[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR GOVERNMENT TRAM AND OMNIBUS SERVICES . Defendant, } Appellant;

AND

VICKERY . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 5, 15.

Dixon C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Appeal—Damages—Assessment by jury—Excessive—Application for new trial—Discovery of fresh evidence—Availability and character of evidence—Credibility of plaintiff—Influence on result—Excessive damages abandoned as ground.

Once an action has been fought out and a jury has returned a verdict great caution must be exercised before the verdict is set aside and a new trial ordered on the ground that the defeated party has since found himself able to put further evidence before a new jury.

In an application for a new trial on the ground of discovery of fresh evidence the effect of the evidence newly discovered upon the assessment of damages must appear to the Court to be such that it cannot reasonably be supposed that, had it been adduced at the trial, the damages would not have been fixed at an amount more favourable to the party seeking the new trial.

Orr v. *Holmes*, (1948) 76 C.L.R. 632, applied.

If an application for a new trial is based on the ground that the verdict was obtained by deception that ground must be distinctly alleged and satisfactorily proved.

Decision of the Supreme Court of New South Wales (Full Court): *Commissioner for Road Transport and Tramways* v. *Vickery* (unreported, 1952), affirmed.

Appeal from the Supreme Court of New South Wales.

The following statement of facts is substantially as it appears in the judgment of *Street* C.J.

The plaintiff, Leslie Charles Vickery, at the time of the injury aged fifty-one years, on 13th October 1949, while a passenger in a

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tram driven by a servant of the Commissioner for Road Transport and Tramways, was involved in an accident the result of which was that a piece of glass in the tram was broken, struck the plaintiff in the face and inflicted certain injuries upon him. At the trial the question of liability was litigated, and the jury found in favour of the plaintiff, negligence having evidently been found to be established either on the part of the tram driver or the driver in charge of the lorry with which the tram came into collision.

The question then arose for consideration by the jury as to the amount of damages. The plaintiff said, and this appeared to be borne out by the other evidence in the case, that the piece of glass inflicted a severe cut on his cheek and penetrated through the cheek into the gum. Actually it caused also a fracture of the bone of the jaw, not a fracture from side to side, but the fracture of an outside piece of bone with the result that after the cut in the cheek had been stitched and had healed, some two or three weeks later the plaintiff attended at the Dental Hospital and there was removed from the jaw the piece of broken bone and some four or five teeth adherent thereto. From that injury the plaintiff recovered in a comparatively short time and, apart from the loss of the teeth, no serious harm seemed to have remained.

Shortly after the accident, however, according to the plaintiff's evidence, he began to notice that his sight was failing and failing so seriously that he first consulted an optician, and subsequently consulted Dr. Jensen, who had formerly practised as an eye specialist but was not then in active practice, and who considered that his condition was such that he referred him to Dr. Rowlands, who specialized as an oculist. The evidence of those two doctors was that the plaintiff's vision, whatever might be the cause, had been so seriously impaired at that stage that he was practically deprived of sight for all normal purposes in both eyes. There was a certain degree of residual vision left to him; he could distinguish movements in front of him, and by turning his head on one side he was able to have some slight degree of sight. Both those doctors attributed the condition which they found on examination of the plaintiff and after hearing the plaintiff's account of the accident, to the accident itself and the blow which the plaintiff had received. Dr. Rowlands thought that it was haemorrhage following upon the blow, the blow itself and the shock, coupled with the fact also that he was a heavy smoker, that had produced a condition which had impeded the blood supply to the optic nerve, with the result that that nerve began to atrophy and produced the condition which was then found.

Medical evidence was called for the defendant commissioner which agreed to the extent that so far as examination could show, the plaintiff was virtually deprived of sight. All the doctors agreed on that point and, while it was argued that they were dependent substantially on the story given to them by the plaintiff and his account of what he could or could not see, they also found, in the eye itself, signs of physical changes which were at any rate consistent with the plaintiff's account of the state of his vision.

Street C.J. thought it was inescapable that the plaintiff's sight had been so far destroyed that while he was not completely blind he had no real effective sight in either eye. The doctors were all agreed on that point, and no cross-examination or specific questions were directed to them for the purpose of establishing that they were compelled to rely upon what the plaintiff told them in reaching that conclusion. They differed, however, as to the cause of the condition. The doctor called for the defendant commissioner, who examined the plaintiff, and another oculist, a specialist, who heard the evidence given in court as to the conditions found inside the eye, thought that the condition was the result of arteriosclerotic degeneration due not to the accident but to the plaintiff's congenital make-up and his age.

The jury found a verdict for the plaintiff and awarded damages in the sum of £14,711 18s. 6d., that amount including an amount of about £90 for medical and out-of-pocket expenses and also an amount of about £1,200 for loss of wages up to the date of the trial.

Motion was made to the Full Court of the Supreme Court of New South Wales on behalf of the defendant commissioner to set aside that verdict, and three grounds were taken on the notice of appeal. The first ground was that the damages awarded by the jury were excessive. This ground was abandoned on the appeal. The second ground was that the verdict was against the evidence and the weight of evidence. Argument was not addressed to the Full Court on that point. The substantial ground that was argued was the third ground, namely, that since the trial of the action, fresh evidence had been discovered which was not available to the defendant at the trial. The fresh evidence could not have been discovered by the appellant commissioner before the trial, and the incident which directed attention to that particular matter only occurred after the conclusion of the trial and as the result of press publicity being given to the substantial amount of the verdict which was involved. The result of the inquiries then made by the appellant appeared to show that towards the end of 1951, the

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trial having taken place in March 1952, the respondent-plaintiff was in fact doing some work for a hotel proprietor at a hotel at Botany. It appeared that he went there for some time every afternoon during the six weeks ended on 22nd November 1951, and did certain work in the way of picking up a few glasses in the bar and removing them to another place where, presumably, they were washed and replaced in their proper position. When asked to clarify the exact happenings the witness whom it was proposed to call, namely, the licensee, said first that the reason for dispensing with the plaintiff's services was that he took on another man at that time and part of his duties were to do the work which the plaintiff had previously done, but he also said that the reason why he dispensed with the plaintiff's services was that he had been breaking too many glasses in collecting them in the bar of the hotel, and therefore he ceased employing him in November 1951.

The Full Court (*Street* C.J., *Owen* and *Taylor* JJ.) dismissed the appeal with costs.

From that decision the appellant commissioner appealed to the High Court, the grounds of appeal being (i) that the judgment of the Supreme Court was wrong in law; (ii) that that court should have held that the fresh evidence available was of such weight that, if believed, it would probably have had an important and material influence on the result of the trial and therefore that a new trial limited to damages ought to have been granted; and (iii) that that court erred in law in refusing to direct a new trial limited to the issue of damages.

E. S. Miller Q.C. (with him *C. A. Cahill*), for the appellant. The further evidence desired to be tendered was not in the possession of the appellant and could not by proper diligence have been procured by him at the time of the first trial (*Ward* v. *Hearne* (1)). The fresh evidence is of such weight that, if believed, it would doubtless have an important influence on the result of the trial, therefore a new trial should be granted (*Meredith* v. *Innes* (2)). The filing of affidavits is permissible to establish the probability of a change in the result of the trial, but not to establish the truth of the facts. The principles stated in *Green* v. *The King* (3) are applicable. The questions to be considered in determining whether a new trial should be directed on the ground of discovery of fresh evidence are shown in *Preston* v. *Green* (4). The basis of the

(1) (1884) 10 V.L.R. (L) 163.
(2) (1930) 31 S.R. (N.S.W.) 104; 48 W.N. 5.
(3) (1939) 61 C.L.R. 167, at p. 174.
(4) (1944) 61 W.N. (N.S.W.) 204.

Court's jurisdiction is that there has been a miscarriage of justice. It is not simply a case of the discovery of fresh evidence (*Hip Foong Hong* v. *H. Neotia & Co.* (1)). It is a case of the fresh evidence showing that the plaintiff-respondent was untrustworthy, and that his statements as to his actual seeing capacity and the cause of his alleged deficiency in that regard were not to be relied upon. The case was conducted before the jury on the basis that he was trustworthy and to be relied upon. Apart from the question of negligence or no negligence in the driving of the tram, the only issue litigated was the nature and cause of the alleged blindness. Blindness and incapacity to work were admitted at the trial. The plaintiff-respondent's case was that the nature of the blindness was atrophy of the optic nerve from exsanguination and shock. The defendant-appellant's case was that the alleged blindness was impairment of the optic nerve (with some atrophy) from arterio-sclerosis. The plaintiff claimed that the cause of his blindness was trauma, whereas the defendant claimed that it was due to senile changes in the arteries resulting in a narrowing of the lumen, thus depriving the optic nerve of an adequate supply of nourishing blood.

J. Harvey Prior (with him *H. A. Miller*), for the respondent. The appellant's submission is that because the respondent either deliberately or accidentally omitted to state that he had been employed for a period of six weeks prior to 22nd November 1951, it establishes: (i) that the evidence was such that it would have irretrievably damaged the plaintiff's credit; and (ii) that the medical witnesses called by the plaintiff, having regard to the damaged credit, would have come to a different conclusion as to the cause of the respondent's loss of sight, as their findings were based on the history given to them by the respondent. Dealing with the first matter as to the damage to the respondent's credit, the evidence establishes that throughout the trial the respondent was uncertain as to the periods in which he had worked after his injury was received, and evidence was called by the appellant to show that the evidence given by the respondent as to such periods of work was incorrect. In this case very little depended upon the respondent's creditability as the evidence as to liability and as to his actual injury and damage was given by the witnesses called on behalf of the respondent. As to the second branch of the appellant's submission, the evidence given by the medical practitioners called on behalf of the respondent was based solely

(1) (1918) A.C. 888.

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on what was in fact found on actual examination of the respondent. Fresh evidence which the appellant seeks leave to introduce would not, if believed, materially have affected the amount of the damages awarded (*Orr* v. *Holmes* (1)), and, in fact, would have established the respondent's case that he was not fit to carry out simple work owing to the condition of his eyesight. The fresh evidence shows that the maximum that the respondent earned during his employment for the relevant six weeks could not have exceeded £30, and, further, that the respondent was dismissed owing to the fact that he had been breaking too many glasses when collecting them from the bar of the hotel. The proposed fresh evidence does not establish that in this case there was a miscarriage of justice, or that the verdict was obtained by fraud.

E. S. Miller Q.C., in reply.

Cur. adv. vult.

Aug. 15.

THE COURT delivered the following written judgment :—

This is an appeal from a refusal by the Supreme Court of New South Wales of a motion for a new trial. The action was for damages for personal injuries caused by the negligent management of a tram car of the appellant-defendant in which the respondent-plaintiff was a passenger. The plaintiff recovered a verdict for the extraordinarily large sum of £14,711 18s. 6d. The defendant moved the Supreme Court to set aside the verdict and order a new trial. The defendant's appeal from the dismissal of this motion does not concern the liability of the defendant to the plaintiff for the personal injuries sustained by the plaintiff but the damages assessed. The ground, however, on which the assessment is attacked is limited to the discovery of fresh evidence.

The plaintiff was travelling by a tram which was involved in a collision with a lorry. As a result of the collision he was struck by a heavy piece of glass which besides fracturing his jaw inflicted a large laceration of the left side of the face, from which, it may be assumed there was considerable bleeding. At the time of the accident the plaintiff was a man of fifty-one years of age employed as a drier hand at a wool scour, work at which he earned between £10 and £11 a week.

The accident occurred on 13th October 1949 and he returned to his work on 7th November 1949. But before he did so, according to the evidence of his wife and himself, a marked impairment of his vision had been noticed and it grew worse. It was noticed

(1) (1948) 76 C.L.R. 632, at p. 642.

a fortnight after the accident and on 3rd November 1949 he went to an optician. The optician told the plaintiff to see an opthalmologist, which, however, the plaintiff delayed doing. He continued in his employment until the end of March 1950. Then on 28th March 1950 for the first time he consulted an opthalmologist. An investigation ensued the conclusions from which in effect formed the foundations of the plaintiff's case. In the first place his acuity of vision was found to be so small that he could not see any of the letters on the card or screen; it was sufficient only for him to see a hand in front of his face and to count the fingers. For this conclusion reliance was necessarily placed upon his statements as to what he could see. In the second place as a result of an investigation of the eye itself and of other physical conditions and possible conditions and of the history of the case, it was considered that his loss of vision was to be accounted for by an atrophy of the optic nerve following retinal ischaemia. In the third place the optic atrophy was put down to the haemorrhage or exsanguination caused by the wound together with the shock and perhaps concussion occasioned by the accident, taking effect, it was thought, upon a man whose prior state of health was poor and who had habitually smoked to excess. This view of the cause of the optic atrophy was based on medical theory applied to the history of the case. It was supported by medical witnesses called for the plaintiff; but on the defendant's side opthalmologists were called who expressed a contrary opinion, an opinion that it was not due to ischaemia and that in any event there was no evidence of sufficient loss of blood to give rise to an ischaemia.

As to the extent of the plaintiff's loss of sight, the plaintiff said in evidence that there was just a little sight, he could see at a short distance things moving but not what they were, he was not totally blind, he could see counsel from the witness box, he could see him moving but could not see what he was like to recognize him. On 1st April 1951 the plaintiff applied for an invalid pension and it was granted on the footing that he could not distinguish three figures at a distance of three feet and was permanently incapacitated for work to an extent exceeding eighty-five per cent.

In the notice of motion to the Full Court of the Supreme Court the defendant took a ground affecting the cause of action but did not argue it. Both in the Supreme Court and upon the appeal to this Court the only attack made upon the verdict related to damages. It would be a natural expectation that a verdict for such an extremely large amount of damages for physical injuries

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would be attacked as an excessive assessment. In fact, the first ground given in the notice of motion to the Supreme Court was that the damages awarded by the jury were excessive. But at the hearing of the motion for a new trial, to the evident surprise of the judges, this ground was abandoned. The ground upon which it was sought to support the motion was confined to the discovery of fresh evidence affecting damages, a ground which their Honours considered was not made out. In this Court neither in the notice of appeal nor during the argument was the ground taken that the actual assessment of the jury was excessive and unreasonable. On the contrary, at the outset we were informed that the Full Court of the Supreme Court had been told by counsel for the defendant that if the plaintiff was a truthful witness and he did have the loss of sight he claimed the verdict though large was not beyond what a jury might reasonably give.

The argument submitted by the appellant's counsel to this Court did not depart from this position. In these circumstances the responsibility for so large a verdict being sustained must rest upon the party and not upon the Court, which, in the face of the attitude so explicitly adopted on the part of the appellant-defendant, could not enter upon a consideration of the question whether the verdict should be set aside on the ground that the damages found were excessive.

As to the contention that the verdict should be set aside on the ground that fresh evidence had been discovered we agree in the view of the Supreme Court that this ground is not made out.

Once an action has been fought out and a jury has found a verdict great caution must be exercised before the verdict is set aside and a new trial ordered on the ground that the defeated party has since found himself able to put further evidence before a new jury. In the present instance it is not the liability of the defeated party that is affected by the further evidence which it is sought to adduce, but the quantification of damages. That is an unusual feature, but not one that should make the court less cautious in acceding to the application. The rule governing applications for new trials, based on the discovery of fresh evidence affecting liability, has often been formulated. Many of the decided cases were referred to in *Orr* v. *Holmes* (1) in this Court and many of the phrases in which the rule has been expressed were mentioned in the judgments. Among them is the statement of Lord *Penzance* in *Scott* v. *Scott* (2) :—" It has never been the habit in Westminster

(1) (1948) 76 C.L.R. 632.

(2) (1863) 3 Sw. & Tr. 319, at pp. 322, 326 [164 E.R. 1298, at pp. 1299, 1300].

Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time."

In *Orr* v. *Holmes* (1) in one of the judgments the effect of the cases is stated thus: "Variations of phraseology occur in later cases but however it is expressed the sense of the rule remains that the new evidence must have so high a probative value with reference to an issue essential to the cause of action or defence as the case may be that it cannot reasonably be supposed that had the evidence been adduced the issue would not have been found for the party seeking the new trial."

In the case of an assessment of damages this language is not directly appropriate. But the rule cannot be less strict. The effect of the evidence newly discovered upon the assessment of damages must appear to the Court to be such that it cannot reasonably be supposed that, had it been adduced at the trial, the damages would not have been fixed at an amount substantially more favourable to the party seeking the new trial.

In the present case the defendant claims that evidence has been discovered which puts a different complexion upon the plaintiff's loss of vision, evidence which if given must have resulted in a much reduced assessment of damages.

Soon after the verdict the defendant was informed that the plaintiff had been employed in some capacity in the bar of an hotel. Inquiries made from the licensee of the hotel elicited some information of a not very full or precise kind. He was probably not very anxious to get mixed up in the matter. The brief result of the statements made by him and on his behalf in response to the inquiries is as follows. The plaintiff's wife had been employed at the hotel as a cook for an hour and three quarters a day for some months in the second part of 1951 and prior to a date in January 1952 or possibly until late in March 1952. During six weeks part of the same period the plaintiff had done some work at the same hotel, for which he received varying payments, the highest payment for one week being £5. The six weeks in which he did work for payment ended on 22nd November 1951. According to one version he was dismissed because he broke too many glasses: according to another a man was taken on by the licensee to do duties which covered the work he had been doing. It appears likely that he was given the task of picking up glasses in the bar

(1) (1948) 76 C.L.R., at p. 641.

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rooms while his wife was engaged in the kitchen. At all events what is stated is consistent with this conjecture.

No direct evidence of the facts was laid before the Supreme Court. It all consisted of what the licensee or his advisers stated in answer to questions or inquiries. But two points were made. First it was said that, to be so employed, his vision must have been greater than he had led the jury to believe and greater than he had led the medical witnesses to believe when they formed their opinions. Secondly it was said that it showed that he had deceived the jury as to his inability to do any work and as to his having done no work after leaving his employment on 28th March 1951. Indeed that itself was a corrected date. He and his wife had given Christmas 1950 as the time when he left his employment, but that had been treated at the trial as an honest mistake. No specific question was asked either of the plaintiff or of his wife which brought their evidence into flat and direct contradiction with the facts stated in answer to the appellant's inquiries made since the trial. But the evidence given by the plaintiff and his wife about his leaving his employment and his incapacity for work did no doubt leave the impression that he had not been employed in the meantime at all.

Now if the evidence given by the plaintiff as to his visual acuity is scrutinized it will be found that he represented it as leaving him with a sense of light colour and movement and of the existence but not form of physical objects. Only could he distinguish form or shape and identify physical objects at a distance of inches. He had said that he mowed the grass outside his house, pushed the mower, that is presumably on the nature strip. All that the new evidence would prove is compatible with his having gone down to the hotel in company with his wife and of having attempted to be useful about the bar rooms and of being found in the end to be of no service, breaking many glasses through his insufficient sight.

In her evidence his wife said that she had given up some employment she was in before the accident in order to look after him and the house. Consistently with this she took employment at the hotel for less than two hours a day because he could accompany her. The failure at the trial to disclose the facts relating to her employment and his own former employment at the hotel does not necessarily imply that the husband and wife considered it inconsistent with the account they gave of his visual condition. It may just as well have been due to their desire not to imperil the invalid pension by disclosing publicly that either or both of them

earned money. Some point was made that the date when he ceased to be employed at the hotel was during the week for which the action was first listed for trial. In fact, it did not come on for trial until four months later, 10th March 1952. But this is not the kind of conjectural inference to which weight can be given on a question whether the discovery of fresh evidence warrants a new trial. So far as the appellant-defendant bases the application for a new trial on an allegation that the plaintiff obtained the large assessment of damages by deception it is enough to say that such a ground must be distinctly alleged and satisfactorily proved. In *Jonesco* v. *Beard* (1) Lord *Buckmaster* is emphatic in stating that if the procedure is by motion for a new trial based upon such an allegation as opposed to the established procedure of an independent action "the necessity for stating the particulars of the fraud and the burden of proof are no whit abated and all the strict rules of evidence apply."

Deception was not alleged and it certainly was not proved. Indeed in strictness there was no proof at all; for there was no evidence admissible on such an issue, merely an affidavit of statements made by the licensee or on his behalf to the appellant's officers.

So far as the application is based on the discovery of fresh evidence, the facts said to have been discovered do not reach the standard required to warrant a new trial. Consistently with them exactly the same view of the plaintiff's visual condition might be taken as on the evidence laid before the jury. Of course they might have made a great difference. But the question is not what significance might be attached to them or how they might be used. It is a question depending on their having so high a probative force that acting reasonably the jury must, if they had been proved, have made a substantially lower assessment of damages. It may be remarked that no attempt was made to sift the proposed evidence before the Supreme Court. No affidavit by the publican was filed and he was not called as a witness on the new trial motion. If he refused to make an affidavit he could at least have been called upon subpoena. Some more precise information as to what the appellant-defendant was really able to prove was surely necessary before a new trial was ordered because of his discovery of further material.

Perhaps it is desirable to add that the respondent-plaintiff made no point concerning the possibility of the new evidence

(1) (1930) A.C. 298, at p. 301.

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being discovered by the defendant before the trial by the exercise of reasonable diligence.

The case is unsatisfactory because of the very high award of damages made by the jury. But once an attack on this as excessive was disowned on the part of the appellant-defendant the appeal became one to be decided according to the settled rule, founded largely on policy, against lightly disturbing verdicts because of the discovery of further information.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *R. W. Scotter*, Solicitor for Government Road Transport and Tramways.

Solicitor for the respondent, *A. J. Devereux.*

J. B.