Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lambkin v. *The South-Eastern Railway Company, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered February 3rd,* 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an action brought against the South-Eastern Railway Company of the Province of Quebec to recover damages which the Plaintiff sustained by reason of an accident to a train in which he was a passenger. The Plaintiff obtained a verdict, with damages $7,000. The Railway Company applied to the Superior Court of Montreal for a new trial upon a number of grounds, including misdirection, the verdict being against the evidence, and the damages being excessive. That Court unanimously expressed themselves satisfied with the verdict, and refused a new trial. Upon this the Defendants appealed to the Court of Queen's Bench. The Court of Queen's Bench, as their Lordships understand, expressed their approval of the verdict, or, at all events, expressed no disapproval of it upon any ground except that of excessive damages; and upon that ground alone directed a new trial. From that judgment of the Court of Queen's Bench the present Appeal is preferred.

It has been sought to uphold the judgment upon grounds other than that on which it was

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pronounced—viz., that the verdict, in as far as it finds negligence on the part of the Company, is against evidence, and that the Judge misdirected the jury. With respect to the verdict being against evidence, it appears to their Lordships, as indeed they have before intimated, that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by two Courts, is not open under the ordinary practice to the Defendants. However, the Defendants have argued, as they had a right to argue, the question of misdirection; and the direction of the learned Judge cannot be considered altogether apart from the evidence to which it applies.

Without going at length through the evidence, it is enough to say that the Plaintiff was a passenger on the 13th August 1874 on the Defendants' railway, and that the accident occurred at a point between the station of Abercorn and the station of Sutton, the distance from one to the other being about 5½ miles; that the line between the two stations is intersected by a number of streams, which are all spanned by bridges, and at times, perhaps generally, contain but little water, but are apt to be flooded after storms. It appears that on the evening before the accident, the 12th August, a violent and most unusual storm had occurred, perhaps in the nature of a water-spout, which carried away five out of six bridges between the two stations. The next morning, at about half-past six, the train in which the Plaintiff was travelling dashed into the bed of one of these streams, of which the bridge had been demolished, without any warning whatever having been given to the driver of the train. The result was that some persons were killed

and many injured—the Plaintiff among them. It was the duty of four men, headed by one who is sometimes called "the boss," to look after the railway between these two stations, a part which would appear to require more than usual care and attention. It was the duty of these men, upon the occurrence of the storm, and some of the bridges being washed away to their knowledge on the previous evening, to use all exertions in their power to stop the train which was coming in the morning. Of two of these men we hear nothing. A third, Doran, who lived at a house rather more than a mile from Sutton, was called; and he speaks of a bridge close to his house being carried away, and of his apprehension that other bridges would be carried away, and says that upon starting on the line in the direction of the Abercorn station in the morning at about four o'clock he was unable to proceed. He then went to the Sutton station, and requested the station-master to telegraph to Abercorn, but it was ascertained that the telegraphic communication was interrupted. Doran, who had borrowed a horse, returned to his own house and planted a flag at the place where the bridge opposite to his house had been demolished; but instead of riding on to ascertain the state of the bridges between his house and Abercorn, he put the horse up and contented himself with remaining where he was. It appears to their Lordships that the jury might have come to the conclusion fairly upon the evidence that if he had ridden on he might have arrived at the place where the accident occurred in time to stop the coming train. White, the foreman or "boss," was not called. He appears to have done but little. He was aware, according to some evidence, that one of the bridges had been washed away as early as four o'clock in the morning. He appears to have made no effort to go beyond

the bridge at Doran's house. The time he arrived there is not very clearly fixed. If it was, as Doran says, at a quarter before six, he would have had time to stop the coming train, which, although due before, did not arrive till half-past seven. Whether he was there at that time or not, it appears to their Lordships that upon the evidence the jury were warranted in the conclusion that he was guilty of negligence.

The summing up of the learned Judge must be taken with reference to the circumstances of the case and to the evidence. The following passage has been picked out and objected to: "First of all, was there time to "give notice? That, of course, is easily "answered; there was time. Then, was there "a possibility of doing it? That is the ques- "tion." Their Lordships have read through the summing up of the learned Judge; and although he may not have explained the law quite as clearly or fully as might have been desired, they are unable to see that he has misdirected the jury. He appears to have put to them as a question of fact whether there was time for either of the men to have got to the place of the accident so as to stop the train; and further, whether, if there was time—that is, if there had been time under ordinary circumstances,—there were physical obstacles, such as the unusual depth of the intervening streams, which would have prevented it; for, undoubtedly, during a portion of the night all the streams were so deep as to be scarcely passable, whereas in the morning the mountain flood had subsided almost as rapidly as it had arisen. The duty of the servants of the Company must be taken with reference to the emergency; and the jury might be properly told that those persons who had charge of the line ought, and were bound, to do all they could to stop the train which

was rushing on destruction. It appears from the summing up, taken as a whole, that the learned Judge, when using the word "possibility," meant to put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case. Their Lordships, therefore, are of opinion that there was no misdirection.

We now come to the question whether the damages were excessive. It appears that the Plaintiff was found soon after the accident with his head jammed between two pieces of timber, that it took two or three hours to release him, which was done by cutting away the timber; that he was then conveyed to Richford, a place at no great distance, and was attended to by two or three surgeons, among others, by a surgeon of the Company. The surgeon who first saw him, or at all events who saw him very soon after the accident, is a Mr. Fassett, who thus describes his injuries:—"The wounds upon the "face were—a cut upon the right side of the "lower jaw; and above that, near the ear, there "seemed to be a bruise. Upon the forehead, "near the right, was a cut; it seemed to be "simply a cut. Over the left eye there was a "severe bruise, which seemed to have been "caused by pressure rather than a blow. That "was the idea it gave me on examining it. The "wound on his thigh was a lacerated and punc-"tured wound. He lay upon the bed, apparently "not noticing things around him, restless, "tumbling about, not heeding anything appa-"rently that was going on." He goes on to say that the man was from time to time delirious, and adds: "I think I gave an opinion at the "time at Richford that his condition was danger-"ous then, and if he recovered at all he would "probably not fully recover, and I am still "inclined to favour that opinion." He attributes

the injury of the brain to pressure, his theory being that the two sides of the skull were to a certain extent pressed together. The Plaintiff was attended by Mr. Hamilton, a surgeon employed by the Company to take care of the wounded, and he gives a description of the state of the Plaintiff not materially different from that of the last witness. He says the Plaintiff was delirious for two or three weeks when he attended him; that he was subsequently removed, and that he had seen but little of him between the time of the accident and the time of the trial, which was just twelve months. He expresses no very confident opinion about his state. He thinks he may recover, but will not undertake to say that he will or to fix any probable time for the recovery. We have further the evidence of Dr. Gibson, the medical attendant of the Plaintiff, who speaks of him as being in a very dangerous state at Richford, so dangerous that at one time his life was despaired of. He does not speak to having attended him very much subsequently, for his physical health appeared to have improved, and he says very candidly that he thought medicine would do him little good; but he speaks to having had a conversation with him shortly before the trial, from which it would appear that his brain was still affected; not that he was idiotic or insane, but that his conversation was rambling, and that he was unable to fix his ideas upon any subject or to attend to business. This witness also declines to give an opinion as to whether the man would ever thoroughly recover, although possibly he might recover.

There is a considerable body of other evidence. The Plaintiff calls his brother, his cousin, and some neighbours, the effect of whose evidence may be shortly stated to be that the Plaintiff was in partnership with his brother, the Plaintiff

being the elder and the more active partner; that they carried on business as builders, and that the Plaintiff did the work of an architect,—was capable of designing a house or public building and seeing to the execution of his design; that they carried on business as manufacturers of cabinet and other articles; that the Plaintiff also, being an active and industrious man, from time to time charged $3 or $4 a day for his own work, in addition to the profit on the work of the labourers he employed and on his materials; and that the two brothers were making some $5,000 or $6,000 a year. The evidence, though not perhaps as conclusive as might be desired on this subject, is to the effect that the business had to a certain extent suffered. The brother said that he had to refuse some orders which otherwise he would have accepted; there is evidence on his part, and also that of the neighbours, of the business having fallen off; it is obviously probable that the business would fall off, more perhaps in future years than at once. There is further evidence that the Plaintiff, although before the accident a strong vigorous man, with much capacity for business, became incapacitated for business; that he was weak and languid in physical health, and unable to fix his attention continuously upon one subject, from the time of the accident up to the time of the trial. One witness, a Director of the Company, who can scarcely be supposed to be biassed against them, says: "I have tried to talk business "with him lately. I did not find him the "same man that he used to be. If he goes "to talk about business, he wanders directly "and gets astray. I cannot say but what this "must affect his fortune. He has not been "engaged in building since the accident. I do "not think he was able to do so."

On the part of the Company Dr. Scott was called, who said that he did not think that the symptoms complained of by the Plaintiff could arise from compression of the skull, inasmuch as he thought that, at the age of the Plaintiff, the skull would not be compressible without fracture. The further effect of his evidence appears to be that he thought, from the description which he had heard of the injuries, that the Plaintiff ought to have recovered; therefore that he had recovered, and therefore that he must be feigning illness. He says that, without having seen the Plaintiff, he is as confident in his opinions as if he had seen him, a confidence which appears to their Lordships to contrast unfavourably with the caution with which the evidence of the other medical men is given.

Assuming the jury to have believed the evidence on the part of the Plaintiffs, their Lordships think that they would have been wrong if they had confined the damages, which they had to assess once and for all, solely to what the Plaintiff had lost at the time of action brought or at the time of the trial; that it was their duty to take into consideration that the Plaintiff had been disabled for twelve months; that he had not then recovered, and that it was doubtful, according to the best evidence, whether he would recover at all, or, if he did recover, when he would recover; and although an estimate of future damages must necessarily be of a somewhat rough and speculative character, still that they were bound to give him some damages in respect of the future loss which he would sustain.

The learned Judges appear to have directed a new trial upon the supposition that the jury only gave damages in respect of what the Plaintiff had lost at the time either of action brought or of the trial, and that

those damages are excessive. Such is the view certainly of Mr. Justice Sanborn, who says: "It is impossible that three or four weeks' "iliness and more or less loss of time for some "months of a man who earned four dollars a "day could occasion a loss of $7,000." Their Lordships may observe that Mr. Justice Sanborn seems not to have been quite correct in estimating the loss of the Plaintiff as of a mere labourer who earned $4 a day, inasmuch as the evidence is that the Plaintiff not only earned $4 a day in addition to the profit upon his workmen and materials, but carried on business as a manufacturer. It appears to have been inferred that the jury intended to assess damages only up to the time of the trial, from their answer to one of the questions put to them in the articulation of facts. But their Lordships are by no means satisfied that such was the intention of the jury. They are first asked:—"Has the Plaintiff ever "since the sad accident been disabled from "doing business, and to what extent is "he disabled from attending to business? "Answer.—He has been disabled up to the "present time;"—that is to say, they did not think him cured. Then this question is put, which divides itself into three:—"Is the "Plaintiff the head of a family composed "of his wife and three children? Are they "all dependent upon his labour for their "maintenance? Have they ever since been "deprived of his labour, and to *what extent* "*in the future will they be deprived of his* "*labour?* Answer.—He is the head of a family "consisting of a wife and three children; one, "a son, is not dependent; wife and two girls "dependent." The answer to the second part of the question is:—"They have been deprived;" and to the third, the jury answer that they cannot form a judgment.

Their Lordships scarcely understand on what principle this question should have been put to the jury. The question in the cause was not what damage had been sustained by the Plaintiff's wife and children, but what damage had been sustained by himself. If he had been killed, and such an action as that brought under Lord Campbell's Act in this country could be maintained in Canada, then the question would be what damage was sustained by his wife and children. But the jury are further asked, "To "what extent in the future will the wife and "children be deprived of his labour?" which seems to mean, "For what time will the wife and "children be deprived of his labour?" It had been originally proposed to put the question in the form:—"For what time, under probable "circumstances, or in all probability, would they "be deprived?" But on the Defendants' objection the question stands in its present form, and the jury are required to fix the time when the Plaintiff will recover. They declined to do what no witness, medical or otherwise, had attempted, but their Lordships do not therefore infer that when they answer the further question, "Has the "Plaintiff suffered damages by the said accident, "and, if so, to what amount?" they excluded all consideration of future loss. If they had thought that the Plaintiff would be disabled for all the rest of his life, in their Lordships' view the damages would be too small; but if they adopted the intermediate view, which seems to be, on the whole, the result of the evidence of the Plaintiff's witnesses, medical and otherwise, that the Plaintiff had been seriously injured, that he still continued to suffer, that his brain still continued somewhat affected, that he was unable to attend to business, and that it was uncertain whether he would ever recover, although he might recover, their Lordships feel unable to say that the damages given were so excessive as to justify

a new trial upon that ground. They observe that the law of Canada, as expressed by Article 426, section 11, is not far different from that of this country upon this subject: "If the amount "awarded be so small or so excessive that it is "evident the jury must have been influenced by "improper motives or led into error, then a new "trial must be granted." On the whole, their Lordships are by no means satisfied that the damages are of such an excessive character as to show that the jury have been either influenced by improper motives or led into error, and they are of opinion that there ought to be no new trial.

Therefore, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench be reversed, that the judgment of the Superior Court of Montreal be affirmed, and that the Appellant have the costs of the Appeal in Canada and of the Appeal to Her Majesty in Council.