1971

Irvin A. Langton v. International Transport Inc., And Bob Haze Roberts : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

IRVIN A. LANGTON,
Plaintiff-Appellant,

v.

INTERNATIONAL TRANSPORT, INC., and BOB HAZE ROBERTS,
Defendants-Respondents.

Case No. 12244

BRIEF OF APPELLANTS

Appeal From a Judgment of the Third District Court
In and For Salt Lake County, Utah
The Honorable Douglas L. Cornaby, Judge Pro Tem

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NATURE OF THE CASE

This is an action to recover damages as a result of an automobile collision.

DISPOSITION IN THE LOWER COURT

The District Court awarded the plaintiff judgment on the jury verdict in the sum of Fourteen Hundred Sixty-Eight Dollars ($1,468.00).

RELIEF SOUGHT ON APPEAL

Appellant seeks an additur or, in the alternative, a new trial on the issue of damages.

STATEMENT OF FACTS

On June 19, 1969, defendants' truck and flatbed trailer encountered mechanical difficulty near 1700 South on the Interstate 15 collector road. The truck was stopped on the overpass with the left hand side of the flatbed extending into the right lane of travel (R. 198, 199). No flares or reflectors were put out (R. 207 and 227), and approximately five minutes later the right front of plaintiff's pickup truck collided with the left rear of the flatbed (R. 205). Plaintiff suffered injuries to include a brain concussion (R. 246), and was still having difficulty with balance, vision and dizziness at the time of trial (R. 254).

After a jury trial, the jury found "a verdict for the issues in favor of the plaintiff and against the defendant and assessed damages as follows: General damages $....., special damages $868.25, property damages $600.00, total $1,468.00" (R. 142).

Plaintiff timely filed a motion for a new trial on the issue of damages, or, in the alternative, for an additur (R. 143), and defendant filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial on all issues. (R. 144). Thereafter,

at the time of hearing of said motions, defendants were permitted to file an amendment adding the alternatives of allowing the jury verdict and judgment entered thereon to stand. Both plaintiff's and defendants' original motions were denied (R. 170.)

ARGUMENT

POINT I

THE JURY, AFTER FINDING FOR THE PLAINTIFF ON THE ISSUE OF NEGLIGENCE AND AGAINST THE DEFENDANT ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE, AWARDED PLAINTIFF DAMAGES FOR HIS MEDICAL EXPENSES AND PROPERTY LOSS BUT FAILED TO FOLLOW THE INSTRUCTIONS OF THE COURT IN THAT THEY FAILED TO AWARD PLAINTIFF ANY GENERAL DAMAGES THOUGH THE EVIDENCE IS CLEAR AND UNCONTRADICTED THAT PLAINTIFF SUFFERED BOTH A LOSS OF WAGES AND SERIOUS BODILY INJURY, THE EFFECTS OF WHICH WERE STILL PRESENT AT THE TIME OF TRIAL.

After the Clerk read the jury verdict the jury was polled with the following results:

> "THE COURT: Keith Privett, was this and is this your verdict in this case?
>
> MR. PRIVETT: Yes sir.
>
> THE COURT: Moleta Carsey, was this and is this your verdict in this case?

MRS. CARSEY: No.

THE COURT: Norman Lister, was this and is this your verdict in this case?

MR. LISTER: Yes.

THE COURT: Wilma North, was this and is this your verdict in this case?

MRS. NORTH: Yes, as a compromise measure.

THE COURT: Arlene De Leeun, is this and was this your verdict in this case?

MRS. DE LEEUN: Yes, but all I —

THE COURT: All I want you to do is answer yes or no these

MRS. DE LEEUN: Yes

THE COURT: William L. Bouck, was this and is this your verdict in this case?

MR. BOUCK: Yes.

THE COURT: Calvin Jackson, was this and is this your verdict in this case?

MR. JACKSON: Yes.

THE COURT: And Clyde Snow, was this and is this your verdict?

MR. SNOW: No." (R. 439, 440)

While it has frequently been held that a verdict for

a grossly inadequate sum is in itself almost a conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision, (e.g., *Simmons v. Fish,* 210 Mass. 563, 97 N.E. 102), in this case the polling of the jury is further indication that the verdict was a compromise verdict and should be corrected. See 53 Am. Jur., Sec. 1033, Compromise Verdicts at page 714, wherein the rule is stated as follows:

> "A verdict which is reached only by the surrender of conscientious convictions as to a material issue by some members of the jury in return for a relinquishment by other members of their like settled opinion on another issue, the result not commanding the approval of the whole panel, is a compromise verdict. Such a verdict is improper and should be set aside as being founded on conduct subversive of the soundness of trial by jury."

That plaintiff suffered serious injury requiring two periods of hospitalization, (Exhibits 8-P and 9-P), and extensive medical treatment with symptoms still persisting at time of trial, is clearly demonstrated in the record as even a cursory review of the testimony of Dr. Edward Daniel Nusbaum, commencing at R. 236, will substantiate.

For example, Dr. Nusbaum testified in part as follows:

> "Q: Now, Doctor, maybe perhaps now is an

opportune time for you to give us the benefit of your artistry; have you formed an opinion as to the type of injury that Mr. Langton suffered as a result of his injury on June 19, 1969?

A: Do you mind if I elaborate a little bit on this?

Q: If you cannot answer it that way please do.

A: All right. The diagnosis carried in his records, I believe, as far as I can recall, from both hospitalizations, was concussions, severe . . . . So the saying that he had a concussion, even a severe concussion I think understates the situation, but that was so put in the record for statistical purposes. In my professional judgment the injury is simply an injury to the brain with lasting impairment. (R. 249, 250)

and again,

Q: . . . . Now, Doctor, what history has Mr. Langton given you on the examinations and treatment sessions that you had with him?

A: Well, the history is rather complicated. He suffered significantly from headache, this was present severely when he was in the hospital, and since the accident for the entire year since the accident . . . So I felt that he presented primarily three problems initially, that was severe headache, severe confusion, and a vomiting and dizziness. Since that time there has been improvement, but some of his complaints have included the fact that he feels off balance or dizzy, when he is -- when moving objects are in his vision, when he sees something moving back and

forth past his head he becomes off balance or dizzy, or if he attempts to get up out of a squating position or from bending over or stooping he becomes dizzy I think to the point of faintness. This has been a complaint all the way along too.

Q: Has his complaints been registered with you since September until the last time you visited with him?

A: Yes, yes, it has.

Q: Doctor, are these complaints all consistent with an injury in the area of the brain stem of Mr. Langton's head?

A: Yes, certainly they are.

Q: And, Doctor, is a brain stem injury consistent with the type of injury he has sustained as a result of the auto accident for which he was treated at Holy Cross Hospital?

A: I think it best fits the situation, yes." (R. 253, 254, 255)

Not only did the plainiff suffer from his injuries, but the treatment itself was painful, as again covered in testimony by Dr. Nusbaum, as follows:

"Q: And directing your attention to the hospitalization of January 1970 which you are holding, which is Exhibit 8-P, is that a hospitalization record where you placed Mr. Langton in the hospital?

A: Yes, it is.

Q: And at that hospitalization what did you have performed on Mr. Langton?

A: I admitted Mr. Langton at that time for a repeat electroencephalogram which was described before, and also for an x-ray study called a carotic angiogram, which is a study in which I put a needle into the arteria that pulsates on each side of the larynx on the side of the neck, and inject a material through the arteries and the veins inside the head and x-rays are taken every few tenths of a second in both the frontal and lateral view, and we obtain x-rays of the inside of the head this way . . .

Q: Now Doctor, what type of material is injected, or was injected into Mr. Langton's head?

A: It's a solution of iodine and an organic complex, and the iodine is the substance that shows up on the x-ray plates. It's a liquid solution.

Q: Is this a painful procedure?

A: It carries discomfort, yes.

Q: And prolonged over what period?

A: The most acute pain is when the dye, as we call it, the iodine solution, courses through the brain, and having the needle puncture into the artery also is painful. Usually there is some hemorrhage around the artery when we are done, and that is painful for a day or two, also."
(R 245, 246)

Plaintiff described the nature of the difficulties he

was suffering as a result of the accident in part as follows:

Q: When you are working around these moving objects do you get any — or do you notice anything different about your feelings or your balance?

A: Yes.

Q: And what is it that you notice that is different?

A: Well, my dizziness just comes and I do cringe and I have to close my eyes until it gets better, or gets by, that's all.

Q: What feeling is it that you sense?

A: Dizziness.

Q. Do you get this dizziness doing anything else?

A: Yes, if I stoop over, get up quickly, or lean over and then bend back up I also do this.

Q: And do you get any dizzy sensation, or, for instance, now, if you were to get up from that chair?

A: Yes.

Q: Tell us what type of feeling you get?

A: Yes, well, its a feeling that I try to fall to my left side, and —

Q: What? Can you describe it a little more?

A: Yes, well, that you want to fall to the left side all the time, or you are fighting to keep yourself back.

Q: Now, have you ever had this problem prior to June 19, 1969?

A: No, sir.

Q: And how frequently do you have that problem since that date?

A: Constantly.

Q: Have you ever had any other problems since that date that you did not have before?

A: Periodic headaches.

Q: What type of headaches?

A: Well, a headache that starts here in the back of my head (indicating) and works around the left side to here (indicating over the left eye)." (R. 379, R. 380).

Plaintiff's testimony as to his condition was corroborated by that of Audrey Langton, his wife, wherein she testified in part as follows:

"Q: And I just want to ask you a few questions about Mr. Langton's physical condition before and after this occurrence. Have you ever noticed any changes in his physical activity since June 19, 1969?

A: Yes, I have.

Q: Would you tell us what changes you have noticed?

A: Well, he is not as steady on his feet as he was before. At night when the phone would ring, which is quite often, he being on call twenty-four hours a day, he would get up and go for the phone; and after the accident he was unable to do that without a staggering effect, or bumping the walls, that type of thing, and when he stands up generally he has to stand for a minute, or when he gets out of bed he sits on the side of the bed before he stands up or else he has a staggering effect when he starts to walk.

Q: Have you ever been around him when he has done any of this papering, or wall papering?

A: Yes, I have.

Q: On how many occasions since June of 1969?

A: Well, he hasn't done much, but I was with him when he papered his daughter's home.

Q: And would you describe what you noticed in the way of changes in his ability to care for himself?

A: Well, he was very cautious, he didn't climb the ladder as quickly as he used to, and he would pause momentarily at times and hold to the ladder at the top of the ladder, and then he would proceed with his work. What he was doing, and this he never did before.

Q: . . . .(By Mr. McRae) Have you ever seen him fall?

A: Not as a dead fall, no, I have seen him catch himself and go to one knee but — and I have been around at times when I have assisted, but I have never actually seen him make a dead fall.

Q: And is this type of behavior, or was this type of behavior present before June of 1969.

A: No, it was not." (R. 413, 414, 415.)

Further, the jury completely disregarded plaintiff's loss of wages even though the evidence is uncontradicted that plaintiff suffered such a loss in that he earned $778.00 per month (R. 396) and lost 22½ working days (R. 385).

The jury, for reasons known only to them, failed to follow the instructions of the court wherein they were instructed in instruction number 26 (R. 130):

DAMAGES

If you find the issues in favor of the plaintiff, Irvin A. Langton, and against the defendant, International Transport, Inc., it will be your duty to award the plaintiff such damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence complained of by him.

And further, in instruction number 27: (R. 131)

GENERAL DAMAGES FOR PERSONAL INJURY

In awarding such damages, you may consider the nature and extent of the injuries sustained by the plaintiff, Irvin A. Langton; the degree and character of his suffering, both mental and physical, its probable duration and severity, and the extent to which he has been prevented from pursuing the ordinary affairs of life as theretofore enjoyed by him; and any disability or loss of earning capacity resulting from such injury.

You may also consider whether any of the above will, with reasonable certainty, continue in the future, and if you so find, award such damages as will fairly and justly compensate the plaintiff therefor . . .

And further, in instruction number 29 (R. 133)

DAMAGES FOR LOSS OF EARNINGS

In determining such damages you may award such sum as will fairly and adequately compensate the plaintiff for any loss of earnings he suffered because of the injury in question by reason of being unable to work at his job.

In determining the amount of such loss, you should consider the evidence of the plaintiff's earning capacity from his job; and the extent to which any disability resulting from said injury has prevented him from carrying on his work and has reduced his income.

> If you find the issues in favor of the plaintiff and that he is entitled to damages for loss of earnings as set out above you may also consider the matter of loss of future earnings and award him the present value of such loss, if any, as you believe from a preponderance of the evidence he is reasonably certain to suffer in the future as a result of the injury in question.

The applicable rule is as set forth in 39 Am. Jur., New Trial, § 140 at page 147:

> "Ground for a new trial exists in the fact that the jury have assessed the damages erroneously, particularly where this erroneous assessment results from the jury's failure to observe the court's instructions. Where the court has instructed the jury as to the extent of a party's liability, if he is to be held liable at all, and the jury has disregarded the instruction and found a verdict for a different amount, it has generally been considered that the court should set aside the verdict and order a new trial. The right to grant a new trial on the ground of erroneous assessment of damages exists both in cases where the amount of the verdict is excessive and in those where it is inadequate. In some jurisdictions the statutes in general terms declare error in the assessment of the amount of recovery to be ground for new trial, whether the amount of damages awarded is excessive or grossly inadequate. It has been said that the amount of damages to be awarded for personal injuries is committed, first, to the sound discretion of the jury, and, next, to the discretion of the judge of the trial court who, in ruling upon the motion for a new trial, may consider the evidence anew.

> determine anew the facts, and set aside the verdict if it is not just. Where a finding of legal liability has substantial basis in competent evidence, but it is obvious that in determining the amount of the verdict, the jury were not governed by the evidence or the proper charges of the court thereon or by any reasonable estimates or computations, the result being that the amount awarded is manifestly inadequate or excessive, it is the duty of the court to grant a new trial in order that the error in the verdict may be remedied and justice administered. Generally . . . a verdict will not be set aside on the ground that the damages are inadequate . . . unless, in the light of all the evidence, it is manifestly so inadequate . . . as to show plainly that the verdict resulted from misconduct of the jury . . . in acting perversely, capriciously, or arbitrarily, or from the jury's misconception of the merits of the case in so far as they relate to the amount of damages recoverable, as by . . . failing to take into consideration proper items or elements, or in some way misconstruing or misinterpreting the facts or the law which should have guided it."

Here the jury completely disregarded plaintiff's claim for damages for pain and suffering, though clearly, from the injuries plaintiff sustained, such damages were suffered, which renders the verdict invalid. See 20 A.L.R. 2d 276:

> "ANNOTATION
>
> Validity of verdict awarding plaintiff in personal injury action amount of medical expenses but failing to award damages for pain and suffering."

wherein the general rule is stated:

> "The number of cases in which this question has been specifically answered is relatively small. But despite the dearth of authority, it seems permissible to state, on general principles, that such a verdict is invalid, and all the cases in which this particular point was involved are in accord with this rule."

Further, this rule has been followed in by far the majority of cases set out in 20 A.L.R. 2d, Later Case Service, pages 201 through 203.

Rule 59A (5) Utah Rules of Civil Procedure 1953, as amended, provides for the granting of a new trial on the grounds of "excessive or inadequate damages appearing to have been given under the influence of passion or prejudice." While the majority of Utah cases interpreting this rule have been ones where the damages were excessive, the same principles as set forth in *Stamp v. Union Pacific Railroad Company,* 5 Utah 2d 397, and as more particularly outlined in Justice Crockett's special concurring opinion, apply in the case of inadequate damages. In the case of *Bodon v. Suhrman,* 8 Utah 2d 42, a case of inadequate damages, where this court ordered an additur, or, in the alternative, a new trial, the court held:

> "There is implicit within the authority of the court to grant a new trial on the statutory ground of "excessive or inadequate damages * * *" the power to order a new trial conditionally: that

is, to order that a new trial be granted unless the party adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court . . .

"We know of no case in which this court has directed an increase of an award of damages, but we have held that the evidence required a finding of some damages. There appears to be no persuasive reason for any differentiation between doing so and ordering a reduction because the verdict is excessive . . .

"It has long been established that where the award is in excess of damages shown by the evidence it will not be permitted to stand. In such instances the courts exercise their inherent supervisory powers over jury verdicts, which derive from their duty to see that justice is done; and make corrective orders necessary for that purpose. This is done by the trial court, or upon its failure to do so, by this court on appeal."

and further, at page 47:

"We affirm the responsibility of this court to be indulgent toward the verdict of the jury, and not to disturb it so long as it is within the bounds of reason . . . and also that it is primarily the prerogative and the duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modification thereof. Nevertheless, when the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obliged

to make the correction on appeal."

Further, in *Hill v. Varner*, 4 Utah 2d 166, where the trial court had awarded only nominal damages, this court holds at page 167:

> "Certainly the trial court, as trier of the fact, was justified in not accepting as true, though uncontradicted, his evidence as to his damages for loss of use of the vehicle. However, as stated above, there is nothing in the record refuting the facts of physical damages which the trial court determined was due to respondent's negligence. It is not within our province to determine just what amount would compensate appellant for his injury; the question to be decided is whether, under the state of proof, appellant was entitled to more than nominal damages as a matter of law.
>
> "The fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party, (citations omitted) . . "

And further, at page 168:

> "However, here we have an instance of substantial damage proved but only nominal damages awarded, where the general knowledge of the trier of the fact and all men must indicate a loss beyond the mere invasion of a legal right for which nominal damages are generally awarded . . .
>
> "Although the amount of damages to be

> awarded is a question of fact, appellant has shown that he is entitled to some compensatory damages.
>
> "The case is reversed and remanded for a new trial on the issue of damages alone."

And further, at page 170 in the special concurring opinion of Justice Crockett:

> " . . . courts must be more interested in seeing that justice is done than in applying technical rules of procedure between the parties."

There is authority for the granting of a new trial on all issues in cases similar to this one. For instance, in a California case where the jury only allowed $182.90 over and above stipulatd special damages for serious brain and other injuries (Homasaki v. Flotho, 248 P. 2d 910), the California Court reversed the order of the trial court granting a new trial on the issue of damages alone and ordered a new trial on all of the issues even though there had been no appeal from the trial court's denial of the motion for an entire new trial. However, in a vigorous dissent, commencing at page 916, it was contended that a new trial on the issue of damages alone was proper since "it has been held repeatedly that in personal injury and wrongful death actions the issue of liability is severable from the issue of damages" and that defendant, having failed to appeal from the denial

of his motion for a new trial, "is now in the position of admitting liability." It should be noted in this case that defendant International Transport, Inc. did not cross-appeal which could be considered an admission of liability.

In any event, a jury verdict which ignores the substantial nature of plaintiff's injuries and his loss of wages, and completely disregards the instructions of the court on the assessment of damages should not be permitted to stand.

CONCLUSION

Plaintiff, having produced clear and uncontradicted evidence of his injuries, is entitled to be adequately compensated therefor, and this court should direct an additur in such sum as would so compensate plaintiff for his general damages or, in the alternative, this case should be reversed and remanded for a new trial on the issues of damages.

Respectfully submitted,

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