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May 3,
Nov. 16
1963
Jan. 24

YIANNAKIS KYRIACOU POURIKKOS v. MEHMED FEVZI

(WILSON, P., ZEKIA, JOSEPHIDES, JJ. AND TRIANTAFYLLIDES, Ag.J.)

YIANNAKIS KYRIACOU POURIKKOS,

Appellant-Defendant,

v.

MEHMED FEVZI,

Respondent-Plaintiff,

(*Civil Appeal No.* 4344)

Civil Wrongs—Negligence—Road accident—Collision—Duties—When two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care—Even if at the material time the other person is on the wrong side of the road in breach of the Rule of the Road Law, Cap. 334, *section* 2*—Excessive speed.*

Practice—Appeal—Findings of fact—The Appellate Court will be slow to reverse a finding of fact of the trial Court when there is evidence to support it.

Practice—Indorsement of the writ—Pleadings—Statement of claim—Amendment—Record should be kept in order—Therefore, proper application for leave to amend should always be made and the amended pleadings be filed—Amendments may in a proper case be allowed even after verdict and, also, by the High Court hearing the appeal—Civil Procedure Rules, Order 20, *r.* 2 *and Order* 25, *r.* 1.

Practice—Indorsement of the writ—Statement of Claim—Damages—The plaintiff if he names a figure, may claim the largest amount he is likely to recover—In the absence of an amendment he cannot recover more than the amount claimed—Special damages should be pleaded—And in the absence of an amendment they cannot be recovered—Such amendment may, in a proper case, be allowed even after verdict and, also, by the High Court hearing the appeal.

The respondent-plaintiff was travelling on his scooter along the Nicosia-Famagusta road. On reaching a bridge, he found that the bridge was being repaired and that traffic was diverted round it on to an old abandoned road in a direction to his left as he was travelling towards Famagusta. Shortly after entering this diversion he collided with a Peugeot saloon, driven by the appellant-defendant who was proceeding in the opposite direction. The trial Court found that the collision occurred when the defendant was not only on his own side

of the road but he was pretty well off the paved portion. The trial Court, further found that the plaintiff was to be blamed 75% for the accident and the defendant 25% and assessed plaintiff's loss for personal injuries and incidental expenses at £2,000 plus £100 damage to his scooter, and the damage to defendant's car at £117.700 mils. It awarded upon this basis £441.225 mils damages to the plaintiff together with costs. Against this judgment the defendant appealed claiming that he acted reasonably under the circumstances and that the trial Court was wrong in finding that the defendant did not take avoiding action. The plaintiff also cross-appealed claiming that the defendant was wholly to blame.

Section 2 of the Rule of the Road Law, Cap. 334, provides as follows :—

" Every person driving any vehicle, which term in this Law includes a bicycle or tricycle, or driving or riding or leading any animal—(*a*) when he meets any other vehicle or any animal, shall keep his own vehicle or animal to the left side."

The plaintiff, in his indorsement of the writ, claimed " £3,000 damages for *personal injuries* ", but he did not include any claim for damage to his scooter. In the body of his statement of claim (paragraph 8), in the particulars of special damage, the plaintiff, *inter alia*, included " damages of the motor cycle which was badly damaged in the accident £135 " ; but in the prayer at the end of the statement of claim the plaintiff only claimed "£3,000 damages for *personal injuries* " and costs, and he did not claim any special damage.

The High Court, in dismissing both the appeal and the cross-appeal :—

Held, per WILSON, P., the other members of the Court concurring :

(1) The plaintiff must be taken to have known of the rule of the road (*supra*) and he must likewise be held to have chosen to disregard it, because he chose to drive at a speed which prevented him from obeying it.

(2) The main, if not the only, cause of the collision was the excessive speed of the plaintiff which caused him to cross over to the defendant's side of the diversion. The defendant, seeing the plaintiff's vehicle travelling at an excessive speed, slowed down and drove his car partly off the pavement to the extent stated above. In these circumstances the action might well have been dismissed and the counter-claim might well have succeeded completely.

(3) However, a careful perusal of all the evidence leaves a doubt whether the trial Court was wrong in the result, applying the principle, as I do, stated in *Nance* v. *British Columbia Electric Railways Company Ltd.* (1951) A.C. 601 at p. 611 : " Generally speaking when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot, and the other controlling or moving vehicle ".

(4) The difficulty here is not whether the defendant took any precautions to avoid the collision, but whether he took sufficient precautions. This is a question of fact, upon which the trial Court has made a finding and it is not to be reversed when, as here, there is evidence to support it.

(5) For the above reasons both the appeal and the cross-appeal must be dismissed with costs.

Held, per JOSEPHIDES, J., the other members of the Court concurring :

(1) In the present case it appears that the special damage to the motor-scooter was included in the body of the statement of claim but not in the prayer at the foot of the statement of claim nor in the indorsement of the writ. Nevertheless no objection was taken by the defendant to the admission of the evidence with regard to the damage to the scooter. The question which arises is : " Was the issue fairly before the court or raised upon the pleadings ? " With some hesitation I would say that it was ; but, on the authorities, I do not think that judgment could be given without amendment of the indorsement of the writ and the statement of claim. The omission to claim the special damages was obvioulsy due to an error or oversight of counsel who drafted the writ and the statement of claim.

(2) Under Order 20, r. 2, of the Civil Procedure Rules, the plaintiff must state specifically the relief which he claims either simply or in the alternative. The plaintiff in settling the claim for damages is not restricted to the figures, if any, given on the writ. If he names a figure, he should claim the largest amount which he is to recover ; for in the absence of amendment, he cannot recover more than the amount claimed.

(3) An amendment, however, may be allowed under the provisions of Order 25, r. 1, after verdict.

In the case of *Wyatt* v. *The Rosherville Gardens Co.* (1886) 2 T.L.R 282, the plaintiff claimed £200 damages for injuries sustained by him by the bite of a bear kept by the defendants. The jury found a verdict for the plaintiff in the sum of £500 damages Plaintiff's counsel then asked leave to amend his claim in order that it might cover the jury's finding and such leave was granted by the court

In "*The Dictator*" (1892) P 64 the plaintiff's claim as indorsed on the writ, was for £5,000 for salvage services The statement of claim subsequently delivered concluded with a claim in the usual form for "such an amount of salvage as to the court may seem just". At the hearing of the action the court made an award of £7,500 Before the decree was drawn up the plaintiffs gave notice of motion to amend the indorsement of the writ by altering the sum named therein to £8,500 and it was held that the court had power after judgment to give the required leave, and the court ordered the indorsement of the writ to be amended accordingly, the plaintiffs paying the costs of the motion

The case of *Modera* v *Modera and Barclay* (1893) 10 T L R. 69 was a petition for divorce on the ground of adultery with a co-respondent against whom £500 damages were claimed The jury awarded £1,000 and counsel for the petitioner asked the court to allow the claim to be amended by making it £1,000 and the court allowed the amendment to be made In the case of the *Chattell* v. *Daily Mail* (1901) 18 T L R 165 the plaintiff claimed in her statement of claim £1,000 damages for libel and no defence was delivered The jury returned a verdict for £2,500 The plaintiff without applying to amend the statement of claim signed judgment for this amount. On appeal it was held that the judgment was bad The Master of the Rolls in the course of his judgment said (at page 168) · "To entitle the plaintiff to judgment for £2,500 the claim required amendment"

(4) On these authorities I have no hesitation in holding that the plaintiff cannot recover the amount of special damage awarded in the judgment without having the indorsement of his writ and the prayer in the statement of claim amended. In my opinion in the circumstances of this case no injustice will be done by allowing the amendment on appeal, if leave was asked for But respondent's counsel has not asked for leave to amend

(5) If an application for leave to amend is made before us and the desired amendment formulated we are prepared to grant such leave on payment of the costs by the respondent.

(6) However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings may lead to grave injustice to the other side and in such a case I apprehend that this Court would not be prepared to entertain an application for leave to amend on appeal.

(7) It has been said more than once in this Court that it is the duty, not only of the Court but of counsel on each side, to see that the record is kept in order *i.e.* that a proper application is made to the Court for leave to amend the pleadings at the trial and where leave is granted an amended pleading is actually filed in Court.

Appeal and cross-appeal dismissed with costs.

Cases referred to :

Nance v. *British Columbia Electric Railways Company Ltd.* (1951) A.C. 601, at p. 611 ;

Wyatt v. *The Rosherville Gardens Co.* (1886) 2 T.L.R. 282 :

Modera v. *Modera and Barclay* (1893) 10 T.L.R. 69 ;

Chattell v. *Daily Mail* (1901) 18 T.L.R. 165 ;

"*The Dictator*" (1892) P. 64.

Appeal.

Appeal against the judgment of the District Court of Famagusta (Vassiliades, P.D.C. and Ekrem, D.J.) dated the 8.4.61 (Action No. 141/60) whereby judgment was given for plaintiff in the sum of £441.225 mils for damage for personal injuries sustained by him in a road collision.

N. Zomenis for the appellant.

M. Fuad Bey with O. Mehmed for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgments delivered by WILSON, P. and JOSEPHIDES, J.

WILSON, P. : This is an appeal by the defendant from the judgment of the District Court at Famagusta delivered on April 8th 1961, and a cross-appeal by the plaintiff asking

a ruling (*a*) that the defendant was wholly responsible for the collision in question, and (*b*) that he is not liable to pay any part of the cost of the repairs to the defendant's car, assessed at £111.700 mils. The Court found the plaintiff 75% to blame for the accident and the defendant 25%. It assessed the plaintiff's loss for personal injuries including incidental expenses, pain, suffering and inconvenience at £2,000, the damage to his scooter £100, making a total of £2,100 and the damage to the defendant's car at £111.700 mils. Upon the basis of the apportionment of the liability it awarded judgment for the plaintiff for £441.225 mils, together with the costs of the action.

The defendant's counsel contends that the trial Court was wrong in finding his client negligent holding that he did not take avoiding action, this being against the evidence adduced. He further alleges that the evidence proves that he acted reasonably in the circumstances and that he took all the steps which a reasonable man could have taken in the circumstances. It is further contended that the finding of the trial court that the defendant's speed may have been one of the reasons of the collision is wrong, and not warranted by the evidence and contrary to the plaintiff's evidence. It is also submitted that the plaintiff was not entitled to the damages to his motor-scooter, because it did not come within the claim as set forth in the statement of claim.

The plaintiff a miner working at Mavrovouni Mine of the Cyprus Mines Corporation and residing at Lefka, on August 16th, 1959, was travelling on his Lambretta scooter motor-cycle to Famagusta along the Nicosia-Famagusta road. When he arrived at a point between 5 and 6 miles away from Famagusta he found that a bridge, known as the Aheritou Bridge, was closed for repairs and the traffic was diverted round it on to an old abandoned road in a direction to his left, as he was travelling towards Famagusta. Shortly after he entered this diversion he came into collision with a French Peugeot saloon, driven by the defendant, a Bank clerk living at Famagusta who was proceeding from his village, Stylous, to Akhna accompanied by a friend.

Each party alleged the accident happened on his own side of the highway and each alleged the other was travelling at a high rate of speed. After hearing conflicting evidence the trial court accepted the evidence of a bus-driver who

was following behind the plaintiff and whose bus had earlier been passed by him and made the following finding :

that—

> " as the motor-cyclist was taking the bend at the junction the two vehicles, scooter and car, came into collision the offside of the scooter colliding with the offside of the car somewhere between the front mudguard and the front door ; the car was then running on its proper side of the road with both nearside wheels on the berm on that side of the road and the offside wheels on the asphalted surface, according to the witness (P. 13) " (that is, the Police Sergeant Ioannis Ypsos, who investigated the accident).

The point of impact was found to be 15 feet from the corner of the junction of the asphalted legs of the road and marked point " C " on the plan put in as Exhibit 1. It is apparent from the findings of the trial Court that the defendant was not only on his own side of the road but he was pretty well off the paved portion which, at the point of impact, was 12'6" in width. As a result of the impact the plaintiff was thrown off his seat against the car and eventually fell on his back towards the left side of the road where he was found lying unconscious with his arm twisted backwards. He was removed in a passing military ambulance to the Famagusta hospital. Later his arm was amputated. The windscreen of the motor-car was smashed.

The Court found the collision was quite forcible and the defendant was negligent in that he " did not take sufficient avoiding action when he saw the motor cyclist approaching that difficult junction on a two-wheeled vehicle at a speed ; nor was he able to control his car after a collision. The defendant, moreover, failed to make use of the wide triangular space between the old and the new asphalted roads, as shown on the sketch (Exh. 1) in order to avoid the motorcyclist on the scooter whom he saw coming to the bend. " Later it held " the collision was, to a certain extent, due to negligence on the part of the defendant in approaching the main road from a diversion at a speed, which may have been one of the reasons, (if not the only reason) he failed to take avoiding action by making use of the wide berm on his side of the road.

I find the conclusions of the trial court difficult to accept. The Rule of the Road Law, Cap. 334, provides in secrion 2—

> " every person driving any vehicle, which term in this law includes a bicycle, tricycle or driving or riding

or leading any animal—(*a*) when he meets another vehicle or any animal, shall keep his own vehicle or animal to the left side."

The plaintiff must be taken to have known of this rule and he must likewise be held to have chosen to disregard it, because he chose to drive at a speed which prevented him from obeying it.

The main, if not the only, cause of the collision was the excessive speed of the plaintiff which caused him to cross over to the defendant's side of the diversion. The defendant, seeing the plaintiff's vehicle travelling at an excessive speed, slowed down and drove his car partly off the pavement to the extent stated above. In these circumstances the action might well have been dismissed and the counter claim might well have succeeded completely.

However, a careful perusal of all the evidence leaves a doubt whether the trial court was wrong in the result, applying the principle, as I do, stated in *Nance* v. *British Columbia Electric Railways Company Ltd.* (1951) A.C. 601 at p. 611 : " Generally speaking when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot, and the other controlling a moving vehicle. "

The difficulty here is not whether the defendant took any precautions to avoid the collision, but whether he took sufficient precautions. This is a question of fact, upon which the trial Court has made a finding and it is not to be reversed when, as here, there is evidence to support it. For these reasons the appeal must be dismissed with costs, and the cross-appeal must also be dismissed with costs.

I concur in the reasons for judgment given by the Honourable Mr. Justice Josephides upon the question of the award of special damages in this case.

ZEKIA, J. : I agree with both judgments, the judgment which has just been delivered by the Honourable the President and the judgment which will be read by Mr. Justice Josephides.

JOSEPHIDES, J. : I agree with the judgment of the Honourable President of this Court with regard to the finding of the trial Court on the issue of negligence. I only propose to deal with the question whether on the

pleadings it was open to the trial Court to award special damages in respect of the plaintiff's (respondent's) motor scooter.

The plaintiff, in his indorsement of the writ, claimed "£3,000 damages for *personal injuries*", but he did not include any claim for damage to his scooter. In the body of his statement of claim (paragraph 8), in the particulars of special damage, the plaintiff, inter alia, included " damages of the motor cycle which was badly damaged in the accident £135 " ; but in the prayer at the end of the statement of claim the plaintiff only claimed "£3,000 damages for *personal injuries*" and costs, and he did not claim any special damage.

The trial Court, after hearing evidence, gave its judgment and assessed the sum of £2,000 for personal injuries and it further assessed the sum of £100 damage to plaintiff's scooter.

In the present case it appears that the special damage to the motor-scooter was included in the body of the statement of claim but not in the prayer at the foot of the statement of claim nor in the indorsement of the writ. Nevertheless no objection was taken by the defendant to the admission of the evidence with regard to the damage to the scooter. The question which arises is " was the issue fairly before the court or raised upon the pleadings ? " With some hesitation I would say that it was ; but, on the authorities, I do not think that judgment could be given without amendment of the indorsement of the writ and the statement of claim. The omission to claim the special damages was obviously due to an error or oversight of counsel who drafted the writ and the statement of claim.

Under Order 20, rule 2, of the Civil Procedure Rules the plaintiff must state specifically the relief which he claims either simply or in the alternative. The plaintiff in settling the claim for damages is not restricted to the figures, if any, given on the writ. If he names a figure, he should claim the largest amount which he is likely to recover ; for in the absence of amendment, he cannot recover more than the amount claimed. An amendment, however, may be allowed under the provisions of Order 25, rule 1, after verdict.

In the case of *Wyatt* v. *The Rosherville Gardens Co.* (1886) 2 T.L.R. 282, the plaintiff claimed £200 damages for injuries sustained by him by the bite of a bear kept

by the defendants. The jury found a verdict for the plaintiff in the sum of £500 damages. Plaintiff's counsel then asked leave to amend his claim in order that it might cover the jury's finding and such leave was granted by the Court.

In "The Dictator" (1892) P. 64 the plaintiff's claim as indorsed on the writ, was for £5,000 for salvage services. The statement of claim subsequently delivered concluded with a claim in the usual form for "such an amount of salvage as to the Court may seem just". At the hearing of the action the Court made an award of £7,500. Before the decree was drawn up the plaintiffs gave notice of motion to amend the indorsement of the writ by altering the sum named therein to £8,500 ; and it was held that the court had power after judgment to give the required leave, and the Court ordered the indorsement of the writ to be amended accordingly, the plaintiffs paying the costs of the motion.

The case of *Modera* v. *Modera and Barclay* (1893) 10 T.L.R. 69 was a petition for divorce on the ground of adultery with a co-respondent against whom £500 damages were claimed. The jury awarded £1,000 and counsel for the petitioner asked the Court to allow the claim to be amended by making it £1,000 and the Court allowed the amendment to be made. In the case of the *Chattell* v. *Daily Mail* (1901) 18 T.L.R. 165 the plaintiff claimed in her statement of claim £1,000 damages for libel and no defence was delivered. The jury returned a verdict for £2,500. The plaintiff without applying to amend the statement of claim signed judgment for this amount. On appeal it was held that the judgment was bad. The Master of the Rolls in the course of his judgment said (at page 168) "To entitle the plaintiff to judgment for £2,500 the claim required amendment".

On these authorities I have no hesitation in holding that the plaintiff cannot recover the amount of special damage awarded in the judgment without having the indorsement of his writ and the prayer in the statement of claim amended. In my opinion in the circumstances of this case no injustice will be done by allowing the amendment on appeal, if leave was asked for. But respondent's counsel has not asked for leave to amend.

If an application for leave to amend is made before us and the desired amendment formulated we are prepared to grant such leave on payment of the costs by the respondent.

However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings may lead to grave injustice to the other side and in such a case I apprehend that this Court would not be prepared to entertain an application for leave to amend on appeal.

It has been said more than once in this Court that it is the duty, not only of the Court but of counsel on each side, to see that the record is kept in order i.e. that a proper application is made to the Court for leave to amend the pleadings at the trial and where leave is granted an amended pleading is actually filed in Court.

TRIANTAFYLLIDES, Ag. J. : I agree with the result reached in this appeal and cross-appeal on the basis of the judgments already delivered.

Appeal and cross-appeal dismissed with costs.