

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . A perusal of the notes of evidence has satisfied me that there was no evidence whatever to warrant the findings of the jury as to contributory negligence; and that the evidence upon the other issues preponderated in favour of the plaintiffs.

If it were not for the findings as to contributory negligence, I do not think that, according to the well-established rule as to setting aside verdicts of juries, the Divisional Court would have been warranted in setting aside the findings of the jury. . . . It is true that . . . their findings as to contributory negligence were not necessary to the success of the defendant. . . . If as to some of the issues the proper conclusion is that the jury did not discharge their judicial duty, but must have been influenced by some improper consideration, the defendant has no reason to complain if the conclusion is reached that the same vice affected the other findings. . . .

It is, in my opinion, of the utmost importance that the rule to which I have referred as to setting aside verdicts of juries should not be departed from. Departure from it results in adding more uncertainty to the proverbial uncertainty of litigation, generally results in loss rather than benefit to the party in whose favour the rule is relaxed, and always adds to the costs of the litigation.

I do not think that the direction that the new trial shall be had before a Judge without a jury ought to have been made. A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties, and I cannot believe that a fair trial cannot be had by a county of Carleton petit jury; and it is to be borne in mind, also, that, if the plaintiffs do not desire to have the case again tried by a petit jury, it is open to them to have a special jury summoned.

I would, therefore, vary the order of the Divisional Court by striking out the direction as to the mode of trial, and would in other respects affirm it and dismiss the appeal, and would make no order as to the costs of the appeal.