DAVID E. ROUMIEU and LAUREL ROUMIEU (*Plaintiffs*) ..... } APPELLANTS;

AND

JERROLD BERTNEY OSBORNE (*Defendant*) ..... } RESPONDENT.

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*Oct. 29, 30
Nov. 20

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Motor vehicle accident—Personal injuries—Jury's award reduced on appeal—Whether Court of Appeal justified in reducing award.

In an action which arose as a result of a motor vehicle accident, liability for which was admitted by the defendant, the jury awarded the plaintiff $17,500 damages in respect of the injuries that she had sustained. On appeal, the Court of Appeal set aside the jury's award and substituted therefor an award of $6,500; from that judgment the plaintiff appealed to this Court.

Held (Abbott and Judson JJ. dissenting): The appeal should be allowed and the award of the jury restored.

Per Taschereau C.J. and Martland and Ritchie JJ.: The Court of Appeal erred in substituting its own view of the severity of the plaintiff's injuries for that of the jury. It was impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount. *Warren v. Gray Goose Stage Ltd.*, [1938] S.C.R. 52, followed; *Praed v. Graham* (1889), 24 Q.B.D. 53; *McCannell v. McLean*, [1937] S.C.R. 341, referred to.

Per Abbott and Judson JJ., *dissenting*: The task of this Court was to determine whether it had been shown that the Court of Appeal was in error, not whether this Court would have done the same thing as the first appellate Court. The appellant had failed to show that the Court of Appeal was in any way wrong. *Donnelly v. McManus Petroleum Ltd.*, [1950] 1 D.L.R. 303, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia, setting aside a jury award for damages for personal injuries received in a motor vehicle accident and substituting therefor a reduced award. Appeal allowed, Abbott and Judson JJ. dissenting, and award of jury restored.

W. J. Wallace and *G. W. Baldwin*, for the plaintiffs, appellants.

G. F. Henderson, QC., and *B. Crane*, for the defendant, respondent.

*PRESENT: Taschereau C.J. and Abbott, Martland, Judson and Ritchie JJ.

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ROUMIEU v. OSBORNE

The judgment of the Chief Justice and Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia setting aside the award by a jury of $17,500 damages to the appellant in respect of injuries which she sustained in a motor vehicle accident, and substituting therefor an award of $6,500.

Liability for the accident which occasioned the injuries complained of is admitted by the respondent, and the sole question at issue is whether or not the Court of Appeal was justified in reducing the jury's award as it did. There is no doubt that the Court of Appeal of British Columbia is empowered to make such a reduction under the provisions of R. 36 of the British Columbia Court of Appeal Rules which read as follows:

> 36. Where excessive damages have been awarded by a jury, if the court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

The rule of conduct for a court of appeal when considering whether a verdict should be set aside on the ground that the damages are excessive, has been well described by Lord Esher in *Praed v. Graham*[1], as being

> . . . 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 statement was endorsed by Lord Wright in *Mechanical and General Inventions Co. Ltd. and Lehwess v. Austen*[2], and in this Court by Kerwin J. as he then was, in *Warren v. Gray Goose Stage Ltd.*[3], and *Deutch v. Martin*[4].

The principle on which this Court acts in such cases has been clearly stated by Sir Lyman Duff C.J. in *McCannell v. McLean*[5], at p. 343 where he said:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported.

As a result of the accident in the present case, the appellant sustained cuts to her face, her dentures were broken

[1] (1889), 24 Q.B.D. 53.
[2] [1935] A.C. 346 at 358.
[3] [1938] S.C.R. 52 at 59.
[4] [1943] S.C.R. 366 at 368.
[5] [1937] S.C.R. 341 at 343.

in her mouth, her right ankle was badly sprained, her right shoulder was broken and she had a dislocation of both ends of the right collar bone. In addition, she complained of a fractured rib on her left side and she had multiple bruises. There was evidence, which the jury was entitled to believe, to the effect that her ankle had suffered an unusual injury resulting in an arthritic process which might require surgery in the future in order to control pain, and that it would require her to curtail her activities. An orthopedic surgeon, who had examined Mrs. Roumieu the day before the trial, which was two years and nine months after the accident, testified, *inter alia,* that she would have a permanent deformity in the shoulder which had some cosmetic effect and that there would always be pain at the outer aspect of her collar bone.

In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal, Mr. Justice Lord made an extensive analysis of the evidence and with the greatest respect, it appears to me that he fell into the error of substituting his own view of the severity of these injuries for that of the jury.

I would adopt as directly applicable to the circumstances of the present case, the words of Mr. Justice Davis in *Warren v. Gray Goose Stage Ltd., supra,* at p. 56 where he said:

> While it may be that the general damages were awarded on a generous scale, there was no firm ground, in our opinion, on which the Court of Appeal was entitled to set aside the jury's assessment. This was essentially a case for a jury and it is quite impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount.

I would accordingly allow this appeal with costs, set aside the judgment of the Court of Appeal and restore the award of the jury.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—I would not interfere with the judgment of the Court of Appeal. The careful and detailed analysis contained in the unanimous reasons of that Court satisfies me that they were acting well within their powers of review of a non-judicial award and that there was no misunderstanding of the principle to be applied, as set out in

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Warren v. Gray Goose Stage Ltd.[1]; *Deutch and Deutch v. Martin*[2].

Our task is to determine whether it has been shown before this Court that the Court of Appeal was in error, not whether we would have done the same thing as the first appellate Court.

> In such matters this Court cannot overlook the fact that the question of damages is intimately related to the surroundings in which they arise and are determined, and the Court below is so far to be credited with an intimate appreciation of those conditions.

Per Rand J. in *Donnelly v. McManus Petroleum Ltd.*[3]

The appellant has not satisfied me that the Court of Appeal was in any way wrong and I would dismiss the appeal with costs.

Appeal allowed with costs and the award of the jury restored, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Wilson, King & Baldwin, Prince George.

Solicitors for the defendant, respondent: Harper, Gilmour, Grey & Co., Vancouver.