1985 May 23

[A. LOIZOU, LORIS AND STYLIANIDES, JJ.]

KALLIOPI SIMOU AND ANOTHER UNDER THEIR CAPACITY AS ADMINISTRATRIXES OF THE ESTATE OF THE DECEASED HUSBAND AND FATHER, SIMOS VARNAVAS,

Appellants-Plaintiffs,

v.

PETROS MOTITIS AND ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 6742).

Negligence—Master and servant—Safe system of work— Independent contractor—Death of well-digger through collapse of sides of well—No side boards and other supports for the well—Employer subjected employee to unnecessary risk—Liable in negligence—Principle of volenti non fit injuria has no application in the absence of a finding that plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it—Since cause of accident known unnecessary to ask whether it would have happend had there been no negligence—Bolton *v.* Stone *[1951] A.C. 850 not applicable.*

Damages—Fatal accident—Damages agreed—But no differentiation made between the amount that was agreed for the estate, the amount for the loss of expectation of life and the amount for the value of the dependency—Apportionment of damages between widow and minor children.

The deceased, Simos Varnava who was married with four children, all under the age of 16, met with a fatal accident, which occurred whilst digging a well and its sides collapsed and he was suffocated from the soil that covered him. At the material time he was in the employment of the respondent who had undertaken as an independent contractor the digging of the said well, for and

on account of ex-defendant No. 1 against whom the action was withdrawn in the course of the hearing. According to the evidence the sides of a well have to be supported by casing especially when there is another well or another bore-hole nearby as there exists always the risk of the new well collapsing. The trial Judge dismised the action of the administrators of the estate of the deceased for damages; and hence this appeal.

Held, (1) that the employer had a duty to take reasonable care for the employee's safety and not subject him to unnecessary risks; that he, further, had a duty to provide sideboards and other supports for the well which was dug below surface where there was the risk of collapse; that on the totality of the uncontested evidence, which was before the trial Judge a case of negligence had been duly made out on the preponderance of evidence required in civil cases, particularly if the evidence adduced was viewed in the light of the admissions in the pleadings so further strengthened thereby; and that, therefore, the appeal must be allowed.

Held, further (1) that the principle of volenti non fit injuria has no application in this case in the absence of a finding "that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it".

(2) That since it was known exactly how the accident happened it was unnecessary to ask whether this accident would have happened had there been no negligence. The only question was: Do the facts or omissions, which were known and which led up to the injury, amount to negligence? And no doubt the answer should have been in the affirmative *(Bolton* v. *Stone)* [1951] A.C. 850 not applicable).

(3) That this Court will proceed to apportion the damages which had been agreed before the commencement of the hearing of the case at £14,000.- though no differentiation is made therein between the amount that was agreed for the estate and the amount for the loss of expectation of life and the amount for the value of the dependency. Such course is not devoid of precedent (see

Christou v. *Panayiotou* 20 (II) C.L.R. 52); that as the hereditary share of the wife and the children have only a small difference between them, the whole amount will be apportioned though this should not be taken as setting up any precedent whatsoever and in the circumstances the proper apportionment should be that half of the agreed amount should go to the widow and the other half to be divided equally between the four minor children.

Appeal allowed.

Cases referred to:

Smith v. *Baker* [1891] A.C. 325;

Viceroy Shipping Co. Ltd. v. *Mahattou* (1982) 1 C.L.R. 170 at pp. 179-180;

Krashias v. *Iacovides* (1972) 1 C.L.R. 40;

Easson v. *L.B.E.R.* [1944] K.B. 421 at p. 424;

Nicolaides v. *Nicou* (1981) 1 C.L.R. 225;

Bolton v. *Stone* [1951] A.C. 850;

Simms v. *Leigh Rugby Football Club Ltd.* [1969] 2 All E. R. 923;

Chop Seng Heng v. *Thevannassan S/O Sinnapan & Others* [1975] 3 All E.R. 572;

Wagon Mound (No. 2) [1966] 2 All E.R. 709;

Christou v. *Panayiotou*, 20 (II) C.L.R. 52.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Larnaca (Papadopoulos, P.D.C.) dated the 31st March, 1984 (Action No. 591/80) whereby their action for damages instituted for the benefit of the dependants of the deceased Simos Varnava was dismissed.

D. Koutras, for the appellant.

Z. A. Mylonas, for respondent No. 2.

Cur. adv. vult.

A. Loizou J. gave the following judgment of the Court. This is an appeal from the judgment of the President of the District Court of Larnaca by which he dismissed the action for damages instituted for the benefit of the dependants of the deceased Simos Varnava, under section 58 of the Civil Wrongs Law, Cap. 148, and for the benefit of the deceased's estate under section 34 of the Administration of Estates Law, Cap. 189.

The deceased was married with four children, all under the age of sixteen and met with an accident on the 14th October 1978, whilst digging a well in Livadhia village in the Larnaca district. He was at the time in the employment of the respondent who had undertaken as an independent contractor the digging of the said well, for and on account of ex-defendant No. 1 against whom the action was withdrawn in the course of the hearing as it emerged that there was no relevant legal relationship between the deceased and the said defendant at the material time.

The totality of the evidence that had been adduced at the hearing of the case came from the appellants. The respondent gave neither evidence himself nor called any witnesses on his behalf and so the circumstances of the accident are related by this uncontradicted evidence. On that day the deceased was according to the testimony of his wife, reluctant to go to work but the respondent who called at his house to take him there persuaded him to go. His reluctance stemmed from the fact that the sides of the well were not being cased or supported in the course of its being dug in order to prevent their collapse. In fact the deceased went to work descended into the well and whilst digging therein its sides collapsed and he was suffocated from the soil that covered him. Matheos Charalambous a well digger with experience and knowledge of such matters who went and found the deceased in the well covered with the collapsed soil, testified that the sides of a well have to be supported by casing especially when there is another well or another bore-hole nearby as there exists always the risk of the new well collapsing.

The learned President accepted the evidence of all these witnesses except, as he put it, that single item in the testimony of the widow that her late husband did not want to

go to the well, because he said "he believed that the widow was lying on this point".

In our view there was nothing to suggest that this witness lied in that respect but it could make no difference to the outcome of the case even if this version was accepted as it only tended to indicate knowledge of the danger on the part of the husband and such knowledge on the part of an employee does not exonerate the employer from liability. As stated in Charlesworth on Negligence 6th edition p. 748, paragraph 1234 under the heading "Effect of knowledge of damages"

> "... the Courts will not find the existence of an implied agreement unless the person who is alleged to have made it had full knowledge of the nature and extend of the risk to be run. The other point is, that although the plaintiff had full knowledge of the nature and extent of the risk and, with that knowledge, in fact incurred it, he will not be prevented from recovering unless the circumstances are such as to show that in incurring the risk he did it on the terms that the loss should fall on him and not on some other person."

And further down it is stated:

> "Evidence of knowledge may sometimes be evidence of assumption of risk but in the nature of things this need not always be so, each case must be judged on its own facts."

This was first laid down in the case of *Smith* v. *Baker* [1891] A.C. 325.

No doubt in the circumstances of the case the defence of volenti non fit injuria could not have succeeded, though specially pleaded, as it ought to be, as alternative to a denial of liability and to the claim for contributory negligence.

As stated in the case of *Viceroy Shipping Co., Ltd.*, v. *Andreas Mahattou* (1982) 1 C.L.R. 170 at pp. 179-180:

> "The principle of volenti non fit injuria has no application in this case in the absence of a finding 'that

the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it', as stated by Wills J., in *Osborn* v. *L. & N.W. Railways* [1888] 21 Q.B.D. 220, at pp. 223 and 224, following the words of Lord Esher M.R. in *Yarmouth* v. *France* [1887] 19 Q.B.D. 647, at p. 657;..."

The learned President, after making his findings of fact went on to examine whether the maxim res ipsa loquitur applied. He referred in that respect to the case of *Nicos Krashias* v. *Nicos Iacovides,* (1972) 1 C.L.R. 40, the case of *Easson* v. *L.N.E.R.,* [1944] K.B. 421, 424, and also pointed out by way of reference *Clerk & Lindsell or Tort,* 14th Edition, paragraph 977, and *Charlesworth on Negligence,* 6th Edition, paragraphs 264, 265, 266 and 267, as being very helpful on the matter.

We are afraid we do not accept the approach of the learned President and the ground for rejecting the principle of res ipsa loquitur in the sense that the res, as he put it, was not under the exclusive control of the defendant, excluding every outside interference by a third person. We do not think however, that we should embark on an analysis of the maxim of res ipsa loquitur.

We are satisfied that on the totality of the uncontested evidence, which was before the learned President, a case of negligence had been duly made out on the preponderance of evidence required in civil cases, particularly if the evidence adduced was viewed in the light of the admissions in the pleadings so further strengthened thereby.

The duty of an employer to take reasonable care for the employee's safety and not to subject him to unnecessary risks explained in relation to the duty of an employer to provide sideboards and other supports for trenches dug below surface where there is the risk of collapse was dealt with by this Court in the case of *Nicolaides Ltd.,* v. *Nicou,* (1981) 1 C.L.R. 225, and we need not really repeat them here.

Furthermore the case of *Bolton* v. *Stone,* [1951] A.C. 850, relied upon by counsel for the respondents, a case which has been applied in *Simms* v. *Leigh Rugby Football*

Club, Ltd., [1969] 2 All E.R. 923, explained and distinguished in *Chop Seng Heng* v. *Thevannasan S/o Sinnapan & Others*, [1975] 3 All E.R. 572, and distinguished in *The Wagon Mound (No. 2)* case, [1966] 2 All E.R. 709, cannot help, as the circumstances giving rise to the cause of the accident were not unknown and the doctrine as pointed out in the *Bolton* case, is of great assistance when such causes of the accident are unknown, but where, as in the present case, all the facts are known, it cannot have any application. Here it was known exactly how the accident happened and it was unnecessary to ask whether this accident would have happend had there been no negligence. The only question was: Do the facts or omissions, which were known and which led up to the injury, amount to negligence? And no doubt the answer should have been in the affirmative.

We have felt that it would be in the interests of justice to draw our own inferences for the primary facts as found by learned President and bring litigation to an end, particularly in a case as the present one which arises out of a fatal injury which occured in 1978 and there have been left, a widow and four infants, who have been in need of the damages to which they were entitled. We shall also proceed to apportion the damages which had been agreed before the commencement of the hearing of the case at £14,000.- though no differentiation is made therein between the amount that was agreed for the estate and the amount for the loss of expectation of life and the amount for the value of the dependency. Such course is not devoid of precedent. It was also pursued in the case of *Christou* v. *Panayiotou*, reported in Vol. 20(II) C.L.R. 52.

We might have divided the amount into the two heads and so proceed with the established method of apportionment, but as in this instance the hereditary share of the wife and the children have only a small difference between them, we have decided to apportion the whole amount, though this should not be taken as setting up any precedent whatsoever and in the circumstances we have come to the conclusion that the proper apportionment should be that half of the agreed amount should go to the widow and the other half to be divided equally the four minor children.

The appeal therefore is allowed. Judgment will be entered for the sum of £14,000.- against the respondent-defendant No. 2 in the action with costs against him, both here and below.

Appeal allowed.