1931
*Nov. 9.

PHILIAS DUPÉRÉ (PLAINTIFF) ..... APPELLANT;

AND

MONTREAL TRAMWAYS LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Jury trial—Trial judge—Charge—Misdirection—Common fault—Annuity table—Estimate of damages—New trial—Exception to the charge—Presence of the judge when made—Arts. 466, 467, 498, 500, 506 C.C.P. —Supreme Court Act, ss. 47, 48.

In an action for damages brought by the appellant for injuries suffered by him as the result of a collision between his horse-driven truck and one of respondent's tramcars, the jury rendered a verdict in favour of the appellant for $23,040, the full amount claimed. But the appellate court ordered a new trial on the ground of misdirection by the

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Smith and Cannon JJ.

(1) (1901) Q.R. 10 K.B. 481.

trial judge in not instructing the jury properly as to the application to the case of the doctrine of common fault, and as to the use to be made of annuity tables by the jury in arriving at the amount of the verdict.

Held that the order for a new trial pronounced by the appellate court should not be interfered with.

Per Anglin C.J.C. and Smith J.—It is unnecessary to decide the question whether or not the respondent was entitled *as a matter of right* to the order for a new trial made by the appellate court, as the result of the trial is so unsatisfactory that this court in the exercise of its own judicial discretion, inherent and statutory, ought to affirm such order.

Per Duff, Rinfret and Cannon JJ.—As to the question whether counsel for the respondent, at the trial, has "duly excepted to such misdirection" by the trial judge in the manner provided for by article 498 C.C.P., the circumstances of this case and the entries in the book of proceedings show that there has been a sufficient compliance with the requirements of the code. Moreover, *per* Duff, Rinfret and Smith JJ., this being a matter of practice and procedure, the judgment of the appellate court should be clearly wrong before this court ought to reverse it.

Per Duff, Rinfret and Smith JJ.—The fact that no mention of a by-law of the city of Montreal applicable to the case was made by the trial judge, in his charge made in French, (although asked to do so), and also the manner in which it was referred to in his charge made in English, amounted to a refusal "to instruct (the jury) on a matter of law" (Art. 498 C.C.P.) and constituted an additional reason for granting a new trial.

Judgment of the Court of King's Bench (Q.R. 50 K.B. 414) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duclos J., in favour of the appellant and ordering a new trial.

The appellant was conducting a horse-driven truck out of a yard when he noticed a street car, some distance away; thinking that he had sufficient time to cross the tracks, he continued his way, but the tram-car struck the wagon killing one of the horses and throwing the appellant on the pavement, causing him serious injuries. The appellant brought an action in damages against the respondent company, and the latter alleged in its plea that the appellant was to blame in driving his truck in front of a moving tram-car when so close as to render the accident inevitable. The jury found the appellant was blameless and having in no way contributed to the accident and assessed the damages at $23,040, the full amount claimed. The trial

(1) (1931) Q.R. 50 K.B. 414.

1931

DUPÉRÉ v. MONTREAL TRAMWAYS CO.

judge rendered judgment according to the verdict. The respondent then appealed to the Court of King's Bench, first, on the ground that the damages awarded were excessive, and also on grounds of misdirection: first, as to the doctrine of common fault, and, second, as to the use to be made of annuity tables in assessing damages. As to the question of common fault the trial judge made the following remarks: "That question is put to the jury because both parties might be at fault, but, as a rule, I would say that in nine cases out of ten, there is no such a thing as a common fault; there is generally one determining fault that causes the accident, and the other one is not a contributing fault in the sense of the law. I might say, with due respect to my fellow judges, that the common fault is often only an easy way to decide a doubtful case. When it is not quite clear who is at fault, they say: Both at fault, and let it go at that." As to the question of the annuity tables, the trial judge gave these directions: "D'après les tables d'assurance, à trente ans, s'il était normal, il devrait vivre trente-cinq ans de plus. On vit plus longtemps que cela des fois, mais il y en a qui vivent moins longtemps; trente-cinq ans c'est la moyenne. Et à cet âge-là, pour acheter une rente viagère de cent dollars, cela lui coûterait dix-sept cent quatre-vingt-deux dollars ($1,782) et pour deux cents dollars ($200) le double et ainsi de suite. Si vous arrivez à la conclusion que quand il était normal il gagnait mille dollars ($1,000) et qu'aujourd'hui il ne peut pas gagner plus, disons, que cinq cents dollars ($500) ce sera une *base* avec la table d'assurance, pour établir le montant des dommages que vous devez accorder pour cet item-là. Ce sera un guide pour vous aider. Vous direz : il perd cinq cents dollars ($500) par année. Si pour se rattrapper il veut acheter une pension viagère, il faudra qu'il paie cinq fois dix-sept cents quatre vingt-deux dollars ($1,782). S'il verse entre les mains d'une compagnie d'assurance dix-sept cent quatre-vingt-deux dollars ($1,782) la compagnie va lui payer cent dollars ($100) par année pour le reste de sa vie. Les rentes viagères plus vous êtes jeune, plus ça coûte cher. Quand vous êtes vieux, ça ne coûte plus bien cher. Cela n'est pas une règle absolue, c'est seulement un moyen, une indication pour vous aider à arriver à une conclusion."

The Court of King's Bench set aside the verdict and ordered a new trial on the ground that the trial judge had misdirected the jury in these two important respects and substantial prejudice had thereby been occasioned. The appellant then appealed to this court and urged as his first ground of appeal (which was also raised before the Court of King's Bench) that the objections to the particular statements made by the trial judge in his charge to the jury were not taken at the proper time. Under the Code of Civil Procedure (art. 498),

a new trial may be granted:

* * *

3. When the judge has misdirected the jury or refused to instruct them on a matter of law, and the party complaining has duly excepted to such misdirection or refusal.

But the causes for a new trial, mentioned in this paragraph,

can be ascertained only by means of the minutes of trial, and when the party has caused his objections to be entered therein.

(art. 506, C.C.P.). With regard to the minutes of trial, the code contains the following provisions:

466. The prothonotary keeps, under the direction of the judge, full minutes of the proceedings at the trial, including all admissions, and all exceptions taken, or objections made, orally in court.

467. A copy of such minutes is made out by the prothonotary, and, after being certified by the judge, is filed of record, and is held to be the true record of all proceedings mentioned therein, and stands in lieu of any bill of exceptions by either party against the evidence or the trial.

What took place after the learned trial judge had completed his address to the jury is recited thus in the minutes of trial:

Les jurés se retirent aux fins de délibérer.

* * *

M. Vallée fait quelques exceptions à l'adresse du juge et M. Genest y répond. Le tout est sténographié.

The material parts of the stenographic report referred to and thereby incorporated in the minutes of the trial read as follows:

Me Genest, C.R., conseil du demandeur:

La cour voudrait-elle demander aux parties si elles désirent que quelque chose soit ajouté à votre charge?

Le juge: C'est après que le jury sera retiré. (Les jurés se retirent. Le juge aussi se retire.)

Exceptions à la charge du juge aux jurés.

Après la charge aux jurés, alors que le juge et les jurés se sont retirés de la salle d'audience, Me Arthur Vallée, C.R., avocat de la défenderesse, fait la déclaration suivante:

1931

DUPÉRÉ v. MONTREAL TRAMWAYS CO.

Le procureur de la défenderesse excipe respectueusement de la charge du juge aux jurés pour les raisons suivantes:

* * *

Parce que le président du tribunal n'a pas éclairé suffisamment le jury sur les dispositions du règlement 890 de la cité de Montréal, et surtout sur les dispositions de l'article 64 du contrat entre la cité de Montréal et la compagnie défenderesse;

Parce qu'il a mal défini la faute commune et mal avisé les jurés, en leur disant qu'il ne pouvait y avoir faute commune en l'occurrence, de même qu'il les a mal avisés en référant au montant nécessaire pour payer une annuité.

Under the above circumstances the effect of the judgment of the Court of King's Bench is that the manner in which the objections were taken was a compliance with the articles of the code sufficient to found a judgment ordering a new trial.

R. Genest K.C. and *B. Robinson* for the appellant.

Arthur Vallée K.C. for the respondent.

ANGLIN, C.J.C.—After giving full consideration to this case and to the arguments of counsel for the appellant and respondent, respectively, I am of the opinion that it is not possible for us to interfere with the order for a new trial. Having reached this conclusion, I abstain, as is our custom, from comment on the evidence or discussion of the facts. Without necessarily agreeing with the view of the Court of King's Bench that there had been sufficient compliance by counsel for the respondent company with art. 498 (3), I think that, in a proper exercise of judicial discretion, we should refrain from interfering with the order pronounced by that court. The trial already had, having regard to the manner in which the case was presented by the learned trial judge to the jury, cannot, as a whole, be regarded as other than most unsatisfactory.

It is almost impossible to say whether the jury was, or was not, properly instructed as to the application to the case at bar of the doctrine of common fault. Indeed, what was said by the learned trial judge may well have been taken by some members of the jury to amount to a withdrawal from its consideration of that issue. Yet, there certainly is evidence in the record of circumstances from which it might be inferred by the jury, as a reasonable deduction, that the plaintiff was not entirely free from fault.

Upon the other point of alleged misdirection, viz., as to the use to be made of annuity tables by the jury in arriving

at the amount of their verdict, the charge is also unsatisfactory, because, although it may not be possible to point to any particular statement of the learned judge, in the course of his directions in regard to the use the jury might make of these tables, as clearly erroneous, the charge was "out of harmony with the ideas that have always obtained as to the manner in which a jury should deal with" such tables, when presented for its consideration. Nor does the charge, read as a whole, so qualify or modify the effect of either of these objectionable features as to render them clearly inocuous. This case does not fall within art. 500 C.C.P.

Personally, I should have been prepared to accept our decision in *Barthe* v. *Huard* (1), as conclusive that a new trial should be had in this case, even if counsel for the defendant had failed to comply with the requirement of art. 498 (3) in regard to taking exceptions to the charge at the trial, before verdict, and in the actual presence of the trial judge. But I understand that some of my learned brethren take a different view of the decision in *Barthe* v. *Huard* (1). I, therefore, do not base this judgment upon it.

There, no objection to the charge was taken at the trial, although formal objections in writing were filed after verdict, on the morning following the hearing. Notwithstanding this state of facts, however, this court, reversing the Court of King's Bench, ordered a new trial. To quote from the judgment of Davies J., concurred in by Girouard and Duff JJ., a majority of the court,

> While the judge's charge to the jury was not objected to as a whole, objection was taken to a particular part of it in which the judge told the jury that "they should consider the case as if the charge of drunkenness had been made against themselves, their brother or their friend."
>
> I cannot but think that this was an entirely wrong and false doctrine to lay down as to the proper functions of a jury. It was calculated to mislead their minds as to the manner and extent to which they should assess the damages or make their findings.
>
> It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it he would have corrected the apparently misleading direction before the jury had retired, or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.
>
> This only goes to shew the imperative necessity of Courts of Appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to

(1) (1909) 42 Can. S.C.R. 406.

1931

DUPÉRÉ v. MONTREAL TRAMWAYS CO.

Anglin C.J.C.

the jury will be considered or given effect to when it is shewn that objection has been taken to them at the time when their misleading character can be corrected before the jury.

A converse case came to this court in *Lamontagne* v. *Quebec Light, Heat & Power Company* (1), of which the headnote reads, in part, as follows:

> Where no objection has been taken to the judge's charge to the jury at the trial and it does not appear that any substantial prejudice was thereby occasioned there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure.

Here, the objections on both points of misdirection by the learned trial judge are to be found formulated in the stenographer's notes which were, apparently, made part of the minutes of trial referred to in art. 506 C.C.P., and, on that ground, would seem to have been treated by the Court of King's Bench as having been properly taken as exceptions under art. 498 (3), C.C.P., and as entitling the respondent to a new trial *as a matter of right.* It is said, however, by counsel for the appellant that, although these objections are found in the stenographer's notes, those notes also shew that they were taken after the learned judge had left the bench and while the jury was deliberating, and that they were not known to the trial judge until after the verdict. In answer to this, counsel for the respondent assures us that they had been stated, in substance, to the learned judge before he left the bench and that they were inserted in the stenographer's notes by his express direction. I find it unnecessary to pass upon the question of fact raised by this regrettable contradiction.

In my view, it is also unnecessary now to decide the question discussed by this court in *Barthe* v. *Huard* (2), and impliedly passed upon in *Lamontagne v. Quebec L.H. & P. Co.* (1), as to whether or not the respondent was entitled, *as a matter of right,* to the order for a new trial made by the Court of King's Bench, since I think that the result of the trial already had is so unsatisfactory that we should, in the exercise of our judicial discretion, inherent and statutory (R.S.C., c. 35, s. 47), affirm the order of the Court of King's Bench for a new trial. Without, therefore, involving art. 495 C.C.P., and without expressing approval or disapproval of the ground on which the Court of King's Bench based its order, I accept its conclusion.

(1) (1914) 50 Can. S.C.R. 423. (2) (1909) 42 Can. S.C.R. 406.

The costs of the appeal to this court shall be to the defendant in any event of the cause, to be set off against the amount of any verdict which the plaintiff may obtain on a new trial.

This somewhat unusual disposition is made in ease of the plaintiff, who might otherwise be embarrassed by having to pay these costs forthwith. As a price of this concession in favour of the plaintiff, I think it reasonable to order the set-off directed,—the whole in the exercise of the discretion conferred on us by s. 48 of the *Supreme Court Act.*

The judgment of Duff and Rinfret JJ. was delivered by

RINFRET J.—For the reasons given in the judgment of the Court of King's Bench, we agree that the particular statements referred to therein and made by the learned trial judge in his charge to the jury were of a misleading character and substantial prejudice to the respondent must have been thereby occasioned. (Art. 500 C.P.)

The appellant urged that the misdirection complained of could not be made the ground of an order for a new trial, because, as he alleged, the objections to the misdirection were not taken at the proper time.

It is not disputed that the objections were taken before verdict. Further, we must hold that they were entered in the minutes of trial as required by art. 506 C.P. They form part of the stenographic report. The minutes of trial state the fact that the objections were made and refer to the stenographic report for the purpose of ascertaining what the nature of these objections was. But the contention is that they were taken after the judge had retired, and, therefore, at a time when the misleading character of the charge could not be corrected before the jury.

The article of the Code of Civil Procedure dealing with this question reads as follows:—

498. Subject to the qualifications stated in the next following articles, a new trial may be granted in any of the following cases:

* * *

3. When the judge has misdirected the jury or refused to instruct them on a matter of law, and the party complaining has duly excepted to such misdirection or refusal.

The French version uses the word " objecté " as the corresponding word for " excepted."

1931

DUPÉRÉ v. MONTREAL TRAMWAYS CO.

Rinfret J.

It will be noticed that the article provides for two distinct cases: the first is misdirection and the second is non-direction. When there has been non-direction, the judge must be asked to instruct the jury on the point of law he has omitted to discuss; and if he refuses, exception must be taken to his refusal. When there has been misdirection, all that is required, according to the decision of the Court of King's Bench, is that the party complaining should have "duly excepted to such misdirection."

That is precisely what the respondent has done in the present case. The entry is as follows:—

"Le procureur de la défenderesse excipe respectueusement de la charge du juge aux jurés pour les raisons suivantes," etc.

The Court of King's Bench held that that was a sufficient compliance with the requirements of the code, and it gave effect to the objections.

As a mere question of the interpretation of the code, we are not prepared to differ from the Court of King's Bench on that point. Moreover, this being a matter of practice and procedure, we should be slow in reversing the judgment of the court of last resort of the province on a question of that kind.

What we have said thus far would be sufficient to dispose of the appeal; but, as there is to be a new trial, we think our view ought to be stated as to a further point raised by the respondent.

At the time of the accident which gave rise to the present action, there was in force, in the city of Montreal, by-law no. 890 entitled: "Règlement relatif à la circulation et à la sécurité publique." This by-law contained the following article:—

Article 15. Le conducteur d'un véhicule, en virant à une croisée ou en passant d'une ruelle, d'un garage ou d'une propriété privée, dans une rue, doit avertir de son intention de ce faire, avancer avec beaucoup de prudence et attendre qu'il ait un passage libre.

While the presiding judge was addressing the jury, counsel for the defendant asked him to call their attention to that by-law. Acceding to the request, the learned judge made reference to it in the following way:

There is a by-law of the city of Montreal known as by-law 890, an article of which I will read to you.

Article 15 of that by-law reads as follows: (It is in French, I will translate it.)

"The conductor of a vehicle, making a turn at an intersection, or coming out of a lane or of a private property into a street, must give notice of his intention so to do, advance with great prudence and wait until the way is clear.

That is the by-law. I am not going to tell you it applies to this case or not, that is the by-law.

No mention whatever of the by-law was made by the learned trial judge when addressing the French-speaking jurors. The absence of any reference to the by-law in the charge made in French and the manner in which it was referred to in the charge made in English amounted, in our view, to a refusal "to instruct (the jury) on a matter of law."

On this point, even if the construction put forward by the appellant should prevail, all the requirements of art. 498 (3) of the code were fully met, and exception to the refusal was duly taken.

We think it was the duty of the trial judge to instruct the jury as to the legal purport of article 15 of the by-law and to tell them that they should consider whether, upon the proven facts, the plaintiff complied with it and, if not, how far his failure to do so had any bearing upon the accident which happened later. The refusal of the trial judge so to instruct the jury, is an additional reason why a new trial should be granted.

1. The disposition made by the Court of King's Bench of the costs of the appeal to that court should not be disturbed. We notice, however, that, evidently through an oversight, no mention was made of the costs of the abortive trial. This clerical omission should be corrected by stating that these costs should be costs in the cause.

2. The costs of the present appeal should be to the respondent in any event; but, for the reasons stated in that respect by our Lord the Chief Justice, we think the right of the respondent to claim them should be suspended until after the new trial, at which time, if the appellant should secure a verdict in his favour, the respondent will be entitled to set off the said costs against the amount of that verdict; if, on the contrary, the verdict should be against the appellant, the respondent will then be entitled, if so advised, to collect his costs in the usual way, the bond given by the appellant upon his appeal to this court to remain in force in the meantime.

1931

DUPÉRÉ v. MONTREAL TRAMWAYS CO.

Smith J.

SMITH, J.—One of the grounds of appeal is that objections to the misdirection of the trial judge were not taken at the time and in the manner required by the Code of Civil Procedure, article 498. The Court of King's Bench have held against this contention, and I agree with my brother Rinfret that we should not lightly interfere with the judgment of that court upon a mere matter of practice and procedure unless there is clear error. This, in itself, might be a sufficient ground for dismissing this appeal.

I am, however, also in agreement with my Lord the Chief Justice that the trial already had, having regard to the manner in which the case was presented by the learned trial judge to the jury, cannot, as a whole, be regarded as other than most unsatisfactory; and that the result of that trial is so unsatisfactory that we should, in the exercise of our discretion under article 495 and R.S.C., c. 35, s. 47, affirm the order of the Court of King's Bench for a new trial. There is no doubt that, in view of the express provisions of article 498 as to new trials, resort for the granting of a new trial should not ordinarily be had to these general provisions. Where, however, the ends of justice clearly require it, as here, this may be done.

In addition to the misdirection on the two points referred to in the Court of King's Bench, I am in agreement with what my brother Rinfret says as to the by-law he refers to, and there is also to be noted the evident lack of information upon the part of the jury when they proceeded to consider their verdict. An amendment of the claim for damages had been asked and granted at the conclusion of the plaintiff's case, by which the amount of damages originally claimed under each heading was greatly increased. The answer of the jury as to the amount of damages that they awarded was first in the following words: "Plein montant réclamé * * * Unanime". Then we have, in the "extrait du procès-verbal d'audience", the following:

Les jurés reviennent dans la salle d'audience.

Appelés, ils répondent à leurs noms et ils donnent les réponses qui suivent.

Mais comme ils ne spécifient pas clairement les dommages qu'ils accordent, la cour leur demande de retourner dans leur chambre de délibérations, et d'exprimer par un chiffre le montant des dommages qu'ils conviennent d'accorder.

Ce qu'ils font pour revenir avec leurs réponses complétées à la satisfaction du tribunal.

From this it is quite clear that the jury, in returning the verdict for the full amount claimed, had no idea of what that amount was, and were prepared to give a verdict for the full amount, whatever it might be. They were sent back to find out the amount in figures, and then returned with the amount $23,040 filled in, after the words "Plein montant réclamé".

A verdict for this large amount, arrived at in this manner, is certainly unsatisfactory, and a strong ground for ordering a new trial.

I agree with the disposition of the costs of this appeal proposed by my Lord the Chief Justice and my brother Rinfret, and agree with the latter that the costs of the abortive trial should be provided for as he suggests, and that it would be well to have it specially mentioned that the bond for costs of appeal to this court is to remain in force.

CANNON, J.—Pour les motifs exposés dans ses notes par l'Honorable Juge-en-chef de la province de Québec, je suis d'avis de confirmer l'arrêt de la Cour du Banc du Roi accordant un nouveau procès. L'appel doit donc être renvoyé. J'accepte aussi la décision de l'Honorable Juge-en-chef du Canada quant aux dépens devant cette cour.

Appeal dismissed with costs.

Solicitors for the appellant: *Robinson, Shapiro & Fells.*
Solicitors for the respondent: *Vallée, Vien, Beaudry, Fortier & Mathieu.*