ROBERT L. FAGNAN (*Defendant*) .....APPELLANT;

AND

MARION FRANCES URE, NEXT FRIEND OF THE INFANT JEAN MARIE URE, AND MARION FRANCES URE IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF DAVID ALTON URE, DECEASED (*Plaintiffs*) ..RESPONDENTS;

AND

HUME AND RUMBLE LIMITED (*Defendant*).

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*Feb. 6, 7
Apr. 22

ROBERT L. FAGNAN (*Defendant*) .....APPELLANT;

AND

THE PUBLIC TRUSTEE, ADMINISTRATOR OF THE ESTATE OF JAMES MITCHELL, DECEASED (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Evidence—"Opinion evidence"—What constitutes—Number of expert witnesses allowed to parties—The Alberta Evidence Act, R.S.A. 1955, c. 102, s. 11.

In an action arising out of an automobile accident the plaintiff pleaded that the defendant had been negligent, *inter alia,* in failing to have his motor vehicle (a truck) in proper and safe operating condition and in failing "to have the steering mechanism and tie-rods . . . checked and the defective conditions remedied". The plaintiff's counsel, in submitting his case, called two witnesses who gave opinion evidence,

*PRESENT: Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

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and also one H, who had had many years' experience in garage operation and vehicle maintenance and who swore that the general and proper practice in the operation of a truck was to have a thorough inspection, including an examination of the "working linkage" and steering mechanism, at least every thousand miles. In reply, the plaintiff's counsel called another witness to give opinion evidence on a different matter and it was argued on appeal that this constituted a violation of s. 10 of *The Alberta Evidence Act*, 1942, which prohibited the calling of more than three witnesses "entitled according to the law or practice to give opinion evidence".

Held: The objection could not succeed. H's evidence was not opinion evidence within the meaning of s. 10, but was factual evidence of the existence of a practice, of which he had personal knowledge, followed by operators of similar vehicles. *Texas and Pacific Railway Company v. Behymer* (1903), 189 U.S. 468 at 470, quoted with approval. In any event, even if H's evidence was considered as opinion evidence, s. 10 properly interpreted permitted the calling of three witnesses to give such evidence upon each of the facts involved in the trial. *In re Scamen and Canadian Northern Railway Company* (1912), 5 Alta. L.R. 376, approved.

Statutes—Effect of re-enactment of statute in same words after judicial interpretation.

The rule at common law is that when words in a statute have been judicially construed by a superior Court and have been repeated without alteration in a subsequent statute, the legislature must be taken to have used them in the sense in which they have been construed by the Court. *Ex parte Campbell; In re Cathcart* (1870), L.R. 5 Ch. 703 at 706; *Barras v. Aberdeen Steam Trawling and Fishing Company, Limited,* [1933] A.C. 402; *MacMillan v. Brownlee,* [1937] S.C.R. 318 at 324-5, applied.

Damages—Award by trial judge—When interference on appeal justified.

An appellate Court will not interfere with the amount of damages awarded by a trial judge unless it is convinced either that the judge acted upon a wrong principle of law or a misapprehension of the evidence or that the amount awarded was so high or so low as to make it an entirely erroneous estimate. *Flint v. Lovell,* [1935] 1 K.B. 354 at 360; *Nance v. British Columbia Electric Railway Company Limited,* [1951] A.C. 601 at 613; *Pratt v. Beaman,* [1930] S.C.R. 284 at 287, applied. *A fortiori,* the Supreme Court of Canada will refuse to interfere with an award that has been affirmed by a provincial Court of Appeal, unless such circumstances exist.

Costs—Two actions consolidated—Plaintiffs represented by separate counsel.

Where two actions, both arising out of the same automobile accident, are consolidated but it is reasonable in the circumstances for the plaintiffs to be represented by separate counsel, it is a proper exercise of the trial judge's wide discretion under Rule 728 of the Alberta Rules of Court for him to award two sets of costs of the action throughout.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Macdonald J. Appeal dismissed.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

Arnold F. Moir, and *J. P. Brumlik,* for the defendant, appellant.

S. H. McCuaig, Q.C., for the plaintiff Ure, respondent.

K. L. Crockett, for the plaintiff The Public Trustee, respondent.

The judgment of Taschereau, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming a judgment of Macdonald J. awarding damages to the respondents.

On December 23, 1953, a truck driven by the appellant collided with an automobile driven by James Mitchell in which the Honourable David Alton Ure was a passenger. Both Mr. Mitchell and Mr. Ure were killed. The respondent Marion Frances Ure, who is the widow and executrix of the late David Alton Ure, brought action on behalf of herself and her five children. The respondent the Public Trustee, who is the administrator of the estate of the late James Mitchell, brought action on behalf of his widow and four children. These actions were consolidated before trial by an order of Johnson J.A.

The learned trial judge found that the collision was caused by the negligence of the appellant. He awarded to the respondent Marion Frances Ure $75,000, apportioned $50,000 to her personally and $25,000 to the five children. To the respondent the Public Trustee he awarded $31,000, apportioned $25,000 to the widow, $3,500 to the daughter Mona and $833.33 to each of the other three children. This judgment was affirmed by the Appellate Division.

In this Court, all but three of the grounds raised in support of the appeal were disposed of adversely to the appellant at the hearing. I shall state the points on which counsel for the respondents were heard and on which judgment was reserved in the order in which I propose to deal with them; they are (i) an alleged breach of the provisions of s. 10 of *The Alberta Evidence Act,* R.S.A. 1942, c. 106 (now R.S.A. 1955, c. 102, s. 11); (ii) the quantum of damages; and (iii) the propriety of the orders as to costs made in the Courts below.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

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Section 10 of *The Alberta Evidence Act*, in force at the date of the trial read as follows:

10. Where it is intended by a party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side.

The section was first enacted in 1910, 2nd sess., as s. 10 of 1 Geo. V, c. 3, and appeared unaltered in the Revised Statutes of 1922, c. 87, and 1942.

At the trial counsel for the plaintiff Marion Frances Ure called in reply a witness George Ford to give opinion evidence as to whether a break in a tie-rod forming part of the steering-apparatus of the appellant's truck had more probably been caused by the impact between the truck and the automobile than by other causes suggested on behalf of the appellant. Counsel for the appellant objected to the evidence being admitted on the ground that counsel for the plaintiff had already called and examined three other witnesses entitled to give, and who had given, opinion evidence. The objection was overruled and Mr. Ford gave opinion evidence. The three other witnesses referred to were Bate, Henne and Hare. It is conceded that the first two had given opinion evidence on the question whether the fact that the speedometer of the automobile, which was apparently broken in the collision, was registering 70 miles per hour showed that at the instant of impact the automobile was travelling at the indicated speed. The third witness Hare was the service manager and part-owner of a city garage. He had had years of experience in the operation of garages in Edmonton and in the last war had had four years' experience in vehicle maintenance and workshop duties with the Royal Canadian Electrical and Motor Engineers. His evidence which it is argued was opinion evidence reads as follows:

Q. Now, what would you regard as proper practice in connection with inspection of trucks which are used from day to day in various types of hauling with regard to inspection and keeping them in shape? A. The standard that I believe is general, I know it is applied very generally, is vehicle inspection with lubrication every thousand miles, some big units less than that I believe, but I am speaking across the board.

Q. Now, we have here a 1942, '43 Dodge truck, two-ton truck, what would you say with regard to inspection of tie-rods in a truck like that? How often would they be inspected? A. All that working linkage should be examined every thousand miles.

Q. What would you say with regard to steering? A. Same rule applies.

Q. Now, is that the practice followed by large operators? A. With fleets, yes.

This evidence was presumably tendered as being relevant to the allegations of the negligence of the appellant specified in subparas. (*j*) and (*k*) of para. 12 of the statement of claim of the respondent Marion Frances Ure, which read as follows:

(*j*) In failing to his knowledge to have the said motor vehicle in proper and safe operating condition at the time of the collision.

(*k*) In failing to have the steering mechanism and tie-rods in the said motor vehicle checked and the defective conditions remedied, when he knew or ought to have known of their disrepair.

The principle on which evidence of a practice of the sort deposed to by the witness is admitted is stated as follows in Phipson on Evidence, 9th ed. 1952, p. 116:

On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided.

In *Texas and Pacific Railway Company v. Behymer*[1], Holmes J., giving the opinion of the Court, said at p. 470:

What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

In my view, the evidence of the witness Hare was not "opinion evidence" within the meaning of that phrase in s. 10. It was factual evidence of the existence of a practice as to periodical inspections followed by operators of trucks, of which practice the witness had personal knowledge. It is true that the second answer quoted above from his testimony was in form the expression of an opinion, but in reality it was simply the relation by the witness of the general practice to the circumstances of the particular case.

If, contrary to the view which I have expressed, it should be held that Hare was entitled to give and did give opinion evidence, I would none the less reject this ground of appeal.

[1] (1903), 189 U.S. 468.

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In 1912, in the case of *In re Scamen and Canadian Northern Railway Co.*[1], s. 10 was interpreted by the Supreme Court of Alberta *en banc*. The effect of the judgment of the Court, delivered by Harvey C.J., is accurately summarized in the second paragraph of the headnote in D.L.R. as follows:

> Upon the proper interpretation of section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.

As already mentioned s. 10 was re-enacted *ipsissimis verbis* in the Revised Statutes of 1922 and of 1942, and this re-enactment should be taken to have given legislative sanction to the construction placed upon that section in *In re Scamen*. The applicable rule was stated as follows by James L.J. in *Ex parte Campbell; In re Cathcart*[2]:

> Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.

This statement was approved by the majority in the House of Lords in *Barras v. Aberdeen Steam Trawling and Fishing Company, Limited*[3], and was applied by this Court in construing an Alberta statute in *MacMillan v. Brownlee*[4]. It should be observed that while Parliament and the Legislatures of some of the Provinces have seen fit to modify this rule of construction (see for example, s. 21(4) of the *Interpretation Act*, R.S.C. 1952, c. 158) this has not been done in Alberta.

It has already been pointed out that no other witness called by the respondents gave opinion evidence upon the subject in regard to which the witness Ford was examined, and it follows that there was no breach of s. 10 as construed in *In re Scamen, supra.*

I turn now to the question of the quantum of damages. No objection is raised as to the apportionments amongst those entitled, but it is contended that the total amounts

[1] (1912), 5 Alta. L.R. 376, 2 W.W.R. 1006, 22 W.L.R. 105, 6 D.L.R. 142.

[2] (1870), L.R. 5 Ch. 703 at 706.

[3] [1933] A.C. 402.

[4] [1937] S.C.R. 318 at 324-5, [1937] 2 D.L.R. 273, 68 C.C.C. 7, affirmed [1940] A.C. 802, [1940] 3 All E.R. 384, [1940] 3 D.L.R. 353, [1940] 2 W.W.R. 455.

awarded in the case of each of the deceased are so inordinately high as to warrant interference by this Court.

It will be observed that the learned trial judge instructed himself that in assessing the damages he should follow the principles laid down by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited*[1], at pp. 613 *et seq.* All the relevant facts as to the financial circumstances of the two deceased, and, so far as they could be estimated from the evidence, the probabilities for the future had they not been killed are detailed in the reasons of the learned trial judge and I do not propose to repeat them. It appears that he gave careful consideration to all the elements properly entering into the calculation of the amounts to be awarded which are dealt with in the *Nance* judgment. It is true that he did not refer expressly to the possibility of either widow remarrying in circumstances which would improve her financial position, but I see no reason for supposing that it was absent from his mind, and, in any event, as Viscount Simon pointed out, it is a possibility which in most cases is incapable of valuation.

In the Appellate Division, Johnson J.A., with whom Ford C.J.A., Primrose J. and Porter J.A. agreed, took a different approach to the assessment, employing a formula which has recently been used in a number of decisions in England, of which *Zinovieff v. British Transport Commission,* a decision of Lord Goddard (1954), reported in Kemp and Kemp on The Quantum of Damages (1956), vol. 2, p. 81, and *Roughead v. Railway Executive*[2], are examples. As a result of the application of this formula the learned justice of appeal reached the conclusion that the amounts awarded by the learned trial judge were not excessive. Boyd McBride J.A. wrote separate reasons at the conclusion of which he dealt with the question of damages as follows[3]:

> Having scrutinized and tested in various ways the amounts of the damages in the light of the various factors mentioned by the learned trial judge, in my opinion they are fair and proper and should not be disturbed.

The amount to be awarded in cases of fatal accident is not susceptible of precise arithmetical calculation, and, generally speaking, the Court of Appeal will not vary the

[1] [1951] A.C. 601, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.
[2] (1949), 65 T.L.R. 435.
[3] 22 W.W.R. at p. 304.

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assessment made by the trial judge unless it appears that it has been arrived at on a wrong principle, or in disregard of some element that should have been taken into account, or under a misapprehension as to some feature of the evidence, or that it is so much too high or too low as to bear no reasonable proportion to the loss suffered; still less, unless one of the conditions mentioned is present, will this Court interfere when the assessment made at the trial has been affirmed by the Court of Appeal. In the case at bar, the Appellate Division have unanimously reached the conclusion that the amounts awarded by the learned trial judge were reasonable and I find no sufficient reason for differing from the result at which they have arrived. It follows that I would reject this ground of appeal.

There remains the submission of the appellant that the learned trial judge erred in awarding two sets of costs of the action to the respondents subsequent to the making of the consolidation order. In my opinion it was reasonable for the respondents to be represented by separate counsel and the order as to costs made by the learned trial judge was a proper exercise of the wide discretion conferred upon him by Rule 728 of the Alberta Rules of Court.

I would dismiss the appeal with costs.

RAND J.:—On the questions of the admission of expert evidence and the award of costs, and in the result, I agree with the reasons and the conclusion of my brother Cartwright. On the point of damages, the amount, ascertained as in *Nance v. British Columbia Electric Railway Company Limited*[1], is more than I would have allowed had I been estimating them at trial; but viewed in proportionment to the total circumstances I am unable to say that it is unreasonably high, *i.e.*, exceeding any reasonable estimation and calling for a reduction by this Court. On the propriety of employing the formula applied by Johnson J.A., I reserve my opinion.

I would, therefore, dismiss the appeal with costs.

[1] [1951] A.C. 601, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

LOCKE J.:—In this matter the issue of liability was decided, contrary to the contention of the appellant, during the hearing before us.

The findings of the learned trial judge as to the compensation to be awarded to the respondents have been approved by the unanimous judgment of the Appellate Division[1].

The rule applicable when the matter was before that Court is as it is stated by Greer L.J. in *Flint v. Lovell*[2], in the following terms:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

That statement was approved by the House of Lords in *Davies et al. v. Powell Duffryn Associated Collieries, Limited*[3], and by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited*[4].

I am unable to conclude from the judgments delivered in the Appellate Division that the learned judges of that Court failed to observe these principles, nor am I able to infer that the learned trial judge, in arriving at the amounts to be awarded, failed to consider any fact that was relevant.

In *Pratt v. Beaman*[5], Anglin C.J.C., delivering the judgment of the Court on an appeal from the Court of King's Bench of Quebec in an action for damages for personal injuries where the damages awarded at the trial had been reduced, said in part (p. 287):

> 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.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

[2] [1935] K.B. 354 at 360.

[3] [1942] A.C. 601 at 617, [1942] 1 All E.R. 657.

[4] [1951] A.C. 601 at 613, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

[5] [1930] S.C.R. 284, [1930] 2 D.L.R. 868.

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As it cannot, in my opinion, be said that the Appellate Division erred in principle in affirming the awards made at the trial, we should follow the practice above referred to.

I agree with my brother Cartwright that, if the evidence of the witness Hare was opinion evidence, it was none the less admissible for the reasons stated by him. I would not interfere with the order authorizing two sets of costs.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant Fagnan, appellant: Wood, Haddad, Moir, Hyde & Ross, Edmonton.

Solicitors for the plaintiff Ure, respondent: McCuaig, McCuaig, Desrochers & Beckingham, Edmonton.

Solicitors for the plaintiff The Public Trustee, respondent: Crockett, Crockett & Silverman, Edmonton.