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District Court Digest

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moved to Rugby, North Dakota, where he was associated for eight years with Albert E. Coger until he moved to Grand Forks, where he associated with Mr. Murphy in the practice of law. This association continued until 1949 when Mr. Murphy retired from active practice.

T. A. Toner was married to Miss Viola Mary Davidson of Fisher, Minnesota, in June 1920.

Mr. Toner was 75 years of age when he died and illness had kept him from active work in his profession for about two and one-half years.

Mr. Toner is survived by his widow, who resides at 118 Belmont Road, where the couple had lived for many years. He is also survived by a brother, P. E. Toner of St. Paul, a sister, Mary Ann Toner of Mt. Angel, Oregon, four half sisters and one half brother.

Interment was made at Calvary Cemetery, Grand Forks.

DISTRICT COURT DIGEST

TRIAL — NEW TRIAL ON THE ISSUE OF DAMAGES ONLY

Deschane v. McDonald, District Court of the First Judicial District, Grand Forks County, North Dakota, O. B. Burtness, Judge.

This was an action for bodily injuries sustained by the plaintiff, when the automobile in which he was riding as a passenger collided with one being driven by the defendant. The jury returned a verdict in favor of the plaintiff in the amount of \$1,508.92, upon which judgment was entered. The plaintiff moved to set aside the verdict of the jury and the judgment entered thereon and for a new trial upon the issue of damages alone, or in the alternative for a new trial on all the issues of the case.

The facts were that the plaintiff had suffered a compound fracture of the right femur, a fracture of the right radius of the wrist, a fracture of the phalanx in the right little finger, a fracture of the neck of the fifth metacarpal bone in the left hand and some lacerations. There was obviously some permanent injury. The evidence also showed that plaintiff had been placed in a complete body cast for two months and was hospitalized for a long time. Plaintiff had hospital and medical bills totaling \$1,423.92 and incurred other special damages including \$40 for clothing, \$5 for a cane, and \$40 to replace broken eyeglasses. Plaintiff also testified to a loss of earnings, and \$75 expense paid for extra help at his residence during his hospitalization. The court felt that liability of the defendant was unquestioned and that undoubtedly the plaintiff had been free from contributory negligence. From the verdict of the jury, the court concluded that it had awarded the plaintiff all of his hospital and medical expense, plus \$85 for the cane, eyeglasses and clothing, but that it had awarded nothing for loss of earnings nor for pain and suffering.

The court ordered a new trial for the plaintiff, to be limited to the issues of damages alone, holding that the verdict was inadequate and not justified by the evidence.

The court reached its decision as follows:

1. The case of *Haser v. Pape*, 78 N. D. 481, is authority for the proposition that where the evidence discloses that the damages awarded by a jury are not adequate and are not commensurate with substantial justice, a new trial may be awarded on the theory that the verdict was not justified by the evidence.

2. The Supreme Court has in at least four cases limited the new trial to the issue of damages only under the provisions of Section 28-2729 of the North Dakota Revised Code of 1943.

3. Although North Dakota statutes do not clearly grant the District Court power to order a new trial for damages only, and although there is no North Dakota case in point, the idea that the trial court can grant a new trial limited to the issue of damages seems to be favored by the weight of authority, when the issue is separable from that of liability, when there is no indication of a compromise verdict, when there is no prejudice to the defendant, and when the court chooses to exercise its discretion in that manner. (Citing: 39 Am. Jur. 47, 9-A Blashfield 8, also see *Jacobson v. Horner*, 49 N. D. 741.)

Therefore, under the circumstance of this case, there appeared to the court no reason why time should be wasted trying the issues of whether the defendant was liable and that the subsequent new trial should be limited to the issue of damages alone, since they were obviously inadequate.

The decision did not pass upon the question of "additur", the court being of the opinion that there was a split of authority on that point, and that it should not set the exact amount of the damages, but only the limits thereof.

Annual Convention
of the
State Bar Association
of
North Dakota

Minot, North Dakota
August 9-10-11, 1956

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