[HIGH COURT OF AUSTRALIA.]

PATEMAN . . . . . APPELLANT;
DEFENDANT,

AND

HIGGIN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 21; *Sept.* 13.

McTiernan, Webb, Kitto and Taylor JJ.

Damages—Action for personal injuries—Award by jury—Inadequate—Whether indicative of compromise verdict—New trial—Generally—Limited to damages—Matters to be considered by appellate court.

Where, the court below having ordered a new trial of an action limited to damages, a general new trial was sought upon the ground that the verdict was so small that it was right to assume a compromise among the jury and a failure by them to try the issues raised between the parties.

Held, by *McTiernan*, *Kitto* and *Taylor* JJ., *Webb* J. dissenting, that, inadequate though the award of damages was, it did not throw doubt on the verdict as a determination of the issue of liability according to law and thus a general new trial should not be ordered.

Per McTiernan J.: The presumption raised by the verdict that the jury decided the issues in the action cannot be rebutted by conjecture.

Per Kitto J.: The question whether a new trial should be limited to damages must always be, in the end, a question whether the appellate court is satisfied that notwithstanding what has happened on the subject of damages the verdict on liability should be accepted as a due determination of that issue.

Observations by *Kitto* and *Taylor* JJ. on the matters to be considered by an appellate court in determining whether an order for a new trial should be made to extend to the whole case or be limited to the issue of damages.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

On 14th January 1954 Leonard Vaughan Higgin commenced an action in the Supreme Court of New South Wales against John Pateman to recover damages for injuries sustained by him on 22nd September 1953 at Dubbo, when a utility truck driven by the

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defendant came into collision with a bicycle ridden by the plaintiff. The plaintiff alleged that the defendant was negligent in the manner in which he drove his utility truck on the date in question and that his injuries resulted from such negligence.

At the hearing of the action before *Maguire* J. and a jury of four liability was a lively issue between the parties. The plaintiff proved that as a result of the collision he had sustained serious injuries such as would be attended with severe pain and suffering. He further gave evidence of pecuniary loss amounting to between £725 and £750. The jury returned a verdict for the plaintiff for the sum of £800 and judgment was entered accordingly.

The plaintiff appealed to the Full Court of the Supreme Court seeking a new trial of the action limited to damages upon the grounds that the damages awarded by the jury were inadequate, that the jury had failed to apply their minds to the proper principles of the assessment of damages and did not consider matters proper to be considered by them, and that the damages as awarded were not in accordance with the evidence and weight of evidence. Upon the hearing of the appeal the defendant contended that, if a new trial was to be ordered, it should be a general new trial and not limited to the issue of damages. The Full Court (*Street* C.J., *McClemens* and *Brereton* JJ.) rejected this contention and ordered a new trial limited to damages.

From this decision the defendant by leave appealed to the High Court upon the ground that the Full Court erred in ordering a new trial limited to damages and should have ordered a general new trial.

A. Bridge Q.C. (with him *W. B. Perrignon*), for the appellant. Where the features of the verdict including the amount awarded give cause for suspicion that the jury may not have considered the whole of the matter fairly and give rise to a suspicion in the process that they may have compromised, then the new trial should be general. Here it is not possible to sever the issue of liability from that of damages when attempting to analyse the jury's verdict, and, that being so, the new trial should be general. [He referred to *King* v. *Ivanhoe Gold Corporation Ltd.* (1).]

[McTIERNAN J. referred to *King* v. *Ivanhoe Gold Corporation Ltd.* (2). Is there sufficient ground here to justify an interference with the exercise of the discretion of the court below ?]

The exercise of the discretion was affected by the application of a wrong principle, namely the necessity to find a special reason

(1) (1908) 7 C.L.R. 617, at pp. 621, 622, 628.

(2) (1908) 7 C.L.R., at p. 625.

for concluding that the verdict was a compromise. [He referred to *Rowe* v. *Edwards* (1); *Tolley* v. *J. S. Fry & Sons Ltd.* (2).] On the material now before this Court there is a strong suspicion that the jury did not calmly consider the whole case. In *Coates* v. *Carter* (3) a general new trial was ordered by this Court, though there it was conceded, not argued, that such a trial should be had.

[KITTO J. Does it not follow from your argument that in every case where a verdict is found to be unreasonably low and there is no circumstance to which one can point to explain it that there ought to be a general new trial ?]

Yes. The defendant in such a case ought not to be deprived of an opportunity to contest the issue of liability. [He referred to *Falvey* v. *Stanford* (4); *Springett* v. *Springett* (5); *Smith* v. *Schilling* (6); *Willis* v. *David Jones Ltd.* (7).] Suspicion in itself that the issues have not been properly considered is sufficient to warrant the grant of a general new trial.

[KITTO J. The statement most favourable to you on the question of the severability of the issues of liability and damages seem to be that by *Cussen* J. in *Holford* v. *Melbourne Tramway and Omnibus Co. Ltd.* (8).]

Yes. For those reasons the appeal should be allowed.

M. D. Healy Q.C. (with him *R. G. Flannery*), for the respondent. The verdict may be explained by evidence given for the defendant tending to show that he was a working man of limited means and by the direction given by the trial judge on the question of damages. The jury may well have been led into error on the issue of damages by these factors, but it leaves their determination on the issue of liability unimpaired, and, so considered, there can be no suggestion of compromise. The only cases where a general new trial has been ordered are cases where the issues are inextricably mixed. [He referred to *Kelly* v. *Sherlock* (9); *Falvey* v. *Stanford* (10); *King* v. *Ivanhoe Gold Corporation Ltd.* (11); *Ryan* v. *Ross* (12).] The present appeal is one against the exercise of discretion by the court below and it is for the appellant to show that there was an

(1) (1934) 51 C.L.R. 351, at pp. 352, 354, 356, 357.
(2) (1930) 1 K.B. 467, at p. 477.
(3) (1951) 82 C.L.R. 537, at pp. 543, 544.
(4) (1874) L.R. 10 Q.B. 54, at pp. 56, 57.
(5) (1866) 7 B. & S. 477.
(6) (1928) 1 K.B. 429, at pp. 433, 440.
(7) (1934) 34 S.R. (N.S.W.) 303, at pp. 316, 317; 51 W.N. 106, at p. 110.
(8) (1909) V.L.R. 497, at p. 529.
(9) (1866) L.R. 1 Q.B. 686.
(10) (1874) L.R. 10 Q.B. 54.
(11) (1908) 7 C.L.R. 617.
(12) (1916) 22 C.L.R. 1.

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error in the exercise of such discretion. [He referred to *Willis* v. *David Jones Ltd.* (1).] Compromise cannot be suggested merely from an inadequate award of damages.

[McTIERNAN J. Is there any case in which an appellate court has directed a general new trial other than in a case where there was merely a nominal verdict or the issues could not conveniently be separated ?]

No, with the possible exception of *Coates* v. *Carter* (2) where the necessity for a general new trial was conceded. The views expressed in *Watson* v. *Levenson* (3) and *Rowe* v. *Edwards* (4) are not incompatible. They amount to this, that to obtain a new trial on all issues, an appellant must show that the award leads necessarily to an inference that the jury failed to decide the issues between the parties. The court below properly exercised its discretion and the appeal should be dismissed.

A. Bridge Q.C., in reply.

Cur. adv. vult.

Sept. 13.

The following written judgments were delivered :—

McTIERNAN J. In this action, on an application by the plaintiff, the Full Court of the Supreme Court of New South Wales granted a new trial on damages only. The order of the Full Court is an exercise of its power under s. 160, par. (b) of the *Common Law Procedure Act* 1899 of New South Wales. It is within the discretion vested by that provision in the Court to grant a new trial in an action either " generally " or " on some point or points as the Court thinks fit ". It is clear that this discretion extends to granting a new trial in an action of negligence on the question of damages only. The defendant, by leave of this Court, has appealed from the order made by the Full Court on the plaintiff's application for a new trial. The ground on which the Full Court granted a new trial was the inadequacy of the damages found by the jury. The defendant does not contend that merely because the damages are inadequate a new trial generally ought to have been granted. His contention is that the verdict is so small that it is right to assume a compromise among the jury and a failure by them to try the issues raised between the parties. The issues of negligence and contributory negligence were left to the jury. The verdict

(1) (1934) 34 S.R. (N.S.W.) 303, at p. 317 ; 51 W.N. 106, at p. 110.
(2) (1951) 82 C.L.R. 537.
(3) (1932) 49 W.N. (N.S.W.) 108, at p. 109.
(4) (1934) 51 C.L.R. 351, at p. 356.

was for the plaintiff with £800 damages. The question of fact at issue between the parties was whether the plaintiff, who was riding a bicycle along a street in Dubbo, gave a signal before turning to the right. The defendant was following, driving a truck. The plaintiff altered his course to the right and there was a collision between the two vehicles in which serious bodily hurt was done to the plaintiff. He swore that he put out his right hand and the defendant swore the opposite. It would appear that the issue of liability turned on the question: whom would the jury believe? Judging the question on the verdict, presumably they gave more credit to the plaintiff than to the defendant.

The jury had clear positive proof that the plaintiff's injuries were serious and such as would be attended with severe pain and suffering. His pecuniary losses resulting from the collision were quantified in the evidence at £725 or, perhaps £750. The defendant argues that the jury found only £50 or £75 compensation for personal injury, pain and suffering. This cannot be so precisely predicated, because it cannot be presumed that the jury gave compensation for pecuniary losses in the full measure which the evidence would have allowed. However, in any reasonable view of the evidence of damage and loss, £800 is too small to be reasonable compensation for the personal injury, pain and suffering as well as the pecuniary loss. The defendant's contention that the jury did not try the issues raised between the parties rests on the disparity between the amount of the verdict and the damage and loss of which there is evidence. According to the contention, the jury differed on the issues of liability which they had to try, and compromised by awarding the full amount of the pecuniary losses which they considered proved and by limiting arbitrarily the compensation for personal injury, pain and suffering to £50 or £75.

As the verdict was for the plaintiff, the probability is that the jury found the defendant solely to blame for the collision. Consistently with this presumption, some error in estimating damages on the part of the jury could account for the inadequacy of the verdict. The inadequacy of the damages which the jury found could be described as striking: but the verdict is nevertheless for a substantial sum. The presumption raised by the verdict that the jury truly decided the issues of liability which they had to try cannot be rebutted by conjecture. The contention of the defendant that the verdict must have resulted from a compromise among the jury rests merely on conjecture. That is not sufficient to sustain the argument that there should be a new trial generally.

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In the case of *Hall and Wager* v. *Poyser* (1) a new trial of an action was sought on the ground that the verdict was against the evidence and could not have been founded on a decision of the issue raised between the parties. It was an action on a bill of exchange for £50; the defendant pleaded that certain goods were accepted by the plaintiff in satisfaction of the bill; there was conflicting evidence as to this fact; and the jury found a verdict for the plaintiff with £25 damages. It was argued for the defendant that the jury appeared to have made a compromise among themselves "to split" the amount of the bill. A new trial was refused. *Pollock* C.B., said "If it had been clear that the jury split the difference, and so came to their decision, I should have thought, certainly, that the verdict must be set aside" (2). *Alderson* B. said "If that" (the verdict for £25) "could be accounted for only on the supposition that, having disagreed as to whether the verdict should be for the plaintiffs or defendant, they had split the difference, the defendant would certainly be entitled to a new trial" (2). In the present case, it is not possible to infer with the degree of certainty involved in these statements that the jury proceeded to the verdict by the improper means contended for by the defendant. I am of the opinion that the order of the Full Court should not be disturbed and the appeal should be dismissed with costs.

WEBB J. I would allow this appeal.

The facts are sufficiently set out in the judgments of the majority of the court.

It must be that in ordering a new trial limited to damages the Supreme Court considered that the sum awarded for general damages £75 was so inadequate that reasonable men with a proper understanding of the matter could not have arrived at it, seeing that their Honours were unable to find an explanation for the inadequate sum. In those circumstances I think a new trial not limited to damages was called for. With great respect I think that the test to be applied in cases where the award cannot be accounted for is that stated by *Dixon* J. as he then was in *Rowe* v. *Edwards* (3). It is true that this test was stated in a dissenting judgment but the majority of the Court did not appear to have taken a different view of the test applicable in that type of case.

Like their Honours in the Supreme Court I think the amount awarded for general damages extraordinarily low and inexplicable.

(1) (1845) 13 M. & W. 600 [153 E.R. 251].

(2) (1845) 13 M. & W., at p. 602 [153 E.R., at p. 252].

(3) (1934) 51 C.L.R. 351, at p. 356.

I am not prepared to attribute the verdict for such a small amount to the summing-up of the learned trial judge which was not challenged here. The complete fairness of the summing-up could never be the explanation of an award otherwise inexplicable.

KITTO J. The courts of common law at Westminster observed a distinction between cases in which a defeated party was entitled to a new trial *ex debito justitiae*, e.g., where inadmissible evidence had been allowed in or the jury had been misdirected, and cases in which a new trial was in the discretion of the court, e.g., where the verdict was against the evidence. In the former class of cases the new trial had to be on all issues; in the latter it might be confined to one issue only: *Chitty's Archbold's Practice*, 12th ed. (1866), p. 1530; *Willis* v. *David Jones Ltd.* (1). In New South Wales, under s. 160 of the *Common Law Procedure Act* 1899, a new trial may be granted either generally or on some particular point or points only as the court thinks fit; and, the old distinction having thus been made irrelevant it would seem that the fundamental guiding principle in choosing between a general and a limited new trial ought to be that which was formerly applied where a new trial was in the discretion of the court: "if on the evidence the court above thinks that justice has not been done, but they shall do more injustice by setting the matter at large again, they may restrict the parties to certain points on the second trial": *Hutchinson* v. *Piper* (2), see *Holford* v. *Melbourne Tramway and Omnibus Co. Ltd.* (3).

To state the principle in this way accords with the suggestion of *Cussen* J. in the case last cited, that to grant a new trial on the whole case is the general rule and to grant it on one issue only is the exception. Actions for personal injury now provide so large a proportion of the work of jury courts, and in most such actions the issue of damages is so easily separable from the issue of liability, that cases in which it is considered appropriate to limit new trials to damages have come to seem anything but exceptional. Yet it remains, I think, a sound general proposition from which to start in the consideration of each particular case according to its own circumstances that if there is to be a new trial it ought to be of the case as a whole unless the Court thinks that "they shall do more injustice by setting the matter at large again".

(1) (1934) 34 S.R. (N.S.W.) 303, at p. 316; 51 W.N. 106, at p. 110.
(2) (1812) 4 Taunt. 555, at pp. 556-557 [128 E.R. 447, at p. 448].
(3) (1909) V.L.R. 497, at pp. 515, 529.

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In the present case one contention that was urged upon us by counsel for the appellant was that the issues of liability and damages were so tied up together that it would not be right to limit the new trial to the question of damages. But there is nothing to be said for the contention. It is often true, in a defamation action for example, that the case on liability and the case on damages are not in distinct compartments and therefore ought not to be decided by different tribunals; but the case before us, like the majority of cases of its class, falls naturally and clearly into the two divisions. The evidence on the one issue is quite separate from the evidence on the other, and the two issues form quite separate subjects for consideration.

The appellant, however, put another contention which was much nearer the mark. The plaintiff proved special damages amounting to £725, and the jury gave a verdict for only £800 in all. Thus they awarded the absurdly low sum of £75 as compensation for a great deal of pain and suffering and for a real prospect of further economic loss. The appellant invites the Court to infer that the verdict was a compromise, or at least is suspect as a whole, and to hold for that reason that the new trial should extend to liability as well as damages. If it were not for one aspect of the trial, I should be disposed to think that the invitation ought to be acceded to. It was rejected in the Supreme Court, and we must consider this appeal in accordance with the established principles of law which govern the determination of appeals from discretionary decisions. But the judgment of the learned Chief Justice of the Supreme Court contains a passage in view of which it was contended that the question whether the new trial should be general ought to be decided according to our own view of the case. After having said that the "test" had been laid down that if a verdict is unreasonably low you should then infer a compromise, his Honour gave as his reason for limiting the new trial to the issue of damages that he could not find "any special reason for coming to the conclusion that the jury compromised with their oaths". It is true that an unreasonably low award of damages may argue, and in some cases argue strongly, that a compromise verdict has been given, but there can hardly be a general rule that the inference should be drawn. On the other hand, a decision to make a new trial extend to the whole case may properly be reached without coming to a conclusion, for a special reason, that the verdict in fact resulted from a compromise. If the smallness of the award of damages, considered in the setting of the whole circumstances of the case, not only vitiates the verdict as an assessment according to law but also creates

in the mind of the appellate court a real doubt as to whether the jury's conclusion on liability has been properly arrived at, the court cannot think that, while injustice as to damages would be done by allowing the verdict as a whole to stand, more injustice would be done by setting the whole case at large than by ordering only a new assessment of the damages. In some cases, as *Alderson* B. said in *Hall and Wager* v. *Poyser* (1), it happens that a verdict can be accounted for only on the supposition that, having disagreed as to whether the verdict should be for the plaintiff or defendant, the jury have split the difference. But though there be nothing to justify a precise supposition of that kind, yet an appeal court may well feel unable, in the circumstances, because of the unreasonableness of the award of damages, to say that in giving the plaintiff relief against an unsupportable decision on that issue by the jury which tried the case it is just to leave the defendant bound by the same jury's determination of the issue of liability. The need to distinguish between issues, though stated in clear language in a summing-up, may be overlooked or ignored by the jury for a variety of causes; and the mental processes which are conveniently grouped under the general description of a compromise do not necessarily consist of clear-cut steps deliberately taken. The question whether a new trial should be limited to damages must always be, in the end, a question whether the appeal court is satisfied that notwithstanding what has happened about damages the verdict on liability should be accepted as a due determination of that issue.

I should not myself be satisfied to accept the verdict on liability in this case were it not that a reading of the summing-up reveals, as I think, an ample explanation of the lowness of the amount awarded as damages. The learned judge was not asked to re-direct on damages or to alter in any way his presentation of that issue to the jury, and on appeal a new trial was not sought on the ground of any misdirection. Yet one cannot but remark that again and again his Honour, no doubt intending only to dissuade the jury from following some recent examples of extravagance in verdicts, played down matters relevant to damages, and did so in terms which might easily have led a conscientious jury, deciding the issue of liability with scrupulous fairness and in accordance with the directions they had received, to be parsimonious to a degree. Indeed, although I am very conscious of the care and lucidity which distinguish the summing-up, I feel bound to mention that

(1) (1845) 13 M. & W. 600, at p. 603 [153 E.R. 251, at p. 252].

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in one passage his Honour used expressions which, if they were closely attended to might actually have led to a misapprehension of the law. The passage is this: "Well, I suppose he suffered a very unpleasant experience in hospital for about ten weeks, and there is no reason why, if you find a verdict in his favour, you should not include in his total award of damages some sum reasonable and proper in your view to compensate him for that experience and also other matters of pain to which I have adverted. It is very difficult to equate human pain and suffering to a sum of money. The two things are not really comparable, but as the law cannot provide any other form of compensation for pain, it says it is proper to compensate it as best you can by an award of money."

I have studied the case as a whole, and in all the circumstances I do not think that the award of damages, quite inadequate though it was, throws doubt on the verdict as a determination of the issue of liability in accordance with law, and I am satisfied to leave it standing as such a determination. For that reason I am of opinion that, although a new trial as to damages must be had, it would be unjust to order a new trial generally.

I therefore agree that the appeal should be dismissed.

TAYLOR J. The question in this appeal is whether there should be a general retrial of an action in which the respondent sued the appellant for damages for personal injuries and recovered a verdict for £800. The verdict was set aside by the Full Court of the Supreme Court as inadequate and a new trial limited to the issue of damages was ordered. In the appeal now brought, by leave, to this Court the appellant maintains that the new trial should not be so limited and seeks a new trial on the issue of liability also.

The authority of the Supreme Court, in any action in which a new trial is directed, to limit the new trial to particular issues is conferred by s. 160 of the *Common Law Procedure Act* 1899 and the exercise of that authority constitutes a discretionary judgment which cannot be set aside unless it be established that appropriate principles have been disregarded or that it has been influenced by some erroneous view of the material circumstances. The power has been exercised frequently in cases where objection has been taken, either on the ground of inadequacy or excessiveness, to the amount of damages awarded and a review of the manner in which it has been exercised shows that it has been the practice, in the absence of any reason for supposing that the jury's error extended beyond the issue wrongly decided, to limit any new trial to the issue

of damages. The practice, no doubt, found its origin in the view that where there has been a finding on each of several distinct issues and objection can properly be taken to one only it would, in general, be both unreasonable and unjust that a general new trial should take place.

But, since in any particular case in which the question arises, it may be a matter of speculation what considerations have led the jury astray on an issue of damages, and, therefore, impossible to conclude with certainty whether or not a finding on such an issue represents the result of consideration of that issue alone, various "guiding principles" have been formulated from time to time. These or some of them are referred to by *Jordan* C.J., in *Willis* v. *David Jones Ltd.* (1), where he said "Certain guiding principles have been indicated, such as that a new trial should be general where the facts establishing damages are involved with the facts establishing liability: *King* v. *Ivanhoe Gold Corporation Ltd.* (2), or where an error as to damages, though technically severable, suggests that the jury may have taken a biassed view of the whole case (3); or where there is reason to suppose that there has been a compromise verdict: *Falvey* v. *Stanford* (4)" (5). Perhaps it may be said that this is not an exhaustive statement but in the nature of things it is impossible to formulate a complete set of principles to deal with the infinite variety of problems which may arise in such cases. The difficulty which arises in formulating precise and exhaustive tests is illustrated by observations made in the Supreme Court in two comparatively recent cases. In *Alchin* v. *Commissioner for Railways* (6) *Jordan* C.J., with whom the other members of the court agreed, expressed the view that the new trial which it had been decided should take place should be restricted to damages only. This view rested, in part, implicitly upon the fact that damages constituted a separate issue in the case and, in part, upon a broad appraisement, based upon the facts of the case, of the view which a second jury was likely to take on this issue. His Honour added that a general new trial is undesirable *unless it is reasonably plain that justice cannot otherwise be done.* Such a conclusion may be reached or rejected upon such a variety of considerations concerned with the circumstances of particular cases that it is impossible to formulate any conclusive and exhaustive

(1) (1934) 34 S.R. (N.S.W.) 303; 51 W.N. 106.
(2) (1908) 7 C.L.R. 617, at p. 628.
(3) (1908) 7 C.L.R., at p. 622.
(4) (1874) L.R. 10 Q.B. 54.
(5) (1934) 34 S.R. (N.S.W.) 303, at p. 317; 51 W.N. 106, at p. 110.
(6) (1935) 35 S.R. (N.S.W.) 498, at p. 514; 52 W.N. 156, at p. 159.

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set of rules. In the same year the Supreme Court directed a new trial in the case of *Bates* v. *Producers & Citizens' Co-operative Assurance Co. Ltd.* (1). In that case *Halse Rogers* J., who delivered the leading judgment, observed : " It is a matter for the discretion of the court as to whether such new trials should be general, or limited to a question of damages. Where a jury has arrived at such a result as was reached in this case, and where it is apparent, on the face of the record, that matters of little or no relevance have been given considerable prominence, and there is a possibility, or more, that these may have diverted the jury from a proper consideration of the real matter in issue in the case, a new trial should not be limited to damages, but should be a new trial generally " (2). It may be of some importance to observe that leave to appeal to this Court was refused in those two cases, and to add that the observations of their Honours are consistent with the views expressed in the joint judgment in *Coroneo* v. *Kurri Kurri & South Maitland Amusement Co. Ltd.* (3).

In the present case the argument of the appellant attempts to reverse the rule of practice commonly observed and to assert that whenever there has been an erroneous determination by a jury on the issue of damages a new trial should, in the absence of countervailing circumstances, take place upon the whole case. The point is of importance in those cases—and they may be thought to be many—where it is quite impossible to suppose what considerations have led the jury into error. But, whilst agreeing that cases may occur in which the assessment of damages is of such a character as to give rise to grave doubts concerning the validity of a jury's findings on other issues, I can see no reason why the mere fact that a finding on one issue is erroneous should necessarily vitiate a finding or findings on distinct and separate issues. I do not doubt that a verdict may be so grossly inadequate as to enable an appeal court to say with some confidence that the jury did not even attempt to consider the issue of damages on its merits and, therefore, to conclude that the verdict generally was the result of an improper compromise or otherwise unsatisfactory. But such a conclusion cannot be reached merely because the view is taken that an assessment of damages is erroneous and should be corrected for, without bias and in the absence of a compromise, a jury may well make an erroneous determination on that issue. Yet, in cases where the inadequacy of the damages awarded is not thought to be sufficient,

(1) (1935) 52 W.N. (N.S.W.) 95.
(2) (1935) 52 W.N. (N.S.W.), at p. 96.
(3) (1934) 51 C.L.R. 328, at p. 346.

by itself, to indicate or suggest error of a character appropriate to vitiate findings on other issues, a firm foundation for the conclusion that a new trial should not be restricted may be reached upon consideration of the circumstances of the case and the course of the trial. And, of course there may be cases where, in the language of *Dixon* J.—as he then was—(*Rowe* v. *Edwards* (1)) an appeal court would feel bound to say that "there is such a chance of the jury having completely failed to deal with the whole case, that the action should be sent down for re-trial generally and not as to damages only" (2).

The question then, as I see it, is whether there is anything in the character of the verdict under review, or in the circumstances of the case, to warrant the conclusion that justice between the parties requires that a general new trial should be ordered. The appellant, of course, says that there is and contends that, upon the view which the members of the Supreme Court formed concerning the character of the assessment, a general new trial should have been ordered. It is said that in spite of the fact that members of that court regarded the verdict as "extraordinarily low" they were not in the absence of "any special reason" prepared to assign the verdict to the category of compromise or to say that the verdict generally was unsatisfactory. But upon consideration of the reasons given for limiting the new trial I do not understand the learned Chief Justice, with whom the other members of the court agreed, to have suggested that it is not possible, on occasions, to take this step upon consideration of the gross inadequacy of a verdict alone. Rather, it seems, he took the view that the character of the verdict did not, in all the circumstances of the case, support such a conclusion. There was, it may be added, no other ground upon which that conclusion could have been reached. I agree that the verdict was extremely low but after careful consideration of the evidence given in the case and of the charge to the jury I am satisfied that there was ample justification for the view that the verdict was not the result of an improper compromise. Indeed I should be disposed to think affirmatively that it was not but, rather, that it was reached by a meticulous and, perhaps, too literal observance of directions couched in what may be regarded as careful but conservative terms. When the whole of the record is examined the jury's verdict assumes rather the appearance of a niggardly assessment and not that of a finding influenced by considerations extraneous to the issue of damages.

(1) (1934) 51 C.L.R. 351.

(2) (1934) 51 C.L.R., at p. 356.

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For the reasons given the appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *McGuinn & McGuinn*, Dubbo, by *Adrian Twigg & Co.*

R. A. H.