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WILLIAM D. ARCHIBALD AND LIONEL GEORGE TALBOT (*Defendants*) ..... APPELLANTS; *May 28, 29 *Nov. 17

AND

EILEEN FLORENCE NESTING AND CLARENCE WILLIAM MADSEN (*Plaintiffs*) ..... RESPONDENTS;

AND

RONALD LESLIE DALTON AND A. E. IRVINE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Collision with approaching car in snow cloud raised by snow plough on wrong side of the road—Liability—Damages—Concurrent findings as to amount of compensation for injuries.

The automobiles of the respondent Dalton and of the respondent Madsen collided when, in order to avoid a snow plough coming toward him on the wrong side of the road, Dalton drove his car to the left and into a cloud of snow which the plough was blowing across the road. The trial judge apportioned the blame between Dalton and the operators of the plough at two-thirds and one- third respectively. The Appellate Division of the Supreme Court of Alberta held that the operators of the plough were solely to blame but refused to increase the amount of the damages awarded to Dalton.

This Court agreed unanimously with the Appellate Division that the accident was occasioned by the sole negligence of the operators of the plough.

On Dalton's cross-appeal for an increase in general damages,

Held: (Locke J. dissenting), that the cross-appeal should be allowed.

Per: Rand, Kellock, Cartwright and Fauteux JJ.: While a second Court of Appeal should be extremely slow to interfere with the assessment of damages made by a judge at trial and affirmed by the first Court of Appeal, it is nonetheless its duty to do so when satisfied that the amount awarded is a wholly erroneous estimate of the damages (*Nance* v. *B. C. Electric Ry Co. Ltd.* [1951] A.C. 601).

Such was the award in this case. The amount was not commensurate with the injuries suffered and it would appear that the trial judge either failed to give due weight to his findings as to the gravity and permanence of the injuries or allowed his assessment to be too greatly influenced by the mere possibility of improvement.

Per: Locke J. (dissenting in part): Since there were concurrent findings on the question of fact as to what sum of money would be a reasonable compensation and since it has not been shown that the Courts below erred on some matter of principle in arriving at their conclusions, this Court, following its well settled practice, should not interfere with the assessment.

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

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APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), in an action arising out of an automobile collision.

J. J. Frawley Q.C. for the appellants.

R. L. Fenerty Q.C. for the respondents Nesting and Madsen.

H. W. Riley Q.C. for the respondent Dalton.

The judgment of Rand, Kellock, Cartwright and Fauteux, JJ. was delivered by:—

CARTWRIGHT J.:—This litigation arises out of a collision between two automobiles, one driven by the respondent Dalton and the other by the respondent Madsen. The respondent Nesting was riding as a passenger in the last mentioned vehicle. Each driver asserted that the collision was caused by the negligence of the other and also by the negligence of the appellants Archibald and Talbot who were operating a snowplough.

The learned trial judge absolved Madsen from blame, found that Dalton and the appellants were negligent and fixed their degrees of fault at $66\frac{2}{3}$ per cent and $33\frac{1}{3}$ per cent respectively. He assessed the damages as follows:— Miss Nesting—$5,504, Madsen—$3,382, and Dalton—$9,295. Judgment was entered accordingly. The present appellants and Dalton both appealed to the Appellate Division of the Supreme Court of Alberta (1). Dalton's appeal succeeded as to the finding of negligence on his part but failed in so far as he sought an increase of damages. In this Court, the appellants ask that they be absolved from all blame and alternatively that part of the blame be attributed to Madsen and Dalton. Madsen and Nesting cross-appeal seeking to have the finding of negligence on the part of Dalton restored. Dalton cross-appeals asking an increase in the general damages awarded to him and that Madsen should be found guilty of negligence contributing to the accident.

I find it unnecessary to set out the facts in regard to the happening of the collision, which are fully stated in the judgments below, as I am in respectful agreement with the conclusion of the Appellate Division that the appellants are solely responsible for the damages suffered.

(1) [1952] 5 W.W.R. (N.S.) 419.

This leaves for consideration the cross-appeal of Dalton in so far as it asks that the general damages of $8,000 awarded to him should be increased. The amount claimed for general damages in Dalton's statement of claim was $25,000. The accident happened on the 30th of December, 1949 and the trial took place in the month of December 1951. At the time of the trial the appellant Dalton was thirty-five years of age. He is married and has two young children. Prior to his marriage he had been in the army and after his discharge had been employed as a salesman with the Heinz Company. At the time of his marriage he gave up the last mentioned employment and thereafter worked for the Imperial Oil Company at Leduc until November, 1949, when he set up a clothing business. The evidence as to the extent and prospects of this business is somewhat indefinite and there is no evidence as to the amount of Dalton's earnings in his prior employments. At the date of the trial he was still carrying on the clothing business but under difficulties resulting from his injuries and necessitating assistance from his wife and others which he had not previously required.

While the assistance to be derived from the medical evidence would have been greater had the doctor who testified made a more recent examination, the evidence taken as a whole supports the findings of the learned trial judge as to the injuries suffered by Dalton and his resulting condition. These findings are expressed as follows:—

> . . . There remains only one question, the amount of his general damage. There is no doubt that this man suffered quite severe physical injuries and unfortunately those injuries were sustained to the head, to the skull, and to the brain. As has been described in considerable detail here by Dr. Gardner, an eminent specialist in that field of medical practice, there is no doubt in my mind that Dalton had a great deal of pain and suffering during and immediately after the time he suffered the injuries. Possibly by far the worst injury he suffered is the resultant amnesia which clearly arose from this accident. There is no difficulty in finding that in fact that amnesia occurred, so that he has no real memory even of the impact. His retrograde amnesia, as Dr. Gordon (sic) described it, was a major one, going back as it did, not to just immediately before the impact or an hour or two before the impact, but for seven days. I am, however, aware that there appears to be some improvement. Dalton, when in the witness stand, was able to remember being in Lethbridge on the day of the accident which means that he has made a considerable measure of recovery in his retrograde amnesia, and possibly he may eventually even remember up to the accident. Dr. Gardner is not able to tell. What is perhaps more serious and is associated with it, perhaps one should say 'allied' to the retrograde amnesia, is the amnesia or defective memory

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from which Dalton has continued to suffer and presently suffers. One only has to see him in the witness box and listen to his testimony to realize that that is indeed a serious condition. This man certainly is unable to carry on in a normal way as his wife described it prior to this accident when he had opened up his clothing business and also when he was in the service of Imperial Oil at Leduc for some two or three years. For example, he forgets his customers, or what it was they may have ordered. He has been and is seriously handicapped from this condition and his other injuries in carrying on his present or any other business or occupation. Very naturally the doctors are cautious as to prognostication. In addition, this man's whole nature has been changed from a vigorous, alert, pleasant and kindly one to one tending the opposite direction, dull, listless and uninterested, a condition arising from head injuries of the kind suffered by him well known to medical men. The possibility is that he may subsequently recover something of this change in personality which has occurred and which cannot but excite a considerable amount of sympathy. I think the appropriate award in the circumstances for general damages to Dalton in addition to the special damage which I have already itemized would be the sum of $8,000 and accordingly I award him that sum as general damages.

The unanimous reasons of the Court of Appeal were delivered by Clinton Ford J.A. who deals with the question of Dalton's damages in the following words:—

Damages were assessed by the learned trial judge after careful consideration of the factors that enter into the question of the amount that should be allowed to each claimant; and, although it was urged that the sum of $8,000 allowed to Dalton was much less than the nature and extent of his injuries should warrant, I would not increase the amount awarded to him.

The principles by which an appellate court should be guided in deciding whether it is justified in disturbing the finding of a court of first instance as to the quantum of damages have recently been re-stated by Viscount Simon giving the judgment of the Judicial Committee in *Nance* v. *B.C. Electric Railway Co. Ltd.* (1). Their Lordships say at pages 613 and 614:—

Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell*, approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries, Ld.*). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any

(1) [1951] A.C. 601 at 613 et seq.

figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly 'out of all proportion' (per Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ld.*).

While no doubt a second Court of Appeal should be extremely slow to interfere with the assessment of damages made by a judge at the trial when that assessment has been affirmed by the first Court of Appeal it is nonetheless its duty to do so in a proper case. An example is to be found in *Davies* v. *Powell Duffryn Associated Collieries, Ld.* referred to above.

As I read the findings of fact of the learned trial judge which I have quoted they indicate that ever since the accident Dalton has, to a very substantial extent, been deprived of his ability to carry on efficiently in any business or occupation, that there has been a grave interference with his normal enjoyment of life, that his memory is seriously impaired and his personality sadly altered, and that there is a possibility, rather than a probability, of some improvement. On this state of facts in my respectful opinion the amount awarded was, to use the words of Viscount Simon, "so inordinately low as to be a wholly erroneous estimate of the damage." I am unable to say to what extent the assessment made by the learned trial judge was affected by his finding as to a possibility of improvement. The existence of such a possibility as the evidence indicates does not appear to me a sufficient reason for fixing the damages at the amount mentioned. The medical testimony was that Dalton had suffered "considerable brain damage of important areas". The evidence of Mrs. Dalton indicated the serious effects of these injuries persisting at the date of the trial two years after the accident. Dr. Gardner's evidence shows that in his opinion there was a possibility of limited improvement not of complete recovery. It is true that it is possible that the future will prove better than the evidence appears to indicate but the contrary is also possible and the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future.

I am driven to the conclusion that the learned trial judge either failed to give due weight to his findings as to the gravity of the injuries suffered or allowed his assessment

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to be too greatly influenced by the mere posibility of improvement; and with the greatest respect I am of opinion that the amount awarded can not be allowed to stand. Accepting, as I do, the findings of the learned trial judge as to the nature and extent of Dalton's injuries I am of opinion that the lowest amount at which his general damages can be fixed which is commensurate with the injuries suffered is $15,000, and I would substitute that figure for the $8,000 assessed at the trial.

In the result I would dismiss the appeal and would allow Dalton's cross-appeal to the extent of directing that he recover from Archibald and Talbot $16,295. The order of the Appellate Division as to the payment of costs in the courts below should stand. The respondents Madsen, Nesting and Dalton should recover their costs of the appeal to this Court from the appellants. The respondent Dalton should recover the costs of his cross-appeal to this Court from the appellants. The cross-appeal of Dalton as against Madsen and that of Madsen and Nesting as against Dalton should be dismissed without costs.

LOCKE J. (dissenting in part):—The able argument addressed to us in this matter by Mr. Frawley on behalf of the appellants has not satisfied me that the finding of the Appellate Division (1) that the accident was occasioned by the negligence of the appellants is not supported by the evidence and, accordingly, in my opinion, the appeal fails and should be dismissed with costs.

The respondent Dalton, whose general damages were fixed at the sum of $8,000, by the learned trial Judge, has cross-appealed, asking that this amount be increased. On the appeal to the Appellate Division by the present appellants, a cross-appeal by Dalton in respect of the general damages allowed him was dismissed by the unanimous judgment of the Court.

The evidence as to the prospects of Dalton recovering from the effect of the injuries sustained by him is unfortunately both incomplete and unsatisfactory. The accident occurred on December 30, 1949, and immediately following it he was removed to a hospital at MacLeod, Alberta, where he was under the care of a Doctor Gordon until January 9, when he was removed to the Colonel Belcher Hospital in

(1) [1952] 5 W.W.R. (N.S.) 419.

Calgary. The injuries he had sustained, other than those to his head, were minor in character. Dr. Gordon did not give evidence at the trial nor any one from the MacLeod Hospital, the only medical evidence as to the nature of the injuries being that given by Dr. J. S. Gardner, a surgeon practising in Calgary, who was one of several doctors who examined Dalton between the time of his entry into the hospital and January 21, 1950, when he was discharged.

Dr. Gardner saw Dalton on his admission to the Colonel Belcher Hospital and said that he was then pale and lethargic and did not seem to know just where he was. According to the doctor:—

> He was put to bed and examined by one of our people who are interested in neurological diseases and his conclusion was that he had suffered a very severe head injury ten days previously and was still suffering considerable effects.

Continuing he said that on investigation it had been found that he had suffered a considerable fracture of the left vault of his skull which ran down into the interior phase of the skull and showed evidence of having suffered cerebral concussion:—

> of a fairly major degree and some cerebral contusions and probably laceration in as much as the spinal fluid was straw-coloured and contained a large excess of protein.

He also said that Dalton was suffering from amnesia. Asked as to whether these conclusions were his own as a result of personal examination or as the result of an examination by somebody who was interested in neurological matters, Dr. Gardner said that various members of the staff had seen Dalton and that it was the general consensus of opinion that he had suffered a brain tissue injury. X-rays had been taken in the Calgary Hospital which disclosed the fracture. The witness said further that:—

> We felt he had suffered a considerable brain damage of important areas by his reactions and his slowness in recovery.

Asked to describe what were the usual effects of that type of head injury, he said that the most prominent symptoms that might go on for years were headache and dizziness or vertigo, which was sometimes very persistent after head injuries, and that sometimes there was buzzing in the ears or "high ear whistling." Continuing he said:—

> Then there is a whole group of what we call post-concussional sequilea that have to do with changes in part in intellect but mainly emotional reaction. Some people following a head injury of this nature, appear to

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be different people. They have a different emotional pattern that makes them like different people. There are all manner of things like tender areas or swollen areas or nerve injuries and all those things.

It was on January 21, 1950, that Dalton left the Calgary Hospital and while Dr. Gardner said that he was under the impression that Mrs. Dalton had brought her husband back to see him some weeks after that, he had no record of the interview. He thought, however, that Dalton had then a poor memory and could not keep his mind on a subject for long and was afraid to return to his business. Dr. Gardner did not see Dalton again until the day the trial commenced at Calgary December 5, 1951.

Cross-examined, Dr. Gardner said that Dalton suffered from what was called "retrograde amnesia", which he explained as a loss of memory of events occurring prior to the accident and said that, as to this, the strange thing was that memory would return up to a point. A further passage in his cross-examination reads:—

Q. As far as being of any assistance to his recovery, on the degree of recovery of paralysis (sic) you cannot assist him at all, can you? You had not seen him for so long?—A. Not at the present time.

Q. He could be perfectly all right at the present time?—A. Yes, indeed, he could.

After the cross-examination by counsel, the trial Judge questioned Dr. Gardner at some length, in an endeavour to clarify his evidence. The doctor said that in Dalton's case there was a retrograde amnesia of about a week and that this was "a fairly large retrograde amnesia." The transcript of this examination reads in part as follows:—

Q. In the light of that, and the fact that you saw this patient at least once a day and perhaps several times a day during the period from the 9th of January until the 21st of January, 1950, are you able to say or would you feel you could make any estimate as to his memory defects and whether there will be any further recovery to any real degree or whether it has now reached its maximum and is stationary?—A. Well, in part, I can say something.

Q. Yes?—A. I would not like to say anything about his present memory defect without examination.

Q. Quite.—A. The man, as I recall seeing him subsequent to his injury, that was the main system (sic), that he could not keep his eye on the ball, as it were, and he could not remember. That is the only knowledge I have of his subsequent memory defect. But I would say in my opinion that it is not likely with that severity of injury and that severity of amnesia at his age that he would get any appreciable improvement in his memory now except by intensive training which might or might not play a part.

After the completion of this examination, counsel for Madsen asked Dr. Gardner if he was aware that Dalton at that time was able to remember to within three hours before the accident and he said that he was not.

The medical evidence was left in this state. The failure to call Dr. Gordon who had attended Dalton at the hospital in MacLeod may have been due to his not having examined Dalton since January 9, 1950. However, according to Dalton, he had gone to "quite a few doctors": their identity, however, was not disclosed nor any explanation given as to why none of them were called. I must assume that the course followed on his behalf was deliberate and that he was advised to rely upon the evidence of a doctor who had not seen him for at least twenty months prior to the trial. It was not apparently suggested to the learned trial Judge that he might then direct a medical examination of Dalton to obtain an opinion as to the prospect of his recovery, under the powers vested in him by Rule 260 of the Rules of the Supreme Court of Alberta. Whether the parties contrary in interest to Dalton had obtained an order for his medical examination prior to the trial under Rule 259 and had him examined is not shown. Neither the present appellants nor the respondents Nesting and Madsen called any medical evidence as to his condition.

Dalton was the owner of a men's clothing store in Leduc, selling amongst other things custom made clothes, the sale of which required him to take measurements of his customers. He had gone back to work in March 1950 following the accident but found that he could not do this particular work without assistance. He had commenced the operation of the store at the end of 1948. According to Dalton, his principal difficulty was his inability to remember people and, on occasions where he had measured people for clothes, he had forgotten both the fact of taking the order and the person who had given it. It was in consequence of this, apparently, that he had got assistance for this work from an older man who was familiar with it. When asked if he suffered from headaches, he said that he did not and he did not complain of dizziness or vertigo. Mrs. Dalton gave evidence as to her husband's difficulties occasioned by his inability to remember orders he had taken and said that before the accident he had been a good salesman. Speaking of his disposition, she said he had been

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very friendly with people and had a pleasant personality but that now he found it difficult to carry on in this way. She said also that her husband, contrary to what he had said in evidence, complained of severe headaches at times. His disposition which was formerly cheerful and optimistic had changed, according to her, and he was now very nervous and both very despondent and inclined to worry over trifles. While Dalton's counterclaim had claimed a loss of $1,500 for wages paid to others and earnings lost, Mrs. Dalton who alone was asked about the matter said that she could not say what amount had been lost, owing to her husband's absence from the business but that they had a bookkeeper who kept track of these things. The bookkeeper was not called. As to wages paid to others, it appeared that at the time of the accident two young Mormon missionaries occupied a room in the Dalton's house for which they paid $25 a month. During her husband's absence from the store, Mrs. Dalton said that these two missionaries ran the store and, after his return from Calgary, they continued to help being engaged for a period altogether of two months. The missionaries did not accept any payment for their services other than their board and lodging and some clothing. The evidence as to the extent of Dalton's expenditure in this respect appears to me unsatisfactory.

It was upon this evidence that the learned trial Judge was faced with the difficult task of assessing the damages sustained by Dalton. The items for special damage, other than the amount expended in connection with the services of the misisonaries, were apparently not disputed: as to these he allowed a sum of $600. In the absence of any evidence on the point, nothing was allowed for loss to the business. Dealing with general damages, he said that the worst injury was the resultant amnesia which, he considered, clearly arose from the accident. Speaking of the "retrograde amnesia", he said that it was a major one going back, according to Dr. Gardner, to seven days before the accident, but noted that there appeared to be some improvement as to this and that Dalton was able on the witness stand "to remember being in Lethbridge on the day of the accident, which meant that he had made a considerable measure of recovery of his retrograde amnesia and that possibly he might eventually even remember up to the

accident." Speaking as to the loss of memory following the accident, the learned trial Judge said that:—

> One only has to see him in the witness box and listen to his testimony to realize that that is indeed a serious condition. This man certainly is unable to carry on in a normal way as his wife described it prior to this accident when he had opened up his clothing business and also when he was in the service of Imperial Oil at Leduc for some two or three years. For example, he forgets his customers, or what it was they may have ordered. He has been and is seriously handicapped from this condition and his other injuries in carrying on his present or any other business or occupation. Very naturally the doctors are cautious as to prognostication. In addition, this man's whole nature has been changed from a vigorous, alert, pleasant and kindly one, to one tending in the opposite direction, dull, listless and uninterested, a condition arising from head injuries of the kind suffered by him well known to medical men. The possibility is that he may subsequently recover something of this change in personality which has occurred and which cannot but excite a considerable amount of sympathy.

This summary of the result of the head injuries is not unfavourable to Dalton. There was no medical evidence as to the prospect of a further recovery in Dalton's memory, other than what has been quoted from the answers made by Dr. Gardner in answer to the questions directed to him by the learned trial Judge, a statement made after he had already said that he would not like to say anything about the matter without examination. There was no evidence of any loss of trade in Dalton's store during the time between the date when he returned to work in March, 1950, and the trial, some twenty months later, so that presumably, other than his inability to measure customers for clothing, his condition did not affect his ability to manage the business.

In delivering the unanimous judgment of the Appellate Division dismissing Dalton's cross-appeal in respect of the general damages awarded him, Clinton J. Ford, J.A. said:—

> Damages were assessed by the learned trial judge after careful consideration of the factors that enter into the question of the amount that should be allowed to each claimant; and, although it was urged that the sum of $8,000 allowed to Dalton was much less than the nature and extent of his injuries should warrant, I would not increase the amount awarded him.

We have thus concurrent findings on the question of fact as to what sum of money would be reasonable compensation to Dalton for the injuries he had sustained. In *Davies* v. *Powell Duffryn Associated Collieries Ld.* (1), Lord Wright said in part (p. 616):—

> An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to

(1) [1942] A.C. 601.

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interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical and General Inventions Co. Ltd.* v. *Austin* (1935) A.C. 346. Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell* (1935) 1 K.B. 354, 360. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

Flint v. *Lovell* (1) was a decision of the Court of Appeal in an action for damages for personal injuries which had been tried before Acton J. without a jury and the remarks of Greer L.J., referred to by Lord Wright, stated the principle which, he considered, should be applied by that Court in dealing with an appeal as to the quantum of damages. In *Owen* v. *Sykes* (2), an appeal to the Court of Appeal from the judgment of a single judge in an action of the same nature, the statement of Greer L.J. in *Flint's* case was adopted. In *Rook* v. *Farrie* (3), a libel action tried by a single judge, where there was a cross-appeal by the plaintiff on the ground that the damages awarded were inadequate, Sir Wilfrid Green, M.R., with whom MacKinnon and du Parcq L.JJ. agreed, said that the principle stated by Greer L.J. in *Flint* v. *Lovell* was applicable to actions for damages for libel, while pointing out that in such an action the very nature of the damages which are awarded made the task of

(1) [1935] 1 K.B. 354. (2) [1936] 1 K.B. 192.
(3) [1941] 1 K.B. 507.

establishing error a great deal more difficult than it might be in other types of actions. The learned Master of the Rolls said in part (p. 518):—

> I agree, as I have said, that this is a case where a jury might well have awarded a very much larger sum, and in fact it is not improper to say that if I had been awarding damages here I should have awarded a larger sum. But that circumstance does not entitle me to interfere with the learned judge's judgment, whose opinion upon the appropriate figure is entitled to as much weight as mine. It is a case of different minds taking different views, and sitting in this Court I am not entitled to substitute my view for his.

The statement from *Flint* v. *Lovell,* referred to by Lord Wright in *Davies'* case, was adopted in the judgment of the Judicial Committee in *Nance* v. *British Columbia Electric Railway* (1). In that case, the Court of Appeal of British Columbia had reduced the award of damages made by the jury and the remarks of Viscount Simon in the passage referred to were directed to the principles which should govern the Court of Appeal in such circumstances.

The principle to be followed by Provincial courts of appeal in dealing with questions of this nature has been dealt with in this Court in *Levi* v. *Reed* (2), *Gingras* v. *Desilets* (3), *Cossette* v. *Dun* (4), *Montreal Gas Co.* v. *St. Laurent* (5), and in *Marsden* v. *Pollock* (6), and does not differ from that stated in the cases decided in England. In *Montreal Gas Co.* v. *St. Laurent,* Taschereau J., delivering the judgment of the Court, said (p. 180):—

> As to the amount of damages given by the judgment, we cannot interfere. *Cossette* v. *Dun; Ball* v. *Ray,* 30 L.T.N.S. 1; *Lévi* v. *Reed.* It certainly appears to be large, but, as the Court of Appeal says, there is evidence to support it, leaving out of consideration the evidence given as to problematic or uncertain future damages.

In the case of *Ball* v. *Ray* (7), to which Taschereau J. referred, Selborne L.C. said in part:—

> It is not shown that the Master of the Rolls in deciding upon the quantum of damages has applied to the measure of those damages any wrong principle. It is not shown that the actual amount of damages were or could be demonstrated to the court . . . In that state of things it was surely in an eminent degree for the court to discharge the office of a jury; and it would be easy to refer to authorities such as *Penn* v. *Bibby* (15 L.T.N.S. 399) before Chelmsford L.C. and Grey v. Turnbull in the House of Lords, and to numerous cases before the Privy Council, which show

(1) [1951] A.C. 601 at 613.
(2) (1882) 6 Can. S.C.R. 483.
(3) (1881) Cassel's Digest 213.
(4) (1890) 18 Can. S.C.R. 222.
(5) (1896) 26 Can. S.C.R. 176.
(6) [1953] 1 S.C.R. 66.
(7) 30 L.T.N.S. 1.

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that where upon questions of fact the court appears to have fairly discharged the same duty which a jury would have to discharge upon conflicting or doubtful evidence, it will be a very difficult thing to induce the Court of Appeal to go into the merits for the purpose of forming that judgment upon the balance of the evidence which possibly might have been formed if it had come before them in the first instance. If that rule has been established and held a satisfactory one as to questions of fact in general which stand in the position which I have described, it appears to me to be of still greater importance to establish and maintain a similar rule as to mere questions of the quantum of damages. In all cases in which you deal with the verdict of a jury, or of a judge in this court, or at common law, giving a verdict properly so called without a jury under the statute which enables that to be done, the verdict is conclusive, unless a principle can be shown in respect of which there is miscarriage, and as to which it ought by a proper proceeding to be disturbed. I think the analogy of that ought to be applied in this court to all these questions of damages, and that if the judge has settled the amount of damages and it cannot be shown that there are grounds for interfering with his judgment, which would be applicable to the verdict either of a jury, or of a judge, properly so called, the Court of Appeal ought not to disturb it.

In the present case the finding of the learned trial Judge has been upheld by the unanimous judgment of the Court of Appeal and I have been unable to find that in any reported case where the finding of the trial judge as to the quantum of damage has been upheld in the Court of Appeal this Court has either varied the amount or directed a new trial upon the question. In *Pratt* v. *Beaman* (1), where the damages allowed by the trial judge for pain and suffering had been reduced in the Court of Appeal, Anglin C.J., delivering the judgment of a Court of which the other members were Duff, Newcombe, Rinfret and Smith JJ. said (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. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

As pointed out by Lord Wright in *Davies' case,* the finding as to the amount of damages differs little from any other finding of fact and where, as in the present case, there are concurrent findings, I am of the opinion that the rule stated by Duff J. (as he then was) in delivering the judgment of the Court in *Rogers* v. *Davis* (2), should be applied unless, indeed, it can be shown that the trial judge and the

(1) [1930] S.C.R. 284.

(2) [1932] S.C.R. 407 at 409.

Court of Appeal have erred on some matter of principle in arriving at their conclusions. In *Marsden* v. *Pollock*, above referred to, where damages had been awarded under the *Fatal Accidents Act*, it was my opinion that the finding as to the quantum could not be sustained for the reason that neither the financial circumstances or the ages of the parents, on whose behalf a claim was made, had been proven and I would have directed a new hearing restricted to the assessment. Here the learned trial judge and the learned judges of the Court of Appeal are in agreement as to what amount would be a fair and reasonable compensation to Dalton for the damage sustained by him by reason of this accident, and to interfere would, in my opinion, be contrary to the well settled practice of this Court.

I would dismiss the cross-appeal with costs, if demanded.

Appeal dismissed with costs; cross-appeal of respondent Dalton allowed with costs.

Solicitor for the appellants: *L. A. Justason.*

Solicitors for the respondents Nesting and Madsen: *Fenerty, Fenerty, McGillivray & Robertson.*

Solicitors for the respondent Dalton: *Macleod, Riley, McDermid, Bessemer & Dixon.*