

and therefore the Court held, and I think held very properly, that although it was a case of Poor Law settlement and of consequent liability, it was not truly a case of recurring liability, because no one could say that such a case would arise again. On the other hand, it was held in the case of *Buie v. Stiven* (1863, 2 Macph. 208) that where the liability was a continuing liability the limit should not apply. Now, I point out that that decision must be subject to this observation, that although it was given on the footing that the liability might occur again, and probably would occur again, there was no certainty as to that, because, of course, the pauper in question might have died, and his death would put an end to any question of relief in the future. Accordingly, the common-sense test seems to me to be simply this—in the whole circumstances of the case, is the Court asked to decide a practical question of continuing liability or is it not? I do not think that is affected by whether there is a declaratory conclusion as there was here in the second conclusion, and that is why I am not affected by the striking out of this second conclusion by the minute of restriction. On the whole matter I am of opinion that the liability here is a continuing liability, and that, accordingly, the objection to the competency of the appeal is not well founded.

LORD M'LAREN—I agree. It should be kept in view that the question of competency depends upon the statutory exclusion of the review of the Court of Session in cases below the value of £25, and therefore it lies with the party who takes the objection to the appeal to satisfy the Court that the value is less than £25; and if he is not able to do that, because the value may or may not amount to that sum, then it appears to me that he fails in his objection to the appeal. It is quite settled, as I think, by authority, that where there is a pecuniary claim, and a claim to be relieved from future payment, that is an action *ad factum prestandum*, and is not struck at by the pecuniary limitation of the right of appeal. But then I agree with your Lordships that, even where there is no express claim of relief, yet if the pecuniary claim which is the immediate subject of the action necessarily leads to the same determination in regard to future years, the decision would really be *res judicata* with regard to the liability for future years. The value of the action is then not to be limited to the sum concluded for. Now I think in coming to this result we are in no way in conflict with the principle of the case of *Den v. Lumsden* (1891, 19 R. 77), as expounded by the late Lord President, because there the man died in the course of the litigation, and therefore it became quite certain that no further liability could ever arise than the liability which was the subject of the conclusion of the action; but it is a very different thing to extend the principle to this case on the ground that the conclusion as to future liability is cut off by a minute of restriction. The minute of restriction

does not destroy the claim. It only makes it impossible to have the matter of future liability determined in this action, but leaves the claim to be followed out if necessary by competent process in the future. Whether that restriction was put in to exclude the appeal or not, I think it does not effect the end of excluding the appeal, because, notwithstanding the restriction, it still remains a conclusion, and therefore the decision as to the claim for £11 odd will rule subsequent advances on account of the pauper. Although it is possible that the pauper may die before the advances amount to £25, yet as the time of death is a matter of uncertainty we cannot tell that the advances will not reach £25, and therefore I say it cannot be affirmed by the objector that the value of the case is less than £25, and that the appeal is excluded. I am therefore for holding that this appeal is competent.

LORD KINNEAR—I concur.

LORD PEARSON—I am of the same opinion.

The Court repelled the objection to the appeal and sent the case again to the roll.

Counsel for the Pursuers—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for the Appellants and Defenders (Row Parish Council)—Dean of Faculty (Campbell, K.C.)—Orr Deas—Carment. Agents—Reid & Crow, Solicitors.

Counsel for the Defenders (Glasgow Parish Council)—Clyde, K.C.—William Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Johnston and a Jury.]

CASEY v. UNITED COLLIERIES, LIMITED.

Reparation—Damages for Personal Injury —Excess of Damages—New Trial.

In an action of damages for personal injury at the instance of a miner, who at the date of the accident was earning thirty-three shillings a-week, the jury found for the pursuer and assessed the damages at £750. The medical evidence for the pursuer was in direct conflict with that given for the defence; the pursuer according to the former being permanently disabled, while according to the latter he had at the date of the trial almost completely recovered, and would be fit to resume work after three or four months. The defenders moved for a new trial on the ground of excessive damages, and obtained a rule.

The Court refused to disturb the verdict, holding that the sum awarded, though larger than the Court sitting as a jury would have given, was not

one which no reasonable jury would have awarded.

“The only ratio, therefore, on which it appears to me the Court can disturb a verdict on the ground of an excessive award of damages, is when the Court can say—‘These twelve men have found this, but it is not a verdict that twelve ordinary men would find’”—*Per Lord President.*

In December 1905 Campbell Casey, miner, 15 Green's Buildings, Birkenshaw, Larkhall, raised an action against the United Collieries, Limited, 109 Hope Street, Glasgow, in which he sued for £750 at common law, or otherwise for £257, 8s. under the Employers' Liability Act 1880, as damages for personal injury.

The Sheriff-Substitute (DAVIDSON) having allowed a proof, the pursuer appealed for jury trial. The case was tried before Lord Johnston and a jury on 11th, 12th, and 13th July 1906, when a verdict was returned for the pursuer for £750 damages at common law.

On 28th November 1906 the Court granted a rule to show cause why the verdict should not be set aside and a new trial granted, on the ground of excess of damages.

The case now came up on the rule.

On 8th July 1905 Casey and his son were at work in one of the defenders' pits, when a fall took place, instantaneously killing his son and seriously injuring the pursuer. At the time of the accident the pursuer was fifty years of age, was married, and had a family of seven daughters and a son, six of whom were living with him, and four of whom were young. His wages were thirty-three shillings a-week. His son's wages were about ten shillings a-week. His two eldest daughters were able to earn about eight shillings a-week. From the medical evidence for the pursuer, given by his own medical attendant and corroborated, it appeared that the pursuer had sustained severe spinal injuries, and would never be able for any manual labour which involved stooping and rising, that he might possibly be able to sit and write, that he might be fit for such work as that of a checktaker or timekeeper, but that he would never be able for manual work of a heavy kind involving physical exercise, that he would never be able to use a hammer or saw wood, or to perform labouring work such as stonebreaking or porter's work.

The medical evidence for the defenders was in direct conflict with that for the pursuer. It appeared, however, that the doctors who had examined the pursuer for the defence had only done so on the day of the trial, that the examination was a somewhat cursory one, and that the pursuer was not stripped, the examination only lasting ten minutes or a quarter of an hour. The doctors deponed that the pursuer at the time of the trial had completely recovered from the injury to his spine; that the only remaining effects of the accident was a slight stiffness, which would pass away in three or four months; that after that period he would have completely recovered, and

be fit for work as a miner. Both the doctors for the defence were in the employment of the Mineowners' Association.

Argued for pursuer—The jury were entitled to accept and had accepted the evidence for the pursuer. On that evidence the award must stand. The elements to be taken into account in considering the amount of damages were (a) the injuries sustained, (b) the pain and suffering involved, and (c) the loss of business; taking these into account the award was not excessive. The pursuer's earnings were about £82 a year; ten years' wages at half that amount came to £410; medical attendance, which had been going on for eighteen months and was likely to continue, would cost, say £100; these sums, together with a sum for *solatium*, say £200, amounted in all to £710. The jury awarded £750, and the Court would not grant a new trial for a difference of £40. To be set aside the award must be extravagant. Reference was made to the cases of *Landell v. Landell*, March 6, 1841, 3 D. 819; *Shields v. North British Railway Company*, November 24, 1874, 2 R. 126, 12 S.L.R. 120; *Young v. Glasgow Tramway and Omnibus Company, Limited*, November 29, 1882, 10 R. 242, 20 S.L.R. 169; and *M'Master v. Caledonian Railway Company*, November 27, 1885, 13 R. 252, 23 S.L.R. 181.

Argued for defenders—The award of damages here was extravagant and should be set aside. The medical evidence was contradictory, but there was no evidence that the pursuer was confined to bed even for a single day; that he had to pay for medical attendance; that he could not be and was not attended to by the works' doctor; that he would not in time recover. Taking the case on the evidence for the pursuer, many occupations were still open to him, for it was only heavy manual labour that he would not be able to do. A sum of £300 would have been ample. Supposing he lost five shillings a week—i.e., £13 a-year—for ten years, that would mean £130. He had lost already, say, £66. Adding £100 for *solatium* that would amount in all to £296, say £300. Reference was made to *Wallace v. West Calder Co-operative Society, Limited*, January 13, 1888, 15 R. 307, 25 S.L.R. 458.

At advising—

LORD PRESIDENT—This is a motion for a new trial on the ground of the damages having been excessive. I have considered this matter very carefully, all the more that upon reading the evidence I think the pursuer here has got too much, but I cannot consistently with the long chain of authorities hold that this is a case in which your Lordships ought to order a new trial, and I am of that opinion for this reason. I think it is clear that the jury did give the damages upon their view of the conflicting medical testimony, because after all the damages here really depended on the medical evidence. It depended upon the medical testimony as to what was in all probability the permanency of the injuries. Now, when one looks at the medical testimony one

sees that there was a sharp divergence of opinion, and that anybody's opinion—one's own opinion—would have very much depended on the view which one took of the medical evidence. I am not altogether surprised, looking at one aspect of the medical evidence of the defenders, that the jury took an unfavourable view of that evidence; and from the explanations which we have received from his Lordship who presided at the trial I think that seems extremely likely. In other words, I think it not at all improbable that the case could have been better presented from the defenders' point of view as regards medical testimony. Now it is certain that a new trial is not to be granted merely in order to set people right again against their own statement of the case. Moreover, in the view of the medical testimony which I think it likely the jury took, I think any of us might have given a verdict of damages—not, I think, as great as the jury gave—but a verdict of damages that would have approached such a sum as would have made it not in accordance with practice to grant a new trial on account of excess of amount.

There are many authorities which deal with the matter, most of which were quoted to us, but I do not think that the views of the whole Court in the case of *Landell* in 3 D. have ever been gone back upon. And I make this further observation that it seems to me that the grounds for disturbing a verdict on account of an excessive award of damages ought to be much stronger than they are for disturbing a verdict as being contrary to evidence, because in the one case there is, and in the other case there is not, what may be called certainty. If a bench of trained judges comes to the conclusion that a verdict is not supported by evidence, I think you may take it that if anything human is right that is right. In cases where a jury has given a verdict which is contrary to law, I think it only right that such a verdict should be set aside and a new trial given, so that a more reasonable jury may come to another conclusion. On a mere question of *quantum* of damages, while a judge would, by long experience, probably be a better appraiser of damages than a jurymen, still at the same time there is no certainty that he would be right, for in this matter there really is no standard of right. After all is said and done, the assessment of damages for personal injuries is, as people say, a very haphazard operation as to which there is no certainty, and the law accordingly has taken as the standard the amount which twelve ordinary men shall think right. The only ratio, therefore, on which it appears to me the Court can disturb a verdict on the ground of an excessive award of damages is when the Court can say—"These twelve men have found this, but it is not a verdict that twelve ordinary men would find." Looking to the fact that practically the jury were entitled to assess such damages as they might consider sufficient, and to the fact that the verdict in question is not one which no twelve reasonable men could have given, I am of opinion that the application should be refused.

LORD M'LAREN—I think in this case the jury have given a great deal too much, but the setting aside of a verdict on the ground of excessive damages is rather an exceptional thing and it is certainly largely a question of discretion, and upon the whole matter I am prepared to concur with your Lordship.

LORD KINNEAR—I am of the same opinion. I think with both of your Lordships that the award of damages is too high. But the general rule upon this subject is, that in an action of damages for personal injury the amount is entirely in the discretion of the jury, subject, of course, to the correction of the Court if there is any exorbitant excess or any unreasonable inadequacy in the award. The grounds on which the Court may upset an award and order a new jury trial were very carefully considered by the whole Court in the case of *Landell v. Landell* (3 D. 819), when the question was submitted to the whole Court for the express purpose of furnishing a rule by which future decisions should be guided. As I understand the rule laid down by that decision it comes to this, that the Court ought not to set aside an award for excessive damages unless it is satisfied that, either from wrong intention or from incapacity, the jury have perpetrated an injustice and have given higher damages than any reasonable jury fairly performing the function of their office could have given. I think, therefore, the question of damages is really a jury question, and I think so for the reason your Lordship has already given—that there is no standard by which in such a case damages can be measured except the reasonable judgment of ordinary men. No sum of money would afford an exact equivalent for the consequences of an accident which unfits a man during the rest of his life for the ordinary work by which he was living; and, on the other hand, it would be plainly unjust that persons who, though legally responsible for an accident, are not in many cases chargeable with any great degree of actual culpability, should have to maintain him during the rest of his life. And therefore it is impossible that we should lay down a rule for the jury, or lay down a rule for ourselves in considering the jury's verdict, that would afford any better guide than that which your Lordship has stated, and I rather think a direction to a jury which has been generally approved, and which certainly has often been given in cases of this kind, is that they ought not to attempt to fix damages at the full amount of compensation for the injury that a man has suffered, but that they should take a reasonable view of the case and give what they consider in the circumstances to be fair compensation. I do not think it advisable to lay down any more exact rule, and therefore I do not think we can disturb the jury's award unless on stronger grounds than any presented here.

I only add that I entirely concur with what your Lordship has said as to the effect of the evidence. I do not express any opinion for myself, but I do think there

was evidence before the jury on which they were entitled to consider that the pursuer had been permanently injured and in a very painful manner. The questions were argued on the motion for a new trial, but I observe that the strongest points argued were not raised by any cross-examination of witnesses for the pursuer, and if these witnesses are contradicted by medical witnesses for the defenders, there are reasons, to which your Lordship referred, why the jury should regard the one side and disregard the other. I therefore agree that the rule should be discharged.

LORD PEARSON—We are asked here to set aside a verdict on the plea that the damages awarded are excessive. The grounds on which, and on which alone, the Court will interfere in a matter of this kind were explained long ago in the cases of *Landell* (1841, 3 D. 819) and *Adamson* (1849, 11 D. 680). Taking our volumes of reports as the test, one finds that such applications are rarely made, and still more rarely granted. I doubt if there are as many as half-a-dozen reported instances of a new trial being granted on this ground since the re-introduction of civil jury trial into Scotland in 1815. In the present case, while the amount awarded by the jury is larger than I should myself have given, I am quite unable to reach the conclusion that we ought to disturb the verdict. It is perhaps not very profitable to examine the various items of which the claim is composed, for we have no means of knowing what view the jury entertained upon any of them. But I may mention one consideration of importance, namely, that on the medical evidence I think it clear that this must be taken as a case of permanent total incapacity caused by the injury complained of. The evidence would amply justify the jury in holding that pursuer will never be able to work as a miner again, and that he will not be fit for any manual labour which involves stooping and rising, nor even for using a hammer or sawing wood. For a working miner of the age of fifty that is a serious outlook. Now, his wages amounted to about £80 a year. He had lost one year's wages at the date of the trial, and if the jury added four years' wages this brings the figure up to considerably more than one-half of the amount awarded, leaving *solatium* out of account; and certainly the jury would be warranted in adding a very substantial sum in name of *solatium*. Now, Lord President Inglis in the case of *Young v. The Glasgow Tramways Company* (1882, 10 R. 242) said—"In order to justify a new trial being granted I think we must be satisfied that the sum is altogether so extravagant that no other jury would repeat it. It seems to me that unless it can be said that the verdict ought not to have been for more than one-half of the sum awarded, there is not, according to our practice, any room for interference." Applying these tests, it follows that in the present case we should not be justified in allowing a new trial.

LORD JOHNSTON—When I received the verdict in this case I was so struck with the amount of damages found by the jury that I came at once to the conclusion that if a new trial were applied for it should be granted. I have reconsidered the subject and cannot say that my views personally have in any way changed, and they were views adopted when the matter was fresh in my mind. I, however, do not think I should be justified in formally dissenting from your Lordships' unanimous judgment. And I am the more reconciled to this course by the fact that the conclusion I came to with regard to the medical evidence was somewhat different from that which your Lordships have taken. I did not consider that the jury weighed the medical evidence on the one side against that on the other, but that they were annoyed or irritated by the way in which the defenders' evidence had been prepared, and the circumstances under which it was given, and I was and am satisfied that this was the determining matter which influenced their verdict. Now that does not indeed justify their giving, in consequence, excessive damages, but the fault of leading their medical evidence in such a way rests with the defenders themselves, and this somewhat reconciles me to the refusing them a new trial, because parties who have carelessly conducted their case are not readily to be allowed another opportunity of laying their evidence in a better form before a new jury.

The Court discharged the rule, of consent applied the verdict, and decreed for payment to the pursuer of £750.

Counsel for the Pursuer—Crabb Watt, K.C.—J. H. T. Robertson. Agent—Alexander Wylie, S.S.C.

Counsel for the Defenders—Watt, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Ardwall, Ordinary.]

SCARLETT v. LORD ABINGER'S TRUSTEES AND OTHERS.

Succession—Vesting—Acceleration—Trust—Direction to Entail Heritage when Disencumbered of Debts—Offer by the then Prospective Institute of Entail to Pay off Debts.

Testamentary trustees were, *inter alia*, directed to hold estates and to pay off the debts thereon, and when the estates were disencumbered to execute a deed of entail thereof in favour of a series of heirs, the institute being, subject to an exclusion on a particular ground, the then possessor of a certain peerage.

Held that the then prospective institute of entail, *i.e.*, were the lands to be