1982 November 30

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

"THIA" INDUSTRIES
(THERMOSIFONES ELIACON AKTINON) LTD.,
Appellants-Defendants,

v.

KYRIACOS HADJIKYRIACOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 6277).

Damages—General damages—Personal injuries—Fracture of the left tibia—Leg immobilised in plaster for about eight months—Treatment complicated because of the infection of the injured part of the leg—Incapacity to work for a period of two years—Award of £2,750 sustained.

Damages—Personal injuries—Loss of earning capacity—Circumstances in which award will be made—Risk of loss of present employment and inability to obtain another job or equally good job—Need to establish that risk substantial.

As a result of the explosion of a boiler that occurred in the course of his employment with the appellants-defendants, the respondent-plaintiff sustained a fracture of the left tibia; there was a penetrating wound 1 1/2 inches long over the fractured side and the leg was grossly swollen. His treatment was complicated because of the infection of the injured part of the leg which was immobilised in plaster for about eight months. Respondent became permanently incapacitated for a period of two years. The trial Court awarded to the respondent an amount of C£2,750.- as general damages and after finding that his earnings after the accident were not absolutely or relatively reduced in comparison to his earnings at the time of the accident but that his earning capacity has been reduced to a moderate extent, particularly his capacity for heavy work, it awarded to him the sum of C£750 for loss of future earnings by relying on the case of *Moeliker* v. *A. Reyrolle and Co. Ltd.* [1977] 1 All E.R. 9.

Upon appeal by the defendants it was contended that the amount of C£2,750 awarded to the respondent as general damages was excessive and/or unreasonable, and that the trial Court wrongly applied the case of *Moeliker* to the facts of the present case, since the evidence adduced did not in any way support the decision of the Court to award the sum of C£750 as future earnings.

Held, (1) that on the totality of the circumstances there is no reason to interfere with the assessment of general damages made by the trial Court.

(2) That where a plaintiff is still in employment at the date of the trial the Court should only make an award for loss of earning capacity if there is substantial or real and not merely fanciful risk that the plaintiff will lose his present employment at some time before the estimated end of his working life, and that if the risk of the plaintiff losing his existing job or of his being unable to obtain another job or an equally good job or both are only slight, a low award measured in hundreds of pounds will be appropriate; that considering the facts of this case and bearing in mind that there is a substantial and not merely fanciful risk that the respondent might lose his present employment and that he will be unable to obtain another job or an equally good job or both in the future, and though not merely slight, both the approach of the trial Court in the application of the aforesaid principles to the facts of this case was a correct one as the facts duly warranted such award (statement of the law in *Moeliker* v. *A. Reyrolle & Co. Ltd.*, [1977] 1 All E.R. 9 adopted).

Appeal dismissed.

Cases referred to:

Moeliker v. *A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9;

Antoniou v. *Iordanous and Another* (1976) 1 C.L.R. 341;

Asprou v. *Samaras and Another* (1975) 1 C.L.R. 223 at p. 231;

Charalambous v. *Cybarco* (1976) 1 C.L.R. 124.

Appeal.

Appeal by defendants against the judgment of the District Court of Larnaca (Pikis, P.D.C. and Michaelides, D.J.) dated the 9th May, 1981 (Action No. 546/78) whereby they were

adjudged to pay to the plaintiff the sum of £4,159.- as special and general damages for injuries sustained by him as a result of the explosion of a boiler that occurred in the course of his employment with the defendants.

A. Andreou, for the appellant.

A. Poetis, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by my brother Judge, Mr. Justice A. Loizou.

A. LOIZOU J.: This is an appeal from the judgment of the Full District Court of Larnaca by which the appellant was adjudged to pay the sum of C£4,159.- with costs, as general and special damages suffered by the respondent, plaintiff in the Court below, as a result of the explosion of a boiler that occurred in the course of his employment with the appellant Company.

The two grounds upon which this appeal has been argued are:

(a) The amount of C£2,750.- awarded to the plaintiff as general damages is excessive and/or unreasonable, having in mind the medical evidence adduced before the trial Court and/or the condition of the plaintiff at the date of the trial.

(b) The trial Court wrongly applied the case of *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All E.R., p.9, to the facts of the present case, since the evidence adduced did not in any way support the decision of the Court to award the sum of C£750.- as future earnings.

As a result of an explosion of a boiler—and we are not concerned with the circumstances it happened as the question of liability is not in issue—the respondent suffered injuries and he was removed to Larnaca Hospital where he was treated by Dr. Savvides, an Orthopaedic Surgeon, at first as an in-patient and subsequently as an out-patient. The trial Court summed up the evidence and the conclusions drawn thereon by it with regard to the question of general damages as follows:-

"Dr. Savvides found that plaintiff suffered as a result of the explosion a fracture of the left tibia; there was a

penetrating wound 1 1/2 inches long over the fractured side whereas the leg was grossly swollen. The treatment of the plaintiff was complicated because of infection of the injured part of the leg, emitting pus therefrom for many months afterwards. The fracture did not unite before the lapse of one year; yet plaintiff's wound did not heal completely for the leg remained oedematous and painful. In the assessment made on the condition of plaintiff on 1.11.1978 the picture indicated by the doctor is rather gloomy in that he found the plaintiff to be unable to squat and unable to walk for more than 100 yards without resting. The left leg was still swollen and knee movements were slightly restricted on the left side. There was also a restriction of the ankle and subtalar movements, as indicated in the report. The doctor diagnosed a pitting oedema of the left leg. X-rays showed a cavity in the bone which, in the opinion of Dr. Savvides, is the focus of chronic infection in the bone which may recrudesce in the future and may, therefore, necessitate appropriate treatment with antibiotics. The evidence of Dr. Savvides on the subject of the existence of a cavity must be ignored for, in the absence of admissible radiological evidence, the opinion of the doctor rests on unfounded premises and should, therefore, be ignored. Otherwise we accept the evidence of Dr. Savvides as a reliable account of the clinical condition of plaintiff. Dr. Efstathiades (D.W.2), an orthopaedic surgeon, who examined the plaintiff at the request of the defendants, gave a somewhat more optimistic view of the condition of plaintiff without in any way attempting to dispute the correctness of the report of Dr. Savvides. He agreed with a suggestion of plaintiff that the after effects of the injuries of plaintiff, as described by Dr. Savvides, may be regarded as a natural corolary of his injuries. Unlike Dr. Savvides he concluded that plaintiff's capacity for work was not seriously reduced though, as he explained in evidence, plaintiff's capacity for heavy work was reduced. In the opinion of Dr. Savvides not only plaintiff's capacity for work was adversely affected as a result of his injuries and their subsequent complication, but necessity may arise for his early retirement or change to lighter duties. Dr. Efstathiades found stiffness of the left ankle and foot, a fact likely to restrict the mobility of plaintiff but not to the

extent of reducing his capacity for work. The evidence of Dr. Savvides that plaintiff was permanently incapacitated for a period of two years was not seriously questioned.

The plaintiff in his evidence made reference to the painful process of recovery. His leg was immobilised in plaster for about eight months. He had to visit the hospital often and incurred expenses for the hire of taxis to convey him to and from the hospital. He maintained that he was unable to do any work for a period of 2 1/2 years. However, his evidence in this area is not fully in accord with that of Dr. Savvides and to whatever extent it conflicts with that of the doctor it must be ignored. When he found it possible to resume work he was employed by his son-in-law, a building contractor.

Mr. Petrou (D.W.3) testified that 9 months after the accident when plaintiff gave up cratches they offered employment to plaintiff on any conditions that plaintiff found convenient but the latter declined on the ground that he could not work and that in any event he was unwilling to go back to work for so long as the case was pending in Court. The plaintiff, on the other hand, maintained that he was offered such employment on condition that he abandoned his present claim for compensation. Whatever the truth may be it is of no consequence for, in our judgment, the plaintiff was unfit for work for a period of two years and for as long as he was incapacitated for work he had no obligation to minimize his damage by assuming work of any kind, be it light. However, to whatever extent it may be necessary to decide the issue as a fact, that is the terms upon which plaintiff was offered employment, we incline to accept the version of the plaintiff. Mr. Petrou maintained that for a period of time they were making payments to plaintiff as shown on exhibit 4, totalling £379.750 mils, covering a period upto 28th January 1978, that is to say for nearly one year. After the accident plaintiff maintained that he received payment for a shorter period, notably for 8 to 9 months; but failed to detail the payments he received. We accept the evidence of Mr. Petrou and find as a fact that the defendants paid in all to plaintiff the sum of £379.750 mils which, together with a

sum of £7 per week that plaintiff was receiving from the social insurance, as learned counsel for the plaintiff candidly admitted in his final address, make up for the loss of his wages for a period of one year."

It has been argued on behalf of the appellant Company that the amount awarded as general damages was excessive and unreasonable if viewed in the light of comparable awards on previous occasions and if after allowing an adjustment called for by the lapse of time and the decrease in the value of money that occurred between the awards. In that respect we would refer to the case of *Kyriacos Antoniou v. Iordanis Iordanous and Another* (1976) 1 C.L.R., p.341, where in respect of what has been claimed to be similar injuries, an award of C£800.- was confirmed on appeal. Whilst examining this case we may point out that the Court in examining on appeal that issue of damages in respect of which the appellant in that case was complaining, pointed out that they had reached the conclusion that although they might have been prepared to award a higher amount of damages in favour of that plaintiff, nevertheless they were not satisfied that the learned Judge in assessing the damages applied a wrong principle of law and that the amount awarded was a wholly erroneous estimate of the damage and stated that they were not prepared to interfere with the finding of damage which "as stated earlier in another case is generally a matter of assessment (see *Asprou v. Samaras & Another* (1975) 1 C.L.R. 223 at p.231)".

We were also referred to the case of *Charalambous v. Cybarco* (1976) 1 C.L.R., p.124, where a labourer sustaining haemarthrosis of the joint and crack fracture of the patella and fracture of the tibia plateau and had his leg in plaster for almost two months with fair amount of pain and suffering from 10 to 15 days and subsequently inconvenience and discomfort of a period of four to five months, and pre-injury walking capacity over rough and hilly ground and ability to carry out jobs calling for repetitive knee and ankle flexion moderately affected, an award of C£1,200.- was found to be within the bracket applicable to such injuries such as those sustained by the appellant and was not interfered on appeal.

We do not propose to enter into a detailed analysis of the similarities between the case in hand and the two cases invoked

by counsel as comparable and that the general damages awarded in each of them are indicative of the reasonable amount of damages that had to be awarded subject to a certain percentage of adjustment in the present case. A perusal of their text shows that they cannot be really that comparable as to afford the basis upon which the Court should have awarded the general damages in the present case.

On the totality of the circumstances as summed up by the trial Court, we have come to the conclusion that there is no reason to interfere with the assessment of damages made by them. Therefore, this ground of appeal fails.

With regard to the second ground, the trial Court summed up the position as follows:

"*Loss of Earning Capacity*

There is no suggestion that plaintiff's earnings after the accident were either absolutely or relatively reduced in comparison to his earnings at the time of the accident. There is, however, definite evidence that his earning capacity has been reduced, a factor we cannot ignore. Where plaintiff's earning capacity is reduced albeit without any immediate loss of earnings, the quantification of future losses of earnings is, to a large extent, a matter of conjecture. In *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9, the Court of Appeal adverted to the implications of loss of earning capacity unaccompanied by any immediate losses of earnings and indicated that the risk of future losses should be evaluated in the light of (a) the time at which such loss is likely to materialize; (b) the possibility of finding alternative employment; and (c) any other factor that may shed light on the subject. And they recommended compensation payment measured in hundreds of pounds where the risk of future loss is slight, as opposed to substantial.

In the present case we find that plaintiff's earning capacity as a labourer has been reduced to a moderate extent, particularly his capacity for heavy work, a matter of some consequence for a worker presently aged 47. On the other hand there is nothing to suggest that plaintiff is likely

to suffer an actual drop of his earnings in the near future more so considering that he is employed by his son-in-law. We feel we can safely take the lead given in the case of *Moeliker* (supra) by quantifying his loss in this area in hundreds of pounds and we adjudge it at £750".

It has been argued that the principle set out in *Moeliker's* case (supra) was wrongly applied to the facts of this case which did not warrant an award for loss of earning capacity as there was no substantial or real risk that the plaintiff will lose his present employment or his chances of obtaining further employment in that event.

The principles enunciated in the judgments delivered in *Moeliker's* case (supra), are summed up in the rubric of the case, p.9, as follows:-

"In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate".

We fully adopt this statement of the law and we hold as duly summed up therein that where a plaintiff is still in employment at the date of the trial the Court should only make an award for loss of earning capacity if there is substantial or real and not

merely fanciful risk that the plaintiff will lose his present employment at some time before the estimated end of his working life, and that if the risk of the plaintiff losing his existing job or of his being unable to obtain another job or an equally good job or both are only slight, a low award measured in hundreds of pounds will be appropriate.

Considering the facts of this case and bearing in mind that there is a substantial and not merely fanciful risk that the respondent might lose his present employment and that he will be unable to obtain another job or an equally good job or both in the future, and though not merely slight, we find that both the approach of the trial Court in the application of the aforesaid principles to the facts of this case was a correct one as the facts duly warranted such award.

For all the above reasons this appeal is dismissed with costs.

Appeal dismissed with costs.