

An appeal by the defendant from a judgment of Divisional Court, 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137, affirming a judgment of HON. MR. JUSTICE RIDDELL, 19 O. W. R. 442; 24 O. L. R. 84; 2 O. W. N. 1328, in favour of the plaintiff.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

Sir George C. Gibbons, K.C., and J. C. Elliott, for the defendants.

T. G. Meredith, K.C., and J. M. McEvoy, for the plaintiff.

HON. MR. JUSTICE GARROW:—The action was brought against the defendant to recover damages sustained in consequence of the want of repair of a highway under the charge and control of the defendant. The learned Judge awarded the sum of \$12,500, as damages, and the only question really before us is whether or not such sum is excessive. The judgment of Riddell, J., is reported in 19 O. W. R. 442; 2 O. W. N. 1238; 24 O. L. R. 84. No written judgments were apparently delivered in the Divisional Court, so that we are pretty much in the dark as to the view there taken. See 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137.

In the reasons for appeal it is said, apparently without contradiction from the other side, that some members of the Court expressed the opinion that although the damages were much larger than they would have given, they would not interfere because the verdict is not so perverse and unreasonable that if it had been tried by a jury twelve intelligent men might not have arrived at the same conclusion. It is of course dangerous to trust in such a matter to the recollection of counsel, who may not remember accurately the whole statement. All, therefore, that I can say upon the subject is that if such a statement was made and was the foundation for the judgment, it does not express my view of what the law is upon the subject, because it apparently fails to discriminate between a trial by a Judge alone and a trial by a Judge with a jury.

The distinction is very clearly expressed by Bramwell, L.J., in *Jones v. Hough*, 5 Ex. D. 115, at p. 122, where he