ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice White.

ANUNDO LALL DASS (PLAINTIFF) *v.* BOYCAUNT RAM ROY (DEFENDANT). 1879 *July* 11.

Measure of Damages—Mode of Assessment—Practice—Fresh Issues—Civil Procedure Code (Act X of 1877), s. 566.

In a suit for negligence, where it is possible that the Court may take one or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the amount of damages according to whichever view the Court may adopt, and if the evidence produced is applicable to one view only, the Court cannot give the plaintiff a retrial and allow him to remodel his case with fresh evidence under s. 566 of the Civil Procedure Code. That section is intended to provide for cases where some point has come to light in the Appellate Court, which has not been raised, or the importance of which has not occurred to the parties or to the Judge in the Court below.

AN appeal from the judgment of Mr. Justice Pontifex.

The plaintiff brought this suit for damage done to his house through the defendant's negligence in not properly laying the foundation of the adjoining house. The lower Court found that the defendant had been guilty of negligence; and that through that negligence a part of the west wall of the plaintiff's house, with certain godowns attached to that wall on the outside, had fallen. But the plaintiff contended, that the defendant was answerable not only for this damage, but also for the expense of rebuilding about three parts of the plaintiff's house which had become ruinous and unsafe from other causes. According to the evidence of the plaintiff's surveyor, who was the only witness called as to the amount of damages, the sum to which the plaintiff would have been entitled upon the above theory was Rs. 25,000. But the lower Court rejected this theory, and as the cost of rebuilding the west wall was estimated by one of the witnesses for the defendant at Rs. 500 or 600, the lower Court awarded the plaintiff Rs. 1,200 damages only.

It was now contended on appeal upon the facts, *first*, that the plaintiff was entitled to the whole sum which he claimed; *secondly*,

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that if he was not entitled to the whole sum, the Court should form the best estimate of the damages which they could upon the materials before them; and *thirdly*, that if there was no sufficient evidence on the record to enable the Court to come to a proper finding in that respect, it was their duty to send the case back to the Court below under s. 566 of the Civil Procedure Code, and to frame an issue or issues to be tried in that Court so as to enable the plaintiff to give fresh evidence of the damages according to the principle which the Court might approve.

Mr. *Jackson* and Mr. *Bonnerjee* for the appellant.

Mr. *Piffard* and Mr. *Branson* for the respondent.

The Court (after first dealing with the facts) delivered the following judgment upon the question of damages:

GARTH, C. J. (WHITE, J., concurring).—We presume that it is to compensate for this injury, as well as perhaps for a portion of the broken glass and the removal of the furniture, that the Judge has given Rs. 1,200 damages.

We are asked to say that this sum is not enough, and to make a substantial addition to it; but I really see no sufficient reason for increasing the damages, and if I did, I find nothing in the plaintiff's evidence to afford me any reasonable guide as to the sum I should give.

I entirely reject as unfair and extortionate the theory of Mr. Cantwell, that the ruinous condition of the plaintiff's house was attributable to the defendant's negligence, and that the house should be rebuilt at the defendant's expense; and rejecting this I find no other evidence whatever to inform me what the proper amount of damages should be.

The plaintiff and his advisers have, I presume, thought it good policy to adhere to their own extravagant claim, and to provide the Court with no means of assessing the damages, except upon the basis of that claim; so that if we were disposed to take a more moderate view of the defendant's liability, we can only assess the damages by guess work.

This is not only an unusual, but, in my opinion, a most improper and reprehensible way of presenting a case to the Court. A plaintiff who prefers a claim like the present, of which the Court, having regard to the circumstances, may take two or more different views, is bound to be prepared with proper evidence of the amount of his damages, according to whichever of those views the Court may think it right to adopt; and if he chooses to confine his evidence of damage to one theory only, which the Court in their discretion think proper to reject, he must take the consequences of his imprudence.

The only real guide which the Court has as to the cost of rebuilding the part of the west wall which came down, is the rough estimate of Mr. Williamson, who puts it at from Rs. 500 to Rs. 600, and we have no means whatever of estimating the expense of rebuilding the godowns, &c., which were attached to the inside of that wall.

Altogether I consider that the plaintiff's case has been presented to the Court in an exaggerated, not to say a dishonest, form. I do not see sufficient reason for increasing the amount of damages, and if I did, I find no evidence on the record which would afford me any safe means for doing so.

Mr. Jackson, under these circumstances, has contended very strongly on behalf of his client, that, as there is no evidence upon the record which would enable the Court to assess the proper amount of damages according to the view which we take of the case, it is our duty to frame an issue or issues, &c., and either to send the case back to the lower Court under s. 566 of the new Code to take additional evidence there, or else to take fresh evidence ourselves in this Court for the purpose of determining the plaintiff's rights.

But in my opinion the provisions of that section are not intended to apply to a case of this nature, and if they were, I certainly, in the exercise of my discretion, should refuse to act under it in this instance. That section is intended to provide for cases where some point has come to light in the Appellate Court, which has not been raised, or the importance of which has not occurred to the parties or to the Judge in the Court below.

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But in this case no new point has arisen, and nothing new has transpired, which the plaintiff was not perfectly aware of at the time when he brought his suit. There is no necessity here for any fresh issue. The only issue necessary to the ends of justice is that which has been already raised and tried in both Courts,—namely, to what damages, under the circumstances, is the plaintiff entitled.

The mistake, if any, has arisen from the plaintiff's own omission to bring forward proper evidence at the proper time in support of his own case, or rather from his determined persistence in endeavouring to enforce a claim which, in our opinion, is unjust and untenable.

If we were to allow him under such circumstances to remodel his case, and to try it over again with fresh evidence upon a more reasonable principle, we should be introducing a very mischievous practice. We should be encouraging dishonest plaintiffs to try experiments with the Court by setting up and insisting upon extravagant claims, in the well assured hope that if they failed in establishing those claims, they would be allowed to amend the proceedings and try their case over again upon a fairer and more moderate basis.

I think that the appeal should be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the appellant: *G. C. Chunder.*

Attorney for the respondent: *A. T. Dhur.*