CASE LAW

EXCESSIVE JURY VERDICTS
HATELY v. *ALLPORT*

In recent months the assessment of damages by juries in actions for negligence has been the subject of controversy.[1] The criticism stems from the claim that the verdicts of juries have in many cases been so unreasonable that an appeal to the Full Court on the ground of either excessive or inadequate awards has been rendered necessary. It is, however, with the problem of excess that the Court is particularly perturbed.

In the case of *Hately* v. *Allport*[2], the Full Court upheld an appeal on the ground of excessive damages, and in the course of its judgment made suggestions as to the causes of what it termed "this sudden upsurge" or "steep increase" in the awards for personal injuries.[3] While the Court's view may be generally correct, the truth is that in any particular assessment neither the Court, the litigants, nor the public are aware of *how* the jury actually comes to its decision. It is submitted, therefore, that a valid criticism of the jury system is the fact that juries are required neither to itemise the damages they award, nor to indicate the basis of their calculations. A reform forcing juries to do both of these things would put the assessment of damages on a firmer and less conjectural basis. It would make the appellate Court's task easier, and render unnecessary the conjectures made by the appellate Court as to how it *thought* the jury went wrong. Unless there is better understanding between judge and jury, the conflict between them can become unending, as has been shown in the now historic case of *Cullinan* v. *Commission of Road Transport*.[4]

In this article it is proposed to examine the Court's conclusion in *Hately* v. *Allport*, namely, that ". . . the award of damages in this case appears to us to be

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[1] On July 23 it was announced in the Press that a Committee had been formed to investigate the replacement of juries by a special Tribunal comprising a judge, medical practitioner, actuary and assessor.

[2] (1954) 71 W.N. (N.S.W.) 12.

[3] The Court was of the opinion that "the recent trend cannot be explained by reference simply to the diminished purchasing power of money." Three reasons are tentatively suggested to explain the increase: firstly, "it may well be that in some cases jurymen have allowed their assessment of damages to be fixed by the heart, and not by the head"; secondly, "the attitude may be that it is the insurance company or the government that pays, and therefore let them pay lavishly;" thirdly, whether this trend is "attributable in some measure to the change in the law which now makes the right to enrolment as an elector the qualification for jury service, we do not know." Two further reasons, namely, the misuse of actuarial calculations so that wrong standards are applied and the giving of double damages are also mentioned. I have considered these separately because they relate to principles of law. They may be grouped under the third heading above, namely, whether under the present system, juries have sufficient intelligence to follow the trial judge's directions.

[4] (1952) 52 S.R. (N.S.W.) 199. This case recently made New South Wales legal history when, after two juries had brought in verdicts of £17,500 and £18,000 respectively, the Full Court ordered a third trial limited to damages only. It is understood an appeal to the High Court will be sought.

unreasonable and indefensible, and it is clear that the jury must have applied wrong standards or have included twice over damages for the same matters, and the award cannot stand".[5] For injuries which admittedly were extensive the jury had awarded the plaintiff the large sum of £30,000.[6] It is nevertheless submitted that the Court was wrong in upholding the appeal and that the Court's conclusion cannot be justified as easily as it might at first appear.

As a preliminary, it will be well to state both the limits of the jury's powers in assessing damages and the limits of the appellate Court's powers in upsetting an assessment. The first limitation on juries is that they cannot "give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, under all the circumstances, a fair compensation."[7] The contrast here is between the full amount of a perfect compensation and fair compensation. The computation of damages for the loss of prospective wages provides an illustration of the operation of this principle. For example if medical evidence establishes the fact that the plaintiff will be incapacitated for 10 years, then he would be assured of receiving perfect compensation if he were given all the wages he would receive if he were to work continuously for 52 weeks in every year. But there would be fair compensation if allowance was made for some period of unemployment due either to a fall in the labour market, or to physical incapacity.[8] The second limitation is that double damages cannot be given.[9] For example, if damages were given for loss of expectation of life, say for the loss of 20 years of prospective happiness, then damages for loss of wages could not be given for these twenty years. Despite these limitations, however, it is submitted that a jury could quite reasonably arrive at a verdict of £30,000 in the instant case.

An appellate court can only interfere with the jury's verdict when it is "convinced that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."[10] In connection with this Lord Wright has said "In considering their (the jury's) award, that view of the evidence most favourable to their finding must be taken, not the view most adverse to it, if or where two views are competent."[11] It is submitted that this principle was not applied in the instant case by the Full Court. It would appear not only that the most favourable view of the evidence was not taken, but further that some evidence before the jury was altogether excluded from consideration. Another dictum of Lord Wright's should be recalled, namely "that the damages cannot be treated as excessive merely because they are large. Excess implies some standard which has been exceeded."

With these considerations in mind, let us turn to the headings of damages applicable in an action involving personal injury. To quote the Full Court, "the rule as to damages for personal injuries requires a jury to take into account: (i) the pain and suffering endured and to be endured in the future; (ii) the inconvenience and loss of enjoyment of life which has been sustained both past, present and future; (iii) any shortening of the expectation of life, (iv) the plaintiff's present and future diminished earning capacity; and (v) other

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[5] (1954) 71 W.N. (N.S.W.) at 21.

[6] *Id., at* 18-19. "His spinal chord was severed and he is and always will be completely paralysed from just below the waist. He will not have any sense of feeling in the lower portion of his body. As a subtitute for the ordinary functions of nature he has an open wound in the lower portion of his body in which is inserted a tube which has to be changed at regular intervals. He is subject to and may still in the future suffer from pressure sores of a grave type. He has been in hospital for a substantial portion of the last 4½ years and incurred expenses in special damages to the extent of £1298."

[7] *Rowley* v. *London and North Western Railway Co.* (1878) L. R. 8 Ex. 221, at 231.

[8] For an application of this principle see *Roach* v. *Yates* (1938) 1 K.B. 256.

[9] *Id., per* Slesser L.J., at 271.

[10] *Flint* v. *Lovell* (1935) 1 K.B. 354, at 360.

[11] *Mechanical and General Inventions Co. and Lehwess* v. *Austin and Austin Motor Co. Ltd.* (1935) A.C. 346, at 375.

financial loss," that is, any expenses incurred or likely to be incurred for medical, hospital and other similar treatment.

It is now proposed to show that if the most favourable and yet reasonable view of the evidence were taken and this view used to determine the damages under each of these five heads, a sum of £30,000 could be justified in the instant case. It will be convenient to consider the last two headings first.

The plaintiff's present and future diminished earning capacity: The seriousness of the plaintiff's injuries has already been mentioned.[12] One thing was certain — that he had been permanently and completely paralysed from the waist down, and thereby confined to a wheel-chair as his normal means of movement. A second thing was certain — that he had been deprived of the capacity of earning his living as a labourer.[13] A third thing was certain — that he would be spending a great deal of time in the future in hospital. On this evidence it is submitted that any jury would have been entitled to find that the plaintiff had been totally incapacitated. This being the case, the Court should, as matters stand at present, have proceeded to test the verdict on that basis, though it would be more satisfactory, as has been indicated at the outset, if the appellate Court were made aware of the basis on which the jury actually proceeded.

The Court does seem to have concluded, and probably correctly, that the jury proceeded on the basis of total incapacity. Nevertheless, it went on to express the opinion "that a man in the position of the plaintiff is not necessarily to be regarded as wholly bereft of any capacity at all . . . Anyone who has had any experience of the rehabilitation of ex-servicemen would regard such a proposition as erroneous." This may be quite true. But at the hearing there was no evidence given concerning the rehabilitation of ex-servicemen. Thus, not only did the Court not take the most favourable view of the evidence, but, in effect, it also criticised the jury's failure to act on evidence which was not given.[14]

The second question to be answered in giving damages for loss of wages is the length of time the incapacity would last. This is another question the answer to which, it is submitted, the jury should be asked to put on record. The answer in the instant case depended on how long the plaintiff could be expected to live — another finding which could usefully have been recorded. Only one doctor was cross-examined on this point; and though he said that the plaintiff's expectation of life had been shortened, when he was asked whether he could put

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[12] See *supra* n.6.

[13] During the trial it was revealed that the plaintiff, 24 years of age at the date of injury, had left school at the age of 14, joined the army at 18, been discharged at 22 in 1946, and a short while after been employed as a labourer with the Department of Main Roads until his injury on September 7, 1948.

[14] It is difficult to determine whether the Court in making these statements was criticising the jury or the trial judge, for the latter said in summing up, that the plaintiff "has been deprived of his capacity to earn his living." It is quite possible that the Court regarded this and similar statements as being misdirections insofar as the impression was given that it was not open to the jury to find partial as opposed to total incapnacity.

Certainly the Court criticised the trial judge's summing up, e.g. on the question of damages for loss of expectation of life, the use of actuarial figures, and the duplication of damages. It is submitted that in an appeal on the ground of excessive damages the question of misdirection or nondirection is irrelevant. If there had been misdirections, certainly they could have been the cause of errors made by the jury in its assessment. But the ground of misdirection forms a separate ground of appeal — a ground which was not taken.

The source of this confusion, this failure to distinguish these two grounds of appeal, lies in the guesswork which is forced on an appellate court after it has found that an assessment is unreasonable (see *infra*). After such a finding, the Court has to infer that wrong standards had been applied or double damages given — exactly what was inferred here. Likewise, the basis of an appeal on the ground of misdirection is that as a result of the misdirection the jury would apply wrong standards or give double damages.

One criticism of the trial judge does not seem justified. The Court said that "on the aspect of loss of wages His Honour invited the jury to take the plaintiff's proved wages at the rate of £15 a week and the actuarial estimate of the normal span of life for a man of his age . . ." The truth is that the plaintiff's counsel sent out the invitations, and His Honour simply drew the jury's attention to them and explained them before acceptance.

any figures on it, he replied "No, it is very difficult, especially in view of the modern drugs." On this evidence, the jury had a very free hand in determining the actual loss of expectation. It would have been both reasonable and consistent with the evidence to limit the loss to ten years, i.e. to give damages for loss of wages for thirty years[15] after the trial.

The third problem is to determine the weekly wage to be given. This offers little difficulty, and there was no dispute nor adverse comment on the use of £15 as the proved weekly wage.

The fourth point is vital, namely the rate of interest to be used in the actuarial calculations. The actuary at the trial gave figures based on interest rates ranging between 3½% and 5%. In his opinion the appropriate rate of interest would have been 4%. Although it was revealed in cross-examination that certain semi-governmental loans were recently issued at 4¾%, the actuary anticipated a fall to 4%. The trial judge rightly left it to the jury to determine the appropriate rate. Again it is not known what rate was applied, but if it was 3½%, there could be no objection. But even using 4%, in order to give the plaintiff £10 weekly (though £15 was agreed) for thirty years, we find that £9,170 would be necessary.[16] The adoption of the lower figure makes liberal allowance for any period of unemployment which would reduce the average wages over the year. So much for future wages, but added to this is the figure for loss up to the date of the trial. This was given as between £2,250 — £2,500. In round figures, therefore, loss of wages both past and future, could be reasonably said to be £11,500.

Other financial loss, i.e. expenses incurred or likely to be incurred for medical and other similar treatment. The medical expenses incurred up to the date of the trial were £1,298. But by far the most important question for the jury to answer with regard to medical expenses was the extent to which nursing attention would be required for the plaintiff in the future. Evidence was given firstly that a nurse would be required all the time to attend to the plaintiff's needs, secondly, that the cost per week of providing the nurse would be £15, and thirdly, that £15 capitalised at 4% for thirty years would yield a figure of £13,755. Strangely enough, the Court failed to direct its attention to this important item. Certainly for one item, £13,755 is a large sum; but the evidence to justify it was given at the trial, the jury was entitled to give the sum, and it is submitted the Court should have considered it. This sum together with the proved expenses of £1,298 would make the damages for medical expenses, both past and future, about £15,000.

A figure of £26,500 has thus been reasonably determined on the evidence. Yet three heads of damages remain to be dealt with.

Shortening of expectation of life: The two principles governing damages under this head are firstly, the damages must not be large and secondly, that they are awarded not for loss of years but for the loss of a prospective happy life.[17] It is submitted that a sum of £500 would not be unreasonable.

Pain and suffering: Nobody will contest the Court's statement that "no arithmetical calculation can fix the price to be paid to a plaintiff for his pain and

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[15] Actuarial evidence was that a man of 24 years of age has an expectancy of life of 45 years. However, it is submitted — and this seems to have been overlooked by the trial judge and the Court — that if a claim for wages lost between the date of the injury and the date of the trial is made (these were proved to be between £2250 and £2500), then the use of 45 years, the full period of expectancy, as a basis of calculation for lost wages, would result in duplication of damages for the period between the date of injury and the date of the trial. Accordingly, calculations for prospective wages should date from the date of the trial, i.e. a maximum of about 40 years only should be allowed, for the trial took place in 1953, nearly 5 years after the injury.

A loss of ten years' expectancy has been chosen here as being both favourable to the plaintiff (in accordance to Lord Wright's principle) and also reasonable on the evidence.

[16] These and other figures were given in evidence by the actuary.

[17] See *Benham* v. *Gambling* (1941) A.C. 157.

suffering, but this head of damage should not receive undue emphasis."[18] Again nobody will deny that the plaintiff in the instant case "whilst not suffering actual pain, suffered an ordeal which entitles him to substantial compensation."[19] The jury's duty under this head therefore, was to award the plaintiff a substantial sum, but to do so without undue emphasis. It is submitted that £1,000 would be so reasonable as to err on the side of inadequacy.[20]

Inconvenience and loss of enjoyment of life: The general remarks just quoted above would again be applicable under this head. Whereas, however, the Court expressed the view that "nature is merciful in that the quality of *pain* can never be recalled to recollection," such a view cannot be sustained with regard to inconvenience and loss of enjoyment of life resulting from a personal injury of an incapacitating and permanent nature. The resultant disability is lifelong. A wheelchair replaces his paralysed legs. He cannot turn over while lying in bed. Skin grafts are prophesied every two years — these will confine him to hospital for six weeks at a time.[21] His excretory organs have been permanently impaired. Is £2,000 too much?

If not, then, the sum total of the damages awarded under each of these five heads is £30,000. In other words, the question "was the assessment of the jury one that could reasonably be arrived at upon the evidence"[22] can be answered in the affirmative. Or again, it has been shown that the Court's conclusion that the award was "unreasonable and indefensible" is very much open to doubt.

This being the case, the second half of the Court's conclusion is also suspect, namely that "it is clear that the jury must have applied wrong standards or have included twice over damages for the same matters." Such an inference can only be made after the verdict has been found to be unreasonable.[23]

It is submitted however, that until juries are asked to itemize damages and to state the bases of their calculations, it can rarely, if ever, be clear that they have applied wrong standards or given double damages. In the foregoing analysis, great care has been taken to avoid these two pitfalls, and to make calculations upon the evidence presented. The fact remains, however, that it is not known how the jury actually arrived at its verdict. It is therefore submitted that it is of doubtful value to make sweepingly critical remarks about juries when it is not known how any particular jury has acted. Before the jury system is condemned it should be thoroughly diagnosed. The first step in the diagnosis should be a detailed statement from the patient itself. It is submitted that this would be achieved by the requirement of itemization.

It is not denied that the jury in this case *may* have applied wrong standards or given double damages. Assuming a finding of partial as opposed to total incapacity, together with the consequent finding of only partial loss of future wages, the use of a higher rate of interest, the finding that a nurse in constant attendance was an unreasonable, extravagant and unnecessary luxury, the finding of a shortening of expectation of life to the extent of twenty years — such findings would have greatly limited the sum of damages that could have been properly awarded under the first three heads. Perhaps, no more than £15,000 could then have been reasonably given in the circumstances. But if a sum total of £30,000 was still given, then a further £15,000 would have to be given for the last two items, i.e. pain and suffering, and inconvenience and loss of enjoyment of life. Quite understandably could the Court then have held that

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[18] (1954) 71 W.N. (N.S.W.), at 14

[19] *Id.*, at 21

[20] An examination of the cases mentioned by the Court would justify the sum.

[21] This was given in evidence.

[22] (1952) 52 S.R. (N.S.W.),*per* Herron J., at 203.

[23] *Electricity Commission of N.S.W.* v. *Brown* (1954) 71 W.N. (N.S.W.) 1, at 4. "The Court cannot always, and in fact perhaps it is seldom that it can, find some precise explanation of the jury's verdict, but this Court is entitled to infer that wrong consideration must have been present to the minds of the jurors if the amount awarded shows that the verdict was unreasonable."

the damages under these last two heads, and consequently, the damages as a whole, were unreasonably large.

Hocking v. *Bell*[24] well illustrates the freedom which a jury has in coming to a certain conclusion on the evidence. It is this freedom of movement which makes it possible for two different juries, taking two extreme yet permissible views of the evidence to come to two vastly different conclusions. It cannot be said that one or both of these juries is necessarily unreasonable. Thus, when assessing damages, e.g. in the instant case, it would have been just as competent and reasonable on the evidence for another jury to award £18,000, as it was for the actual jury to award £30,000. In neither case should the verdict be upset so long as in neither case wrong standards have been applied nor double damages given. And yet, appeals are being upheld and juries blamed for applying wrong standards and giving double damages. The absurdity and injustice of the present position is that the application of wrong standards or duplication of damages is tolerated so long as the resultant award happens to fall within the limits allowed by the Court. Just as litigants have the right to a legally unobjectionable summing up by the trial judge, likewise they should have the right to the benefit of a verdict which can be justified by the evidence and which contravenes no principle of law in the method of its computation, but not otherwise.

The root of the problem lies in the necessity of speculative inference by the appellate Court.[25] In the instant case, for example, without considering in its judgment the five heads of damage which by law a jury is required to consider, the Full Court concluded that the award was unreasonable and indefensible. Having done this, it exercised its right of inference to conclude further that wrong standards or duplication had prevailed. If juries were required to itemise there would be no need to make an inference shrouded with uncertainty.

This itemization would have further advantages. Firstly there would be clarified the much discussed question — whether juries are intelligent enough to follow the directions given by the judge, e.g. warnings against double damages. Secondly, it would reveal the extent of a jury's credulity, i.e. whether it believes the evidence which is most consistent with the truth or whether it is easily led astray by a "cock and bull" story. Thirdly there would be revealed their scale of values, i.e. whether reasonably fixed or subject to flights of fancy. It is in this third revelation that the part played by emotion would be clarified. For example, one might reasonably be excused for thinking that in a verdict for £30,000, emotion would have loomed large. And yet, the verdict for £30,000 in this case could be justified, even if only £3,000 were set aside for pain and suffering and inconvenience and loss of enjoyment of life — the two heads of damage in which appeals to the emotions could reasonably have been expected to have been more lucrative.

The tragedy of this case, like that of *Cullinan's Case*,[26] is that it may be hit as a shuttlecock from one court into another simply because the true basis of the jury's verdict has not been disclosed.

It is apparent that the present relation between the Full Court and the jury in this State is not satisfactory. A study of the judgment in *Hately* v. *Allport* reveals a conscious effort by the Court to cure the jury of extravagance. Assuming the malady to exist — itself a debatable question — it is submitted that specialist treatment can be administered only after the true causes have been determined, and that this requires not mere guess-work, but the assistance and cooperation of the alleged patient.

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[24] 75 C.L.R. 125.
[25] See *supra* n.23.
[26] (1952) 52 S.R. (N.S.W.) 199.