

that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. I am on the whole of opinion that on the evidence a recovery is warranted by the rules or principles established in *Pym v. Great Northern R.W. Co.*, 2 B. & S. 759, and in such cases as *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211; *Dalton v. South Eastern R.W. Co.*, 4 C.B.N.S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Wolfe v. Great Northern R.W. Co.*, 26 L.R. 1r. 548; *Blackley v. Toronto R.W. Co.*, 27 A.R. 44n; and others. The cases of *Renwick v. Galt, etc., R.W. Co.*, 12 O.L.R. 35, 37; *Clark v. London General Omnibus Co.* [1906] 2 K.B. 645, and *Jackson v. Watson* [1909] 2 K.B. 193, may also be referred to. The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference; and I would therefore affirm the judgment and dismiss the appeal.

Per GARROW, J.A.:—If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically; and I therefore agree—reluctantly, I admit—that there was evidence which could not have been withdrawn from the jury, and the judgment must therefore be affirmed.

MAGEE, J., who sat for Meredith, J.A., concurred. MOSS, C.J.O., and MACLAREN, J.A., dissented.

W. Nesbitt, K.C., and M. Lockhart Gordon, for defendants.
J. McGregor, for plaintiff.

HIGH COURT OF JUSTICE.

Divisional Court—King's Bench.]

[Sept. 7.

WOODBURN MILLING CO. v. GRAND TRUNK RY. CO.

Railway—Animal killed on track—Agreement for use of siding—Construction—Protection of railway from animals—Negligence—Leaving gate open—Duty of railway company—Implication of terms in contract.

The action brought in the County Court of Middlesex for the value of a horse killed upon the defendants' railway, owing, as