1982 December 30

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

ANASTASSIS LOIZOU,

Appellant,

v.

CHARILAOS SOLEAS,

Respondent

(*Civil Appeal No.* 5701).

Evidence—Civil action—Standard of proof—Is on the balance of probabilities

Damages—General damages—Personal injuries—Neck injury and concussion with loss of consciousness lasting for a few minutes—Loss of taste and smell—Headaches and dizziness from time to time—"Mild incapacity"—Diminished earning capacity for about a year—Award of C£3,500*—Excessive—Reduced to* C£2.800

The respondent-plaintiff, a well-digger, was injured in a traffic accident for which the appellant-defendant was liable. He suffered a neck injury and a concussion with loss of consciousness lasting for a few minutes. Though the ensuing severe state subsided to a considerable extent there still occurred headaches and dizziness from time to time which got better or disappeared with medication. His condition at the time of the trial was described as "mild incapacity". The trial Court after taking into consideration the totality of the evidence and particularly the fact that there was no response by the respondent to the test performed by all doctors, and having seen and heard the respondent, decided, on the balance of probabilities, that in consequence of the accident he suffered loss of his senses of smell and taste. The trial Court, further, found that for a period of about a year respondent's earning capacity was in a way adversely affected and he made no effort at all to find work. The respondent was awarded an amount of C£3,500 general damages by way of a global sum.

Upon appeal the defendant contended:

(a) That the finding of the trial Court that, as a consequence of the injuries he has suffered, the respondent lost his sense of smell and taste was erroneous.

(b) That the amount of C£3,500 general damages which was awarded to the respondent by way of a global sum was excessive in the light of the particular circumstances of this case.

Held, (1) that in civil cases, such as the present one, the standard of proof is that of the balance of probabilities; that having in mind the standard of proof that was required and, also, the medical evidence which was adduced before the trial Court, this Court is of opinion that, on the balance of probabilities, it was reasonably open to the trial Court to reach its complained of by the appellant conclusions about the loss of the sense of taste and of the sense of smell of the respondent and there is, therefore, no reason to interfere with such conclusions on appeal.

(2) That bearing in mind that this Court should not interfere on appeal with an award of general damages by a trial Court unless such award is so very high as to justify its interference, it has, indeed, reached the conclusion that in the present instance, in the light of the relevant case law, and of the findings made by the trial Court itself in particular, the after-effects of the injuries that were suffered by the respondent, the amount of C£3,500 which was awarded to the respondent as general damages is really excessive, justifying interference on appeal in order to reduce it to C£2,800; accordingly the appeal must be allowed in part.

Appeal allowed in part.

Cases referred to:

Lancaster v. *Backwell Colliery Co. Lim.* [1920] 89 L.J. K.B. 609;

Miller v. *Minister of Pensions* [1947] 2 All E.R. 372 at pp. 373–374;

Bonnington Castings Ltd. v. *Wardlaw* [1956] 1 All E.R. 615 at p. 618;

Dingwall v. *J. Wharton (Shipping) Ltd.* [1961] 2 Lloyd's Rep. 213 at p. 215;

Cyprus Asbestos Mines Ltd. v. *Scoufaris*, 1964 C.L.R. 6 at p.14;

Savvides v. *Georghiou* (1975) 1 C.L.R. 140 at p. 143.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Nikitas, D.J.) dated the 4th April, 1977 (Action No. 5921/73) whereby the plaintiff was awarded the sum of £3,500.—as general damages in respect of personal injuries suffered by him in a traffic accident.

St. Erotocritou (*Mrs.*), for the appellant.

E. Vrahimi (*Mrs.*) for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. By means of this appeal the appellant, who was the defendant at the trial, complains about the amount of C£3,500 which was awarded as general damages to the respondent, who was the plaintiff at the trial, in respect of personal injuries suffered by the respondent in a traffic accident.

The liability of the appellant for the accident was not disputed; and, also, the amount of special damages, C£587, which were awarded to the respondent, was agreed between the parties.

According to the statement of claim the respondent had suffered the following injuries:

"(a) Cerebral concussion;

(b) Compression fracture of the third cervical vertebra;

(c) Fracture of the upper end of the fibula; and

(d) Lacerations of the left eyebrow and the upper and lower lips and damage to and removal of four teeth".

The effect of those injuries was described in paragraphs 6 and 7 of the statement of claim as follows:

"6. As a result of the injuries the plaintiff now suffers from permanent symptoms and incapacity in the form of:-

1. Dizziness, headaches, lack of concentration, fainting attacks, forgetfulness and loss of taste and smell;

2. Pain and restriction of movements of the neck;

3. Pain, weakness and restriction of movements of the left knee.

7. The plaintiff's condition and incapacity is serious and will get worse in the future owing to probable development of osteoarthritis in the neck and post-traumatic epilepsy".

As regards the nature of respondent's injuries and their after-effects six doctors testified at the trial as witnesses called by the respondent and four doctors were called as witnesses by the appellant. Also, a technician who was at the time in charge of the electroengephalography section of the Nicosia General Hospital gave evidence as a witness for the appellant.

There was considerable conflict among the expert witnesses and the findings of the trial Court, as to this aspect of the case, are set out in the following passages of its judgment:

"We take first the injuries to his teeth. The testimony of Dr. Palmas is just about the only medical evidence which was not in dispute. In consequence of the accident six teeth had to be removed either because they had been broken or loosened. The plaintiff himself said that he still has trouble in the sense that his jaw cracks when taking food. The dentist stated—and we believe him—that the plaintiff suffered from traumatic crick of the left temporo-mandibular joint, but after proper treatment the plaintiff recovered.

Having examined the evidence, we are satisfied that, because of the accident, the plaintiff suffered:-

1. The lacerations referred to by Dr. Xiros which, as Dr. Pelides found, left two small scars 'just discernible'. Indeed as we ourselves saw, they are hardly noticeable.

2. Fracture of the upper end of the fibula of the left leg. There is agreement in the medical evidence that there was sound union of the fracture. We prefer the views of Dr. Xiros and in particular those of Dr. Pelides, who was more elaborate and specific, to the effect that this injury had left no disability. In January, 1974, when the plaintiff was examined by Dr. Xiros, the plaintiff was limping a little as we were told by Dr. Xiros and had difficulty in going upstairs. In October, 1975, he was

complaining to Dr. Papasavvas of pain in the leg after prolonged standing or walking. At any rate we find that by the time he was seen by Dr. Pelides in November, 1974, the illeffects of this injury had resolved.

On the matter of sclerosis we think that it cannot be attributed to the accident for the reasons stated by Dr. Pelides. We may add here that Dr. Papasavva does not clearly connect the condition of the knee joint, as he described it, with the fracture of the fibula.

It is safer in our view to rely on the evidence of Dr. Pelides who had the opportunity to read the hospital X-rays and who is supported in his conclusions by a specialist radiologist (D.W.4). In consequence, we find that there was no fracture, though we accept that there was a neck injury in the nature of a sprain on contusion, which aggravated for a few months the existing osteoarthritic changes in the spine, as testified by D.W.2 and D.W.4. Any other ill effects of this injury have resolved completely and in this respect the conclusions of Dr. Pelides on 30.11.1974, as well as the results of the joint examination with Dr. Xiros are accepted.

Post-traumatic epilepsy: The plaintiff referred to several fainting incidents which he had experienced. P.W.4 witnessed such an incident on Good Saturday last year when, as stated by the witness, the plaintiff had fainted and recovered consciousness within a few seconds. However, as there is no medical evidence connecting these fainting spells with epilepsy or risk of epilepsy, we reject this part of plaintiff's claim.

Having reviewed all relevant evidence we find that the plaintiff suffered a concusion with loss of consciousness lasting a few minutes. The ensuing severe state subsided to a considerable extent without, however, clearing up completely, a matter of some consequence for a man occupied in digging wells. There still occur headaches and dizziness from time to time which get better or disappear with medication. Dr. Malekkides described

plaintiff's condition at the time of trial as 'mild incapacity'. Also we accept the prognosis of Dr. Malekkides which forecasts further improvement once these proceedings are ended.

It is no easy task for a Court to make a choice between conflicting expert evidence, especially in the present situation, where it appears that the medical science has not settled its own difficulties. There exist, however, some factors which help the Court in reaching its decision:-

First, the finding of the E.E.G. technician is not an end of the matter as Mr. Tsolakkis himself admits to a certain extent. A doctor can make a different diagnosis. Further there is the evidence of Dr. Pyrghos on this matter which the Court accepts and which shows that a certain doctor in the hospital was the expert on these matters.

Second, on Dr. Economides's own admission in cross-examination in November, 1974, he had issued a report saying that plaintiff's loss 'pre-existed the accident', a statement that cannot be reconciled with his evidence before the Court.

On the other hand, it was common ground that there was no response by the plaintiff to the test performed by all four doctors, a strong indication that plaintiff suffered the loss complained of. Moreover the plaintiff's doctors had the opportunity to consider the E.E.G. examinations.

After careful scrutiny of the totality of the evidence before us and having seen and heard the plaintiff, we decide, on the balance of probabilities, that in consequence of the accident the plaintiff suffered loss of his senses of smell and taste".

Counsel for the appellant has submitted that the finding of trial Court that, as a consequence of the injuries which he has suffered, the respondent lost his sense of smell and sense of taste is erroneous.

We have perused carefully the judgment of the trial Court and have examined the way in which the medical evidence

adduced before it has been evaluated; and in this respect we have borne duly in mind that in civil cases, such as the present one, the standard of proof is that of the balance of probabilities, as it is to be clearly derived from the case-law which is referred to hereinafter:

In *Lancaster* v. *Blackwell Colliery Co. Lim.*, [1920] 89 L.J.K.B. 609. Lord Chancellor stated the following (at p. 611):

> "If the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon him. But where the known facts are not equally consistent, but there is ground for comparing and balancing probabilities, as to their respective value, and a reasonable man might hold that the conclusion for which the applicant contends is the more probable, then the arbitrator is justified in drawing an inference in his favour".

In *Miller* v. *Minister of Pensions*, [1947] 2 All E.R. 372, Denning J, as he then was, said (at pp. 373-374):

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.
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> 2. In cases falling under art. 4(2) and art. 4(4) (which are generally cases where the man was fit on his discharge, but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal

is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not".

In *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E.R. 615, Lord Reid said (at p. 618):

"In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury".

In *Dingwall* v. *J. Wharton* (*Shipping*), [1961] 2 Lloyd's Rep. 213, Lord Reid said (at p. 215):

"Accordingly, in my opinion, the balance of probability is clearly in favour of the appellant having been struck by a substantial lump which had negligently been left on the ledge. I need not further elaborate because I agree with the careful and detailed opinion of the Lord Ordinary".

In *The Cyprus Asbestos Mines Limited* v. *Scoufaris*, 1964 C.L.R. 6, Zekia J. said (at p. 14):

"On the other hand, we have to bear in mind that we are dealing with a civil case where we may act only on preponderance of probabilities.

'In a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf

between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities'. (*Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247)".

In *Savvides* v. *Georghiou*, (1975) 1 C.L.R. 140, the following were stated by this Court (at p. 143):

"We do agree that a burden was cast on the respondent to establish his claim; but in a civil proceeding, such as the present one, this burden could be discharged if the judge was satisfied, on the basis of the balance of probabilities, that the claim of the respondent, as plaintiff, was well-founded; and the appellant, as the defendant, did not put forward, before the trial Court – or before us – any alternative probable, or even possible, explanation as to how the taxi in question came to be found damaged at the place where the accident has allegedly occurred.

We certainly think that this is a case in which on the evidence adduced it was open to the trial judge to reach, on the balance of probabilities, a decision in favour of the respondent, and this Court, as an appellate Court, has not been given any really valid ground on the basis of which we could, in the exercise of our relevant powers, interfere to set aside the trial judge's decision; therefore, this appeal is dismissed with costs".

Also, it is useful to refer, in this respect, to Halsbury's Laws of England, 4th ed., vol. 17, p. 16, para. 19, Phipson on Evidence, 12th ed., p. 53, para. 123 and Cross on Evidence, 5th ed., p. 110.

Having in mind the standard of proof that was required and, also, the medical evidence which was adduced before the trial Court, we are of the opinion that, on the balance of probabilities, it was reasonably open to the trial Court to reach its complained of by the appellant conclusions about the loss of the sense of

taste and of the sense of smell of the respondent and we see, therefore, no reason to interfere with such conclusions on appeal.

It has been further submitted by counsel for the appellant that in any event the amount of C£3,500 general damages which was awarded to the respondent by way of a global sum is excessive in the light of the particular circumstances of this case.

As regards general damages the trial Court stated the following in its judgment:

"*GENERAL DAMAGES*:- In Cyprus there is no decided case relating to loss of the senses of smell and taste except *Pilios* v. *Marcoulli*, (1969) 8 J.S.C. p. 1013, in which the Supreme Court increased an award made in respect of other injuries by £100.- to take account of some disturbances in both these senses, a matter overlooked by the District Court. Sachs, L.J., in *Kearns* v. *Higgs and Hill Ltd.*, (1968) 112 S.J. 252, considered a sum around £2,000.- to be appropriate compensation. In *Moggerides* v. *Ambrose*, a 1971 case, cited by counsel for the plaintiff and reported in Kemp & Kemp, Vol. 2, 4th edition, p. 5612, £2,200.- was the sum awarded for loss of smell, impairment of sense of taste and other minor injuries suffered by a 38-year old man. It seems that the sense of smell was of some importance to the plaintiff in his work as a farmer. The Court in this case also took into account the fall in the value of the pound.

In the case of *Andronikou* v. *Kitsiou*, (1970) 5 J.S.C. 494, the plaintiff's concussion caused some brain injury and neurotic symptoms which lasted for over two years and his general damages were assessed by the Supreme Court at £600.-.

The proper approach to compensation in personal injuries claims was laid down in *Fletcher* v. *Autocar & Transporters Ltd*, [1968] 1 All E.R. 726, and was adopted by the Supreme Court in a number of cases. (See, for example, *Constantinou* v. *Salachouris*, (1969) 1 C.L.R. p. 416, and *Antoniades* v. *Markides*, (1969) 1 C.L.R. p. 245).

The chief point to be kept in mind is that a Court is required to arrive at a fair and reasonable compensation

in all the circumstances of the particular case. To achieve this end a global sum should be given without assessing first damages under the separate heads and then award the total. We have merely referred to some cases that will be helpful and instrumental in reaching a fair award.

There is one further point that we have to determine before assessing general damages. It concerns the plaintiffs earning power. The plaintiff told the Court that he has not worked since the accident and is unable to work any more, either as a well-digger or a plumber, his previous occupations. The plaintiff was granted sick-leave upto 31.3.1974 and thereafter, according to Dr. Malekkides, he was fit for 'light duty for one year'. Dr. Malekkides did not really clarify what he meant by 'light duty', though he thought that most probably the plaintiff could not return to well-digging. At one stage of his evidence the doctor said that after March, 1975, the plaintiff had to try resuming his old job, but it would be better for him to find another more convenient employment.

Dr. Pelides, whose testimony was accepted, stated that there is no disability resulting either from the leg or neck injury and plaintiff could work as before the accident, unless his age or his diseased spine, prevented him from doing so.

Having considered the evidence on this issue and having seen and heard the plaintiff, we are satisfied that he could resume both occupations at least as from March, 1975, though with some discomfort and inconvenience. At any rate between 31.3.1974 and March, 1975, the plaintiff's earning power was in a way adversely affected. We have no evidence as to any possible earnings from an alternative job during such period which would enable us to make a concrete calculation. We believe that the plaintiff has made no effort at all to find work. However, we shall bear in mind his diminished capacity for work during the aforesaid period in making our assessment of general damages.

In the light of all our findings and the authorities, we award plaintiff £3,500.- by way of general damages".

Bearing in mind that we should not interfere on appeal with an award of general damages by a trial Court unless such award is so very high as to justify our interference, we have, indeed, reached the conclusion that in the present instance, in the light of the case-law referred to, and of the findings made, by the trial Court itself in the aforequoted passages from its judgment regarding, in particular, the after-effects of the injuries that were suffered by the respondent, the amount of C£3,500 which was awarded to the respondent as general damages is really excessive, justifying our interference on appeal in order to reduce it to C£2,800.

This appeal is, therefore, allowed in part accordingly; and we shall not make any order as to its costs.

Appeal partly allowed with no order as to costs.