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THE COURT OF APPEAL.

The measure before the local legislature, for appointing a sixth Judge of the Court of Queen's Bench, has elicited the emphatic disapproval of one of the Judges of the Court. Mr. Justice Ramsay took occasion, during the June term, to express, from his place on the bench, his conviction that the proposition was unwise, and far from being calculated to facilitate the administration of justice. According to a letter which Mr. Pagnuelo, a member of the Montreal bar, has published in the daily papers, the opinion of Judge Ramsay is shared by a majority of the Judges of the Court. Mr. Pagnuelo makes some observations upon the number of Judges sitting in appeal, which are worthy of attention :

" En effet, pourquoi demande-t-on un sixième juge ?

C'est pour obvier à l'inconvénient très-grave de ne pouvoir prolonger les audiences de la Cour d'Appel au-delà du terme de rigueur, par suite de la nécessité de détacher l'un des juges pour tenir la Cour Criminelle à Québec et à Montréal, deux fois par année. Les termes de la Cour Criminelle sont toujours très longs, surtout à Montréal, et au lieu de faire siéger la Cour Criminelle en même temps dans ces deux villes, on paraît attendre que l'une ait fini ses séances avant que l'autre ne commence les siennes.

Or les causes portées en appel à Montréal sont si nombreuses et l'arriéré si considérable depuis plusieurs années, qu'il est devenu nécessaire de faire siéger la Cour d'Appel presqu'en permanence à Montréal, du moins pendant 7 à 8 mois de l'année ; les termes actuels suffisent pour Québec. Avec un sixième juge pour présider la Cour Criminelle et servir de juge *ad hoc*, lorsque l'un des cinq autres juges est empêché de siéger, on obtiendrait ce résultat.

Tout le monde concourt entièrement dans ces vues.

Mais on obtiendrait le même résultat en exigeant la présence de quatre juges ni plus ni moins à la Cour d'Appel au lieu de cinq. Lorsque les quatres juges seraient divisés d'opinion, le jugement porté en appel serait confirmé. Pour les questions surgissant en Cour d'Appel même, les quatre juges seraient départagés par le cinquième, ou trois juges pourraient les décider, vu que ce ne sont toujours que des questions de procédure ou de compétence ou des affaires criminelles.

Ce système est de beaucoup plus logique que celui d'avoir cinq juges en appel. En effet si trois des cinq juges sont d'avis d'infirmer le jugement porté en appel, et deux de le confirmer, il est infirmé. Si l'on joint à la minorité le juge de la Cour de première instance, on se trouve avec un jugement infirmé par trois juges contre trois ; ce qui n'est pas raisonnable, puisque le premier jugement devrait avoir en sa faveur la présomption du bien jugé. Avec quatre juges seulement en appel, on ne rencontre pas cet inconvénient, car le jugement du premier juge est confirmé dans le cas de partage égal des voix en appel, ce qui donne sur les cinq juges saisis de la cause dans les deux Cours, une majorité d'une voix en faveur du jugement. Il ne pourrait être infirmé également que par une majorité d'une voix, savoir trois contre un en appel, ou si l'on ajoute à la minorité en appel la voix du premier juge, trois contre deux.

Quand le jugement de la Cour Inférieure a été rendu par trois juges unanimement, l'erreur de le faire infirmer par trois juges contre deux en appel, est encore plus sensible, puisque la minorité de trois contre cinq fait la loi.

J'ai raison de croire que cette opinion est partagée par presque tous les juges de la Cour d'Appel, sinon tous.

J'ajouterai en faveur de ce système l'opinion de Sir L. H. Lafontaine, et la composition de la Cour d'Appel dans la Province d'Ontario.

Une seconde raison également forte, c'est que ce sixième juge ne pourrait pas être obtenu avant un an, parce qu'il faudrait attendre la réunion du parlement fédéral, et l'adoption d'une seconde loi pour sanctionner le paiement de son traitement.

En attendant l'adoption de la loi qui ne serait sanctionnée probablement que le printemps prochain, et la nomination nouvelle qui se ferait encore attendre quelque temps, les affaires continueraient à souffrir à la Cour d'Appel ; tandis qu'en adoptant la suggestion

que j'ai l'honneur de soumettre, la Cour d'Appel pourrait commencer ses séances en septembre prochain, et les continuer presque sans désemparer; je dirais même "sans désemparer," si elle adoptait de suite le mode de plaider et de juger des tribunaux français et du Conseil Privé de Sa Majesté, et qui consiste à faire de la plaidoirie un délibéré public, et à rendre le jugement sur le champ dans la plupart des cas.

Enfin, une troisième raison, c'est que la Cour Supérieure demande une composition différente de celle qui existe aujourd'hui. Le sentiment général est favorable à la présence de trois juges pour les causes contestées. Il en faudra venir là, avant longtemps. Cette mesure exigera trois ou quatre juges additionnels pour la Cour Supérieure, ainsi que je l'exposerai prochainement dans une étude sur la *réforme judiciaire*.

Or le parlement fédéral ne consentira que difficilement à encourir les dépenses qu'entraîneront ces juges supplémentaires, et celles de la résidence à Montréal et à Québec de plusieurs juges qui résident aujourd'hui à la campagne, et enfin celles de 5 à 6 juges de comté, qui remplaceraient nos magistrats de district, et soulageraient d'autant notre trésor provincial ainsi que je le propose encore dans cette même étude. Il importe donc de ne pas faire de demande inutile, et même non strictement nécessaire, comme celle d'un sixième juge à la Cour d'Appel. Ce serait nuire à une mesure d'une extrême importance, celle de la réorganisation de nos tribunaux de première instance."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 15, 1880.

Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., CROSS, J.

BEAUDRY (deft. below), Appellant, and CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE NOTRE-DAME DE MONTREAL (plffs. below), Respondents.

Absolute obligation—Putting en demeure.

The appeal was from the judgment of the Court of Review, Montreal, March 31, 1879, which will be found in 2 Legal News, p. 126.

The reasons of the decision in appeal are fully set out in the judgment, which is as follows:—

"La Cour, etc.

"Considérant que par l'acte d'échange fait entre les parties, le 10 Sept., 1869, l'appelant s'est obligé de payer aux intimés une soulte de $75, lorsqu'il ferait construire son charnier ou monument sur le terrain par lui reçu en échange, avec stipulation que les intimés mettraient et garderaient les corps qui seraient exhumés de l'ancien cimetière, appartenant à la famille du dit Appelant, dans le charnier du cimetière de Notre-Dame de la Côte des Neiges, jusqu'à ce que le dit Appelant, ou ayant droit, eussent fait construire un charnier sur son dit terrain;

"Considérant qu'il résulte de l'objet des stipulations contenues au dit acte d'échange, des circonstances sous lesquelles elles ont été faites, et des stipulations elles-mêmes, que l'intention des parties était que le dit appelant construirait sur son terrain dans un délai raisonnable un charnier ou monument, pour y faire déposer les corps des membres de sa famille, et que la construction de ce charnier ou monument déterminerait le terme auquel la dite soulte serait exigible, et que les intimés cesseraient de garder dans leur charnier les corps des membres de la famille de l'Appelant, et que par le dit acte d'échange, l'Appelant a contracté l'obligation absolue de payer la dite soulte, et non l'obligation facultative ou conditionnelle de ne la payer que s'il jugeait à propos de construire un charnier ou un monument sur son terrain;

"Mais considérant que le délai dans lequel le dit Appelant devait construire ce charnier et payer la dite soulte n'a pas été fixé par leur convention, et qu'aux termes des articles 1067 et 1134 C.C., l'Appelant ne pouvait être contraint de payer la soulte stipulée au dit acte d'échange qu'après avoir été mis en demeure, soit par une interpellation judiciaire, ou au moins par une demande par écrit, de construire son charnier dans un délai raisonnable et déterminé par l'interpellation même, et de payer la dite soulte après l'expiration de tel délai;

"Et considérant que les intimés n'ont pas même par leurs conclusions demandé à ce que l'Appelant fut condamné à leur payer la dite soulte sous un délai raisonnable à être fixé par la Cour, pour permettre à l'Appelant de construire un charnier sur son terrain, mais qu'ils

ont conclu purement et simplement à ce que l'Appelant, à défaut d'avoir construit son charnier, fut condamné à leur payer la somme de $75, montant de la dite soulte, avec tous les intérêts sur cette somme à compter de la date du dit acte d'échange, lesquels intérêts ne pouvaient courir avant l'échéance du terme qui devait rendre le capital exigible ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 30 Nov., 1878 ; qui a adjugé que la stipulation relative à la construction du charnier était facultative, et rendait l'obligation de payer la soulte stipulée au dit acte, une obligation conditionnelle dépendant de la volonté du dit Appelant ;

" Et considérant qu'il y a aussi erreur dans le jugement rendu en révision le 31 Mars, 1879 ; et par lequel l'Appelant sans aucune mise en demeure régulière de remplir son obligation, a été condamné à payer aux intimés la dite soulte de $75 avec intérêt à compter du 17 Mai, 1872 ;

" Et vû les offres réelles faites par l'Appelant de la somme de $22.45, dont $19 pour l'usage du charnier des intimés, et $3.45 pour frais encourus avant le rapport de l'action et jusqu'à l'époque des dites offres ;

" La cour casse et annule les dits deux jugements, du 30 Nov., 1878, et du 31 Mars, 1879, et procédant à rendre le jugement que la dite Cour siégeant en révision aurait dû rendre, déclare les offres réelles faites par le dit Appelant de la dite somme de $22.45 bonnes et valables, et ordonne au Protonotaire de la dite Cour Supérieure de payer la dite somme aux dits intimés, et renvoie l'action des dits intimés quant au surplus de leur demande, et condamne les dits intimés à payer à l'appelant les frais encourus en Cour Supérieure à compter des offres faites par le dit Appelant, ainsi que ceux encourus sur le présent appel ;

" Et la Cour condamne l'Appelant à payer les frais encourus en révision ;

" Et la Cour réserve aux intimés tel recours que de droit pour recouvrer de l'Appelant la soulte stipulée au dit acte d'échange du 10 Sept., 1869." (*Dissentiente* l'Hon. M. le Juge TESSIER.)

Judge TESSIER's dissent was as follows :—" Je suis d'opinion d'infirmer ce jugement en raison d'erreur pour les intérêts, et de condamner l'Appelant à payer aux intimés le principal $75, avec intérêt du jour de l'assignation, et dépens de la Cour en première instance, mais avec dépens de révision et d'appel contre les intimés.'

Judgment reversed.

A. Dalbec for Appellant.

Béique & Choquet for Respondents.

COURT OF REVIEW.

MONTREAL, June 30, 1880.

JOHNSON, J., MACKAY, J., RAINVILLE, J.

HALL v. BRIGHAM et vir.

[From S. C., Ottawa.

Costs—The Superior Court in Review will revise a judgment where the only point in dispute is as to costs, and will reform an award as to costs which appears to be unjust.

The plaintiff brought his action against the defendants, husband and wife, to cancel the effect of the registration of a will of the late Dame Abigail Wright (Mrs. Brigham) against his property.

The defendants resided in Ottawa City.

The will had been registered by the male defendant, and by its terms purported to convey a portion of the property to the female defendant.

Before action plaintiff by letters requested the defendants to sign a cancellation of the registration of the will, and also caused a notary at Hull to prepare such a deed and requested defendants to sign it. They refused; the female defendant specially replying that she would not sign any deed at all.

Action brought, the male defendant confessed judgment but asked to be freed from costs, which plaintiff accepted.

The female defendant pleaded that she was not amenable to the Quebec Courts as she resided in Ontario, that the plaintiff had no action against her, she never having taken possession of any of the property bequeathed, &c. Conclusion for dismissal of the action.

Mr. Justice Bourgeois rendered judgment at Aylmer, giving the plaintiff all his demand, and ordering the cancellation of the registration of the will. He however condemned the plaintiff to bear his own costs, and to pay the female defendant her costs of contestation.

The plaintiff inscribed in Review on the question of costs between himself and the female defendant.

In plaintiff's factum there were cited the cases in Review, not reported, *Patterson* v. *Archambault*, No. 1,750, S. C., 30 November, 1876 (Johnson, Mackay & Papineau, JJ.), and *Bayard* v. *McMartin*, No. 1,449, 30 April, 1877) Mackay, Torrance & Rainville, JJ.), where the Court of Review had interfered and reformed a judgment on a question of costs.

MACKAY, J., after reviewing the facts, said the Court was unanimously of opinion to reform the judgment and award plaintiff his full costs both in this Court and the Court below. The female defendant was amenable to our law. She had been put in default, or rather when the plaintiff asked her to sign a deed at Hull, she said no, I will not sign that or any other deed; then to the action she filed a contestation.

JOHNSON, J., said after the argument he had no doubt the judgment should be reformed. The plaintiff was right in his action. The female defendant contested and filed a plea. The judgment in Review was illogical on its face. The plea of defendant was overruled, yet the plaintiff was condemned to pay her all her costs. The judgment will therefore be reformed as to costs and the plaintiff awarded full costs in this and the Court below.

The judgment is as follows :—

"The Court, etc.

"Considering that there is error in the said judgment as to costs only, on the issues between the plaintiff and the female defendant;

"Doth revise the said judgment as to costs, and doth condemn the female defendant to pay plaintiff all costs in both Courts," etc.

Macmaster, Hall & Greenshields for plaintiff.
Fleming & Co. for defendants.

SUPERIOR COURT.

MONTREAL, June 18, 1880.

HUGHES v. REES.

Alimentary allowance—Wife excluded by her husband from his house.

TORRANCE, J. The demand here is by a wife for alimentary allowance, and for permission to live apart from her husband. There is no difficulty in the cause, and no justification or excuse whatever for the husband in excluding from his home his wife, to whom he owes protection. Counsel cited *Lachapelle* v. *Beaudoin*, 1 Legal News, 581, to which may be added *Conlan* v. *Clarke*, 15 L. C. Jur., 263, and Revue Critique A.D. 1872, p. 470; also Carré & Chauveau, tom. 7, supplem. n. 2,981. J. Avoués, tom. 79, p. 520. Alimentary allowance of $1,200 per annum ordered.

Kerr, Carter & McGibbon for plaintiffs.
Robertson & Co. for defendants.

MEASURE OF DAMAGES FOR INJURY TO RAILWAY PASSENGER.

ENGLISH COURT OF APPEAL, DECEMBER 17, 1879.

PHILLIPS v. LONDON AND SOUTH-WESTERN RAILWAY CO. (42 L. T. Rep., N. S. 6.)

[Concluded from page 216.]

BRAMWELL, L. J. I am of opinion that there ought to be no rule. I will deal first with the last objection. Lord Coleridge is supposed to have told the jury in his summing up that they were to take £5,000 a year as the plaintiff's net income, and were not to make any deduction in respect of the precarious income composed of special emoluments. If the learned judge had said this I think it would have been inaccurate, for it would be fairly open to the jury, in estimating the plaintiff's average income, to say, "we cannot take in the special fees, for they are specialties which may not occur again." On the other hand I am of opinion that it would be equally wrong to say that the special fees ought to be altogether excluded from consideration. I am quite certain that the possibility or probability of their recurrence ought to be included. One may bear in mind the saying that nothing is so certain as the unexpected, and though a physician who has on former occasions received special fees of £500 may not be able to designate any other patient who will pay him another £500, still the probability is that in the course of his life he will have not only one but many other similar fees. But Lord Coleridge did not tell the jury that they were not to take into account the precarious nature of these fees. On the contrary, in the course of his summing up he says, "I do not see at all why, I will not say the wisdom, but why the confidence of the gentlemen who make these large payments should diminish, or their generosity either;" and he finishes in this

way: "I really do not see why these should be the only nine people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous, but you must give it such weight as you think fit; subject to that observation it comes to this, that it is about 5,000*l.* a year." Therefore Lord Coleridge did not withdraw the precarious nature of these fees from the jury, but in my opinion he dealt with it in his summing up with perfect propriety. As to the main question, undoubtedly if this case came before us, as so many do, where complaint is made of the amount found by a jury, and it is impossible to get at the elements upon which they decided, one would be inclined to take this view: there has been a verdict given; the court was dissatisfied with it, and granted a new trial; the case was then tried over again, and a case is always more satisfactorily tried upon the second than upon the first occasion, because the points on both sides are known, and can be more clearly put before the jury; the judge before whom the case was tried is not dissatisfied with the verdict, nor are the judges of the Divisional Court, before whom the case has been brought; it would therefore require a very strong case indeed to induce this court to set aside a verdict so given and affirmed. If we could not guess the ground upon which the jury proceeded, I should say there was nothing so extraordinarily wrong in what they had done as to induce the court to disregard the opinions of Lord Coleridge, and of the other judges before whom, after a second trial, the case has come, and who are satisfied with the verdict. But I do not think that we ought to dispose of the case in that way, because we can judge tolerably well as to the ground upon which the jury proceeded. I will assume that they gave the plaintiff 1,000*l.* for his pain and suffering, and three years' income at the rate of 5,000 a year. I cannot say that I think that wrong; on the contrary, I think it at least right. They ought, at any rate, to have given him as much as that, and the only misgiving which I have is whether they ought not to have given him more. Now, what is the proper direction for a judge to give to a jury in cases of this description? I think the direction given by Lord Coleridge in the present case is the usual and proper one. It is the common form of summing up, which after trying a very great number of these cases, I have never known questioned until now, and it comes to this: "You must give the plaintiff compensation for his money loss; you must give him compensation for his pain and suffering; of course it is almost impossible for you to do what can strictly be called 'compensate' him, but you must take a reasonable view of the case, and consider under all the circumstances what is a fair sum to give him." I think that is the stereotyped form in which the direction in such cases as this is given to a jury. As an instance, one often has the case of some unfortunate laborer who has suffered an injury, which has kept him out of work for, say, six months. He was making 25*s.* a week at the time when the injury was done; then you tell the jury "that is twenty-six weeks at 25*s.* a week; then he says that for ten weeks more he has only been able to earn 10*s.* a week, and you say to the jury, "that is ten times 15*s.*;" perhaps he also says that he will not be able to get into full work again for twenty weeks, and then you say to the jury "that is twenty times 15*s.*" To these amounts something is added for his doctor's expenses, and in that way one arrives at some kind of compensation for his pecuniary loss. In the case of a professional man, and where perhaps it may be impossible to get at any definite term during which the plaintiff will be unable to work, the direction to the jury would be, "You must consider for yourselves how long this gentleman will be incapacitated from carrying on his profession, and you must give him compensation in reference to that." Of course, it is in all cases open to the jury to say, "possibly the laborer might not have been able to get work," or "possibly the professional man might have lost patients." All these contingencies, where they properly arise, ought to be taken into account, and ought to be presented to the jury, but after all, the fundamental direction is this, "give the man a fair and reasonable compensation for his pecuniary loss." I have always understood this to be the right direction, and I have never heard it questioned until now, nor am I able to see in it any such wrong or anomaly as my brother Ballantine has pointed out. It is said

to be unreasonable that where two persons are carried for the same fare, one of them if injured should recover £10,000 against the company, while the other would only be able to recover £1,000. It may be unreasonable as regards the two passengers *inter se*, but it is not unreasonable as between the railway company and the public. The company have taken their powers upon certain conditions, and one of them is that if they break their contracts to carry they shall make compensation to persons injured by reason of the breach. If one man who has paid a half-crown fare recovers £1,000 damages from the company, and another man who has paid the same fare recovers £10,000, the legitimate conclusion may be that, as regards the two passengers *inter se*, the man who only recovers £1,000 may have paid too much for his ticket, and the man who recovers £10,000 may have paid too little, but between them they have paid that which is enough to compensate the company for the risk which they incur of becoming liable for injury to passengers. Here the defendants have entered into a contract, and having broken that contract they must indemnify the person with whom they made the contract for the loss which has been occasioned to him. In conclusion, I wish to point out what to my mind is the utter dissimilarity between the present case and that of *Hadley* v. *Baxendale*, 9 Ex. 341. In that case there had been delay in the delivery of a chattel, and the plaintiff put forward a claim for certain damages, not for injury done to the chattel itself, but consequential upon the delay which had taken place. In the present case the damages claimed are for injury done to the individual who was carried, and not damages claimed in consequence of his non-arrival at a particular place at a particular time. The analogy would apply more to a case where there were goods of different values than to a case of consequential damages for delay, such as *Hadley* v. *Baxendale*. The Carriers Act (11 Geo. 4 & 1 Will. 4, ch. 68) allows railway companies to charge an additional sum for insurance on a declaration being made of the value of certain specified kinds of goods, but there are many classes of goods which are not within the act, and, although of different values, such goods are carried at the same rate. I have gone into these different matters, which are perhaps not of any great consequence, because the whole effect of our judgment is that the set form of summing up has been observed in the present case, and there is no ground for supposing that the jury have given anything as damages beyond what that summing up authorizes and directs; I am therefore of opinion that a rule must be refused.

BRETT, L. J. I am also of opinion that we are bound to refuse a rule in this case. After the very great number of times I have had occasion to consider this question, I can have no doubt that the direction to the jury in this case was right according to the recognized rule of law. The action was brought for a breach of contract to carry a passenger, and damages are awarded for breach of that contract. Now the fundamental proposition undoubtedly is that damages are to be given which will as nearly as possible compensate the person with whom the contract was made for the breach and the injury resulting therefrom. The injury is complicated; it is an injury to the body, and in addition a further injury consisting of pecuniary loss. Now there has been for years a recognized mode of leaving the question as to the amount of damages to the jury. In the present case Lord Coleridge left it to them in this form—that the damages were to be such compensation as under all the circumstances of the case the jury thought was fair and reasonable, and to that he added afterward that the jury must not attempt to give an absolutely perfect compensation with regard to the money loss. Now I think both these propositions are correct, and that the reason why that general mode of leaving the question to the jury is right is that human ingenuity has not been able to formulate a more correct proposition. If one were to try to make a more correct proposition one would be sure either to state something wrong or to omit something that ought to be stated. As to the second part of the proposition—that is, the caution to the jury—the law is settled by authority; for in the case of *Rowley* v. *The London & North Western Railway Co.*, L. Rep., 8 Ex. 221; 29 L. T. Rep. (N. S.) 180, in the Exchequer Chamber it was held to be wrong to tell the jury that they could or ought to try to make an absolute compensation. That, I apprehend, means a perfectly mathematical or arithmetical compensation. The reason of that decision was, that it would be impossible for the jury to have

before them all the circumstances which would enable them to make such a compensation. In that case, Kelly, C. B. tried to direct the jury to a perfect compensation by telling them to calculate an annuity which would produce for a certain number of years, or for such years as they might think necessary, such a sum as the plaintiff was making yearly. The court in that case thought the direction wrong, because in attempting to make a perfect compensation the jury would of necessity leave out a number of circumstances which ought to be taken into consideration, but which no human ingenuity and no evidence which could be produced could bring before them. I am strongly of opinion that the decision in that case was right. Next as to the direction that the compensation to be awarded must be such as under the circumstances of the case should be fair and reasonable. That, as I have said, has been the recognized mode of summing up, because it is not possible to make a better one. But a judge would not properly assist a jury if he only left that bare proposition to them. It is necessary to point out some of the circumstances which they are to take into consideration, and in considering the pecuniary loss suffered by the person who has been injured, I can have no doubt, where the loss has been suffered by a person having a professional or trading income, that one of the principal factors to be considered is, what is the amount of that income. The learned counsel for the defendants, putting forward a view which is absolutely the converse of the decision in *Rowley* v. *London & North-Western Railway Co.* (*ubi sup.*), contends that the jury ought not to take the plaintiff's income into account at all. That would be strange indeed. It seems to me to be quite clear that they must take the income into account, but the question is, how? Now if Lord Coleridge had told the jury, as a matter of law, that if it had not been for the accident the plaintiff would have made £5,000 a year during the time he was disabled, I should have thought that a wrong direction, for although the plaintiff is still alive, yet a thousand circumstances might have prevented him from making that income if he had remained well, and the accident had not happened. But Lord Coleridge did not direct the jury in that way. He told them that they were to consider what was the average income which the plaintiff had been making, that the defendants had thrown no real doubt upon the plaintiff's evidence, that he had practically been making £5,000 a year, and that, unless they could see any circumstances which in any probability would have made that income less, they might well take it that the plaintiff would have made that income during the time he was disabled. I think that was right. Lord Justice Bramwell has pointed out generally the mode in which the earnings of a working man ought to be dealt with in similar cases. But they would be dealt with in the manner pointed out on the assumption that there were no circumstances which would have prevented the working man from earning the same wages during the period during which he was disabled in consequence of the injury. If, for instance, the defendants were able to prove that the plaintiff had worked in a mill in Lancashire, and that during the time between the accident and the trial all the mills in Lancashire had been closed, the jury ought to consider that fact and say whether the plaintiff would have earned the 25*s.* a week during that period if he had not been injured. As to compensation for money loss for the time to come, supposing the plaintiff had not been injured, there are a thousand circumstances which might have prevented him from earning a fixed income. He would have been subject to the ordinary illnesses of life, and to the ordinary vicissitudes of trade, and when one considers all those circumstances, of which no evidence could possibly be given, it is beyond the region of practical life that any accurate arithmetical compensation could be given. No doubt the jury would be wrong if they did not consider those circumstances as upon the doctrine of chances. It is impossible to give evidence of them, and the judge can only leave it at large to the jury, telling them that all the circumstances and possible chances are to be taken into account, and that they must give what twelve men of ordinary sense consider a fair and reasonable compensation, but without attempting to make it an absolutely accurate and mathematical compensation. I agree that it is a wrong direction to the jury that the proved income is the basis—in the sense that it is to be the only basis—of compensation; but Lord Coleridge did

not so direct the jury. He only said to them that it was a fact, or one of the circumstances (to my mind in estimating the money loss it is the main circumstance), which ought to be taken into account. Therefore that objection is founded upon an incorrect supposition as to what the direction to the jury really was. It is said that there is an anomaly because a small practitioner, who had paid the same fare as another person who was making a large professional income, might receive 500*l.* while the other received 15,000*l.* for similar injuries caused by the same accident. But although the personal injury is the same in both cases, the pecuniary loss is not; for the small practitioner might lose perhaps 300*l.*, while the other lost 13,000*l.*; that is no anomaly. I think it is right to say that to a working man and to a person of great wealth the same amount of compensation should be given for personal injuries, if the pain and suffering is the same. You should give to each of them the amount of the expenses actually sustained, but with regard to the pecuniary loss incurred, you should give each as reasonably and nearly as you can something to repay the loss actually sustained. I can see no anomaly or injustice in this mode of leaving the case to the jury. The fundamental reason for this mode of summing up I have always understood to be that no more accurate definition can be given, and the law does not require an impossibility. I think, therefore, that the only way in which the question can be left to juries in the future is the way in which it has been left to them for so many years in the past.

Cotton, L. J. I agree that there should be no rule. The plaintiff having established his right to recover judgment against the defendants is entitled by way of damages to a fair and reasonable compensation for his suffering and for his money loss. The defendants complain of misdirection as to the latter head of compensation and their contention amounts to this, that in estimating the compensation the income which the plaintiff was earning ought to be entirely disregarded. That amounts to saying that in estimating the money loss it is necessary to leave out of sight that which really constitutes the money loss, viz., the loss of that income which if it had not been for the accident the plaintiff would have earned, and which he was prevented by the accident from earning. I am of opinion that it is impossible to disregard the income in estimating the money loss. Then there remains the question as to whether the income was properly taken into account in the present case. I propose to state my views as to how it ought to be taken into account. It is impossible by any mathematical calculation or rule of three sum to arrive at a fair and reasonable compensation for money loss, but the nature of the income must be taken into account, and the probability of its continuance, and how far it depends on favor, and how far on exertion which may or may not be carried on for long, and having taken into consideration all the circumstances affecting the income, the jury ought to say what is a reasonable sum to award as compensation. Of course they ought not to give the amount of the income as an annuity for the rest of the injured person's life, nor ought they to assume that the income would always continue as it was at a particular time, but taking into consideration all the circumstances affecting it, I think that the income must be taken as a basis of compensation. Lord Coleridge told the jury to give a fair compensation for the money loss. He laid before them all the evidence as to the plaintiff's income and as to the special fees, and told them to consider whether the plaintiff's evidence was a fair representation of what the income was and what it would have been likely to be. I am of opinion that it would have been wrong to exclude the special fees entirely from consideration, for when a man has arrived at such a position in his profession as to receive many large special fees, it certainly is for the jury to consider whether he would not have received similar fees in the future. I think the question was properly left to the jury. It was contended on behalf of the defendant that in estimating the damages the fact that the plaintiff had an income of his own independently of his professional earnings ought to be taken into account. I do not think this is so, for it does not make the money loss any less that the plaintiff has an independent income. I think the question ought to be considered with regard to his suffering, for he is likely to suffer more from the bodily injury if deprived of his means of support, and so is unable to provide himself with that which may alleviate his sufferings. I am of opinion that the Division Court were right in refusing a rule.

Rule refused.