

v. *National Bank of Scotland, Limited*, 1909 S.C. 1038, per Lord M'Laren, 46 S.L.R. 730; Evidence Act 1852 (15 and 16 Vict. cap. 27), secs. 3 and 4; *Robertson v. Stewart*, 1874, 1 R. 532, 12 S.L.R. 514; *Hoey v. Hoey*, 1884, 11 R. 578, 21 S.L.R. 407; *Begg v. Begg*, 1887, 14 R. 497, 24 S.L.R. 367; *Gracie v. Stuart*, 1884, 11 R. (J.) 22 at p. 23, 21 S.L.R. 526.

Argued for the pursuer—The motion should not be allowed. The new averments in the minute did not constitute a condescendence of *res noviter veniens ad notitiam*. They were not pertinent to the issue, and if they had appeared on the original record they would have been struck out as irrelevant. The defenders had failed to state in the minute how the new facts they now averred had come within their knowledge, or that the defender could not have had earlier knowledge of them. Merely new evidence was not allowable—*Longworth v. Yelverton*, 1865, 3 Macph. 645, per Lord President M'Neill at pp. 648-649, and Lord Curriehill at p. 651. Proofs were closed for the purpose of imposing a limitation on the conduct of trials, which otherwise might be protracted indefinitely. Counsel also referred to *Allan v. Stott*, 1893, 20 R. 804, 30 S.L.R. 728.

The Court (LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE) *eo die*, without delivering any opinions, pronounced the following interlocutor:—

“The Lords, under reservation of all objections, allow the minute to be received as a condescendence of *res noviter*; and appoint the pursuer, if so advised, to answer the same within fourteen days from this date.”

Counsel for the Pursuer—Solicitor-General (Morison, K.C.)—Fraser, K.C.—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Moncreiff, K.C.—Gentles. Agents—Macpherson & Mackay, S.S.C.

Thursday, March 6.

FIRST DIVISION.

[Lord Anderson, Ordinary.

M'KIERNAN v. CORPORATION OF GLASGOW.

Reparation—Jury Trial—Excessive Damages—Solatium for Death of Infant Son.

A child of working class parents, both of whom were under thirty years of age, was killed by being thrown from a tramway car owing to the negligence of those in charge of the car. The child in question was a son aged six months. The parents had one other child, a daughter about two years old. In an action for *solatium* for the death of the child in question the parents deponed that they missed their son very much. A jury having awarded £250 in name of dam-

ages, held that in the circumstances the damages were excessive.

John M'Keirnan, boiler and steam-pipe coverer, 12 Newton Street, Partick, pursuer, brought an action against the Corporation of Glasgow, defenders, concluding for decree for £250 damages for the death of his infant son, alleged to have been caused by the fault of the defenders' servants.

The case was tried before Lord Anderson and a jury.

The evidence led for the pursuer was to the following effect:—The pursuer was twenty-nine years of age and his wife was twenty-five. At the date of the accident (1st April 1918) they had one other child, a daughter about two years old. The pursuer's wife, who was carrying the child in question, aged six months, was thrown off a tramway car, and the child was so seriously injured that it died the following day. The only evidence as regards *solatium* was to the effect that the pursuer and his wife felt the death of their son very much.

The jury having found for the pursuer, assessed the damages at £250.

The defenders obtained a rule upon the pursuer to show cause why a new trial should not be granted. At the hearing on the rule the following authorities were referred to:—*Landell v. Landell*, 1841, 3 D. 819, per Lord Justice-Clerk (Boyle) at p. 822; Lords Fullerton, Mackenzie, Jeffrey, and Murray at p. 825, and Lord Cockburn at p. 826; *Adamson v. Whitson*, 1849, 11 D. 680; *Horn v. North British Railway Company*, 1878, 5 R. 1055, per Lord Ormidale at p. 1075, 15 S.L.R. 707; *Young v. Glasgow Tramway and Omnibus Company, Limited*, 1882, 10 R. 242, per Lord President Inglis at p. 245, 20 S.L.R. 169; *Middlemas v. North British Railway Company*, 1893, 1 S.L.T. 12; *Casey v. United Collieries, Limited*, 1907 S.C. 690, 44 S.L.R. 522; *Thoms v. Caledonian Railway Company*, 1913 S.C. 804, 50 S.L.R. 498; Glegg on Reparation, p. 115.

Counsel for the defenders offered £100 to the pursuer, which offer counsel for pursuer stated that he was willing to accept in the event of the Court being of opinion that the damages were excessive.

LORD PRESIDENT—We are asked to set aside this verdict on the sole ground that the amount awarded by the jury is excessive. The sum claimed was £250, and the jury have awarded the whole sum claimed. They were confronted, as your Lordships are confronted, by what appears to be an almost impossible task—to measure a parent's grief for the loss of an infant, in pounds, shillings, and pence. But our law allows such an action, and however difficult it may be to estimate the amount of damage we must face the task.

Now the pursuer was a boiler and steam-pipe coverer in Glasgow. His child was five or six months old. It was not killed at the time when the accident actually took place, but died afterwards from injuries then received; and the sole evidence in the case is that he and his wife were much attached to their child. There are, therefore, no peculiarities of any kind or specialties of

any kind in this case. The jury was asked to award what was a reasonable compensation to this man, in this situation in life, for the loss of his only son, six months old.

In awarding the full sum claimed in the summons the jury were, in my opinion, giving what is known in our law as an excessive award. When I say so I adopt, as many of our predecessors have adopted, the standard laid down in the case to which we have been referred, and to which Courts have often been referred—the case of *Landell v. Landell*, 1841, 3 D. 819. I cannot express my view of the law better than it is done in the joint opinion of Lords Fullerton, Mackenzie, Jeffrey, and Murray, where they say—"It is clear that in order to warrant the application of the term 'excessive' the damages must be held to exceed, not what the Court might think enough, but even that latitude which in a question of amount so very vague any set of reasonable men could be permitted to indulge. The excess must be such as to raise on the part of the Court, the moral conviction that the jury, whether from wrong intention or incapacity or some mistake have committed gross injustice, and have given higher damages than any jury of ordinary men, fairly and without gross mistake exercising their functions, could have awarded." Or to use the language in subsequent cases we are not entitled to set aside the jury's verdict on the ground of excessive damages unless the damages awarded are "palpably extravagant and unreasonable," unless they are "outrageous," unless "a palpable hallucination had come over the jury" (as Lord Jeffrey put it), or the award is "altogether so extravagant that no other jury would repeat it," or unless we think "the verdict ought not to have been for more than one-half of the sum awarded."

Now in this case I do not think the award should be for more than one-half the sum awarded. In short, I think that half the sum awarded would have been an extravagant verdict. But counsel for the defenders here have offered £100 as reasonable, and as we think this verdict cannot stand, counsel for the pursuer agreed in that event to accept £100. I think we should be doing justice here, and giving what is a reasonable award in the circumstances—and it is always a jury question what that is—in respect of that offer and acceptance we fix £100 as a reasonable sum in this case. And in that view we shall not direct a new trial.

LORD MACKENZIE—I am of the same opinion. Applying the law as it has been laid down in a series of cases, and especially as put by Lord President Inglis in the case of *Young v. Glasgow Tramway and Omnibus Company, Limited*, 1882, 10 R. 242, 20 S.L.R. 169, I am of opinion that the sum of £250 in the circumstances of this case is altogether so extravagant as that no jury would repeat it; that the jury in no view was entitled to return a verdict for more than one-half that sum having regard to the rank in life of the pursuer, to the wages he was earning, to his age, to the family that he had, and to the circumstances of the accident.

What exactly should be the sum to represent the *solatium* we might have a difficulty in fixing, but we have been relieved from the necessity of estimating the amount in consequence of the offer of £100 which has been made by Mr Sandeman on behalf of the defenders—an offer which was accepted by counsel for the pursuer conditionally upon our taking the view that the amount awarded was excessive.

LORD CULLEN—I entirely concur.

LORD ANDERSON—I also agree.

LORD SKERRINGTON was absent.

The Court discharged the rule and refused to grant a new trial, of consent applied the verdict, and in respect of a joint minute for the parties assessed the damages at £100 in the place of £250 contained in the verdict, and decerned against the defenders for payment to the pursuer of the said sum of £100.

Counsel for the Pursuer—J. A. Christie—E. O. Inglis. Agents—Manson & Turner MacFarlane, W.S.

Counsel for the Defenders—Sandeman, K.C.—Garrett. Agents—Campbell & Smith, S.S.C.

Saturday, March 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

NEILSON v. THE FARME COAL COMPANY (1915), LIMITED.

Master and Servant—Workmen's Compensation—Remit—Competency—Termination of Compensation—Omission to Apply for Suspensory Order—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (1) (b) and 16.

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, in respect that the appellant's incapacity, due to injuries resulting in the loss of his left eye, had ceased, terminated the compensation. In a stated case for appeal he stated that no evidence was led before him to the effect that the workman's wage-earning capacity in the open market would be prejudicially affected on account of the injury sustained by him, and that no motion was made for a suspensory order. At the hearing on the appeal the appellant moved the Court to remit the case to the arbitrator in order that he might submit to his consideration the propriety of pronouncing a suspensory order. The Court (*dub.* Lord Cullen), on condition of the workman paying the expenses of the stated case within eight days, remitted the case to the arbitrator to consider whether in view of the fact that the workman was a one-eyed man, the compensation ought to be ended or suspended.

Mulligan v. Corporation of Glasgow, 1917 S.C. 450, 54 S.L.R. 352, followed.