1967
May 26
1968
Mar. 28

—

EVRIPIDES
K. MANOLI
v.
KYPROS
EVRIPIDOU

[JOSEPHIDES, LOIZOU, HADJIANASTASSIOU, JJ.]

EVRIPIDES K. MANOLI,

Appellant-Defendant,

v.

KYPROS EVRIPIDOU,

Respondent-Plaintiff,

(Civil Appeal No. 4610).

Road Traffic—Accident—Personal injuries—Damages—General damages—Assessment—Evidence as to matter not expressly stated in the pleadings but made an issue, without objection, before the trial Court—Whether properly admitted.

Damages—General damages—Quantum—Principles upon which the Court of Appeal will interfere with the quantum of general damages awarded by trial Courts—Principles restated.

Practice—Pleadings—Particulars—A party giving particulars is bound by them—And cannot go beyond them without proper amendment by leave of the Court—Matter not set up in terms by way of defence—But made an issue, without objection by the other party, before the trial Court—Evidence as to such matter properly admitted in the circumstances of the present case.

Evidence—Admissibility—See immediately above.

Particulars—A party giving particulars is bound by them—And cannot go beyond them without proper amendment with leave —See, also, above.

Pleadings—See above.

Appeal—General damages—Principles upon which the Court of Appeal will interfere with the quantum of damages awarded by trial Courts—See, also, above.

Appeal—Findings of fact made by trial Courts—Credibility of witnesses—Primarily a matter for the trial Courts.

Personal injuries—Impairment of hearing—General damages—Quantum—See above.

Witness—Credibility—See above.

This is an appeal by the defendant against a judgment of the District Court of Nicosia awarding to the respondent-

plaintiff £1500 general damages for personal injuries which the latter sustained in a road accident on the 3rd November, 1963, due to the negligence of the defendant-appellant. The injury with regard to which those damages were awarded was mainly the impairment of the respondent's hearing and to a very small extent a minor injury to his right wrist. In the particulars of injuries as they appear in the Statement of Claim the main aforesaid injury—incapacity was given as follows: "(*a*)(*b*) (*c*) (*d*) (*e*) (*f*) (*g*) Impairment of hearing (nerve deafness) 34-40 per cent". In spite of this, evidence was adduced that when the respondent-plaintiff was examined by Drs. P. and E. in 1965 the impairment of his hearing was in the region of 90% and there was no hope of any improvement but in all probability he would lose his hearing altogether. On the other hand the appellant-defendant by his Defence denied generally the particulars of injuries and the incapacity alleged and put the respondent-plaintiff to the strict proof thereof. But in the course of the hearing of the action the appellant-defendant called three witnesses who, without any objection on the part of the other side, gave evidence to the effect that the respondent-plaintiff was hard of hearing since his childhood; the respondent-plaintiff then applied and was granted leave to call evidence in rebuttal and thereupon proceeded and called six witnesses on this issue of the condition of the respondent-plaintiff's hearing prior to the accident.

The appellant-defendant now appeals on the main ground that the trial Court's award of damages was arbitrary, particularly in view of the fact that deafness preexisted the accident as it was found by the trial Court.

The respondent cross-appeals mainly on the ground that the evidence regarding the condition of the respondent's hearing prior to the accident was wrongly admitted as no such averment was made in the pleadings; and that the Court erred in believing the evidence of appellant's witnesses on this issue; and, also, that the amount of damages awarded was inadequate.

In dismissing both the appeal and cross-appeal, the Court:-

Held, I. As regards the appeal:

Having given the matter our best consideration we have

reached the conclusion that in the light of the evidence it was reasonably open to the trial Court to draw the inference that the respondent suffered from concussion as a result of the accident and that such concussion caused the damage to the acoustic nerve with consequent loss of hearing.

Held, II. As regards the cross-appeal:

(1)(*a*) In the present case the question of the respondent's hearing prior to the accident was not set up in terms by way of defence; the appellant-defendant by his Defence denied generally the particulars of injuries and the incapacity alleged and put the respondent to the strict proof thereof; but it was made an issue without objection before the trial Court. Three out of four witnesses called for the defendant gave evidence to the effect that the respondent-plaintiff was hard of hearing since his childhood. Not only there was no objection to this evidence on the part of the respondent-plaintiff but on the contrary he applied and was granted leave to call evidence in rebuttal and thereupon proceeded and called six witnesses on this issue.

(*b*) It seems to us quite impossible in those circumstances for counsel for the respondent to say in this Court that he was taken by surprise and not given an opportunity of contradicting such evidence and that that issue was one which ought not to have been taken into consideration in view of the pleadings (see *Tomlinson* v. *The London, Midland and Scottish Railway Co.* [1944] 1 All E.R. 537; *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 at p. 35.

(*c*) We are clearly of opinion that the case of *Roberts* v. *Dorman Long and Co. Ltd.* [1953] 2 All E.R. 428, relied upon by counsel for the respondent in support of his argument, should be distinguished from the present case on the ground that in that case particulars were delivered and the effect of this was to cut down the matters in question in the action to the particulars, it being well settled that the party giving particulars is bound by them and has no right to go beyond such particulars without proper amendment by leave. (See *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington* [1895] 2 Q. B. 152).

(2) Regarding respondent's ground that the trial Court

erred in believing the defendant's witnesses on the aforesaid issue and in not believing his witnesses we need only say that this is a question of credibility which is a matter primarily for the trial Court to decide. We have not been persuaded by the respondent that the trial Court was wrong or that there are sufficient grounds for disturbing the trial Court's finding.

Held, III. As regards the question of the quantum of the general damages which is challenged by both sides:-

(1)(*a*) The impairment of the respondent's hearing given in the particulars of injuries at paragraph 5 of the Statement of Claim is 35-40%. In spite of this evidence was adduced that the impairment was in the region of 90%.

(*b*) We must say that we find it difficult to understand why no steps were taken, at any time, to have the pleading amended. But, be that as it may, it is quite clear from the Judgment that in considering the quantum of damages the trial Court disregarded that evidence and assessed general damages on the basis of the extent of the disability pleaded in the particulars of injuries *i.e.* 35-40% minus the small impairment of hearing which the Court found to have pre-existed the accident.

(2) It has been laid down by this Court that it would not be justified in disturbing the finding of the trial Court on the question of the amount of the general damages unless it is convinced either that the trial Court acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled: See *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 at p. 36; *Ioannou* v. *Howard* (1966) 1 C.L.R. 45 at p. 55.

(3) On these principles and having regard to the facts of this case we are satisfied that we would not be justified in disturbing the finding of the trial Court as to the amount of damages.

Appeal and cross-appeal dismissed.
No order as to costs.

Cases referred to:

Roberts v. *Dorman Long and Co. Ltd.* [1953] 2 All E.R. 428, *distinguished;*

Christodoulou v. *Menicou* (1966) 1 C.L.R.17 at pp. 35 and 36, *followed;*

Tomlinson v. *The London, Midland and Scottish Railway Co.* [1944] 1 All E.R. 537, *followed;*

Ioannou v. *Howard* (1966) 1 C.L.R. 45 at p. 55 *followed;*

Yorkshire Provident Life Assurance Co. v. *Gilbert and Rivington* [1895] 2 Q.B. 152, *followed.*

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Nicosia (Dervish P.D.C. & Mavrommatis D.J.) dated the 11th January, 1967, (Action No. 5140/63) whereby the defendant was adjudged to pay £1,556.- to plaintiff as damages for the injuries he sustained in a road accident.

X. Clerides, for the appellant.

G. Ladas with *Ch. Loizou*, for the respondent.

Cur. adv. vult.

JOSEPHIDES, J. The judgment of the Court will be delivered by my brother Loizou, J.

LOIZOU, J.: The accident which gave rise to the institution of these proceedings occurred on the 3rd November, 1963. The respondent who, at the time, was a minor, commenced these proceedings in the District Court of Nicosia through his father. Before the action was heard, however, he attained his majority and the title of the action was amended accordingly.

As a result of the accident the respondent suffered injuries and by his action he claimed damages therefor.

On the second day of the hearing the appellant-defendant admitted liability for the accident and there-after the hearing continued on the issue of the injuries and the quantum of damages.

The only dispute with regard to the special damages claimed was in respect of an item of £65.- for medical expenses (item (a) of the particulars of special damages at para. 5 of the Statement of Claim). The trial Court, on the evidence, assessed damages for this item at £56.- and there

does not appear to be any quarrel with this finding.

On the question of the general damages the trial Court came to the conclusion that the appropriate amount would be £1500 and gave Judgment for the respondent-plaintiff accordingly.

The particulars of injuries as they appear at para. 5 of the Statement of Claim are as follows:

"(a) Injuries on the head and right wrist and bruises in other parts of the body.

"(b) Right wrist swollen, aching and painful.

"(c) Tenderness on the wrist joint and cannot grip very well.

"(d) Radiant heat with physiotherapy for 2 months.

"(e) Post-traumatic arthritis which is of permanent origin and which will always cause trouble and pain with the right wrist on and after heavy work or in cold weather.

"(f) Partial permanent incapacity of the right wrist 10 per cent.

"(g) Impairment of hearing (nerve deafness) 35-40 per cent".

The appellant by his defence denied the particulars of injuries and the incapacity alleged at para. 5 of the Statement of Claim.

The injury with regard to which general damages were awarded by the court was mainly the impairment of respondent's hearing and to a very small extent a minor injury to his right wrist.

With regard to the wrist injury the only medical evidence was that of P.W.6 Dr. Nicolaos Kountouros who examined the plaintiff on the 3rd April, 1964, i.e. almost five months after the accident. The witness ex-rayed plaintiff's wrist and found no bone injury. He treated it with radiant heat and also applied physiotherapy for two months and in the end the condition of the wrist so improved that at the time of the hearing in January, 1966, there was no measurable incapacity. Although there is no separate assessment the trial Court clearly say in their Judgment that they have awarded only a nominal sum for this injury.

On the issue of the impairment of respondent's hearing the Court heard the evidence of three specialists, two of whom gave evidence for the respondent and one for the appellant. The first of respondent's witnesses P.W.5 Dr. Panayiotis Pamporides said in evidence that he examined the respondent on the 21st June, 1965, and found that the hearing of the left ear was impaired to the extent of 90% and that of the right ear to the extent of 83%. P.W.7 Dr. Economides said that he examined the respondent on several occasions. On the first occasion, which was shortly after the accident, he found the hearing of both ears impaired by 35-40% and on the last occasion on the 19th October, 1965, i.e. almost two years after the accident he found that the hearing of both ears had deteriorated to the extent of 80-95%.

D.W.1 Dr. Djirkotis, who examined the respondent at the request of the Insurance Company concerned on the 27th October, 1964, stated in evidence that he found his hearing impaired to a "moderate degree".

In the course of the hearing the appellant called three witnesses with a view to proving that the respondent was hard of hearing since childhood. At the close of the case for the defence the respondent, with the leave of the court, called six witnesses in order to rebut the evidence on the pre-accident deafness.

Having considered the evidence adduced on the issue of disability the trial Court found that the respondent's hearing was to a certain extent impaired since childhood but that as a result of the accident his condition was made worse. At p. 35 of the record they summarise their finding as follows:

> "The plaintiff as a result of the accident for which liability was conceded by the defendant received an injury on the wrist for which injury the wrist was bandaged and also had his impaired hearing made worse, which must, in terms of a percentage be less than the percentage pleaded".

The appellant now appeals on the ground *(a)* that the finding of the trial Court that the deafness is the result of the accident is not supported by the evidence adduced, particularly in view of the fact that the court found that the respondent was suffering from deafness long before the accident; that there was no evidence of concussion and that

there was no evidence to prove that the impairment of hearing became worse as a result of the accident; and *(b)* that the trial Court's award was arbitrary particularly in view of the fact that deafness pre-existed the accident, that no evidence was adduced to prove that respondent's deafness was made worse as a result of the accident and that the respondent did not prove any loss.

The respondent cross-appeals mainly on the ground that the evidence regarding the condition of respondent's hearing prior to the accident was wrongly admitted as no such averment was made in the pleadings; that the court erred in believing the evidence of appellant's witnesses and not believing the evidence of the respondent's witnesses on this issue; and also on the ground that the amount of damages awarded is inadequate.

In support of the first ground of appeal it was contended for the appellant that in the absence of any averment in the Statement of Claim that the plaintiff suffered concussion as a result of the accident and of any direct medical evidence to that effect, it was not open to the court to find that the plaintiff suffered concussion; and this, it was argued, together with the finding that the respondent's hearing was defective since birth, do not warrant the conclusion reached by the trial Court that the impairment of respondent's hearing is the result of the accident, especially in view of the fact that there was medical evidence to the effect that damage to the acoustic nerve would normally result from concussion.

There was evidence before the trial Court that after the respondent was knocked by appellant's car he fell over the edge of the road, a height of about 8 1/2 feet, and that he received a knock at the back of the head and lost consciousness; there was also evidence that on medical advice he was confined in bed for about a fortnight; and the finding of the court that he suffered concussion is based on these facts. In considering this issue the trial Court had this to say (p. 34G):

> "The lack of direct evidence on this issue is glaring. Yet having given serious consideration to this matter we have come to the conclusion that taking into consideration the fact that there is evidence of a knock on the head, plus evidence of loss of consciousness, this coupled with the fact that after the plaintiff saw Dr. Lyssarides

(who was not called as a witness) he was ordered to, and in fact did rest in bed for 15 days, we may say that *it is quite possible that plaintiff suffered a concussion* as a result of the knock".

In reaching the conclusion that respondent's condition was brought about as a result of the concussion the trial Court relied mainly on the evidence of P.W.7 Dr. Economides. This witness examined the respondent by means of an audiogram twice. The first occasion was on the 16th November, 1963 and the audiogram showed 35-40% loss of hearing in both ears. The second occasion was on the 19th October, 1965, and the audiogram showed 80-95% loss of hearing in each ear.

"When I first examined him" the witness said (p. 18F) "I thought though I was not sure that it was due to the concussion. Now I am more certain that that was the cause. It is a case of progressive degeneration of the acoustic nerve due to the concussion. I say so as this is the only possible explanation. There was no history of any other illness".

In cross-examination the witness further said (p. 19A) :

"I base my findings on the audiogram. It is a classical case of nerve deafness due to the concussion of the labyrinth. When I examined the plaintiff for the first time there was a 30-40% loss and I accepted his explanation that it was due to the concussion. My later examinations confirmed the concussion cause".....
....."Now I am basing my opinion on my external findings and audiograms. The nerve is affected by certain causes e.g. typhoid and meningitis or concussion. From the first to the second audiogram there was deterioration and no such sickness intervened, thus it all points more to concussion".

P.W.5 Dr. P. Pamporides who, as stated earlier, examined the respondent on the 21st June, 1965 gave it as his opinion that plaintiff's condition might have been brought about by a knock on the head, although he said, that he would normally expect concussion. The witness further said that concussion is usually accompanied by loss of consciousness but the latter does not necessarily involve the former.

Having given the matter our best consideration we have

reached the conclusion that in the light of the evidence it was reasonably open to the trial Court to draw the inference that the respondent suffered from concussion as a result of the accident and that such concussion caused damage to the acoustic nerve with consequent loss of hearing.

It is convenient at this stage to deal with respondent's cross-appeal on the question of his pre-accident condition.

It was contended for the respondent that the finding of the court that his hearing was defective since his birth was not warranted by the evidence adduced and that it was based on inadmissible evidence inasmuch as no such averment was made in the pleadings. In support of his argument on this point learned counsel for the respondent cited the case of *Roberts* v. *Dorman Long & Co. Ltd.* [1953] 2 All E.R. p. 428. That was an action for damages for negligence and breach of statutory duty. The breach of statutory duty alleged by the plaintiff was the failure of the defendants to have safety belts available for the use of workers engaged in a building operation; the defendants alleged that an adequate supply of safety belts was available and particulars supplied stated that they were at the defendant's main office on the building site about half a mile away from the place of work where they might be used. The trial proceeded on this basis, evidence for the defendants being given in accordance with the particulars, and, on an objection raised during the examination of a witness, counsel for the defendants disclaimed any intention of suggesting that there were any safety belts at a nearer point. The last witness for the defendant gave evidence that two safety belts were available at an office near the place of work and, no objection being taken for the plaintiff the evidence was admitted and acted on by the trial Judge. It was held on appeal that the evidence ought not to have been admitted. Birkett, L.J. in the course of his judgment said this on this point (p. 435D) :

> "In my opinion, the evidence ought not to have been allowed at that stage of the case, though in the absence of any objection the learned judge admitted it. It was in flat defiance of the particulars which had been expressly asked for and given, and in any event, in my opinion, it ought not to have been accepted and allowed to be the decisive element for the widow's action when all the evidence had been considered".

We are clearly of the opinion that the case cited should be distinguished from the present case on the ground that in that case particulars were delivered and the effect of this was to cut down the matters in question in the action to the particulars. It is well-settled that the party giving particulars is bound by them and has no right to go beyond such particulars without proper amendment by leave. *Yorkshire Provident Life Assurance Co.* v. *Gilbert and Rivington* [1895] 2 Q.B. p. 152.

In the present case the question of the condition of the respondent's hearing prior to the accident was not set up in terms by way of defence; the appellant denied generally the particulars of injuries and the incapacity alleged in the statement of claim and put the respondent to the strict proof thereof (para. 3 of the Defence); but it was made an issue without objection before the trial Court. Three out of the four witnesses called for the defendant gave evidence to the effect that the respondent was hard of hearing since his childhood. Not only there was no objection to this evidence on the part of the respondent but on the contrary he applied and was granted leave to call evidence in rebuttal and thereupon proceeded and called six witnesses on this issue. It seems to us quite impossible in those circumstances for counsel for the respondent to say in this court that he was taken by surprise and not given an opportunity of contradicting such evidence and that that issue was one which ought not to have been taken into consideration in view of the pleadings. *Tomlinson* v. *The London, Midland and Scottish Railway Co.* [1944] 1 All. E.R. p. 537; see also *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 at p. 35.

Regarding respondent's ground that the trial Court erred in believing the defendant's witnesses on this issue and in not believing the plaintiff's witnesses we need only say that this is a question of credibility; it is a matter primarily for the trial Court to decide and we have not been persuaded by the respondent that the trial Court was wrong or that there are sufficient grounds for disturbing the trial Court's finding. On the evidence before the trial Court it was reasonably open to them to make the finding which they did make.

There only remains the question of the amount of general damages which is challenged by both sides. As stated earlier on the impairment of respondent's hearing given in the particulars of injuries at para. 5 of the Statement of Claim is

35-40%. In spite of this, evidence was adduced that when he was examined by Drs. Pamporides and Economides in 1965 the impairment of his hearing was in the region of 90% and there was no hope of any improvement but in all probability he would lose his hearing altogether.

Pausing here for one moment we must say that we find it difficult to understand why, since this evidence was available long before the trial, no steps were taken, at any time, to have the pleadings amended and that we share the concern expressed by the trial Court regarding the manner in which the case was handled by counsel who had the conduct of the plaintiff's case. (Mr. Ladas did not appear at the time).

But, be that as it may, it is quite clear from the judgment that in considering the quantum of damages the court disregarded that evidence and assessed general damages on the basis of the extent of the disability pleaded in the particulars of injuries i.e. 35-40% minus the small impairment of hearing which the court found to have pre-existed the accident.

It has been laid down by this court that it would not be justified in disturbing the finding of the trial Court on the question of the amount of damages unless it is convinced either that the trial Court acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled: See *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 at p. 36; *Ioannou* v. *Howard* (1966) 1 C.L.R. 45 at p. 55.

On these principles and having regard to the facts of this case we are satisfied that we would not be justified in disturbing the finding of the trial Court as to the amount of damages. It should, however, be stated that it is clear from the record and, in fact, it was conceded at the hearing of this appeal that the total sum awarded should be £1,581 and not £1,556 as erroneously recorded, due, no doubt, to an oversight. The judgment of the trial Court should, therefore, be amended accordingly.

In the result both the appeal and the cross-appeal fail and are hereby dismissed.

In the circumstances we make no Order as to costs.

Appeal and cross-appeal dismissed.
No order as to costs.