[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;
PLAINTIFF,

AND

JENNINGS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 19;

SYDNEY, *Nov.* 22.

Dixon, C.J., McTiernan and Kitto JJ.

Appeal—Damages—General damages—Personal injury—Assessment by judge—Inadequacy—Review by appellate court.

In order to justify a review by an appellate court of an assessment of damages on the ground of inadequacy, the compensation so assessed must be so inadequate as to be beyond the limits of what a sound discretionary judgment could reasonably adopt.

As a result of a motor collision caused by the negligence of J., M., a compositor, who was then thirty-seven years of age, suffered a permanent brain injury which subsequently manifested itself in certain permanent disabilities, viz. an involuntary twitching of his left arm and leg, the loss of his senses of smell and of taste, psychological deterioration, a deterioration in memory, and impairment of his skill and efficiency as a hand compositor in the printing trade. In an action by M. against J. for damages, evidence was given that M. would find it difficult to find another job in the printing trade; that he could do unskilled work but the trade provided little of that. The trial judge found that the future earning capacity of M. had been affected, though to what extent might be uncertain; he recognized the uncertainty in M. obtaining regular employment in some other occupation and the smallness of his chances of obtaining another job carrying the same rate of wages as a compositor. The trial judge assessed the general damages at £2,700 adding thereto special damages amounting to £260 12s. 6d.

Held, by *Dixon* C.J. and *Kitto* J. (*McTiernan* J. dissenting), that the amount assessed could not be regarded as so inadequate or unreasonable as to justify the conclusion that it had been erroneously reached.

Decision of the Supreme Court of Western Australia (*Jackson* J.), affirmed.

APPEAL from the Supreme Court of Western Australia.

On 5th February 1952 one Esmond James Ronald Miller then aged thirty-seven was seriously injured by a motor car driven by Charles Arthur Jennings. In an action by Miller against Jennings liability for damages for negligence was admitted at the trial and the amount of the special damages was agreed at £260 12s. 6d. The plaintiff's injuries were severe. He was taken from the scene of the accident to hospital and when admitted he was conscious but drowsy and he complained of severe headaches. Some days later the possibility of intra-cranial haemorrhage was recognized and for this he was treated surgically. An exploratory burr hole was made and a quantity of old blood clot and disorganized brain tissue was aspirated from the posterior portion of the right frontal lobe of the brain. Thereafter his condition improved and he was discharged from hospital on 27th February 1952. Two weeks later he experienced a severe burning pain in the left elbow and thereafter he developed an involuntary twitching of his left arm and later of his left leg. He returned to work on 8th May 1952. The plaintiff was by occupation a compositor.

The medical evidence established that the twitching in the arm and leg was caused by scarring of the brain in the posterior part of the right frontal lobe and that this condition would be permanent. The loss of the sense of smell and taste would also be permanent. The occupational impact of these disabilities was summarized by the trial judge as follows:—"I think I must conclude on the evidence that he will have difficulty in obtaining or holding a job as a compositor (which is a skilled trade) though there should be other classes of work (such as proof reading) in the same industry of which he should be capable and, in general, I can see no reason why he should not be able to earn a living in any partly skilled clerical capacity or any other position which does not involve, on the one hand, heavy physical labour or, on the other, deft or delicate movement of the left arm or hand; but whereas hitherto he has been able to regard his present position as a permanent one carrying a journeyman's margin for skill and more, in the future he can perhaps look forward only to a lesser margin over the basic wage in some other capacity. It is undoubtedly a serious matter for a tradesman to find himself in such a position, the effects of which would be more noticeable at a time, unlike the present, when employment is difficult to secure".

The trial judge also found "that there has been a considerable psychological upset to the plaintiff from which he may never entirely recover even though the effects may diminish. The plaintiff's

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injuries have undoubtedly led in the past to a material impairment of his enjoyment of life and this must continue to a considerable degree. The disability in his arm is apparent to an observer and must cause him embarrassment and discomfort".

The Supreme Court of Western Australia (*Jackson* J., sitting without a jury) assessed the general damages at £2,700.

From this assessment the plaintiff appealed to the High Court.

O. J. Negus Q.C. (with him *G. W. Gwynne*), for the appellant. The assessment of general damages made by the trial judge does little more than cover the loss of earnings which the plaintiff will experience over the balance of his working life. The loss of the senses of taste and smell are serious matters which alone would justify a substantial award. The trial judge appears to have made no assessment for the loss of enjoyment of life or for pain and suffering. The award is so unreasonably small as to justify an appellate court reviewing it. [He referred to *Lee Transport Co. Ltd.* v. *Watson* (1); *Pamment* v. *Pawelski* (2).]

K. W. Hatfield (with him *I. W. P. McCall*), for the respondent. An appellate court should not interfere with an award of damages made by a judge sitting without a jury unless it can be shown that the judge has acted on a wrong principle of law or that he has misapprehended the facts or that he has made a wholly erroneous estimate of the damage suffered: *Flint* v. *Lovell* (3); *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (4). In this case the trial judge was influenced by his own observation of the plaintiff and he therefore enjoyed an advantage which cannot be shared by the appellate court. All factors relevant to an assessment of damages were considered by the trial judge and it cannot be shown that he acted on any wrong principle or that he misunderstood the evidence.

O. J. Negus Q.C., in reply.

Cur. adv. vult.

Nov. 22. The following written judgments were delivered:—

DIXON C.J. AND KITTO J. This appeal concerns an assessment of damages for personal injuries sustained by the plaintiff appellant in a traffic accident. The liability of the defendant respondent is not in dispute. The assessment of damages was made by *Jackson* J.

(1) (1940) 64 C.L.R. 1.
(2) (1949) 79 C.L.R. 406.
(3) (1935) 1 K.B. 354.
(4) (1942) A.C. 601.

and the amount he awarded forms the only ground of the appellant's complaint. This Court is asked to say that the amount is inadequate to the injuries which the appellant sustained and the consequences they entail and so inadequate as to justify a review of the assessment in the exercise of the Court's appellate jurisdiction.

The most important of the bodily injuries that he suffered were to the head. The accident occurred on 5th February 1952 when, as the appellant was riding his motor cycle, he was struck by the respondent's motor car. He was taken at once to the Royal Perth Hospital where he was found to be conscious but suffering from a severe frontal headache accompanied by drowsiness. Within a few days it was noticed that his left limbs became appreciably weaker than his right and that at the back of the eye there was a swelling of the head of the optic nerve. An X-ray examination showed that, although no fracture of the skull was disclosed, there had been a widening of the sagittal and coronal sutures. Ten days after the accident he was treated surgically. An exploratory burr hole was made and some brain needling was done. About five cubic centimetres of old blood clot and disorganized brain tissue was aspirated from the posterior portion of the right frontal lobe. After this his condition improved and he was discharged from hospital, but about two weeks later he felt a severe pain in his left elbow. Some days afterwards there developed an involuntary twitching of his left arm and a little later of his left leg. These muscular movements are uncontrollable, though at the trial the extent and severity of them seems to have been questioned. The appellant's sense of smell and of taste has disappeared. He has suffered a psychological deterioration, although again its extent and importance was not undisputed. His memory seems to have deteriorated and he has shown some confusion and uncertainty in his work, which is that of a compositor. All these are more or less permanent disabilities which are ascribed to the scarring of the brain in the posterior portion of the right frontal lobe. According to the evidence of the factory manager of the printers by whom he was employed, his work became very slow after the accident and he could only get through half the work he formerly did. Because of the involuntary movements of his hand the kind of work to which he was put had been changed. The managing director said that he had been an average worker, not very quick but reliable. He had become slower and his efficiency had decreased. He gave the appellant's out-turn as three-quarters of the former quantity. The appellant's previous earnings had been thirty shillings a week above award rates but because of his reduced efficiency he now received no more than

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award rates, a wage that the managing director considered to be greater than the real value of his work. He gave it as his opinion that the appellant would find it difficult to obtain another job in the printing trade; he could do unskilled work but their trade provided little of that.

The appellant at the time of the accident was about thirty-seven years of age. He is married and has two children. According to his wife's evidence, his injuries have caused changes in his personality which have distinctly impaired the former happiness of their family life.

Jackson J. assessed the general damages recoverable by the appellant at £2,700 adding thereto special damages amounting to £260 12s. 6d. His Honour accepted the view that the future earning capacity of the appellant had been affected, though to what extent might be uncertain. The work of a compositor being skilled, he would have difficulty in holding or obtaining employment in that capacity. His Honour said that there should be other classes of work in the same industry that the appellant could do and instanced proof reading. The exact view the learned judge adopted of the appellant's situation is stated in the following passage, which occurs in the course of a careful judgment: " . . . in general, I can see no reason why he should not be able to earn a living in any partly skilled clerical capacity or any other position which does not involve, on the one hand, heavy physical labour or, on the other, deft or delicate movement of the left arm or hand; but whereas hitherto he has been able to regard his present position as a permanent one carrying a journeyman's margin for skill and more, in the future he can perhaps look forward only to a lesser margin over the basic wage in some other capacity. It is undoubtedly a serious matter for a tradesman to find himself in such a position, the effects of which would be more noticeable at a time, unlike the present, when employment is difficult to secure ". At the same time his Honour thought that there was some exaggeration in the outward manifestations in the appellant's left arm of his disability and that when he was not conscious of being observed he performed with speed and accuracy some movements which at other times were slow and clumsy.

For what the appellant has undergone and for the consequences which have followed and for the chances to which he has become exposed the sum of £2,700 must be regarded as a compensation which is by no means high. Indeed in comparison with many awards that have been made by juries in parallel cases it may appear very low. But such awards do not form a standard and

the fact that we ourselves might have assessed the damages at a greater sum, had we been in the position of the judge at the trial, is not a sufficient reason for interfering with his determination. In *Nance* v. *British Columbia Electric Railway Co. Ltd.* (1), Viscount *Simon*, speaking for the Privy Council, described the function of a court of appeal when it is called upon to consider the adequacy of an assessment of damages by a primary judge. The assessment in question in that case was for the loss suffered by a widow and children through the death of her husband and their father. Perhaps an even greater discretionary element enters into an assessment of damages for bodily injuries in such a case as the present. His Lordship said: "The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (2). In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (3), Lord *Wright* explained the function of a court of appeal with reference to an award of damages for personal injuries made by a judge. Lord *Wright* said: "An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There

(1) (1951) A.C. 601.
(2) (1951) A.C., at p. 613.
(3) (1942) A.C. 601, at pp. 616-617.

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is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical & General Inventions Co. Ltd.* v. *Austin* (1). Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by *Greer* L.J. in *Flint* v. *Lovell* (2). In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency" (3). We have had before us cases in which consistently with these principles we have increased the damages awarded by a judge although they were damages for bodily injuries; a notable example is *Pamment* v. *Pawelski* (4), where an attempt was made briefly to restate the considerations which at the present day should enter into an assessment of such damages. In that case we considered that the disparity between the sum fixed and what appeared proper was so extreme as to justify our interference. Can we say that of the assessment in the present case? Or can we discover any error of principle in the manner in which the learned judge arrived at his award? In other words is the case one to which either branch of the general proposition of *Greer* L.J. in *Flint* v. *Lovell* (2) applies, namely that the appellate court must be convinced either that the judge acted on a wrong principle or that the amount awarded was so extremely small as to make it, in its judgment, an entirely erroneous estimate of the damage to which the party is entitled.

For the appellant it was suggested that *Jackson* J. had laid great emphasis upon factors of the appellant's case which might be summed up as occupation and domestic and had lost sight of the intrinsic importance in themselves of pain and suffering, diminished

(1) (1935) A.C. 346.
(2) (1935) 1 K.B. 354, at p. 360.
(3) (1942) A.C., at pp. 616-617.
(4) (1949) 79 C.L.R. 406.

physical powers, loss of taste and smell and the disabilities of involuntary movements of leg and arm, to say nothing of the depression of mind and other potential *sequelae* of the appellant's brain injury.

His Honour's reasons give a full description of the appellant's condition and it is difficult to see why it should be supposed that the elements mentioned were left out of account simply because great emphasis was rightly laid on the very important factors of his occupational prospects, his reduced earning capacity and the effects on his home life.

A point was made of the reference by way of illustration to proof reading which occurs in the learned judge's reasons and it was urged, with some plausibility, that proof reading was not a form of work for which the appellant would be fitted by education and training. But the use of an illustration by his Honour that might not be very apt does not mean that there was any error of principle. The substance of what the learned judge meant to convey remains true enough, namely that other kinds of work in the industry existed for which the appellant's disabilities should form no disqualification.

The appeal must depend simply upon the answer to what must be the ultimate question, namely whether the compensation assessed is so inadequate as to be beyond the limits of what a sound discretionary judgment could reasonably adopt. We do not doubt that the amount of the compensation awarded is low and we have had some hesitation concerning our decision but we do not think that it is so inadequate as to justify us in reviewing the learned judge's assessment. It cannot be described as outside the limits of what a sound discretionary judgment could reasonably adopt. It is in fact a sum reached after a very full and careful examination of the facts of the case and it represents an informed judgment upon a matter which must largely be one of opinion and must be governed to a not inconsiderable degree by an estimate formed of the witnesses and in particular the appellant. The amount assessed cannot, we think, be regarded as so inadequate or unreasonable as to justify the conclusion that it has been erroneously reached : cf. *Bocock* v. *Enfield Rolling Mills Ltd.* (1).

The appeal must be dismissed.

McTIERNAN J. In this case the learned trial judge made findings showing the nature of the injury which happened to the appellant in the collision between the motor vehicles which was the subject

(1) (1954) 1 W.L.R. 1303, at pp. 1306-1307.

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of the action. He found that the appellant sustained a severe injury to the brain. The medical evidence clearly establishes that after the collision bleeding occurred in the frontal right lobe of the brain. One of the facts is that a quantity of blood clot and disorganized brain tissue was aspirated from that part of the appellant's brain by an operation performed while he was in hospital. The injury to the appellant's brain is permanent. The learned trial judge found that the injury is a scarring of the posterior part of the right lobe. There is really no dispute about the nature of the injury. The intra-cranial bleeding had caused pressure which was evidenced by a widening of the lines between bones of the skull: there was a swelling in the optic nerve: and the reflex of the toes had been inverted by the resulting disturbance to the function of the brain. These conditions were relieved by the operation and the appellant returned to his work. For the few days which elapsed while the cause of these conditions was being explored the appellant suffered a severe headache.

The learned trial judge also made findings showing the physical, social and economic detriment which the injury has and will cause to the appellant. The most serious physical defect is that the injury led to a coarse irregular twitching in the appellant's left arm and leg. This condition did not break out for some time after the appellant left the hospital. It was preceded by a "severe burning pain" in the appellant's left elbow. The medical evidence clearly establishes that these outbreaks of twitching will occur during the remainder of the appellant's life. It would appear that the only dispute about this matter at the trial was whether the appellant voluntarily behaved so as to exaggerate this disability. The trial judge inclined to the view that to a degree he did so. The appellant's counsel criticised this part of the findings as underrating the seriousness of the disability in the industrial field. The criticism, I think, leaves untouched the substance of the findings made by the learned judge. There is no doubt that they establish that the injury to the appellant's brain involves severe functional damage to that organ. The medical evidence shows that delantin capsules are recommended to deal with the twitchings affecting the appellant and that this drug is commonly used for the treatment of epilepsy. The trial judge's notes of the evidence of one of the doctors contains the statement that "any person with brain injury is a potential traumatic epileptic—impossible to say whether it will come or not". The appellant's sense of smell was, by the injury to his brain, totally destroyed and his sense of taste partly. At the time of the accident the appellant was thirty-seven

years of age. His occupation was a hand compositor in the commercial printing trade. The outbreaks of twitching have permanently destroyed his skill and efficiency as a hand compositor. The findings of the learned judge indicate the uncertainty that faces the appellant of regular employment in some other occupation and how small are his chances of obtaining another job at his rate of wages as a compositor. It would appear that the weekly wages of a compositor exceed by at least thirty shillings that of an unskilled worker in the printing trade. There are also findings which show that the injury to the appellant's brain with the accompanying condition of twitching has caused him a severe psychological upset and has seriously interfered with his enjoyment of life and that these consequences are likely to be permanent. The question is whether the Court should interfere with the amount of the assessment which the learned judge made as general damages for the injury sustained and the detriment which they involve to the appellant. It does not appear that the learned trial judge proceeded upon a wrong principle or that he omitted to consider any proper materials or considered extraneous matters. But I cannot agree that an award of £2,700 as general damages is a reasonable result in this case. The findings of the learned judge ought in my opinion to have led him to award higher damages. When a reasonable allowance is made for the loss of earning power suffered by the appellant there appears to be much disparity between the other detriment which the appellant must suffer and the balance of the general damages. In my opinion the sum of £2,700 is less than any amount which could be fairly regarded as a reasonable compensation for the injuries sustained. I think that it is an erroneous estimate because it is so inadequate as not to be reasonably commensurate with the injuries. I think that the amount of the general damages ought to be increased by £1,000. The special damages were by agreement fixed at £261. In my opinion the total damages should be £3,961. I should allow the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Parker & Parker.*
Solicitors for the respondent, *K. W. Hatfield.*

F. T. P. B.