[HIGH COURT OF AUSTRALIA.]

PAMMENT . . . . . APPELLANT;
PLAINTIFF,

AND

PAWELSKI . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1949.

ADELAIDE, *Sept.* 20, 27.

Latham C.J., Dixon and McTiernan JJ.

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

P., a youth fourteen years of age, was seriously injured by the negligence of a motor lorry driver. His right leg was crushed, the bones of his thigh and lower leg suffered compound fractures, and his right arm was broken. He endured many months of acute and intense pain, and had much painful treatment including several skin grafts and ten major operations. About seven months after the operation the right leg was amputated. At the time of the trial, about seventeen months after the accident, P. was still in a nervous condition, was attending hospital, and was using a peg leg. An artificial leg could not be satisfactorily provided until he was fully grown. He was a butcher's employee and desired to continue in that employment. In an action by P. against the lorry driver for negligence in which liability was admitted and special damages agreed upon the trial judge awarded him £1,300 general damages. P. appealed to the High Court from that assessment.

Held, that, having regard to the pain endured by P., and his probable future pain and suffering, and the probable effect upon his life prospect, the sum awarded as general damages was unreasonably small and should be reviewed. The general damages should be increased to £2,500.

Decision of the Supreme Court of South Australia (*Napier* C.J.) varied by substitution of an increased amount of general damages.

APPEAL from the Supreme Court of South Australia.

On 11th November 1946 a lad fourteen years of age, Raymond Murray Pamment, was seriously injured by a motor lorry driven by John Edward Pawelski. The motor lorry struck the rear of a bus in which Pamment was travelling. In an action by Pamment

against Pawelski, liability for damages, based on negligence, was admitted and the amount of special damages was agreed at £412 6s. 4d. The plaintiff's injuries were severe. His right leg was crushed, the bones of his thigh and lower leg suffered compound fractures, and his right arm was broken. He endured, for many months, acute and intense pain. Injuries to his face necessitated artificial feeding for some days. He had many transfusions of blood. The bone of his leg below the knee was exposed. Daily dressing, occupying up to two hours, was necessary and was very painful. It sometimes involved the use of anaesthetics. A vile smell was associated with the injury. Pamment was obliged to submit to a number of skin grafts and to ten major operations. Ultimately it was decided that the right leg must be amputated some ten inches from the top of the leg. This was done on 24th May 1947, some seven months after the accident. At the time of the trial, on 30th June 1948, Pamment was still in a nervous condition, was attending hospital, and was using a peg leg. The evidence was that an artificial leg could not be satisfactorily provided until he was fully grown. He had been a butcher's employee and wished to continue to work in the butcher's shop. His medical advisor stated that the boy "had a very bad time and a very nasty leg."

In the Supreme Court of South Australia *Napier* C.J., sitting without a jury, assessed the damages at £1,712 6s. 4d. This amount was made up of the agreed amount of £412 6s. 4d. special damages and £1,300 general damages.

From this assessment of general damages the plaintiff appealed to the High Court.

K. L. Ward K.C. (with him *L. J. Stanley*), for the appellant. It is our onus to show that the assessment of damages was unreasonably low. We submit that it was (*Lee Transport Co. Ltd.* v. *Watson* (1); *Rowe* v. *Edwards* (2); *Coates* v. *Rawtenstall Borough Council* (3)).

[LATHAM C.J. referred to *Rowley* v. *London and North Western Railway Co.* (4)].

Damages assessed in South Australia are low compared with assessments in other States. In this case the assessment is low even by South Australian standards. Though one case cannot be compared with another, there should be some overall consistency running through the decisions. The amount awarded is so much below what should have been given that the High Court is not only justified in interfering, but bound to interfere, with the assessment.

(1) (1940) 64 C.L.R. 1.
(2) (1934) 51 C.L.R. 351.
(3) (1937) 3 All E.R. 602, at p. 606.
(4) (1873) L.R. 8 Ex. 221.

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V. R. Millhouse, for the respondent. The question is not what this Court would have awarded but whether the trial judge's award can be said to be entirely erroneous (*Lee Transport Co. Ltd.* v. *Watson* (1)). The disparity must be so great as to shock the conscience of the appellate court (*The Aizkarai Mendi* (2); *Gibbs* v. *Ellis* (3)). It is impossible to say that the trial judge proceeded on a wrong principle or that his award was clearly erroneous.

K. L. Ward K.C., in reply. An appellant court is less reluctant to increase damages than to reduce them (*Gibbs* v. *Ellis* (4)).

Cur. adv. vult.

Sept. 27.

The following written judgments were delivered:—

LATHAM C.J. delivered the following written judgment on behalf of himself and McTIERNAN J. On 11th November 1946 the appellant Raymond Murray Pamment (then fourteen years of age) was seriously injured by a motor lorry driven by the respondent John Edward Pawelski which struck the rear of a bus in which the plaintiff was travelling. The appellant sued the respondent for damages for negligence. Liability was admitted. The case was tried before the Supreme Court of South Australia (*Napier* C.J.) without a jury. Special damages were agreed (including loss of wages to 30th June 1948, hospital charges, cost of artificial limb &c.) at the sum of £412 6s. 4d. Judgment for the plaintiff was given for £1,712 6s. 4d., that is, for £1,300 in addition to the special damages. The plaintiff appeals to this Court, contending that the amount of damages awarded is inadequate.

In some cases it is possible to measure with accuracy the damage which has resulted from a defendant's breach of duty. In many cases where general damages are recoverable it is impossible to lay down any precise rule whereby the loss of the plaintiff can be translated into pecuniary figures. This is most obviously true in the case of personal injuries. Most people would not be prepared to lose a leg or an arm in return for the payment of any sum of money that could be stated, but it has never been the rule that therefore in such cases there was no limit to the amount of damages which can be awarded. Special damage representing proved loss directly attributable to the wrong of which the plaintiff complains is recoverable. Further damages must be assessed in respect of past pain and suffering of the plaintiff and in respect of prospective

(1) (1940) 64 C.L.R. 1, at p. 14.
(2) (1938) P. 263, at p. 272.
(3) (1942) S.A.S.R. 125, at pp. 127, 129.
(4) (1942) S.A.S.R., at p. 128.

damage in the form of future probable pain, suffering or inconvenience, probable loss of earning power and inability to live a full life and to enjoy the amenities of living. It is impossible to measure pain and suffering in money with mathematical precision and the same observation applies to damage suffered by reason of the loss of a limb or of eye-sight or other grave personal injury. Loss of future earnings is also a matter into which a large element of uncertainty enters.

Where a case is tried before a jury a court of appeal is most reluctant to set aside a verdict, but even in such a case where there has been severe personal injury the court will grant a new trial if the damages are plainly inadequate. A conspicuous example is to be found in the case of *Armytage* v. *Haley* (1) where the plaintiff's leg was broken by reason of the negligence of the defendant and the jury gave a farthing damages. But, apart from such extreme cases, an appellate tribunal may legitimately set aside a verdict of a jury where the damages are out of proportion to the injury sustained, either by being obviously excessive or by being plainly inadequate: see *Phillips* v. *London & South Western Railway Co.* (2). In the present case the trial was by a judge without a jury and upon appeal this Court, if it is of opinion that there is great disparity between the damages awarded and the damages which it thinks to be adequate may assess damages at such amount as it thinks proper, having regard to the pain endured by the plaintiff, the seriousness of the injury suffered, and the probable effect upon his life prospect: *Lee Transport Co.* v. *Watson* (3).

In the present case the plaintiff endured many months of acute and intense pain before his leg was amputated on 24th May 1947, that is, seven months after the accident. His right leg was crushed, the bones of his thigh and lower leg suffered compound fractures and his right arm was broken. His leg was placed in a suspended position for weeks; he was artificially fed for some days because his face was injured; he had many transfusions of blood; the bone of his leg below the knee was exposed; a vile smell was associated with the injury; and the daily dressing, which took up to two hours, was very painful, sometimes requiring the administration of anaesthetics. He had several skin grafts and had what were described as ten major operations before it was ultimately decided that the best thing to do was to amputate the right leg. This was done above the knee about ten inches from the top of the leg. He was at the time of the trial still in a nervous condition, was attending

(1) (1843) 4 Q.B. 917.
(2) (1879) 5 Q.B.D. 78.
(3) (1940) 64 C.L.R. 1.

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hospital, and using a peg leg. An artificial leg can be satisfactorily provided only when the plaintiff is fully grown. He was a butcher's employee and desired to continue to work in a butcher's shop. The doctor who treated the plaintiff gave evidence which he summarized by saying: "He had a very bad time and a very nasty leg."

A sum of £500 would be a not excessive amount to award for the acute and long-continued pain and suffering. If it is assumed that £500 of the £1,300 general damages awarded may fairly be attributed to pain and suffering, a sum of £800 is left as a final assessment of damages for loss of future earning power during the whole life of the plaintiff from the age of fourteen years, subsequent pain, suffering and inconvenience, and the difficulties and deficiencies in life which are necessarily involved in having only one leg. This is in our opinion an inadequate sum, more particularly having regard to the fact that the value of money today is about half what it was ten years ago. In our opinion a reasonable and not inadequate amount to award for general damages would be £2,500. We are therefore of opinion that the appeal should be allowed and that the judgment of the Supreme Court should be varied by increasing the amount awarded for damages (which includes £412 6s. 4d. special damages) to £2,912 6s. 4d.

DIXON J. As a result of the injuries sustained by the plaintiff appellant he underwent a long period of intense suffering from which he has emerged maimed by the loss of a leg. When he met with the injuries he was fourteen years of age. He must go through life as a one-legged man. It is a century since *Parke* B. said:— ". . . it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Here you must estimate the damage by the same principle as if only a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life . . ." (*Armsworth* v. *South Eastern Railway Co.* (1)). But this counsel of moderation does not mean that a defendant is to be relieved of any part of a just and fair compensation in money for the injuries which a plaintiff has suffered as a consequence of the wrong. It means only that in assessing a just and fair compensation the purpose is not to attempt by means of money completely to insure that the plaintiff will be placed for the rest of his life in the same position as if he had

(1) (1847) 11 Jur. 759, 760 [81 R.R. 918, at p. 923].

not sustained the injuries. A full compensation must nevertheless be awarded. It is a compensation once for all. Besides the actual expenditure incurred as the result of the wrong and the actual loss suffered the damages must cover a reasonable estimate of future loss and expenditure, a sum forming a reasonable recompense for the pain and suffering the plaintiff has undergone and for any further pain and suffering he may be expected to undergo and, if he has, as in this case, suffered a permanent injury, an amount to compensate him for that and for the changed circumstances of life it entails. These last items of compensation cannot be calculated and can only be measured according to the standards which generally prevail, and a reasonable conception of what is adequate to the occasion. The diminishing purchasing power of money has robbed the traditional standards of past experience of much of their value as a test. The anxiety of judges of former times lest juries should be extravagant in expressing their sympathy with plaintiffs at the expense of defendants has perhaps operated somewhat against plaintiffs. At all events it seems no longer necessary to remind ourselves of the importance of making conservative estimates of the compensation a plaintiff should receive for physical injury. In the present case the sum of £1,300 seems to me to be a very inadequate assessment of general damages. In *Lee Transport Co.* v. *Watson* (1) I stated what I conceived to be the principles governing the review by a Court of Appeal of an assessment of such damages and I shall not again do so. Applying those principles I am of opinion that the amount awarded is not proportionate to the injury suffered and the consequences to the plaintiff and that the assessment must be reviewed because of the great disparity between the sum fixed and what appears proper.

I agree in the contention of the plaintiff's counsel that double the amount fixed should be awarded, and I am not sure that if I had been the judge of first instance my estimate would not have been greater still. I concur in the order of the Court increasing the general damages to £2,500.

Appeal allowed with costs. Judgment of Supreme Court varied by substituting therein for the sum of £1,712 6s. 4d. *wherever appearing the sum of* £2,912 6s. 4d.

Solicitors for the appellant, *L. J. Stanley and Kerin.*
Solicitors for the respondent, *Baker, McEwin, Millhouse & Wright.*

C. C. B.

(1) (1940) 64 C.L.R., at pp. 13, 14.