Privy Council Appeal No. 20 *of* 1925.

Wing Lee - - - - - - - - - - *Appellant*

v.

David C. Lew, since deceased, now represented by Yick Pang Lew, the Administrator of his Estate - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH MAY, 1925.

Present at the Hearing:

LORD BUCKMASTER.
EARL OF OXFORD AND ASQUITH.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD BUCKMASTER.]

This appeal arises out of a dispute which was originally nothing more serious than a quarrel between two adjacent landowners. On the 28th December, 1922, an information was issued by the appellant against one David Lew charging him with having removed a landmark that lay between his property and what David Lew claimed as a road. That information failed, and David Lew accordingly took proceedings against the appellant, claiming damages for malicious prosecution. On the 28th June, 1923, verdict and judgment were given in that action, the result of which was that David Lew obtained a judgment for 5,490 dollars and costs. This sum was a modification of the verdict which the jury were anxious to give, for they desired to assess what they called the general damages at 10,000 dollars, and the special damages at 490 dollars. As in the later stages of these proceedings

some questions arise about the 490 dollars, it is as well to state that they appear to have been the sum which David Lew claimed as the out-of-pocket expenses to which he had been put in the course of the prosecution that had failed; these sums were, for reasons which are not very apparent, treated by the jury as an independent head of damages, and were so returned in the verdict. The judgment thus given in favour of the plaintiff was not destined to remain unchallenged. The defendant applied to have the judgment set aside, and on the 8th January, 1924, the Court of Appeal of British Columbia set the judgment aside and ordered that a new trial should be had. Thereupon the plaintiff appealed against that judgment, but after he issued his notice of appeal, and before the hearing, he appears to have been murdered. His personal representative is the present respondent, who took steps to bring the appeal on before the Supreme Court of Canada by the necessary motions, the hearing of which were adjourned till the appeal itself came on.

The appeal was heard on the 19th November, 1924, and on its hearing the first question discussed was: Whether or not the notice of motion to file suggestion as to the death could be properly entertained or not. The Supreme Court held that it could, and that in the circumstances the legal personal representative was fully entitled to prosecute the appeal. That question occupied a substantial part of the judgment of the Supreme Court; as against it very little, if any, argument has been advanced before this Board, and their Lordships are clearly of opinion that in that respect at least the judgment of the Supreme Court was perfectly accurate.

There remains what is the real controversy upon the present appeal. The Supreme Court decided that the judgment could be dealt with under two heads, the special and the general damages, that the judgment for 490 dollars was damage which in any case must be recovered if the cause of action was well established, and they saw no reason for thinking that there was any fault in the verdict of the jury upon this point. It followed in their opinion that the 490 dollars at least was a sum for which judgment must be obtained, and that the question as to what further sum should be added for general damages was a matter which a new jury should be called upon to assess.

The Supreme Court expressly declined the jurisdiction to fix these damages on their own account, because they thought that Order 58, Rule 5 (*a*) had no application to cases where the party had of right under the statute the power of having the dispute determined by a jury. In the view that their Lordships take of this appeal, it becomes unnecessary to decide whether the Supreme Court were right or wrong in that opinion; they only desire to have it recorded that their omission to discuss that part of the judgment must not be interpreted as expressing their approval of the conclusion to which the Supreme Court came. The remaining part of the judgment was this: They held that

there should be a new trial as to the damages, and that that new trial should be conditioned by a provision that the original judgment should stand unless the defendant submitted to a condition that no exception at the hearing should be based upon the fact that the plaintiff was dead. The real question is whether or no the Supreme Court acted within their powers in imposing such a condition upon the defendant. Their Lordships think that the authorities referred to in the judgments of the Supreme Court are sufficient justification for the course they took. It is perfectly true that when it is said, as it was in *Watt* v. *Watt* [1905], A.C. 115, that the right to a new trial is a right which is based upon discretion, it none the less follows that the discretion being judicial must be based on sound principles and cannot be arbitrarily exercised; but if the exercise of the discretion without control or limitation may produce what appears to be a manifest injustice, it is well within the power of the Court in exercising such a right to take steps to prevent that injustice should arise. That appears to have been the reasoning that persuaded the Court in *Griffiths* v. *Williams*, 1, C. & J., page 47, where a matter which appears to their Lordships to be identical with the present came up for consideration. In that case there had been a verdict obtained *in assumpsit* for breach of promise to marry, and a rule *nisi* had been granted for a new trial upon the ground that the verdict was contrary to the evidence. Before the rule came up for final argument the plaintiff died, and the question then arose as to what ought to be done; it was argued on behalf of the plaintiff that the setting aside of the verdict would entirely defeat justice as no new trial could be had without error being assignable upon the record. It was to this argument that the Court answered that they should have no difficulty because if they thought the case required further consideration they could have imposed the terms of the verdict being entered as of the assizes when the case was first tried, or of the defendant undertaking not to assign error. The question came up again in the case of *Palmer* v. *Cohen*, reported in 2 B. & A., at page 966, and there Lord Tenterden, a Judge paramount for his knowledge, made a statement to which great importance should be attached. The point arose in this way: In an action for libel, the plaintiff obtained a verdict and died after the verdict had been obtained. His successor entered up judgment and a rule *nisi* was obtained to set this aside with costs on the ground that the executor could not enter up judgment on a verdict obtained by his testator when the right of action died with the testator. The discussion took place notably upon the two statutes of 17 Charles II, Chapter 8 and 8 & 9 William III, Chapter II, but in the argument in support of the rule it was argued that if the executors could enter up judgment they would have an undue advantage, for the defendant in such a case could not move for a new trial, and it was in answer to this that Counsel, who showed cause against the

rule, quoted *Griffiths* v. *Williams* (*supra*), and pointed out what had been done there. Lord Tenterden answered that it might be done "in an action of this kind as well as in a mere action of debt."

Their Lordships think that that is abundant authority to support the condition which the Supreme Court of Canada has imposed upon the leave to obtain a new trial in the present case.

There is the remaining and slender argument that the circumstances of both those cases differ from the present in this, that the Court of Appeal of British Columbia having in fact overthrown the original judgment before the plaintiff died, the conditions which might have been imposed by them could not be imposed by the Supreme Court of Canada; but in truth the provisions of the Act which enable the Supreme Court of Canada to exercise all the powers of the Court below appear sufficient to remedy the mischief. The hearing before the Supreme Court is in fact and effect the equivalent of a full re-hearing of the whole case, and though it is perfectly true at the time when the case was heard by the Supreme Court of British Columbia the circumstances had not arisen which had occurred when the case was finally heard, yet the Supreme Court of Canada had full liberty to bring that circumstance into effect, and to give such judgment as in those circumstances they thought would do justice between the parties. Their Lordships do not think it is possible to split the judgment into two halves as has been done. The right order, in their Lordships' opinion, will be to modify the judgment of the Supreme Court by referring the matter back to the jury to re-assess the damages generally, with the condition that the Supreme Court of Canada has imposed, and as that means that the respondent has succeeded upon the appeal, they will humbly advise His Majesty to make the order that has been indicated, and to direct that the appellant should pay the costs of these proceedings. Upon the respondent's petition for special leave to appeal there should be no order except that the costs of such petition will be costs in the appeal.

In the Privy Council.

WING LEE

v.

DAVID C. LEW, SINCE DECEASED, NOW REPRESENTED BY YICK PANG LEW, THE ADMINISTRATOR OF HIS ESTATE.

DELIVERED BY LORD BUCKMASTER.

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