REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

LEE TRANSPORT CO. LIMITED AND ANOTHER . . . . . Defendants, } Appellants ;

AND

WATSON . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1940.

ADELAIDE, *Sept.* 20.

MELBOURNE, *Oct.* 11.

Rich, Starke, Dixon and McTiernan JJ.

Negligence—Contributory negligence—Defendant's vehicle, standing at side of road, not adequately lighted—Collision with plaintiff's car—Plaintiff's "dilemma"—Speed—Sufficiency of look out.

Damages—General damages—Inadequacy—Increase by appellate court.

The lighting system of a motor truck and trailer belonging to the defendant having failed, the driver drew the truck and trailer to the side of a country highway for the night, but made inadequate arrangements for lighting it. The plaintiff, driving his car at a considerable speed, hit the rear of the trailer.

Held that (1) there was evidence of negligence on the part of the defendant's driver, and (2) the plaintiff was not necessarily guilty of contributory negligence; the suggested dilemma, that either the plaintiff's speed was excessive having regard to the range of his head-lights or he kept an insufficient look out, was incomplete and did not establish contributory negligence. Accordingly, the judgment given in the plaintiff's favour by the trial judge should be upheld.

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W. was a medical practitioner who conducted a general and surgical practice at a country town in South Australia. He was very severely injured in a motor accident which was found to be due to the negligence of the defendants. He spent some eight weeks in hospital, and he had to return there on many occasions for further treatment extending over a period of about eight months. The treatment included six operations—some serious and painful. In addition to this pain there was severe pain for six weeks, and for months after that there was more or less pain. There was an injury to the nose which would permanently interfere with natural breathing and a permanent drooping of an under eyelid which prevented the natural protection of the eye from wind and light. His facial appearance was much deteriorated, and his injuries, both external and internal, were extraordinarily severe and complicated. Though he recovered sufficiently to be able to do competent medical and surgical work, it appeared that he could not stand the constant routine and strain of a country practice, and that it was unlikely that he would ever stand extreme nervous tension as well as he used to do. In an action by him against the defendants for damages for negligence the trial judge awarded him £2,669 damages, including £550 general damages.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* J. dissenting), that the case was one in which a court of appeal should review the assessment of damages: The general damages awarded were unreasonably small and should be increased to £1,500.

Decision of the Supreme Court of South Australia (*Richards* J.) varied.

APPEAL from the Supreme Court of South Australia.

About 1 a.m. on 19th October 1939 a 1939 model Buick Sedan motor car driven by the plaintiff, Dr. Watson, collided with a stationary truck and trailer owned by the defendant Lee Transport Co. Ltd. and driven by the co-defendant, a servant of the company. The scene was the Main North Road, about seven-tenths of a mile north of the township of Two Wells on a straight level stretch over a mile in length. The road surface was bitumen eighteen feet wide, and there were only about eighteen inches on each side of the bitumen which could be used by vehicles. The night was dark and cloudy, but not wet. There was no moon, and there were no trees in the neighbourhood. The truck and the trailer, both of which were heavily laden, and the merchandise on which was covered with white tarpaulin, had left Adelaide in the evening. When passing through Two Wells, the driver found his lights were becoming dimmer. He stopped at the scene of the accident to try to remedy the defect, but failed to do so. A mechanic obtained from Two Wells also failed to put the lighting system in order. The truck and trailer were drawn as far as possible to the left hand side of the road, and the driver decided to remain where he was for the night. He hung a small oil

lamp with a red glass from the side of the truck and refused the mechanic's offer of another lamp.

Dr. Watson was a medical practitioner who conducted a general and surgical practice at Yorketown, a country town in South Australia. He was returning from Adelaide to Yorketown at the time of the accident. He approached the scene of the accident at a speed which he estimated at a little over forty miles per hour. He then noticed the headlights of a car, some half a mile away from him, proceeding towards him in the opposite direction. He thereupon reduced his speed to, he said, about forty miles per hour and dipped his headlights. The other car did the same. As Dr. Watson was about to pass this other car, he observed for the first time the company's trailer, which then appeared to him as a dark object looming up in front of him. He applied his brakes, but was unable to prevent his car running into the trailer. The approach of the oncoming car apparently precluded the possibility of Dr. Watson's avoiding the trailer by swerving to his right. Neither Dr. Watson nor the driver of the oncoming car noticed the oil lamp on the truck.

Dr. Watson sustained injuries of great severity. *Richards* J. (who tried an action by Dr. Watson against the defendants in the Supreme Court of South Australia), described his condition at the time of the trial in the following words :—" There is an injury to the nose which will permanently interfere with natural breathing, and a permanent drooping of an under eyelid which prevents the natural protection of the eye from wind and light. In addition, his facial appearance has been very much deteriorated, especially in the nose and about the mouth. There are other troubles which if not permanent, may continue for a considerable time. It would be a mistake to attempt to assess complete compensation for those injuries, or for the suffering or anxiety endured. The injuries, externally and internally, were extraordinarily severe and complicated, and it is a surgical triumph that the face and jaws have been so far restored. He spent sixteen days in the Adelaide Hospital before he could be removed to a private hospital, where he was kept for about six weeks, and to which he had to return on many occasions for further treatment extending over a period of about eight months. The treatment included six operations, some quite serious and painful, including graftings. Owing to the completely shattered condition of the jaws he had for a long time to swallow his food unmasticated, resulting in indigestion, not to mention other unpleasantness. Apart from that there was severe pain for six weeks ; Dr. Watson described it as ' rather terrible,' and my impression was that he in no instance sought to exaggerate his suffering. For months after that there was

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more or less pain, and, recovery being slow, it is not surprising that at the end of about four months he became very depressed; that wore off however. It is contemplated that there will be another attempt to improve the condition of the nose, which however will not cure the trouble already mentioned, and cannot be regarded as certain to be effectual. Headaches have been frequent throughout. There has always been difficulty in eating; his natural teeth have had to be replaced by dentures and the condition of the jaws has not been favourable to satisfactory results from that expedient. The anxiety as to the future in the case of any person who had suffered such great injuries and has to live by his profession cannot be ignored." His Honour observed that " extra strain or worry is likely to cause quite severe headaches " and " the difficulty in his continuing his practice is not that he cannot do an isolated job, but that he cannot continue with the constant routine and strain; he might be able to do a job and lie down and have a rest without any harm, but if he had to keep up and go on all day he could not do it. A country practice such as Dr. Watson's is a big strain on the mental and physical strength of the doctor. I think it is unlikely that Dr. Watson will ever stand extreme nervous tension as well as he used to do."

Richards J. gave judgment in the plaintiff's favour for £2,669, of which £2,119 was for special damages and £550 was for general damages. The defendants appealed to the High Court, and the plaintiff cross-appealed for an increase in the amount of damages.

Further facts appear from the judgments hereunder.

Ligertwood K.C. (with him *J. N. McEwin*), for the appellants. The worst finding against the appellants is that the respondent ran into an unlighted vehicle at night time. The only negligence found against us is failure to proceed slowly to a safer spot. The nature of the damage to the truck and trailer shows clearly that Dr. Watson underestimated his speed. The only proper inference from this damage is that the speed was excessive. A motorist is not entitled to assume that the road will be free from unlighted objects. [Counsel referred to *Tart* v. *G. W. Chitty & Co.* (1); *Baker* v. *E. Longhurst & Sons Ltd.* (2); *Tidy* v. *Battman* (3); *Anderson* v. *Dent* (4); *Stewart* v. *Hancock* (5).]

Alderman (with him *Brazel*), for the respondent. The respondent could and would have avoided the unlighted object but for the fact

(1) (1933) 2 K.B. 453, at p. 455.
(2) (1933) 2 K.B. 461.
(3) (1934) 1 K.B. 319.
(4) (1937) S.A.S.R. 255, at p. 258.
(5) (1940) 2 All E.R. 427, at p. 432.

that he would have faced a head-on collision with the oncoming car. The cases cited are distinguishable because in all those cases it would have been possible to swerve. [He was stopped on the question of negligence.] As to the cross-appeal, £550 general damages are insufficient. The amount given is manifestly wrong, and, in particular, diminution of earning capacity has been overlooked.

Ligertwood K.C., in reply. As to the damages, there has been no error in principle (*Smith's Newspapers Ltd.* v. *Becker* (1)).

Alderman, in reply on cross-appeal. Even if there is no mistake in principle, a court of appeal can interfere if in its judgment the damages are excessively low (*Mills* v. *Stanway Coaches Ltd.* (2)).

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered :—

RICH J. In cases of this kind each case depends on its own facts. In the present appeal the circumstances are somewhat complicated. The respondent met in an unexpected place a large stationary vehicle not properly lighted. At the same time he had to pass an oncoming car. If he had swerved, he would have crashed into that car. It was a case of Scylla and Charybdis. Mr. *Ligertwood's* argument appeared to suggest that in these unexpected and difficult circumstances Dr. Watson should have possessed and exercised the prescience of Sherlock Holmes. I do not infer from the facts that the respondent was going at such a speed that he could not pull up within the limits of his vision, and I decline to interfere with the finding of the learned primary judge on the question of the collision raised by the appeal.

In my opinion the appeal should be dismissed with costs.

With regard to damages the subject of the cross-appeal, I venture to differ with great respect from his Honour's assessment of general damages as I consider that he did not sufficiently take into account the great personal injuries suffered by the appellant, especially those which will remain permanent. The principle, if such it be, enabling an appeal court to control damages has been discussed in *Phillips* v. *London and South Western Railway Co.* (3) ; *Smith* v. *Schilling* (4) ; *Rowe* v. *Edwards* (5). Dr. Watson has undergone several painful operations and will undergo more. " In no instance," said the learned trial judge, " did Dr. Watson seek to exaggerate his suffering.

(1) (1932) 47 C.L.R. 279.
(2) (1940) 2 All E.R. 586.
(3) (1879) 5 Q.B.D. 78 ; 5 C.P.D. 280.
(4) (1928) 1 K.B. 429, at p. 440.
(5) (1934) 51 C.L.R. 351, at pp. 354, 355.

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The injuries externally and internally were extraordinarily severe and complicated, and it is a surgical triumph that the face and jaws have been so far restored." His facial appearance has greatly deteriorated. Conspicuous injuries cause much greater suffering and anxious concern than those which are hidden from observation. In the case of a practising medical practitioner such injuries are likely to affect his earning capacity. Mr. Messent, the senior honorary surgeon at the Adelaide hospital, gave very striking evidence of the operations undergone and injuries sustained by Dr. Watson. This evidence was accepted by the trial judge. Without going into details, his permanent injuries are those to his nose, which interfere with natural breathing, and " a partial paralysis of his lower lid of the right eye which prevents the natural protection of the eye from wind and light. Neuralgic pains will continue indefinitely." " Extra strain or worry is likely to cause quite severe headache." " The difficulty in his continuing his practice is not that he cannot do an isolated job, but that he cannot continue with the constant routine and strain; he might be able to do a job and lie down and have a rest without any harm but if he had to keep up and go on all day he could not do it. A country practice such as Dr. Watson's is a big strain on the mental and physical strength of the doctor. I think it is unlikely that Dr. Watson will ever stand extreme nervous tension as well as he used to do."

In circumstances such as these complete compensation cannot be made. But this is the only occasion on which it can be made for these injuries. Dr. Watson cannot sue again, and he cannot be restored to his original position. I consider, therefore, that the sum of £550 is not full or fair compensation for the suffering and injuries Dr. Watson has sustained and that the amount should be increased to the sum of £1,500. It is nothing to the point that the special damages are large—£2,119. This amount was scrupulously calculated item by item by the learned judge as his computation of the actual or estimated pecuniary expenditure or loss incurred by Dr. Watson in consequence of the accident. It has nothing to do with the general damages for pain and suffering and the other effects of bodily injury. No doubt his Honour measured these damages with the same meticulous consideration which he gave to the special damages, and no doubt we ought not lightly to interfere with an assessment of general damages made by a judge, especially with such evident care. But, if we consider the damages awarded unreasonably small, we are bound to do so. Even in so uncertain a field as that of general and vindictive damages in libel this court, by a majority, has seen fit to interfere and divide the damages by two,

notwithstanding that some estimate of the witnesses whom the trial judge saw and heard entered into the matter (*Smith's Newspapers Ltd.* v. *Becker* (1)).

For these reasons the appeal should be dismissed with costs, the cross-appeal allowed with costs and the judgment of the Supreme Court of South Australia varied by increasing the damages from £2,669 to £3,619.

STARKE J. Appeal from a judgment of the Supreme Court of South Australia. It concerns a collision on the Adelaide to Port Wakefield Road between a motor truck and trailer belonging to the appellant and a motor car driven by the respondent, Dr. Watson. The motor truck was driven by the appellant Gluis, who was an employee of the appellant company. On the night of 19th August 1939 Gluis was driving the truck, which with the trailer was loaded, along the roadway. Near Two Wells, the lights on the truck failed and the driver pulled off the bitumen roadway about eighteen inches and hung a small hurricane red lamp over the bitumen roadway about midway between the front and back of the truck. The respondent was driving a motor car in the same direction as the motor truck and was travelling at some forty to forty-five miles per hour. He left Adelaide about midnight and about half-past one in the morning ran into the rear of the trailer near Two Wells and was seriously injured. The night was dark and cloudy when the collision took place. The learned trial judge found that the driver of the truck was negligent in stopping where he did on the roadway and that his warning light was insufficient. He also found that the respondent was not guilty of contributory negligence, having regard to all the circumstances existing at the time.

Now it is said that the respondent should not have proceeded at so great a rate of speed that he could not pull up within the range of his vision and that consequently he must be found guilty of contributory negligence (*Baker* v. *E. Longhurst & Sons Ltd.* (2)). But the questions involved in this appeal are really matters of fact depending upon a variety of circumstances (*Tidy* v. *Battman* (3) ; *Stewart* v. *Hancock* (4)). *Richards* J. has considered and discussed all the relevant circumstances in this case in his very full and careful judgment, and no useful purpose can be served in restating them. There is ample material to support his conclusions, and they should be supported.

(1) (1932) 47 C.L.R. 279.
(2) (1933) 2 K.B. 461.
(3) (1934) 1 K.B. 319.
(4) (1940) 2 All E.R. 427.

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The respondent, however, contends that the damages awarded to him are insufficient. He was very seriously injured, and the learned judge gave judgment in his favour for £2,669, of which £2,119 was for special damages and £550 for general damages in respect of his suffering, discomfort, anxiety and permanent injuries. But in the special damages considerable sums were allowed for loss of practice and the employment of other medical men to carry on his practice for some months. The learned judge considered that these sums would compensate the respondent for all his actual or prospective loss and that at the end of the period for which provision was made for the employment of other medical men the respondent would be fully restored to health and to the practice he formerly carried on despite the physical disfigurement which he had sustained. The assessment of these general damages was essentially a matter for the learned judge, and this court should not interfere with that assessment even though some of its members might have felt disposed to award a greater sum.

The appeal and cross-appeal should be dismissed.

DIXON J. The judgment under appeal awards to the plaintiff for personal injuries sustained in a road accident damages amounting to £2,669, a sum made up of £2,119 special damages and £550 compensation for pain and suffering and the more lasting effects of the plaintiff's bodily injuries.

From this judgment the defendant appeals on the ground that its servants ought not to have been found guilty of negligence causing the accident and the plaintiff ought to have been found guilty of contributory negligence.

The plaintiff is a medical practitioner who conducts a general and a surgical practice at Yorketown. The accident occurred on 18th August 1939 as he was driving himself and his wife home from Adelaide, whence they set out at about midnight. They left Two Wells, and the plaintiff was driving his car, a 1939 model Buick Sedan, at a speed which he estimates at a little over forty miles per hour when he saw another car approaching. His headlights were full on. He reduced his speed, he says, to about forty miles per hour and dimmed his headlights. The other car did the same. As they were about to pass, the plaintiff suddenly saw a dark object loom up in front of him. He applied his brakes but was unable to prevent his car running into the object with considerable force. Both he and his wife were badly injured, he very severely. What he ran into was the rear of a trailer attached to a truck, both carrying heavy loads, covered with whitish tarpaulins and standing from nine to

eleven feet from the ground. The truck and trailer had been drawn into the roadside because the lighting system had failed. The men in charge had hung a small oil lamp with a red glass from the side of the truck. It is said to have been hung six inches out from the side of the vehicle by means of a stick. But, however this may be, neither the plaintiff nor the driver of the vehicle which passed him going in the opposite direction saw the light of the lamp. It seems unlikely that the light was of such a nature and in such a position that it was plainly visible up and down the road for any sufficient distance. The truck and trailer had been pulled in as close to the side of the road as reasonably practicable, but they were an obstruction to traffic travelling on the bitumen surface. There was a township six miles further on, and, when the men in charge of the truck and trailer became aware that the lighting system was about to fail, they could have driven slowly on and reached it before the truck's lights were completely out. It happened that two other courses also presented themselves. One of the men went back on foot to Two Wells, and a mechanic drove him back in a car. He was unable to put the lighting system of the truck in order, but it seems to have occurred to no one that his lighted car might have preceded the truck and trailer and so led them in safety to the next township or to some other place where they would not obstruct traffic. The third course was to obtain more lights. According to the finding of *Richards* J., who tried the action, the mechanic offered them another lamp but his offer was not accepted.

In all these circumstances the learned judge found that it was negligent on the part of the men to allow the truck and trailer to remain all night at the side of the open road with nothing but the light of a small hanging lamp to illuminate the obstruction. There is, in my opinion, no ground at all for disturbing this finding.

The appellants' chief contention, however, was that the respondent's own contributory negligence led to the accident and a finding to that effect ought to have been made. The foundation of this contention consists in the character of the damage done to the trailer and to the motor car. Without entering into details, it is enough to say that great force would be required to bring about the consequences which were to be seen in the state of the trailer and that the nature of the injuries to the car made it clear that the force had been applied by the radiator of the car hitting the off side rear wheel of the trailer. From this, combined with the distance during which the brakes of the car were applied, it is argued that the car must have been travelling at a very high speed. It is said that, however reasonable may have been the speed of the car when its

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headlights were up, prudence demanded that the speed should be reduced as the headlights were dimmed to pass the car going in the opposite direction, and that accordingly the respondent was conclusively shown to have been guilty of contributory negligence leading to the accident. Reliance was also placed on the well-worn argument that the respondent stood in a dilemma; either he did see the obstruction presented by the trailer and took insufficient measures to avoid it, or, if he did not see it, his failure to do so could only be ascribed to his own fault, a fault in this case consisting in driving at a speed disabling him from pulling up within the distance that his lights illuminated the road ahead of him: See *Commissioner of Railways* v. *Leahy* (1), per *Griffith* C.J.; *Fraser* v. *Victorian Railways Commissioners* (2), per *Griffith* C.J.; *Tart* v. *G. W. Chitty & Co.* (3); *Baker* v. *E. Longhurst & Sons Ltd.* (4); *Tidy* v. *Battman* (5); *Williams* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6); *Anderson* v. *Dent* (7); *Stewart* v. *Hancock* (8).

General reasoning of an *a-priori* character about states of fact appears to me to be seldom possible and always dangerous. The infinite variety of circumstances which differentiate situations, however similar in broad description, in which human beings find themselves, makes it always unsafe to employ mere dialectical processes in the examination of conduct and in the estimation of its culpability or absence of culpability.

In the present case there can be no doubt that the truck and trailer were not seen by the respondent until it was too late to avoid them by pulling up. If there had been no passing car, perhaps he might have avoided them by swerving. He reduced his speed to some degree on dimming his lights. But the real question is whether he showed a lack of reasonable prudence in failing to reduce his speed to a greater degree, when he dimmed his lights, in order to guard against collision with some obstacle of an unusual character which he had no reason to expect. *Richards* J. fully considered the question. He said that the answer given was "that, unless such an obstruction as existed in this instance is a thing which ought to be guarded against all the way along the road in question well after midnight, it cannot reasonably be held that Dr. Watson was negligent in continuing at a speed of something under forty miles per hour.

(1) (1904) 2 C.L.R. 54, at pp. 60-62.
(2) (1909) 8 C.L.R. 54, at p. 61.
(3) (1933) 2 K.B. 453.
(4) (1933) 2 K.B. 461.
(5) (1934) 1 K.B. 319.
(6) (1933) 33 S.R. (N.S.W.) 250, at pp. 257, 258; 50 C.L.R. 258, at pp. 265, 266.
(7) (1937) S.A.S.R. 255.
(8) (1937) N.Z.L.R. 321; (1940) 2 All E.R. 427.

If it had been other than a straight road, without cross-roads and in an uninhabited neighbourhood, or if it had been a road on which at such an hour a considerable amount of traffic might be expected, or if the car's braking or other equipment had been defective, or if the driver had been lacking in skill, I might be inclined to say that it was negligent driving; but I am not prepared, having regard to the circumstances existing at the time, to hold that the onus of proving negligence on Dr. Watson's part has been discharged."

In my opinion this finding also cannot be disturbed. It depends of course on the view that the respondent's speed did not exceed at that point more than forty miles per hour. But, notwithstanding the considerations presented on behalf of the appellant, it is impossible to say that this conclusion is inconsistent with the physical facts. Once that view is adopted the finding that there was no negligence on the part of the respondent appears to me to be fairly open.

I am therefore of opinion that the appeal fails.

The respondent, however, gave notice of cross-appeal on the ground that the general damages awarded for pain and suffering and physical injury were inadequate.

He sustained injuries of great severity to his face. When he was examined at the Royal Adelaide Hospital in the early hours of the morning, he was suffering from concussion, severe shock and haemorrhage. He had extensive and deep lacerations on the face and nose. The nose was broken and some of the cartilage was missing. The bones of the upper jaw were broken into many fragments, and the cheek bones were broken. One laceration extended from the left cheek across the junction of the upper lip and the base of the nose and came across to the right cheek-bone, practically severing the upper lip from the face except at the corner of the mouth. His condition was then considered very grave. Two or three hours later an anaesthetic was administered, his wounds were cleaned, the fragments of tissue were stitched up and an attempt was made to mould the bones into as accurate a position as possible. *Richards* J. described briefly in the following passage from his judgment the respondent's condition at the time of the trial, the treatment he underwent and his sufferings. His Honour said :—" There is an injury to the nose which will permanently interfere with natural breathing, and a permanent drooping of an under eyelid which prevents the natural protection of the eye from wind and light. In addition, his facial appearance has been very much deteriorated, especially in the nose and about the mouth. There are other troubles which if not permanent, may continue for a considerable time. It

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would be a mistake to attempt to assess complete compensation for these injuries, or for the suffering or anxiety endured. The injuries, externally and internally, were extraordinarily severe and complicated, and it is a surgical triumph that the face and jaws have been so far restored. He spent sixteen days in the Adelaide Hospital before he could be removed to a private hospital, where he was kept for about six weeks, and to which he had to return on many occasions for further treatment extending over a period of about eight months. The treatment included six operations, some quite serious and painful, including graftings. Owing to the completely shattered condition of the jaws he had for a long time to swallow his food unmasticated, resulting in indigestion, not to mention other unpleasantness. Apart from that there was severe pain for six weeks; Dr. Watson described it as 'rather terrible,' and my impression was that he in no instance sought to exaggerate his suffering. For months after that there was more or less pain, and, recovery being slow, it is not surprising that at the end of about four months he became very depressed; that wore off however. It is contemplated that there will be another attempt to improve the condition of the nose, which however will not cure the trouble already mentioned, and cannot be regarded as certain to be effectual. Headaches have been frequent throughout. There has always been difficulty in eating; his natural teeth have had to be replaced by dentures and the condition of the jaws has not been favourable to satisfactory results from that expedient. The anxiety as to the future in the case of any person who has suffered such great injuries and has to live by his profession cannot be ignored."

His Honour then went on to say that he considered that £550 was not too large a sum to be allowed in addition to those which he had already specified, thus bringing the amount he allowed to £2,669.

The special damages to which the learned judge so referred represented a careful computation and estimate on his part of the respondent's expenditure or loss in respect of hospital and ambulance charges, travelling and hotel expenses when he visited Adelaide for treatment, dental fees, depreciation of his motor car, loss of earnings up to the date of judgment, the cost of employing a locum tenens up to that date and for a further period of probably six months.

His Honour appears to have considered that the respondent, who had performed some important operations within four months of his accident, would probably be able to take up his work in a normal way at the end of another six weeks, but that for some time after the trial it would be too great a strain to do it single-handed.

As general damages for the bodily injuries which the respondent sustained, the pain and suffering he has endured and the lasting physical defects he must bear, the sum of £550 appears to me to be quite inadequate and I think that in a proper exercise of our appellate jurisdiction we are bound to interfere and increase the amount.

It is true that an appeal against the quantum of general damages fixed by a judge is to be determined upon principles analogous to those which govern appeals from the exercise of judicial discretion. The standards by which the amount of general damages is to be fixed are indefinite and uncertain, and to estimate the sum to be awarded involves the exercise of a form of discretionary judgment. If the appellate court is satisfied that some error of principle has been made, it must, of course, review the assessment. It must do so if it positively appears that some material consideration has been disregarded or that extraneous matter has been taken into account. But it ought not to reconsider the amount of damages independently of the assessment made by the judge whose decision is under appeal. The appeal remains a rehearing (*Reaney* v. *Co-operative Wholesale Supply Ltd.* (1)), but, because of the nature of the duty discharged by the primary judge, the question whether his assessment or determination of the amount of damages was wrong must be decided, not by the court of appeal making its own estimate, but by considering whether a reasonable result has been reached and in the manner which the law provides. It is enough, however, to entitle and require a court to interfere if a very great disparity exists between the amount which ought, in its judgment, to have been awarded and that which has been fixed ; if it is " convinced . . . 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 " (per *Greer* L.J. in *Flint* v. *Lovell* (2), approved in *Owen* v. *Sykes* (3))—Cf. *Coates* v. *Rawtenstall Borough Council* (4) ; *Mills* v. *Stanway Coaches Ltd.* (5).

In the present case I do not think that the general damages awarded can be treated as reaching the region of what might reasonably be considered commensurate with the injury received.

No doubt it is right to remember that the purpose of damages for personal injuries is not to give a perfect compensation in money for physical suffering. Bodily injury and pain and suffering are not the subject of commercial dealing and cannot be calculated like

(1) (1932) W.N. 78 ; 173 L.T. Jo. 262 ; 73 L.J. 292.
(2) (1935) 1 K.B. 354, at p. 360.
(3) (1936) 1 K.B. 192.
(4) (1937) 3 All E.R. 602, at p. 606.
(5) (1940) 2 All E.R. 586.

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some other forms of damage in terms of money. But, while remembering that fair compensation between the parties is what must be arrived at, it is equally important to keep in mind that after all it is compensatory and that the figures to which in former times courts grew accustomed ought not to govern our notions of what should be awarded in the terms of the money of to-day with its reduced purchasing power.

In my opinion the general damages should be increased to £1,500.

I think that the appeal should be dismissed with costs; the cross-appeal should be allowed with costs and the judgment appealed from varied by increasing the amount of damages to £3,619.

McTIERNAN J. I agree that the appeal should be dismissed and that the cross-appeal should be allowed.

I find it impossible to regard the amount of damages awarded to the respondent in addition to the damages awarded for the pecuniary losses sustained by him as a reasonable measure of compensation for the bodily injuries and disfigurement caused by the appellant's negligence. The case is one in which the court should, in my opinion, make a fresh assessment of damages. I agree that the sum of £1,500 should be substituted for the sum of £550 which the learned trial judge awarded in addition to damages for pecuniary loss. The total damages, therefore, should be £3,619.

Appeal dismissed with costs. Cross-appeal allowed with costs and the judgment of the Supreme Court of South Australia varied by increasing the amount of damages from £2,669 *to* £3,619.

Solicitors for the respondent, *Alderman, Reid & Brazel.*

Solicitors for the appellants, *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.