[BOURKE, C.J., and ZANNETIDES, J.]

1959
Oct. 22,
Nov. 20

THE ELECTRICITY AUTHORITY OF CYPRUS,
Appellant (Defendant),

v.

ANTONIS KIPPARIS,
Respondent (Plaintiff).

THE ELECTRICITY AUTHORITY OF CYPRUS
v.
ANTONIS KIPPARIS

(Civil Appeal No. 4293).

Civil Wrongs—Negligence—Duty not to be negligent—The Civil Wrongs Law, Cap. 9, section 47 (1) proviso and (2)—Whether exhaustive—The Courts of Justice Law, 1953, section 33 (1) (c)—Duty not to be negligent under section 47 (2) (e) of Cap. 9 (supra)—Wide scope of.

Electricity Authority—Execution of Works by the Authority—Accidents, damages, injuries—Liability—The Electricity Law, Cap 82, section 41—Whether it excludes actions at law on negligence.

Practice—Recalling witnesses—The Civil Procedure Rules, 0.38, r.1.—Recalling after the closing of a party's case—Unless not objected to, allowed only in special circumstances—Appeals—Damages—Misdirection—New trial—The Civil Procedure Rules 0.35, r. 9—But the Court of Appeal may instead proceed to assessment if there is sufficient material before it, an appeal being by way of rehearing—Civil Procedure Rules, 0.35, r. 3.

The respondent-plaintiff was awarded damages for personal injuries sustained as a result of the defendant's negligence. The respondent, whilst walking from his employer's premises to the public road in the dark, slipped and fell breaking his right leg. The cause of the fall was that he stepped on to the surface of a filled in trench which had subsided so that its level was lower than that of the road. This trench had been excavated by the defendant Public Authority. The full facts of the case appear in the judgment. It was argued on behalf of the appellant-defendant that in view of The Civil Wrongs Law, Cap. 9, section 47 (1), proviso, and sub-section (2), the respondent-plaintiff could not, in the circumstances of the case, maintain an action on the ground of negligence. The material parts of section 47 (1) and (2) are as follows:

Section 47 (1) Negligence consists of—

(*a*) doing some act which in the circumstances a reasonable prudent person would not do or failing to do some act which in the circumstances such a person would do, or

(*b*) failing to use such skill or to take such care in the exercise of a profession, trade or occupation as a reasonable prudent person qualified to exercise such profes-

sion, trade or occupation would in the circumstances use or take,
and thereby causing damage:

Provided that compensation therefor shall only be recovered by any person to whom the person guilty of negligence owed a duty, in the circumstances, not to be negligent.

(2) A duty not to be negligent shall exist in the following cases, that is to say:—

(*a*) (*b*) (*c*) . .. .(*d*) . ... . and

(*e*): "any person, whether for reward or otherwise, exercising any profession, trade or occupation or rendering any service to any other person shall owe such a duty to any person upon whom, or upon the property of whom or to whom such person is exercising his profession, trade or occupation or rendering any service".

Shortly, it was argued that an action for negligence cannot succeed in the instant case, because the appellant owed no duty in the circumstances to the respondent not to be negligent under the Civil Wrongs Law, Cap. 9, section 47 (1) proviso, and sub-section (2) of that section. In support of this argument, reliance was put on the authority of *Vassiliou v. Mitsi* Civil Appeal No. 3934 (*unreported*), in which it was held that "the only action for negligence that can be brought in Cyprus is under section 47 of the Civil Wrongs Law, Cap. 9, and, consequently the duty not to be negligent exists only in the cases defined in section 47 (2) which section must be considered strictly", and not the action as defined by English Law. In other words the argument was that the cases in which a duty not to be negligent shall exist, are exhaustively defined by sect.47 (2) reference in that regard to English Law being thereby excluded. That being so, the argument proceeded, section 47 (2) does not cover the circumstances of the instant case. It was further argued on behalf of the appellant that in any event the action is not maintainable in view of section 41 of the Electricity Law, Cap. 82. Section 41 reads as follows: "In the exercise of the powers in relation to the execution of works given them under this Law or any Order, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount of such compensation in case of difference to be determined by the Governor, and shall save harmless all authorities and persons from all damages and costs in respect of accidents, damages and injuries occasioned to them through the act or default of the undertakers or of any person in their employment".

A point was also taken on behalf of the appellant with

regard to misreception of evidence in that the respondent-ptf was allowed to be recalled as a witness after the case for the appellant-defendant was closed. Finally it was submitted on behalf of the appellant that the trial Court erred in principle in assessing damages and that, indeed, it failed to assess them at all acting on the mistaken view that there was an admission as to the amount claimed.

Held: (1) This case falls within section 47 (2) (e) of the Civil Wrongs Law, Cap. 9. The appellant Public Authority, constituted to render a service to the public, owed a duty to the respondent as a member of the public to take reasonable care when engaged in a course of action required for the rendering of its service—in this case the digging of trench by the public road. The wide scope of paragraph (e) of sub-section (2) of section 47 was expressly recognised in *Vassiliou V. Mitsi*, Civil Appeal No. 3934, (*unreported*).

Statement regarding the wide scope of paragraph (e) of sub-section (2) of section 47 of Cap. 9, in Vassiliou v. Mitsi (supra), applied. (v. that statement in the judgment , *post*).

(2) Section 41 of the Electricity Law, Cap. 82 (*supra*) does not preclude the bringing of an action at law to determine liability on the allegation of negligence.

(3) It is true that after a party's case is closed the recall of a witness should only be allowed in special circumstances. For the purposes of this case it seems to me that it is enough to advert to the fact that the application to recall the witness was not contested and no objection was taken to the recall or at any stage of the further examination of the witness. There was no contradictory account by any other witness as to the precise way in which the accident occurred and it was not an instance of a plaintiff attempting to mend his hand having heard any such evidence. But whatever may be said as to whether the discretion was properly exercised in the circumstances, it appears that there was consent, even it was not express, and it is too late for the appellant to take the point at this stage.

(4) The assessment of damages was made upon a wrong principle. But the matter should not be sent back under the Civil Procedure Rules, 0.35, r. 9 for trial of this particular issue. An appeal being by way of rehearing and there being before the Court sufficient material, the Court will assess itself the damages·

Statement in *Owen v. Sykes* (1936) 1 K.B. 192, at p. 198 *followed.*

(*Note:* The Court assessed the damages at the sum of £200 as claimed in the st. of claim, which is the figure arrived at by the trial judge acting under the misconception that the defendant did not dispute that amount.)

Appeal dismissed.

Cases referred to:

Newsome v. Darton U.D.C. (1938) 3 All E.R. 93.

Owen v. Sykes (1936) 1 K.B. 192.

Vassiliou v. Mitsi, Civil Appeal No. 3934 (*unreported*) dated the 26th January 1952.

Vassiliou v. Vassiliou (1939) 16 C.L.R. 70.

The Universal Advertising and Publishing Agency and Others v. Vouros (1952) 19 C.L.R. 87.

Myrianthousis v. Petrou (1956) 21 C.L.R. 32.

Per curiam: Reliance was placed by counsel for the appellant upon the judgment of this Court (Griffith Williams, Acting C.J., and Melissas, J.) in *Vassiliou* v. *Mitsi*, Civil Appeal No. 3934 (*unreported*), in which it was held that—"The only action for negligence that can be brought in Cyprus is under section 47 (of Cap. 9), and consequently the duty not to be negligent exists only in the cases defined in section 47 (2) which section must be considered strictly".

Section 33 (1) (c) of the Courts of Justice Law, 1953, provides for the application of "the common law and the doctrines of equity save in so for as other provision has been or shall be by any Law of the Colony". There is the Civil Wrongs Law but it has been held that it is not exhaustive of the civil wrongs in the Colony as supplying remedies for all injuries caused by tortious acts—See: *Vassiliou v. Vassiliou*, 16 C.L.R. 70; *The Universal Advertising and Publishing Agency and Others v. Vouros* 19 C.L.R. 87 (see also *Myrianthousis v. Petrou*, 21 C.L.R.32). It may be arguable that the effect of these later authorities is to establish that section 47 (2) of the Civil Wrongs Law, contrary to the view adopted in *Vassiliou v. Mitsi* (*supra*), is not exhaustive.

The statement of the law just referred to in Vassiliou v. Mitsi (*supra*), *doubted.*

Appeal.

The defendant Authority appealed against the judgment of the District Court of Larnaca (Pierides D.J.) dated the 14th April, 1959 (Action No.767/56), whereby the plaintiff was awarded £200 damages for personal injuries due to the negligence of the defendant.

G. Cacoyiannis for the appellant.

G. Stavrinakis for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by:

BOURKE, C.J. : This is an appeal from a decision of the District Court of Larnaca awarding the respondent £200 as

damages in respect of personal injuries sustained as the result of negligence on the part of the appellant. Briefly the facts as found are that the respondent at about 7.30 p.m. in the month of March, 1956, drove his employer's car into its garage in a yard the gate of which opened onto a public road. He returned through the gate walking to the road in the dark when he slipped and fell breaking his right leg. The cause of the fall was that he stepped on to the surface of a filled in trench which had subsided so that its level was lower than that of the road. This trench ran parallel to the road and was a few feet distant from the gate and wall of the yard: it had been excavated by the appellant in August, 1955, and they placed boards over it to enable the respondent to drive the car into the garage. It was filled in by the appellant in September, 1955, and the surface was then raised above that of the road. But after a few weeks the looser earth in the trench sank below the surrounding surface. A piece of wood was used to restore the level and facilitate the driving of the car into the yard. This piece of wood was not in place on the night of the accident. It had originally been laid on the trench surface by another servant of the respondent's employer and it was his custom to remove it at night which, according to the finding, he had done on this occasion. The appellant had taken no step to put more earth on the trench surface after it had subsided in order to bring it up to the level of the road. After the occurrence of the accident the appellant took steps to level off the depression. The trial judge concluded that the appellant was negligent and also found that there was no contributory negligence on the part of the respondent.

In the first place it is argued that the findings were unreasonable and that credence should not have been given to the respondent's story as to how the accident occurred because he had given two versions in which there was difference in detail. The first account was in examination in chief:—

> " I drove it into the garage. I left it there and I came out of the garage and walked out of the yard. I stood in front of the gate trying to close the gate of the yard. This gate consists of two big wooden leaves. I closed the one leaf of the gate and I was going to close the other one and in doing so I applied some force and my right foot which was near the edge of the trench slipped and I fell down on the ground. The level of the surface of the trench was lower than that of the surface of the road, by about half a foot ".

and in cross-examination he said:—

> " At the time I was trying to close the second leaf of the gate I slipped into the trench and fell down. I cannot describe the real position of my body and my feet at the time I was trying to close the second leaf of the

gate. It was a dark night and there was no electric light there. After my right foot had slipped into the trench my body fell on the street, but I do not remember whether I sat before I fell on the street. No one was present. If the trench was not there I would not slip and fall on the ground".

In answer to the Judge he testified:-

"although I knew the existence of the trench at the night I forgot its existence at the moment I was trying to close the gate of the yard, and I paid no attention to its existence ".

After the close of the case for the appellant the respondent's advocate applied to recall him as a witness. There was no objection taken to this course by the other side and the recall was permitted, the respondent being further examined by his advocate and very briefly cross-examined by the appellant's advocate. In the course of this further evidence the respondent said:—

"What I have stated in my evidence in the morning that the edge of the trench was at a distance of about 1 1/2 feet from the base of the gate and that the accident occurred while I was trying to close the second leaf of the gate and that my foot slipped on the trench and I fell down is not correct. I made a mistake in stating as above. The true facts are that the distance between the edge of the trench and the base of the gate is about 5 feet and that the accident occurred to me after I had closed the second leaf of the gate and I started walking towards the road when my foot stepped on the surface of the trench, I slipped and fell down because the surface of the trench was at a lower level than the surface of the surrounding road on both sides".

This corrected version was accepted by the trial court as a true account of what happened. The respondent, it must be remembered, was testifying some eight months after the event : at the conclusion of his evidence as the first witness in the case, the Judge and the parties visited the scene and the respondent would have the occasion to refresh his memory on the point of distance and as to the occurrence of the accident. On his recall it was never put to him in cross-examination that he was giving an untrue account of what had happened. It is now suggested that the lower Court was wrong to accept it that the fall occurred because of the subsidence in the trench. I am not prepared to say there is substance in this submission. The Judge had the advantage of seeing and hearing the witness and was in a better position to decide whether there was a genuine and honest correction of detail. Had the respondent wished to concoct a story to involve the appellant, there would have been no need for him

to seek to put a correction before the Court ; the first version, if accepted, would have served his purpose just as well.

It is then a ground of appeal that it was wrong in law to allow the respondent to be recalled as a witness after the case for the appellant was closed. The learned Judge in acceding to the application and granting leave to recall was acting in the exercise of a discretion resting with him under 0.38 r. 1 and he was no doubt informed that it was a matter of seeking to make a correction. It is true that after a party's case is closed the recall of a witness should only be allowed in special circumstances. For the purposes of this case it seems to me that it is enough to advert to the fact that the application to recall the witness was not contested and no objection was taken to the recall or at any stage of the further examination of the witness. There was no contradictory account by any other witness as to the precise way in which the accident occurred and it was not an instance of a plaintiff attempting to mend his hand having heard any such evidence. But whatever may be said as to whether the discretion was properly exercised in the circumstances, it appears that there was consent, even if it was not expressed, and it is too late for the appellant to take the point at this stage. In my opinion it is not a good ground of appeal.

The next argument advanced for the appellant was in support of the contention that under the Law of Cyprus the respondent could not in the circumstances maintain an action on ground of negligence. The learned District Judge rejected this submission and had this to say in his judgment:—

> " I had the opportunity of reading the judgment of His Honour the President of the District Court of Larnaca in the action No.1323/55 which was brought by another plaintiff against the same defendant, for damages due to negligence and/or nuisance of the defendants and in which the same counsel for defendants made the same submissions as in the present case and it was decided by His Honour the President of the Court as follows:—
>
> > 'The case comes clearly within section 47 (1) (a) of the Civil Wrongs Law Cap. 9 which in my opinion must be read and applied on the principles covering negligence in Common Law'.
>
> I fully agree and I adopt what the learned President said in that case and taking the view that the act of the defendants in opening a trench in front of the gate of the garage and filling it in with earth on the 16.9.55, and failing to fill it in again with more quantity of earth when later on a depression had formed at the place where the accident occurred and thus became of lower level than the surface of the road and leaving it at that condition for a considerable time without taking any precaution

or any measures whatsoever (such as placing a red light during night over it), was an act which in the circumstances a reasonable prudent person would not do, I find that the defendants were guilty of actionable negligence ".

The Judge also referred to *Newsome v Darton U D.C* (1938) 3 All E R 93 and to Clerk & Lindsell, On Torts p. 376 and Charlesworth, On Negligence, 3rd edition, p 148.

Shortly, Mr Cacoyiannis argues that an action for negligence cannot succeed because, as he submits, the appellant owed no duty in the circumstances to the respondent not to be negligent. In this connection reference is made to the proviso to section 47 (1) of the Civil Wrongs Law, Cap 9, and to sub-section (2) of that section, which provides for cases in which a duty not to be negligent shall exist, and which, it is said, does not cover the circumstances of the instant case. Reliance is placed upon the judgment of this Court (Griffith Williams, Acting C J. and Melissas J.) in *Vassiliou* v. *Mitsi*, Civil Appeal No. 3934 (*unreported*), in which it was held that—

"The only action for negligence that can be brought in Cyprus is under section 47 (of Cap 9), and consequently the duty not to be negligent exists only in the cases defined in section 47 (2) which section must be considered strictly"

Section 33 (1) (c) of the Courts of Justice Law, 1953, provides for the application of " the common law and the doctrines of equity save in so far as other provision has been or shall be made by any Law of the Colony". There is the Civil Wrongs Law but it has been held that it is not exhaustive of the civil wrongs in the Colony as supplying remedies for all injuries caused by tortious acts — *Vassiliou v. Vassiliou*, 16 C L.R 70 ; *The Universal Advertising & Publishing Agency & Others v Vouros* 19 C L.R 87 (see also *Myrianthousis v. Petrou*, 21 C L R. 32). It may be arguable that the effect of these later authorities is to establish that section 47 (2) of the Civil Wrongs Law, contrary to the view adopted in *Vassiliou v. Mitsi* (*supra*). is not exhaustive ; that, however, is not a question upon which I find it necessary to reach an opinion because it seems to me, and I so hold, that the contention put forward by the respondent's advocate that his client's case falls within section 47 (2) (e) is correct In my judgment this Public Authority, the appellant, constituted to render a service to the public, owed a duty to the respondent as a member of the public to take reasonable care when engaged in a course of action required for the rendering of its service — in this case the digging of a trench by the public road The wide scope of paragraph (e) of section 47 (2) was expressly recognised in *Vassiliou v Mitsi* (*supra*) where the learned Judges said:—

" The only remaining paragraph is (e) and in view of

the restricted number of persons affected by paras (a) to (d) we must hold that this paragraph (e) was intended by the Legislature to impose a duty not to be negligent on the very wide range of persons unaffected by the other paragraphs. In the other paragraphs a duty not to be negligent arises only in respect of a person who stands in some peculiar relationship towards either immovable property or to some vehicle or other means of conveyance. Paragraph (e) refers to persons generally performing services for other people either in the way of their profession or not and whether for payment or otherwise, and imposes on them a duty not to be negligent".

The argument based upon sections 33 to 37 and 41 of the Electricity Law with reference to the grounds set forth in paragraphs 6 and 7 of the notice of appeal went, as I understood it, to the question whether the claim could be based on a breach of statutory duty as a cause of action. It was, however, on one of the alternative causes of action pleaded involving the allegation of negligence that judgment was entered and I do not propose to enter into a disquisition that appears to be academic in the circumstances. But if I am to understand that it is seriously contended that the effect of section 41 of the Electricity Law is to preclude the bringing of any action at law to determine liability on the allegation of negligence, then I do not accept that proposition and am content to adopt the reasoning of the President of the District Court of Larnaca in Civil Case 1323/55 which was quoted and accepted by the trial Judge in the instant matter.

It is also a ground of appeal that the Court below erred in finding that there was no contributory negligence and in not apportioning blame. The Judge found as a fact that there was no negligence on the part of the respondent and I do not think this conclusion is unreasonable having regard to the evidence.

Finally it is submitted that the Judge erred in principle in arriving at a figure for damages ; indeed it is said that he failed to assess the damages at all but wrongly took the view that there was an admission as to the amount and entered judgment accordingly.

There was no claim for special damages ; the respondent sought unliquidated damages but the course was taken of specifying a sum, viz., £200, in the statement of claim. Judgment was given for this amount. In his judgment the District Judge said:—

" Defendants did not dispute the amount of damages claimed by the plaintiff but they dispute and deny liability for its payment for the ground and reasons which are

stated in their statement of defence and which I have already mentioned".

At the close of his judgment he said:—

"As I have already said in the beginning, the defendants do not dispute the amount claimed by the plaintiff. For all the above reasons judgment is given for plaintiff for £200.....".

The damages were of course in issue (O. 21, r. 5) and there was no admission or agreement as to the amount. The appellant's advocate cross-examined, though very briefly, as to the injury sustained. I am unable to accept it, as we are invited by the respondent's advocate, that what the learned Judge meant by the passages just quoted was that there was no dispute in the sense that there was no cross-examination with a view to showing ground for reduction in the sum claimed or to minimise the figure to be assessed. The position as I see it is that the assessment of damages was made upon a wrong principle ; it appears that the learned Judge failed to apply his mind at all to the considerations relevant to a proper assessment. It arises as to whether the matter should be sent back under O. 35, r. 9 for trial of this particular issue. The proceedings have been pending for a very long time and finality is obviously desirable ; moreover the trial judge is no longer a member of the District Court at Larnaca, though that is a difficulty that could, if necessary, be overcome. An appeal is by way of rehearing (O. 35, r. 3) and as was held in *Owen v. Sykes* (1936) 1 K.B. 192 at p. 198 — "An appeal from a decision of a Judge trying a case without a jury with regard to damages is a rehearing of the case, and if we are satisfied that the assessment of damages was made on a wrong principle, we ought to re-open the question of damages and ourselves decide what the proper damages should be". The advocate for the appellant has stated that if the matter, having regard to his other grounds of appeal, came to a decision on this issue, it was open to this Court to determine a proper amount as damages on the material before it and I understood him to be inviting us to deal with this aspect of the case. I think this is the proper course to pursue.

It is plain that the Judge of trial accepted the respondent's evidence and the medical evidence as to the injury to his leg. He sustained a "spinal" fracture of the "middle of the bone at about 9 inches from the ground" (Dr. Francis), and was a short time in hospital where his leg was put in plaster. It remained in plaster for about 75 days. The respondent testified that after the fall he felt great pain ; in the nature of things it is obvious that he must have endured pain and inconvenience. About a month after the removal of the plaster he found he was able to drive a car. The evidence of the hospital surgeon, Dr. Francis, which was uncontradicted and unchallenged in cross-examination, was that as a result of

the injury the respondent "sustained an amount between 10% to 15% out of 60% of permanent incapacity." In the circumstances it seems to me that the sum of £200 represents a fair and reasonable estimate as compensation and I would assess the damages in that amount.

Since my brother is of the same opinion the result will be that the appeal stands dismissed. The damages payable are fixed at £200—with legal interest at 4% from date of judgment of the lower court and costs as fixed below together with costs on this appeal.

ZANNETIDES, J: I agree.

Appeal dismissed with costs.