pain in his leg makes sleep difficult. He gets pain in his neck if he lies on his right side. He still enjoys his meals. He can't go out in the winter now but still enjoys getting out in good summer weather.
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> Dr. F. G. Day, an orthopaedic surgeon, said that Mr. Missiaen was very severely injured, the main injury being to the hip joint and clavicle. In hospital he developed chest trouble from having to stay so long in bed. His right hip is his principal trouble at present. It is almost fixed in one position because there is no fusion. If there were, he would be much better off. The only remedy would be to remove the head of the femur and replace it with an artificial one. The doctor said he would not recommend such major surgery for a man of his age as he would hardly have the necessary "drive" to put him through the post-operative period. Dr. Day said that Mr. Missiaen suffered a great deal of pain, so much so that he cannot walk or sit or lie in bed without suffering. The doctor fixed his disability at 50 percent of total, which is just about double the degree he had ever before estimated. He said he was surprised to hear that Mr. Missiaen had said in evidence that he could walk about a hundred feet at one time—a longer distance than the doctor would have thought possible.
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> From his own evidence and that of Dr. Day, it was made quite clear that this unfortunate old man is anything but a malingerer. From a remarkably healthy and active old age this accident has turned him into an invalid who is practically never free from pain—even his sleep being frequently interrupted thereby.

The learned trial judge also found that prior to the accident Mr. Missiaen, who had farmed for the greater part of his life, had always been an extremely active man, that after he retired he kept himself busy at work not too heavy for him, that he kept the grounds in front of his sons'

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company office in proper shape, that he did a lot of work at the summer cottage of one of his sons, 54 miles away, driving himself out there in the morning and back to Edmonton in the evening, that he was employed as the caretaker of the sons' business premises at a salary of $210 a month although possibly during the two or three years prior to the accident this may have been an over-payment made because of the family relationship. For one year following the accident, the sons' company continued to pay the monthly salary but since then Mr. Missiaen has not received any salary. Because of the physical condition of himself and his wife resulting from the accident, he has to employ a housekeeper at a salary of $150 a month to care for the two of them.

At the trial the witness, F. G. Missiaen, produced a list of items of special damage and supporting vouchers totalling $8,624.49. This was not seriously challenged in cross-examination and neither the list nor the vouchers were made an exhibit. However from an examination of the evidence of this witness and the comments of counsel it would seem that this total (which was the amount at which the learned trial judge assessed the special damages) does not include any loss of salary or any expense for feeding the housekeeper but does include the amounts paid to the housekeeper up to the date of the trial.

From this it follows that the sum of $12,000 at which the learned trial judge assessed the general damages of Mr. Missiaen includes (i) loss of salary from one year after the accident to the date of trial, (ii) his prospective loss of salary, (iii) the prospective payments to the housekeeper plus the cost of feeding her, (iv) damages for pain and suffering, (v) damages for loss of the amenities of life.

Item (i) would be in round figures $2,520.

Items (ii) and (iii) together, even excluding any allowance for the food and lodging of the housekeeper, would amount to approximately $4,300 a year.

At the time of the trial, in June 1965, Dr. Day was asked in cross-examination as to Mr. Missiaen's life expectancy; he replied that while he would "only like it recorded as a guess", he thought "it would not be much longer than three or four years"; later in his evidence while emphasizing that

it was a guess rather than an estimate, he suggested the possibility of the period being ten years.

If one assumes that Mr. Missiaen's life expectancy at the date of the trial was only three years, the shortest period suggested in Dr. Day's "guess", it is at once obvious that the total of items (i), (ii) and (iii) exceeds by more than $3,000 the total award of general damages and that less than nothing remains to compensate him in regard to items (iv) and (v), that is to say for the fact that, to quote again the words of the learned trial judge:

> From a remarkably healthy and active old age this accident has turned him into an invalid who is practically never free from pain—even his sleep being frequently interrupted thereby.

In these circumstances, it appears to me that the amount at which the general damages were assessed is so inordinately low as to be a wholly erroneous estimate. The proper amount is not susceptible of precise calculation. It is, I think, our duty to endeavour to deal with the matter as would a properly instructed jury acting reasonably, not attempting to award "a perfect compensation" but seeking to fix an amount reasonably proportionate to the gravity of the injuries suffered. In my opinion the general damages should be increased by $10,000.

In the first action, the appeal is dismissed with costs, I would allow the cross-appeal with costs in this Court and in the Appellate Division and direct that the judgment at trial be varied by substituting for the sum of $12,000 general damages awarded to the respondent Albert Missiaen the sum of $22,000. In the second action the appeal is dismissed with costs.

Appeals dismissed with costs; cross-appeal in first action allowed with costs.

Solicitors for the appellants: Clement, Parlee, Irving, Mustard & Rodney, Edmonton.

Solicitors for the respondents, A. Missiaen and M. Missiaen: Wood, Moir, Hyde & Ross, Edmonton.

Solicitors for the respondents, H. Bast and A. Bast: Stack, Smith & Bracco, Edmonton.