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INTERPRETATION OF VERDICTS IN CIVIL JURY CASES*

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The rôle of judge in a civil jury trial is not an easy one. His knowledge of the laws of procedure and evidence should be such as to enable him to render immediate rulings on motions and objections instead of following the easier course of postponing decisions and accepting evidence under reserve;[1] he must constantly be on guard to prevent the making of remarks or gestures likely to prejudice the jury; and in delivering his charge he must be careful to give adequate instructions, at the same time avoiding any direction or comment that might result in the verdict being set aside.[2] In many cases, however, his most difficult task lies in deciding whether or not the verdict should be confirmed.

For the purpose of this article it is assumed that there has been an assignment of facts (arts. 424 and 427 C.P.) and that the verdict must accordingly be "special, explicit and articulated upon each fact submitted" (art. 483 C.P.). The first matter for consideration, therefore, is the interpretation of article 483.

*In 1952, a Committee of which this writer was a member, was formed by the General Council of the Provincial Bar to study and report on the *avant-projet* of the proposed new Code of Civil Procedure. The *avant-projet* contains no provision for jury trials, but the Committee recommended (by a majority) that the right to such trials should be retained in certain classes of cases, subject to important amendments to simplify the presently complicated and unsatisfactory pre-trial procedure — see (1953) 13 R. du B. pp. 45 *et seq.*

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[1]See art. 498(2) C.P.: *Boileau* v. *Boileau et al* (1940) 69 K.B. 308, Hall J. at p. 311. This follows from the general rule that questions of law relating to evidence should be decided in advance in order to prevent illegal evidence going before the jury.— e.g., see *Graham* v. *Graham* (1935) 62 K.B. 381, 382.

[2]See art. 498(3) C.P.

I

Interpretation of Article 483 C.P.

As a general rule it is not sufficient for a jury to give a general expression of opinion; they must indicate in their verdict the fact or facts constituting the fault or omission alleged.[3] The difficulties experienced by juries in answering the standard form of questions and in being sufficiently explicit have frequently been subjects of judicial comment.[4] In most instances these difficulties and the serious complications to which they give rise are due to inadequate instructions on the part of the judge. It is submitted that in all cases the judge should: (a) draw the jury's attention to the principal allegations in the pleadings, (b) read and explain the questions, and (c) stress the necessity for specific findings based on one or more of the allegations in the pleadings, as distinct from general expressions of opinion. If, notwithstanding those precautions, the jury should return a verdict not in conformity with article 483, the instructions should be repeated and the jurors should be ordered to retire again and to return with specific answers. In the event of the judge not giving that order *suo motu,* he should be requested to give it by the attorney whose client's interests are likely to suffer through the illegality of the verdict. In one case in the writer's experience neither attorney was satisfied with the form of answers and the jury was sent back twice to reconsider them.[5]

It is not right, however, to construe article 483 so strictly as to require a jury to make known its decision in any "sacramental form".[6] The jurors are not as a rule versed in legal phraseology and it is for the Court to give an intelligent effect to their findings and not to apply too meticulous a criticism.[7] As E. McDougall J. observed: "A jury must not be held too rigorously to the niceties (perhaps subtleties) of judicial expression and it is not fair to submit their verdict to the meticulous and exact scrutiny which would be accorded to statements delivered by men versed in the law".[8]

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[3]*Davis* v. *Julien* (1915) 25 K.B. 35; *McGivren* v. *Chars Urbains de Montréal* 19 R.L.n.s. 356 (K.B. 1913); *Colonial Coach Lines Ltd.* v. *Davies* (1937) 64 K.B. 118.

[4]E.g. in *Blair* v. *Berry* (1937) 76 S.C. 189 at p. 191, E. McDougall J. expressed the opinion that the standard questions put to juries are "unsatisfactory and lead to confusion and inexactitude". Rivard J. has suggested that the source of these difficulties might be avoided by limiting the questions put to the jury to facts purely and simply, as distinct from questions of mixed fact and law. — *Manuel de la Cour d'Appel* (1941), p. 75.

[5]*Friend* v. *C.P.R.* S.C. No. 255084 Feb. 1950, Casgrain J. (unreported). The jury returned a verdict of common fault but in the first two instances the findings were insufficiently explicit as to the faults found against each of the parties.

[6]*Temple* v. *Montreal Tramways Co.* (1915) 47 S.C. 121.

[7]*Montreal Tramways Co.* v. *Yervant* [1936] 3 D.L.R. 241 (S.C.C.); *Grinnell Co. of Can. et al* v. *Warren* [1937] S.C.R. 353; *Toronto Transportation Commission* v. *Rosenberg* [1950] 4 D.L.R. 449, 454 (S.C.C.).

[8]*Blair* v. *Berry op. cit.* at p. 191.

Moreover, the rule that the verdict must be special, explicit and articulated may be subject to an important exception in cases where a legal presumption is applicable. For example, in a running-down case[9] in which an injured pedestrian claimed damages from the driver of an automobile, the jury, in answer to the usual question as to common fault, replied: "Yes, the plaintiff did not pay proper attention to the traffic, and the defendant showed lack of judgment and care when he first observed the plaintiff". Although such an answer (insofar as it related to the defendant) probably was insufficiently explicit within the meaning of article 483, the trial judge maintained the verdict, holding that it was clear from the finding of common fault that the jury had not exonerated the defendant and, therefore, that the presumption under section 53(2) of the Motor Vehicles Act had not been rebutted.[10] In another somewhat similar case a jury found that an accident was "not due exclusively to the fault of the defendant" but was "due exclusively to the fault of the plaintiff" *without stating in what that fault consisted.* Greenshields C.J. held that such a finding did not satisfy the requirements of article 483, but his judgment was reversed on appeal. Barclay J. expressed the opinion that all the jury had to do was "to decide whether the defendant had rebutted the presumption", and that it was clear from their answers that they had exonerated him from any fault.[11]

II

Verdicts Failing to Establish Fault in Law

Juries sometimes return verdicts by which they find a party responsible because of some act or omission which is not a fault in law, or, if a fault in law, is not relevant to the case. In neither event should the verdict be confirmed.[12] For example, when a jury found a defendant partly responsible for an automobile accident for having with him in his car "two infants of tender years who must have required some of the attention he would otherwise have been able to give to his driving", it was held that this was "not in law a fault at all, and is not proved to have in any degree caused the accident."[13]

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[9]*Blair* v. *Berry op. cit.*

[10]R.S.Q. 1941, c. 142.

[11]*Sloan* v. *Fraid* [1943] K.B. 91, reversing (1941) 79 S.C. 346.

[12]Here it is assumed that (as usually happens) the case has been allowed to go to the jury. As to motions for non-suit see footnote No 19 *infra.* The omission of a defendant to make such a motion at the conclusion of plaintiff's evidence does not preclude him from later attacking the verdict on the ground of insufficient evidence.

[13]*Darling* v. *Emery* 60 S.C. 509 (C.R. 1921); see also *Bouillon* v. *Poiré* (1937) 63 K.B. 1; *Grand Trunk Rly* v. *Labreche* (1922) 64 S.C.R. 15; *Decarie* v. *Patenaude* (1927) 30 Q.P.R. 188; *Littley et al* v. *Brooks et al* [1920] S.C.R. 416, 421.

In *C.N.R.* v. *Lancia*[14] respondent's son, aged nine (who admittedly was a trespasser) boarded a freight train. The train started to move and while the boy was still holding on to one of the cars the appellant's employee in the caboose of the train shouted to him to get off. The boy jumped and was injured. In an action for damages against the railway company, the jury found that the accident was due both to the fault of the boy because he had no business on the train, and to the fault of the appellant's employee for shouting, and returned a verdict holding each 50% at fault. The appellant moved to set aside that verdict on the ground that the fault against the appellant as determined by the jury was *not a fault in law* in the circumstances of the case.[15] The trial judge dismissed that motion and his judgment confirming the verdict was affirmed by a four to one majority in the Court of King's Bench. The Company then successfully appealed to the Supreme Court which held that the trial judge should have rejected the verdict and dismissed the action with costs. Rinfret C.J. stated in part (at pp. 186-187):

> It is clear . . . that when the jury was asked to decide the fault that caused the accident that was putting a question of mixed law and fact. Notwithstanding the form of the question, it cannot detract from the principle laid down in article 475 of the Code of civil procedure, nor from the well-established principle that the jury's verdict must be limited to the finding of facts and that the law is exclusively the domain of the courts.
>
> With respect, it was, therefore, the duty of the presiding judge and of the learned judges forming the majority in the Court of King's Bench (Appeal Side) to accept the verdict of the jury in the present case as a finding of fact that Tremblay had shouted and perhaps also that such shouting was one of the causes of the accident, the other cause being, as found by the jury, that "the boy had no business on the train". The result of the jury finding was that the boy was a trespasser and, in its opinion, the shouting at the boy was a contributory cause of the accident.
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> It remained, however, for the Courts to decide whether, in the circumstances, the mere shouting, as found by the jury, amounted to a fault in law, or, in the language of the Civil Code (article 1053) amounted to a fault or "offence" within the four corners of that section of the law.
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> It can be seen, from the review I have made of all the judgments of the learned judges both in the Superior Court and in the Court of King's Bench, that not only was the shouting of Tremblay not an offence or fault in the circumstances, but, moreover, it was not a contributory cause of the accident of which the boy, Lancia, was a victim.

III

VERDICTS "AGAINST THE WEIGHT OF EVIDENCE"

Although a jury's findings may conform with article 483, and although they may specify a fault in law, a trial judge may be confronted with a difficult situation when the verdict appears to him to be against the weight of evidence.

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[14][1949] S.C.R. 177, reversing [1948] K.B. 156.

[15]i.e. by motion for judgment *non obstante veredicto* under art. 491 C.P.

In such cases it is submitted that he should place himself in the position of a court of appeal, bearing in mind that a verdict should be read with and construed in the light of the issues presented by the pleadings, the evidence and his charge to the jury,[16] and applying the rules set out in articles 498(4), 501 and 508(3) C.P.

Article 498(4) provides for a new trial when the verdict is *clearly* against the weight of evidence, but to be so construed it must be one which the jury, viewing the whole of the evidence, could not reasonably find.[17] Article 508 makes provision for a different judgment, in whole or in part, when "it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the appellant". These rules have been the source of a good deal of jurisprudence, the general principles of which may be summarized briefly as follows:

In the first place, a judge should never lose sight of the basic rule that while he is master of the law, the jurors are masters of the facts[18] (a rule which applies not only in considering the verdict but throughout the trial).[19] It follows that it is for the jury to pass upon the credibility of witnesses and when there are conflicting versions to decide which version is the right one, and neither the trial judge nor the court of appeal should substitute their opinion on such matters for that of a jury.[20] The test to be applied is not

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[16]*Montreal Tramways Co.* v. *Yervant op. cit.* at p. 243; *Grand Trunk Rly.* v. *Mayne* (1917) 56 S.C.R. 95, 97; *Montreal Tramways Co.* v. *Lindner* [1939] S.C.R. 405, 407; *B. C. Electric Co.* v. *Dunphy* [1920] 50 D.L.R. 264, 268 (S.C.C.)

[17]Art. 501 C.P.

[18]Arts. 474, 475, C.P.

[19]Art. 469 C.P. provides that whenever the trial judge is of the opinion that the plaintiff has given no evidence upon which the jury could find a verdict, he may dismiss the action on a motion for non-suit, e.g. *Volkert* v. *Diamond Truck Co.* (1939) 66 K.B. 385. However, the trial judge should not maintain such a motion except in very clear cases, remembering always that it would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury because in his opinion negligence ought not to be inferred. On the other hand, if a jury were at liberty to hold that negligence might be inferred from any state of facts, it would place in their hands "a power which might be exercised in the most arbitrary manner" — *Metropolitan Rly Co.* v. *Jackson* [1877] 3 A.C. 193, 197 cited by Rinfret J. (now C.J.) in *Littley et al* v. *Brooks et al op. cit.* at p. 421.

[20]The accepted rule was well summarized by Rivard J. in *Kearns* v. *Montreal Tramways Co.* (1931) 50 K.B. 340 at pp. 344-5 as follows: — "Le jury est le maitre des faits; il est libre de juger comme il l'entend, non seulement de la crédibilité des témoins, mais aussi de la foi qu'il convient d'accorder à telle partie de leur déposition ou à telle autre. Quand il s'agit, comme dans l'espèce, de croire un témoin plutôt qu'un autre, de juger des circonstances et d'apprécier divers éléments de preuve qui tous méritent considération, le juge présidant au procès ne peut pas plus qu'une cour d'appel modifier le verdict et substituer sa propre opinion à celle des jurés. Il en serait autrement si le verdict n'était pas fondé en droit ou si vraiment il ne pouvait raisonnablement s'appuyer sur aucune preuve légale."

whether the verdict appears to the Court to be right, but *whether the jury as reasonable men could have reached such a conclusion.*[21]

The difficulty of applying this test in practice and of knowing when and where to draw the line is apparent from the many judgments that have been reversed in appeal.[22] An important ruling on the point was laid down by the Supreme Court in *Laporte* v. *C.P.R.*,[23] a level crossing accident case in which the principal question for decision was whether a signal given by the locomotive engineer was the usual signal given at the whistling post or whether it was an alarm signal given only at the moment of impact. The jury's verdict, accepting the latter version and finding the railway company responsible, was confirmed by the trial judge, but was set aside by the Court of King's Bench. The plaintiff then appealed to the Supreme Court which restored the original judgment and reiterated the rule that unless a jury's findings are "clearly such that no reasonable men could reach, they are final and conclusive and should not be interfered with by any court of appeal". Referring to that rule Idington J. said (p. 279):

> A jury has not only a perfect right but an absolute duty to believe and accept one part of a witness's statement and discard another part thereof which it does not believe.

The effect of that ruling is evident from subsequent trial court decisions in which it has been cited as the reason for confirming verdicts with which the judges personally disagreed. A typical example is *Landry* v. *Montreal Tramways Co.*[24] in which the only point in issue was whether the jury was justified in awarding the plaintiff $1,500 for permanent disability in addition to other damages which the defendant did not contest. Four doctors, two of them appearing for plaintiff, testified that there would be no disability. A fifth doctor, called by the plaintiff, while expressing no definite opinion, said that he thought the plaintiff's condition "might perhaps improve", but nowhere in the record was there any evidence that the plaintiff would suffer future incapacity — a fact commented upon by the trial judge in his address to the

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[21]E.g. *McCannell* v. *McLean* [1937] 2 D.L.R. 639 (S.C.C.); *C.N.R.* v. *Muller* [1934] 1 D.L.R. 768 (S.C.C.); *Winnipeg Electric Co.* v. *Geel* [1932] A.C. 690; *Vallée* v. *The Shedden Forwarding Co.*, 40 S.C. 454 (C.R. 1911); *Hutcheon* v. *Storey* [1935] S.C.R. 677.

[22]E.g. *Thibodeau* v. *Provincial Transport Co. et al* [1947] K.B. 116, in which Tyndale J. (later A.C.J.) set aside the verdict on the ground that is was "absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the said defendants". This decision was reversed by a majority judgment in appeal which held that while the evidence was conflicting it could reasonably justify the verdict. See also *McGillivray* v. *City of Montreal* (1937) 62 K.B. 402; *Kearns* v. *Montreal Tramways Co. op. cit.*, and other cases referred to in this article.

[23][1924] S.C.R. 278.

[24]S.C. No. 231360 Tyndale A.C.J. 23rd May 1945; K.B. No. 2922, 26th June 1946, affirmed by S.C.C. 18th November 1946 (unreported).

jury. Notwithstanding this, nine of the twelve jurors apparently seized upon the inconclusive evidence of the fifth doctor as a ground for awarding the damages above mentioned.[24a] In confirming the verdict the trial judge stated that while it was against the weight of evidence "in the ordinary sense" he was "not prepared in view of the principle laid down in *Laporte* v. *C.P.R.* to declare that it was one which the jury, viewing the whole evidence, could not reasonably find". His decision was upheld by a majority judgment of the Court of King's Bench and later unanimously by the Supreme Court, both appellate tribunals holding that the jurors were entitled to form their own conclusions on the medical evidence.

The problem of deciding whether the quantum of an award is sufficient or otherwise,[25] is complicated by the fact that a jury may determine the total amount of damages sustained by a plaintiff and is not as a rule required to specify the amounts awarded on each item of damage.[26] The Code of Procedure contains special rules on this question, article 502 providing for a new trial when the amount awarded is "so grossly excessive or insufficient that it is evident that the jurors have been influenced by improper motives or led into error". The next two articles, 503 and 504, do not go so far and make no mention of improper motives or error.[27] They provide that if the amount awarded is either grossly excessive or grossly insufficient, the court may refuse a new trial, provided that the plaintiff agrees in the one case that it be reduced to an amount which the court considers not excessive, and in the other case that the defendant agrees to its being increased to an amount which the court considers not insufficient. While these provisions have been applied in numerous cases,[28] they necessarily involve setting aside the verdict and are therefore subject to the general rule as to interference with a jury's conclusions.[29]

[24a]The agreement of nine of the twelve jurors is sufficient to return a verdict (art. 480 C.P.).

[25]This difficulty was discussed by Gallipeault J. (now C.J.) in *City of Montreal* v. *Michaels* (1930) 49 K.B. 481 at pp. 486-7.

[26]*Merry* v. *Montreal Tramways Co.* 53 S.C. 226 (C.R. 1917). In the *Landry* case, however, (since the defendant had admitted certain items of damage) it was possible by simple process of elimination to determine the amount awarded for permanent disability.

[27]See *Montreal Street Railway Co.* v. *Normandin* (1917) 26 K.B. 467 at p. 475. Unlike art. 502, arts. 503 and 504 C.P. are not to be found in the old Code of Procedure. Art. 503 was taken from the rule laid down by the English Court of Appeal in *Belt* v. *Lawes,* L.R. [1884] 12 Q.B.D. 356.

[28]E.g. *Laurin* v. *Noël* [1952] K.B. 161 — $4,939.40 award *reduced* to $2,755.61; *Montreal Street Railway Co.* v. *Normandin, op. cit.* — $12,000 award *reduced* to $6,000; *City of Montreal* v. *Michaels, op. cit.* $12,950 award *reduced* to $6,770.73; *Sevigny* v. *Bourdon,* (1932) 40 R.L. n.s. 925 — $8,000 award *increased* to $24,508.68; *Marquis* v. *Fortin* (1933) 36 Q.P.R. 196 and *Patenaude* v. *Newsam* (1934) 38 Q.P.R. 143 in both of which cases awards were *increased* because it was evident that the jury had not taken all the items of damage into consideration.

[29]E.g. *Warren* v. *Gray Goose Stage Ltd.* [1938] 1 D.L.R. 104 (S.C.C.); *C.P.R.* v. *Lachance* (1909) 42 S.C.R. 205, and see cases cited under footnote No. 21 *supra.* The

But obviously there are *limits* beyond which no trial judge or appeal court should go in confirming a jury's findings. Otherwise the relevant articles of the code would be meaningless and a jury's verdict would be final. Thus Rivard J. in his *Manuel de la Cour d'Appel,*[30] wrote:

> Le respect dû au verdict ne va donc pas jusqu'à exiger qu'on maintienne celui qui ne trouve pas d'appui dans le dossier, qui ne pourrait s'expliquer que par la constatation de faits qui ne sont pas révélés, ou qui serait le résultat d'une erreur de principe ou de logique.

There is no doubt that in their efforts to comply with the ruling in *Laporte* v. *C.P.R.* some judges have exceeded reasonable limits and have confirmed verdicts which should have been rejected. In *Vineberg* v. *Larocque et. al,*[31] for instance, the jury found the defendants 65.5% to blame for a fatal accident to the plaintiff's husband and fixed the total damages sustained by her and her four children at $23,581.05. In confirming the verdict the trial judge stated:

> In the present case, it may be possible to find some evidence in the record upon which twelve reasonable men might, without improper motives, reach the decision which the jury did in this case; although the undersigned has not been able to discover any such evidence.
>
> In these circumstances, although the undersigned considers that the confirmation of the verdict will result in a miscarriage of justice, he is not prepared to take the responsibility, as one judge alone, of setting aside the unanimous decision of twelve jurors.

The trial court judgment was reversed unanimously by the Court of King's Bench which found no evidence of fault on the part of either defendant and dismissed the action with costs. Pratte J., after referring to the general rule in *McCannell* v. *McLean,*[32] commented (page 6):

> Mais le respect dû au verdict ne va pas jusqu'à rendre celui-ci intangible; il ne commande pas au juge du procès, non plus qu'à ceux d'appel, de confirmer ce qui leur apparaît clairement être un déni de justice.

In the same case Bissonnette J. stated (page 12):

> Dans la présente espèce, convaincu comme il l'était qu'un jugement, autre que celui que les défendeurs devaient obtenir, serait un déni de justice, il lui appartenait, et je le dis avec le plus grand respect, d'exercer ce pouvoir de casser le verdict et de rejeter l'action. Et toute règle traditionnelle ou jurisprudentielle ne peut recevoir un sens étendu au point de rendre inefficaces comme inexistantes des dispositions expresses du Code.

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rule is of particular importance in a second court of appeal (S.C.C.) when the first court of appeal (K.B.) has affirmed the judgment confirming the verdict — *Montreal Tramways Co.* v. *Lindner, op. cit.* at p. 407.

[30](1941) No. 142, p. 81; see also *Curley* v. *Latreille* (1920) 60 S.C.R. 131, 178.

[31][1950] K.B. 1.

[32]*op. cit.*

Bordeleau v. *Bouchard et al*[33] is a recent example of the setting aside of a verdict by a trial judge because, in his opinion, it was clearly against the weight of evidence. The jury had found the defendants jointly and severally responsible for the death of the plaintiff's husband in an automobile accident and had assessed the damages at $6,000. Brossard J. held that the husband should also have been found at fault to the extent of 25% and rendered judgment for $4,500.

In *Laurin* v. *Noël*[34] the Court of King's Bench set aside a verdict on the ground that the damages assessed by the jury were grossly excessive. The trial judge had confirmed a verdict awarding the plaintiff, a widow, $4,939.40 as damages for the death of her 18-year-old son. The plaintiff was 61 years of age and had six other children, four of whom were gainfully employed and able to contribute to her support. The appeal court concluded that the jury had overlooked the fact that the deceased was only one of seven children and ordered a new trial failing agreement by the plaintiff to accept $2,755.61.[35]

When it is recalled that the presence or absence of evidence sufficient to support the finding of a jury as reasonable men is a matter on which different minds may well come to opposite conclusions, the difficulty facing a trial judge is obvious. It is submitted, however, that he should never lose sight of the provisions of the Code which exist for a definite purpose, and that the ruling in the Laporte case should not be interpreted as meaning that a jury's verdict must stand no matter how unreasonable it may appear in the light of the evidence. The situation was summed up by Lord Atkinson in the Judicial Committee of the Privy Council in *C.P.R.* v. *Fréchette*[36] when he referred to the general reluctance of the Board to disturb a jury's findings. At the same time he pointed out that if, after careful consideration of the evidence, the Board "comes to the conclusion that the verdict of a jury cannot be sustained, no course is open to it but to set that verdict aside".[37] And he concluded that "any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable".

Unfortunately the latter part of Lord Atkinson's statement is sometimes overlooked.

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[33]S.C. No. 292289, 27th February 1953 (unreported at date of writing).

[34]*op. cit.* The appeal was solely on the question of quantum. The jury found that the deceased was 35% responsible for the accident and fixed the damages at $7,000 *et les frais.* The judge gave judgment for 65% of $7,000 plus $389.40 representing disbursements, making a total of $4,939.40. A jury has no business with the costs, but has a right to declare that disbursements will form part of the damages. The Appeal Court held that *frais* must be taken to mean the disbursements, but pointed out that the judge was wrong in awarding 100% of those disbursements since the jury had found the victim partly to blame for the accident.

[35]Art. 503 C.P.

[36][1915] A.C. 871, 881.

[37]See also *Mechanical & Gen. Inventions Co. Ltd. et al* v. *Austin et al,* [1935] A.C. 346, 347; *Banbury* v. *Bank of Montreal* [1918] A.C. 626.