

The trial Judge did not direct the jury as to what evidence they were to consider or not to consider in assessing the damages; and it must be concluded that the jury took into consideration all the portions of the evidence improperly admitted, to the prejudice of the defendant.

In all the circumstances, the award of damages was excessive, and was materially increased by the wrongful acts and improper evidence complained of, and substantial wrong, within the meaning of sec. 28 of the Judicature Act, had been done. The Court should not deny the defendant a new trial simply because his counsel failed at the trial to object to the evidence and acts now complained of: *Gage v. Reid*, 38 O.L.R. at pp. 521, 523.

The judgment should be set aside and a new trial directed; the costs of the former trial and of this appeal to be costs to the defendant in any event.

MEREDITH, C.J.O., read a short judgment in which he said that he agreed that it was proper that there should be a new trial, though he did not subscribe to all that Ferguson, J.A., had said.

The learned Chief Justice said that he was always reluctant to interfere with the finding of a jury, and endeavoured to be on his guard against usurping the functions of a jury in a case in which they had come to a conclusion different from that which he had formed as to the result of the evidence; but, at a time like this, when the minds of the people were rightly inflamed against the Germans and Austrians, it was incumbent on the Court to guard against that feeling being used to the detriment of a litigant, and to be astute to see that where it has been played upon by the successful litigant he is deprived of any advantage thus unfairly obtained, and it is not unfair to presume against such a litigant that his effort has had the desired effect.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., read a judgment in which he examined with care the various objections made by the defendant now to the course taken and the evidence admitted at the trial, and concluded that there was no ground for directing a new trial—the appeal should be dismissed with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

*New trial ordered; MAGEE and HODGINS, JJ.A., dissenting.*