1983 September 21

[HADJIANASTASSIOU, STYLIANIDES, PIKIS, JJ.]

G.I.P. CONSTRUCTIONS LTD.,

Appellants–Defendants,

v.

1. PANAYIOTA NEOPHYTOU AND CHARALAMBOS PITSILLIDES AS ADMINISTRATORS OF THE ESTATE OF THE DECEASED GEORGHIOS NEOPHYTOU,
2. PANAYIOTA NEOPHYTOU AND CHARALAMBOS PITSILLIDES AS ADMINISTRATORS OF THE ESTATE OF THE DECEASED GEORGHIOS NEOPHYTOU FOR THE BENEFIT OF PANAYIOTA NEOPHYTOU, ARGYRO NEOPHYTOU AND NEOPHYTOS NEOPHYTOU, WIDOW AND CHILDREN OF THE SAID DECEASED,

Respondents–Plaintiffs.

(Civil Appeal No. 6410).

Negligence—Occupiers liability—Invitee—Invitor—Movements of an invitee on the premises cannot be minutely or unreasonably restricted—So long as the use made of the premises is legitimate and reasonable the invitor remains liable at common law for negligence —Block of flats under construction—Fall of invitee from ground floor to the basement through an unguarded gap on the ground-floor—Occupiers guilty in negligence because they failed to warm invitee of the existence of gap—Invitee guilty of contributory negligence to the extent of 60% because presence of the gap was both visible and noticeable—Approach of Court of Appeal to apportionments of liability made by a trial Court—Apportionment in this case reasonably open to the trial Court—Sustained.

Death—Cause of—Whenever an issue in the proceedings it must be proved by the plaintiff to the satisfaction of the Court—Claim for damages for death allegedly arising through fall from ground floor to basement—Uncertainty in the pleadings respecting the cause of death—Retrial ordered on this issue.

Negligence—Action for—Plaintiff burdened to prove not only neglig-

ence but the existence of the necessary causal link between the negligence and the injurious result meriting an award of damages.

Civil Procedure—Pleadings—They serve a vital purpose for the definition of the issues in dispute and the establishment of the basis upon which the trial shall proceed—Claim for damages arising 5 *from death due to fall from groundfloor in the basement—Uncertainty in the pleadings respecting the cause of death—Retrial ordered on this issue—Uncertainty might be removed had parties availed themselves of the provisions of Order* 30 *of the Civil Procedure Rules and taken out a summons for directions.* 10

Georghios Neophytou ("the deceased") was on the 4th February, 1978 found dead in the basement of "Eliana" Court, a block of flats under construction. The deceased used to supply the appellants, a construction company responsible for the building operations, with water for the building needs. 15 On the 3rd February, 1978 he visited the site of the works for the purpose of supplying the appellants with water from his lorry. Having fitted an electric pump belonging to the construction company onto his lorry, and having set it in operation he left intending to return when the emptying process was expected 20 to end. Shortly afterwards the site was vacated by the work force engaged thereat as their working hours came to an end. The first floor was unfinished and entry could be gained to the shops under construction thereon without hindrance. In proceedings for damages, against the construction company, 25 by the administrators of the estate of the deceased, the trial Court found that the deceased must have returned to the premises later in the afternoon on the 3rd February, 1978, disentangled the electric pump from his vehicle and found himself in the basement while trying to store it within the building before 30 leaving the building; that the pump was discovered in the basement under an unguarded gap on the groundfloor, wherefrom the deceased was presumed to have fallen through to the basement; that the area on top of the basement whereto he was found lying dead, was uncovered and unfenced; that the 35 exposed gap was 1.20 m long and 0.90m wide. It was common ground at the trial that the gap on the groundfloor constituted a trap for users of the premises not aware of its existence and not alerted to the danger. The trial Court found the construction company guilty of negligence arising from failure on their 40

part to discharge the duty owed to the deceased, an invitee thereon, making lawful use of the premises at the time of the accident because they failed to warn the deceased of the existence of the gap.

5 The trial Court rejected evidence coming from an employee of the company who allegedly requested the deceased to store the pump somewhere at an appointed place outside the premises having held that the disposal of the pump after the completion of the process of water supply and its storage in safety was very 10 much left to the discretion of the invitee. Also, the trial Court held that the deceased was not free of blame for the accident because the presence of the gap was both visible and easily noticeable; and that his failure to spot it and guard against the vicissitudes of approaching it was an act of folly on the part 15 of the deceased, who has, thus, shown lack of care for his own safety and was guilty of contributory negligence to the extent of 60%.

From the pleadings it was not clear whether the cause of death was a fact in issue.

20 Upon appeal by the construction company it was mainly contended:

(a) That the trial Court for no good reasons rejected the uncontradicted evidence of an employee of the appellants to the effect that he requested the deceased to 25 dispose of the pump by leaving it outside the premises.

(b) That no medical evidence was adduced to prove the cause of death.

On the other hand, the respondents by means of a cross-appeal, disputed the apportionment of liability.

30 *Held,* (1) that even if the submissions made by appellants were to be accepted it would carry their case no further, though no valid grounds were raised to upset the finding of the trial Court in this area; that the movements of an invitee on the premises cannot be minutely or unreasonably restricted; that so long 35 as the use made of the premises is legitimate and reasonable the invitor remains liable at common law for negligence; that under no circumstances can the deceased be charged with unreasonableness for trying to store the electric pump inside

the premises; that even in the face of instructions to dispose of the pump outside the premises, it would not be officious on his part to choose another course equally consistent with his legitimate pursuits on the premises; that an occupier wishing to limit the movements of an invitee on the premises, must do so specifically and explicitly, otherwise he remains liable in negligence, in cases where the invitee suffers foreseeable injury in the course of a legitimate use of the premises; that given the findings of the trial Court on the circumstances of the accident, the attribution of liability to the appellants was inevitable; accordingly contention (a) should fail.

(2) That the finding of lack of care by the deceased for his own safety was fully warranted; that the apportionment of liability is pre-eminently an issue for determination by the trial Court; that an appellate Bench is distinctly reluctant to upset the apportionment made by the trial Court; that had this Court been concerned itself to evaluate the apportionment at first instance, it might, it must be said, make an apportionment more favourable to the respondents; but that is no ground for interfering with the apportionment made, since it was one reasonably open to the trial Court; and that, consequently, the cross-appeal must be dismissed.

(3) That the cause of death, whenever an issue in the proceedings, is a material fact that must be proved by the plaintiff to the satisfaction of the Court; that in an action for negligence the plaintiff is burdened to prove not only negligence but the existence of the necessary causal link between negligence and the injurious result meriting an award of damages; that in the absence of a specific legal or factual presumption recognised by the Rules of Evidence, the plaintiff cannot be relieved of the burden cast on him to prove the facts in issue; and that this is a precondition for the recovery of damages; that in this case it is not at all clear from consideration of the pleadings whether the cause of death was a fact in issue; that in the light of the uncertainty, arising from the pleadings, respecting the cause of death, it was impossible to dispose without more of the issue under consideration; that since justice cannot be administered upon a premise of uncertainty this Court is left with no alternative but to order a retrial of this issue; accordingly the case will be remitted for retrial upon the single issue of the cause of death.

Held, further, (1) that under our adversary system of trial, pleadings serve a vital purpose for the definition of the issues in dispute and the establishment of the basis upon which the trial shall proceed; (see *Loucaides* v. *C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134).

(2) That the confusion arising from the pleadings might be dispelled and the uncertainty removed, had the parties availed themselves of the provisions of Order 30 of the Civil Procedure Rules, and taken out a summons for directions, a procedure often ignored in Cyprus. Under a summons for directions, there is power on the part of the Court to define the facts in issue if they are insufficiently or inconclusively defined by the pleadings—Order 19, r. 27.

Appeal partly allowed: retrial ordered. Cross-appeal dismissed.

Cases referred to:

Stone v. *Taffe* [1974] 3 All E.R. 1016 at p. 1021;

British Railway Board v. *Herrington* [1972] 1 All E.R. 79;

Harris v. *Birkenhead Corpn.* [1976] 1 All E.R. 341 (C.A.);

Christodoulou v. *Menikou and Others* [1966] 1 C.L.R. 17;

Loucaides v. *C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134.

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Nicosia (Papadopoulos, P.D.C. and G. Nicolaou, D.J.) dated the 11th February, 1982 (Action No. 277/79) whereby defendants were ordered to pay to the plaintiffs the sum of £5,040.- as damages due to the death of Georghios Neophytou as a result of the negligence of the defendants.

G. Pelaghias, for the appellants.

A. Paikkos, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS J.: On 3rd February, 1978, Georghios Neophytou failed to return home from work. His family were alarmed, they reported him missing whereupon a police search was mounted to trace his whereabouts. The following day the venture proved successful but the news was bad. Neophytou was found dead in the basement of "Eliana" Court, a block of

flats under construction. The deceased was last seen visiting "Eliana" Court earlier on the 3rd February, 1978, to supply the builders with water at the request of the appellants, the company engaged in the construction of the premises. The deceased carried on the business of water supplier; the appellants were regular customers. The water was collected from a private source and was distributed to customers by means of a motor-lorry fitted with a tank designed for the storage and conveyance of water.

The appellants, a construction company, were responsible for the building operations under progress on the site and at the premises under their control. They invited the deceased, on the aforementioned date, to supply them with water for their building needs as he had done on previous occasions; but, unlike prior visits, the water was needed on the fourth floor; so, special arrangements had to be made to pump the water to that level. The pump with which the vehicle of the deceased was equipped could only pump water up to the height of the first floor; no higher. On earlier occasions when the deceased was requested to supply water, it was pumped into a tank on the ground floor. For the purpose of facilitating the deceased to send water to an elevation as high as the fourth floor they supplied him with an electric pump of their own apparently suitable for the purpose. However, the process of emptying water thereon was slow and expected to last longer than two hours. Having fitted the pump onto his lorry and having set it in operation he felt unneeded at the site and left with the avowed purpose of returning thereto when the emptying process was expected to end. It was the last, so far as the record shows, that anybody saw him alive.

Shortly after the deceased left the premises the site was vacated by the work force engaged thereat as their working hours came to an end. It was a Friday and they were not expected to come back to work before Monday next. Neither the appellants nor their employees were in a position to follow movements on the premises in their absence. The first floor was unfinished and entry could be gained to the shops under construction thereon without hindrance. The trial Court concluded with justification that the deceased must have returned to the premises later, on the afternoon of the 3rd February, 1978, disentangled the ele-

ctric pump from his vehicle and found himself in the basement while trying to remove it to safety before leaving the building. The pump was discovered in the basement under an unguarded gap on the groundfloor, wherefrom the deceased was presumed 5 to have fallen through to the basement. The area on top of the basement whereto he was found lying dead, was uncovered and unfenced. The exposed gap was 1.20m long and 0.90m wide. Reconstructing the events that were deemed to have preceded the fall from the facts known to the Court, they concluded that 10 the deceased had fallen through the aforementioned gap while trying to dispose of the electric pump to safety.

It was common ground at the trial that the gap on the groundfloor, earlier described, constituted a trap for users of the premises not aware of its existence and not alerted to the danger. 15 The appellants were found guilty of negligence arising from failure on their part to discharge the duty owed to the deceased, an invitee thereon, making lawful use of the premises at the time of the accident. On a review of the evidence the trial Court found that the appellants failed to warn the deceased of the 20 existence of the gap. Nor could earlier visits of the deceased to the premises excuse them of the duty to warm him for, prior to the 3rd February, 1978, the area leading to the gap was fenced by water-tanks blocking access thereto. A builder engaged in the plastering of the walls of the groundfloor, in the 25 area where the gap existed, removed earlier that day the tanks from their former position for his facilitation in doing his work. And he left the opening unfenced when he left work on 3rd February, 1978, in order to continue with his job the following Monday. In the judgment of the trial Court the removal of the 30 water-tanks exposed users of the premises unwarned of the existence of the gap to foreseeable dangers against which the appellants failed to guard. Consequently, the appellants were held liable in negligence to the estate and dependents of the deceased.

35 They rejected the evidence coming from an employee of the appellants who allegedly requested the deceased to store the electric pump somewhere at an appointed place outside the premises. The disposal of the pump after the completion of the process of water supply and its storage in safety was very much 40 left, in the circumstances, to the discretion of the invitee. That

he tried to store it inside the premises was found to be a lawful pursuit that could reasonably and foreseeably be undertaken by a person in the position of the deceased.

On the other hand, the deceased was not free of blame for the accident for the presence of the gap was both visible and easily noticeable. His failure to spot it and guard against the vicissitudes of approaching it was an act of folly on the part of the deceased. He had shown, hence, lack of care, as the trial Court found, for his own safety. Therefore, he was found guilty of contributory negligence. Liability was apportioned at the ratio of 40% (appellants), 60% (deceased).

Surprising as it may be there was no evidence whatever before the trial Court as to the cause of death. The trial Court did not overlook this vacuum in the case for the estate and dependents of the deceased but did not regard it as an impediment to the respondents succeeding in the action. Notwithstanding the absence of medical evidence explaining the cause of death, the trial Court held that death must be presumed to have resulted from the fall of the deceased through the gap and, therefore, it must be attributed, in part, to the negligence of the appellants.

The Appeal-Cross-Appeal

The appeal was three-pronged. The appellants disputed liability on two distinct grounds and thirdly questioned the quantum of damages awarded £4,640.- for the dependents and £400.- for the estate. The last ground was effectively abandoned at the hearing of the appeal and need concern us no further.

The first ground of appeal was directed against the finding of the trial Court ascribing negligence to appellants. It was submitted that the trial Court for no good reason rejected the uncontradicted evidence of an employee of the appellants to the effect that he requested the deceased to dispose, as earlier on mentioned, of the pump by leaving it outside the premises. Even if we were to accept the submission made here it would carry the case of the appellants no further, though no valid grounds were raised to upset the finding of the trial Court in this area. The movements of an invitee on the premises cannot be minutely or unreasonably restricted; so long as the use made of the premises is legitimate and reasonable the invitor remains liable at common law for negligence. Under no cir-

cumstances can the deceased be charged with unreasonableness for trying to store the electric pump inside the premises. Even in the face of instructions to dispose of the pump outside the premises, it would not be officious on his part to choose another course equally consistent with his legitimate pursuits on the premises. As the case of *Stone v. Taffe* [1974] 3 All E.R. 1016, 1021, demonstrates, an occupier wishing to limit the movements of an invitee on the premises, must do so specifically and explicitly, otherwise he remains liable in negligence, in cases where the invitee suffers foreseeable injury in the course of a legitimate use of the premises. The current trend, as eloquently expressed by the House of Lords in *British Railway Board v. Herrington* [1972] 1 All E.R. 79, is towards harmonizing the duties of an occupier at common law with contemporary precepts of social duty. The paramount consideration that permeates every notion of duty lies in the need to act with humanity towards fellow citizens. This salutary decision serves to indicate how law should keep pace with social ethos. Although the case of *Herrington* above was concerned with the duties of an occupier to a trespasser it has, nevertheless, wider repercussions upon the definition of the duties of an occupier towards persons coming on the premises (see also *Harris v. Birkenhead Corpn.* [1976] 1 All E.R. 341 (C.A.). In our judgment, given the findings of the trial Court on the circumstances of the accident, the attribution of liability to the appellants was inevitable. Nothing we heard justifies interference with this finding. This part of the appeal fails.

The appellants are not the only party challenging the findings by the trial Court on negligence. By a cross-appeal the respondents dispute the apportionment of liability. A faint attempt was also made to dispute the finding of contributory negligence. The submissions that were made affected almost exclusively the apportionment made by the trial Court. In any event, counsel submitted, on the findings of the trial Court there was no basis whatever for apportioning the damage suffered by the respondents unequally between appellants and respondents. The case of *Tessi Christodoulou v. Nicos Savva Menikou And Others* (1966) 1 C.L.R. 17, was cited in support of counsel's submission. There was, considering the findings of the trial Court, evidence tending to establish contributory negligence on the part of the deceased. There was some lighting and, had he walked within

the premises with greater care, he could have easily noticed the big opening ahead of him. To the extent that the premises were improperly lit, he should have taken proportionately extra care in moving about the premises. The finding of lack of care for his own safety was fully warranted. The apportionment of liability is pre-eminently an issue for determination by the trial Court. An appellate Bench is distinctly reluctant to upset the apportionment made by the trial Court. Had we been concerned ourselves to evaluate the apportionment at first instance, we might, it must be said, make an apportionment more favourable to the respondents. But that is no ground for interfering with the apportionment made, since it was one reasonably open to the trial Court. Consequently, the cross-appeal must be dismissed.

Now we shall revert to another aspect of the appeal revolving round the existence of the necessary causative effect between negligence and death, in respect of which the claim for damages is raised. In the contention of the appellants, not an iota of medical evidence was adduced to prove the cause of death.

The submission is factually well founded. There was undoubtedly a chasm in the case of the respondents. The trial Court found it was bridged by circumstantial evidence associated with the circumstances of the accident. This finding was warranted, in the submission of the respondents, by the evidence before the Court. The trial Court approached the issue of cause of death and its connection with the negligence of the appellant rather summarily and, in our view, this aspect of the judgment is unconvincing.

The cause of death, whenever an issue in the proceedings, is a material fact that must be proved by the plaintiff to the satisfaction of the Court. In an action for negligence the plaintiff is burdened to prove not only negligence but the existence of the necessary causal link between negligence and the injurious result meriting an award of damages. In the absence of a specific legal or factual presumption recognised by the Rules of Evidence, the plaintiff cannot be relieved of the burden cast on him to prove the facts in issue. This is a precondition for the recovery of damages. Whether the cause of death, as opposed to the circumstances leading to the fall of the deceased

from the groundfloor to the basement, was a fact in issue, was never examined by the Court. They assumed it was a fact in issue that was found proven basically by juxtaposing the circumstances of the accident and the position where the deceased was found dead, a proposition that leaves a definite vacuum in the evidential process of establishing that death was the result of negligence. There was other evidence in the case that might arguably bear on the issue of cause of death, such as that furnished by exhibit 1, a set of photographs showing the dead body in the basement, the area surrounding it, and marks thereon, as well as photographs showing the dead body at the mortuary of the Nicosia General Hospital. In our judgment, it is not at all clear from consideration of the pleadings whether the cause of death was a fact in issue. Admittedly, paragraph 4 of the statement of claim purporting to set forth the essentials of the case for the plaintiff on negligence and the resulting damage, raises a multitude of issues in the same spell, making answer to it in the precise manner envisaged by the Civil Procedure Rules, difficult. The response thereto made nothing to clarify the issues; on the contrary, its examination leaves a question mark whether appellants admitted that death resulted from the fall of the deceased from the groundfloor to the basement, if that was found as a fact by the trial Court. The answer of the defendants is found in para. 4 of the defence. It states that para. 4 of the statement of claim is denied and every allegation set out therein, except to the extent it is not inconsistent with allegations made thereunder; a series of allegations propounding the versions of the defendants, made in the alternative. The introductory formula employed by the appellants is similar to the one usually adopted to signify confession and avoidance. There is only one specific allegation under letter (g), bearing on the subject of cause of death. But none too certain as to its effect. It states that on 4.2.78 the deceased was found dead in the basement of the premises in question, under unknown circumstances. Certainly this is not a specific denial of the allegation that death resulted from the fall of the deceased from the groundfloor to the basement, although, in fairness, it cannot be construed as an admission because of non specific denial, as provided by Ord. 19, r. 11 of the Civil Procedure Rules. The confusion is compounded by the succeeding subparagraph of para. 4, namely sub-paragraph (h), advancing an alternative version as to the circumstan-

ces of the accident, leaving untouched the issue of the cause of death. In the light of the state of the pleadings, it was a matter of inconclusive guesswork whether the cause of death was admitted or disputed. Under our adversary system of trial, pleadings serve a vital purpose for the definition of the issues in dispute and the establishment of the basis upon which the trial shall proceed. Their significance was stressed in *Christakis Loucaides v. C. D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134. They lay, to borrow their simile the rail-lines upon which the trial must proceed. Pleadings are not only designed to provide for an orderly trial. They are intended to prevent surprise and afford a proper opportunity to the adversaries to prepare their case for the trial. Unless the triable issues are properly defined, the path of trial remains unmarked and the ends of justice may be defied by uncertainty.

The confusion arising from the pleadings might be dispelled and the uncertainty removed, had the parties availed themselves of the provisions of Ord. 30 of the Civil Procedure Rules, and taken out a summons for directions, a procedure often ignored in Cyprus. Under a summons for directions, there is power on the part of the Court to define the facts in issue if they are insufficiently or inconclusively defined by the pleadings - Ord.19, r. 27.

In the light of the uncertainty, arising from the pleadings, respecting the cause of death, it was impossible to dispose without more of the issue under consideration. Nothing was done at any stage of the trial to clarify the issue. Had the appellants properly joined issue with the respondents as to the cause of death, particularly its connection with the alleged negligence of the appellants, we might conclude that respondents failed to establish the necessary connection between negligence and death, although we must not be taken as expressing a concluded opinion on the subject for, the Court did not, as earlier indicated, evaluate all the evidence bearing on the subject.

Justice cannot be administered upon a premise of uncertainty. We are left with no alternative but to order a retrial of this issue, and we remit the case for retrial upon this single issue. The parties shall be at liberty to amend their pleadings on the subject. We direct retrial upon the issue of the cause of death, that is,

whether death was caused as a result of injuries sustained in consequence of the fall of the deceased from the groundfloor to the basement.

The appeal is allowed in part; a retrial is ordered as above 5 directed. The cross-appeal is dismissed. The respondents shall bear the costs of the appeal and cross-appeal. The costs before the trial Court shall be costs in the cause.

Appeal partly allowed. Retrial ordered. Cross-appeal dismissed. Order for costs as above.