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* Oct. 6.
* Dec. 15.

C. T. WARREN (PLAINTIFF) ..... APPELLANT;

AND

GRAY GOOSE STAGE LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Jury trial—Assessment of damages in negligence action—New trial ordered on ground that damages excessive—Jurisdiction of appellate court—Order for new trial set aside.

Where in an action for negligence the damages have been assessed by a jury, an appellate court has no jurisdiction in respect of the amount awarded to rehear the case and control the verdict of the jury. The court is not a court of review for that purpose. If, viewing the evidence as a whole, an appellate court can see plainly that the amount of damages is in law indefensible, or that the trial has been unsatisfactory by reason of misdirection or wrongful admission or rejection of evidence, or if it is demonstrable that the jury have or must have misunderstood the evidence or taken into account matters which could not legally affect their verdict, the court may grant a new trial for the reassessment of the damages. This is not to be taken, however, as an exhaustive statement of the circumstances in which a new trial may be granted for such a purpose. The verdict ought to be set aside in any case in which an appellate court finds it clearly established that the jury had misunderstood or disregarded their duty.

Per Kerwin J.—When an appellate court cannot agree with the jury's estimate of the amount of damages, "the rule of conduct" for that 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 when the court is asked to set aside a verdict on the ground that it is against the weight of evidence." *Praed* v. *Graham* (24 Q.B.D. 53) approved.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, with a jury, awarding $5,392.30 as damages resulting from an automobile accident and ordering a new trial limited to the assessment of damages (unless the parties consented to a reduction of the general damages from $5,000 to $2,000), upon the ground that the amount of the damages fixed by the jury was grossly excessive.

The material facts of the case and the questions at issue are stated in the judgment now reported.

J. M. Stevenson K.C. for the appellant.

Thos. N. Phelan K.C. and *Brenton O'Brien* for the respondent.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 1 W.W.R. 465.

The judgment of Duff C.J. and Crocket, Davis and Hudson JJ. was delivered by

DAVIS J.—The plaintiff (appellant) was a passenger in a public motor car owned and operated by the defendant company (respondent) on an occasion when the car suddenly left the travelled highway and went into the ditch. The plaintiff claimed damages in this action for physical injuries alleged to have been suffered as a result of what occurred. Liability was denied. The action was tried with a jury and on the answers of the jury to certain questions submitted to them the learned trial judge entered judgment against the defendant for $392.30 special damages and $5,000 general damages. The defendant appealed to the Court of Appeal for Saskatchewan (1) and that court affirmed the liability but ordered a new trial limited to the assessment of damages (unless the parties consented to a reduction of the general damages from $5,000 to $2,000) upon the ground that the amount of the damages fixed by the jury was grossly excessive. Both parties appealed from that judgment to this Court.

The motor car was not a regular bus model but was an old seven-passenger car that had been driven for 200,000 miles and had been put into service as a public conveyance. There was evidence that the accident was caused by a break occurring in the steering apparatus which put the car out of control of the driver and there was evidence that part of the steering apparatus had been severely worn and was in a bad state of disrepair. On the other hand, there was evidence, on behalf of the defendant, that the practice had been to have an almost daily inspection of the car and that the car had in fact been inspected and the steering apparatus found in good condition three days before the accident. The jury were of course entitled to disbelieve this evidence if they chose. They found that the defendant had been guilty of negligence and that the negligence was "that proper inspection of the vehicle was not carried out."

At the time of the accident and for some time thereafter it is plain that the plaintiff did not regard the physical injuries which he suffered as of very much account. He

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was a war veteran with a progressive disability which had led to the increase of his pension from a ten per cent disability to a thirty per cent disability and at the time of the accident an application from him for a larger disability pension was pending. After the accident he consulted several doctors, one after the other, over a period of some months. His substantial claim for damages at the trial was made upon his story that he had suffered very considerably from headaches since the accident occurred and that they had resulted in a condition of physical weakness and in a lack of power of concentration on his work which had seriously affected his earning capacity. His business was that of an insurance adjuster. It appears that a diet which one of the doctors prescribed for him had counteracted the headaches but the evidence does not disclose what effect if any the diet had upon his general health.

Counsel for the defendant contends that there is no liability. This contention is put firstly upon the ground that, while the jury found negligence, the answer they gave as to what constituted the negligence, i.e., the absence of proper inspection of the vehicle, was not in itself negligence and that the very answer negatived all other acts of alleged negligence. We did not require to hear counsel for the plaintiff on this point. While it may well be that want of inspection is not by itself negligence unless there was either some original defect or a state of disrepair which inspection would have disclosed, where, as here, the evidence pointed to a known defect or condition of disrepair in the steering apparatus, the language of the jury read and construed in the light of the evidence and the charge can only be interpreted fairly as meaning that the jury thought that a proper and sufficient inspection would have disclosed the full extent of the faulty condition and that its repair would have avoided the event that happened. A high degree of care is required on the part of common carriers and the lack of inspection as found by the jury was, in view of the evidence, plainly a sufficient finding of negligence.

The mention of an insurance company in the case, which was one of the grounds of the defendant's appeal to the Court of Appeal for Saskatchewan, was not pressed in that

court, perhaps because the complaining party realized that it was as remiss as its opponent in this regard. In any case, as the point was not pressed in the court below, it was not open to the defendant in this Court.

The main proposition advanced by counsel for the defendant before us was that on the evidence no causal relation is proved between the headaches and the accident —that the evidence is so vague that it could not reasonably be concluded that the headaches were the direct result of the accident. But there was some evidence, if believed, sufficient to connect the headaches with the accident. The weight of the evidence was a question solely for the jury and in an admirably clear and direct charge the learned trial judge put that question to the jury as "the big question" to be decided by them.

> If you find he was not suffering from a headache before the accident and that he struck his head on the occasion in question against the back of the front seat of the car and has been suffering headaches since then, it would be a fair inference that it was the blow on the head from the back of the front seat that caused them; and in that case the evidence of Dr. McConnell would be of some importance. But before using the evidence of Dr. McConnell at all you must find that the headaches did not exist before the accident and that he did not suffer from headaches before the accident. Because the evidence of Dr. McConnell is not going to be of any assistance to you in coming to a conclusion as to whether he had these before or after. He says: "Assuming the truth of his history"; that is, assuming the truth of what the plaintiff tells him, then he says: "The condition I found could be due to the accident." But he also says "The condition which I found may have existed long before the accident." So that as to whether he was suffering from those injuries before the accident or whether they commenced after the accident, the evidence of Dr. McConnell does not help you one way or the other. If you find they were non-existent before the accident, then you consider the evidence of Dr. McConnell who says he found the third ventricle was slightly larger than normal, that the left frontal region was abnormal, there was a larger space than normal, and that they were liable to cause headaches.

The jury could not have assessed the general damages at $5,000 unless they had accepted the plaintiff's evidence that the headaches were the direct result of the accident because the other complaints of the plaintiff were admittedly of trifling significance. The jury's finding of liability, affirmed as it was by the Court of Appeal, must stand.

Once liability has been established, any views as to the weakness of the evidence regarded from the point of view of liability (the weight of which evidence, we repeat, was for the jury) must not influence the Court on the amount

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of compensation for the injuries. 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. Lord Wright in the House of Lords in *Mechanical and General Inventions Co.* v. *Austin* (1) said:

> The appellate court is never the judge of fact in a case where the constitutional judge of fact is the jury. For the appellate court to set aside the verdict of a jury as being against the weight of evidence, merely because the court does not agree with it, would, in my judgment, be to usurp the functions of the jury and to substitute their own opinion for that of the jury: that would be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it.

And at p. 377:

> The jury were, as the Lord Chancellor explains, properly directed and had all the facts fully before them. In considering their award on damages, that view of the evidence most favourable to their finding must be taken, not the view most adverse to it, if or where two views are competent. It is true that the damages awarded ran into big figures, but damages cannot be treated as excessive merely because they are large. Excess implies some standard which has been exceeded.

The authorities are numerous but we might usefully refer to the judgment of the Privy Council in *McHugh* v. *Union Bank of Canada* (1). That was an Alberta case. Beck, J., sitting without a jury, assessed the damages (a mortgagee's negligence case) at $2,800. The Alberta court of appeal set aside the assessment but granted to the plaintiff the option to have it referred back to the clerk of the court at Calgary to take an account within prescribed limits of what damage, if any, the plaintiff had suffered by the negligence of the defendants. Upon appeal to this Court, the majority (Duff and Anglin JJ. dissenting) affirmed the order permitting a reference at the plaintiff's option but varied the directions as to the mode of assessing the damages. Upon further appeal to the Privy Council, the assessment made by the trial judge was restored. Lord Moulton, who delivered the judgment of the Board, said at p. 309:

(1) [1913] A.C. 299.

(1) [1935] A.C. 346 at pp. 373 and 374.

The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the courts of appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

The importance of that case lies in the fact that the assessment had been made by the trial judge himself and the court of appeal had jurisdiction to rehear the case and to substitute their findings for his findings. But notwithstanding that both the court of appeal of Alberta and the Supreme Court of Canada had seen fit to set aside the assessment of damages made by the trial judge, the Privy Council restored the assessment. That course undoubtedly would not have been taken had the Privy Council not concluded that the two appellate courts below had erred in principle in interfering with the assessment made by the trial judge.

In the case before us, however, the damages had been assessed by a jury and the Court of Appeal had no jurisdiction in respect of the amount awarded to rehear the case and control the verdict of the jury. The court is not a court of review for that purpose. If, viewing the evidence as a whole, the Court of Appeal can see plainly that the amount of damages is in law indefensible, or that the trial has been unsatisfactory by reason of misdirection or wrongful admission or rejection of evidence, or if it is demonstrable that the jury have or must have misunderstood the evidence or taken into account matters which could not legally affect their verdict, the court may grant a new trial for the reassessment of the damages. This, of course, is not an exhaustive statement of the circumstances in which a new trial may be granted for such a purpose. The verdict ought to be set aside in any case in which the court finds it clearly established that the jury have misunderstood or disregarded their duty.

In this case the jury were properly directed and had all the facts before them and there is no reason for inferring that they took into account any irrelevant consideration in arriving at the amount of the damages.

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The appeal must be allowed and the cross-appeal must be dismissed and the judgment at the trial restored, with costs throughout.

KERWIN J.—The cross-appeal was practically disposed of on the argument. The evidence at the trial was directed to the condition of the automobile and the answer of the jury must be considered in view of that evidence and of the judge's charge. I have no doubt that so reading the jury's answer, it is a sufficient finding of negligence.

As to the appeal of the plaintiff on the question of the amount of damages, I must confess that I was much impressed by Mr. Phelan's contention that there was not shown to be any connection between the accident and the headaches of which the plaintiff complained. That argument is based to a great extent upon the care with which Dr. McConnell answered the questions put to him upon the precise point. However, a perusal of the evidence since the argument satisfies me that while Dr. McConnell was not as emphatic as some expert witnesses in other cases, there was no doubt as to his opinion, the reasons for which he gave simply and clearly. The jury were entitled to give effect to his opinion and, of course, so far as it was predicated upon the symptoms of the plaintiff, as told by the latter to the doctor, the plaintiff was in the witness box and was heard and seen by the jury. The jury apparently accepted the plaintiff's story and their finding cannot be disturbed.

Once granted these premises, I am unable to see how, on the evidence, the amount of the verdict can be challenged. A claim based upon headaches may be suspect but the evidence of the plaintiff as to his loss of earnings, the fact of the encephalographies and the prescribed diets, and the plaintiff's testimony as to his pain and suffering, coupled with the evidence of Dr. McConnell that the plaintiff would have pain, were all questions for the jury to consider. As the Lord Chancellor stated in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austen* (1):

> The jury were the proper constitutional tribunal to assess the damages and it is impossible to say that they have gone so wrong that their assessment must be set aside. It is not a case merely for a nominal but for substantial damages, of which the jury were the judges.

(1) [1935] A.C. 346, at 358.

Part of Lord Wright's judgment in the same case, at page 374, has been transcribed and referred to by this Court in *McCannell* v. *McLean* (1), and I think that the following quotation from the extract,—

> Thus the question in truth is not whether the verdict appeals to the appellate court to be right but whether it is such as to show that the jury have failed to perform their duty.

is particularly appropriate to the case at bar.

Neither from a perusal of the evidence and the judge's charge nor from a careful consideration of the reasons for judgment of the learned judges in the Court of Appeal can I conclude that the jury in this case have failed to do their duty. With great respect I read the latter as indicating nothing more than that the learned judges in the Court of Appeal could not agree with the jury's estimate of the amount of damages, and that is not in my view a correct method of approach. In the *Mechanical and General Inventions* case, Lord Wright, at page 378, points out that in *Praed* v. *Graham* (2), Lord Esher had stated that "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.

I would allow the appeal with costs throughout and dismiss the cross-appeal with costs.

Appeal allowed with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant: *Stevenson, McLorg and Bence.*

Solicitor for the respondent: *Gilbert H. Yule.*

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(1) [1937] S.C.R. 341.

(2) (1889) 24 Q.B.D. 53.