Findings that Defy Reason:

Housser vs. Otis Corporation | April 6, 1989

Oral Reasons for Judgment—The Honourable Judge W. J. Rapson

There is no shortage of jury findings that seem perverse in light of the facts. One case that stands out for me involved an elderly woman who suffered injuries boarding an elevator that had failed to level at floor level. The woman refused what she considered a low offer from the elevator manufacturer, preferring to take her chances in court. But the jury found she had not proven the elevator was not level, leaving the victim with significant court costs. In response to a request from the plaintiffs' counsel, the trial judge acknowledged the defendant's offer was only one third of a fair settlement and disagreed with the jury's decision.

Judge W. J. Rapson's oral reasoning is published here in full.

Frank Gomberg
2013

IN THE DISTRICT COURT OF ONTARIO

No. 270635/86
B E T W E E N:

JOY HOUSSER and JOHN HOUSSER

Plaintiffs

- and –

OTIS CANADA INC. and
YORK CONDOMINIUM CORPORATION NO. 510

Defendants

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BEFORE: THE HONOURABLE JUDGE W. J. RAPSON

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ORAL REASONS FOR JUDGMENT

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APPEARANCES:

F. GOMBERG, Esq.	Counsel for the Plaintiffs
J. WITHROW, Esq.	Counsel for Otis Canada Inc.
I. BIANCHI, Ms.	Counsel for York Condominium

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The Court House
361 University Avenue
Toronto, Ontario
Courtroom 2 – 1

April 6, 1989

RAPSON, DIST. CO. J.

The motion before me to declare the jury's verdict to Question No. 1 as being perverse was ably argued by Mr. Gomberg and both defendants' counsel. Had I been the trier of fact in this case, I would have found on all the evidence, including the documents entered as exhibits regarding the operation of the subject elevator, that the plaintiff had satisfied me as to the negligence of the defendant Otis Elevator. In particular, I would have been satisfied that the subject elevator should not have been in service as it was because of the problems of levelling that were clearly being encountered at certain floors in the building. It is, however, clear that to find that it was not levelling at the fifteenth floor, the jury would have had to draw inferences from the evidence that it had not levelled at the fifteenth floor because there is no direct evidence of the plaintiffs that they had seen that it had not levelled. I would have drawn such an inference on the evidence. Indeed the evidence to me appeared overwhelmingly in favour of such a finding. However, that was not my function ie. it was the jury's, and they in their collective wisdom did not draw such an inference. My charge included the appropriate references to the law

Oral Reasons for Judgment
RAPSON, DIST. C. J.

and how they should approach the problem of drawing inferences. There was no objection by any of the parties to my charge. As stated by the right Honourable Bora Laskin in February of 1980, he was then Chief Justice of the Supreme Court of Canada, in the Kathleen Cameron v Excelsior Life Insurance Company case that the jury's findings are entitled to respect. It is not a case where the jury's answers were not responsive to the questions which were put to the jury nor did the jury refuse to answer questions. That was the situation in our case. It is not for me to veer from the findings of the jury when it was open to them to draw or not to draw the necessary inference. Jurys' findings are entitled to rational appreciation and to be regarded in as favourable a light as the evidence supporting the findings. The jury in this case had the opportunity of observing all of the witnesses and deciding which part of the evidence should be accepted. It is not for this Court to disagree with their findings when there is some evidence upon which they could have reached the conclusion which apparently they did.

Oral Reasons for Judgment
RAPSON, DIST. C. J.

Consequently, I am unable to accept the plaintiff's position that the answer to Question 1 was perverse.

With regard to the second portion of this motion, it is true that as I read my endorsement I awarded costs to the defendants but only if demanded. That was placed there in the hope that counsel would be able to persuade their respective clients to waive costs. I indicated that because I felt this was a case where, had I been trying the action, the plaintiff would have succeeded and I would have awarded costs against the defendants. It was not an extremely difficult case, but it was not an easy case, perhaps mainly because the plaintiff could not adduce direct evidence of having seen that the fifteenth floor elevator did not level. It was, however, a case that should have been brought to trial if it could not have been settled at the pretrial or after an offer had been made. It is appropriate that I should know what happened at the pretrial and what offers were made because of the cost factors involved here. It is noted that the defendant's counsel did not refute the fact that on June the 21st, 1988,

Oral Reasons for Judgment
RAPSON, DIST. C. J.

at pretrial, our Senior Judge would have found two thirds to three quarters percent in favour of the plaintiff and awarded damages, and apparently, these damages that Senior Judge Coo determined on the material he had before him were in excess of the $5,000.00 that had already been offered by the defendant.

I conclude that it was reasonable for the plaintiff to reject the $5,000.00 offer because her injuries were clearly worth more than that, even on a fifty percent liability basis.

In this case, if costs were awarded against Mrs. Housser there would be two sets of costs as there are two defendants. She is not a young person; it would appear that her husband is retired, and I think there would be financial hardship because clearly the costs could come to something in excess of $15,000.00. I have discretion to make a determination on costs. I am not fettered by the fact that the plaintiff lost this action, and as I say, it was quite correctly brought to trial. It is unfortunate that the jury did not find for the plaintiff.

Oral Reasons for Judgment
RAPSON, DIST. C. J.

In the result, I will not award costs against the plaintiff, and the endorsement will be amended to read, “no costs awarded to any of the parties” in lieu of my previous endorsement, “costs to defendants if demanded”.

I might further add that it was appropriate for the plaintiff to join both defendants that she did join in this action. There is no notice of motion before me, and I merely place on the record that there will be no costs of this motion as success has been shared.

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THIS IS TO CERTIFY THAT
the foregoing is a true
and accurate transcript
of my notes to the best
of my skill and ability.

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DIANNE LETTS
Official Court Reporter

Frank Gomberg

BA (McGill), JD (Osgoode), LLM (Osgoode), of the Bar of Ontario

Frank Gomberg was called to the Ontario Bar in 1979 and for 20 years acted principally for plaintiffs in wrongful death and personal injury claims. He represented families at a number of landmark Coroners Inquests, including the inquests into the 1995 TTC subway crash and the 1998 in-hospital death of Lisa Shore.

Mr. Gomberg was designated a Specialist in Civil Litigation by the Law Society of Upper Canada in January 1990. He resigned as a specialist in 2005 given his evolving practice to full-time mediator. He now spends all of his professional time mediating civil cases pending in the Ontario Superior Court of Justice. He has mediated over 3,600 such claims since he began mediating in 1995.

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