1986 December 22

[A. LOIZOU, SAVVIDES, PIKIS, JJ.]

CHARILAOS TELEMACHOU,

Appellant-Defendant,

v.

ALEXIS CHRISTODOULOU PAPAKYRIACOU,

Respondent-Plaintiff,

(Civil Appeal No. 6815).

Appeal—Apportionment of liability in respect of a road traffic accident—Principles governing interference by Court of Appeal with such apportionment.

Negligence—Road traffic accident—Respondent's car hit appellant, whilst the latter, riding a donkey and pulling a cow by a rope tied around her neck, was crossing the old main Nicosia-Limassol road—Darkness prevailed at the scene of the accident—At the moment of the accident appellant had covered most of the way towards the opposite side of the road—Respondent travelling with the lights of his car in the dipped position—Parties equally to blame—Apportionment of liability upheld.

Damages—Special damages—Loss of earnings—Trial Court may either assess such loss down to the date of trial or include such damages after a certain date in the amount of general damages—Plaintiff unable to work for 18 months after accident—In the circumstances of this case his loss of earnings for the period following the expiration of the said period to the date of trial ought to have been included in the general damages.

Damages—General damages—Personal injuries—Plaintiff, a man 67 years old, sustained a comminuted fracture of the upper third of the left tibia and fibula, a 3 c. m. laceration of left eyebrow, cerebral concussion with loss of consciousness, scratches, bruises and pain at his back-Laceration stitched—Fracture immobilised in plaster for

three months—In-patient for 22 days—Physiotherapy for two months after removal of plaster—Permanent shortening of left leg by 2 c.m. with muscular atrophy—Flexion of knee point affected by one third—Permanent limping which can be reduced by the use of a special shoe— Acceleration of pre-existing osteoarthritic changes to the spine—Scar on left eyebrow, though unsightly, permanent —Fracture soundly united at the expense of some deformity—Award of £3,500 (not including loss of future earnings)—Upheld. 5 10

Damages—General damages—Personal injuries—Loss of future earnings—Assessment of—In the circumstances rightly trial Judge did not use the method of multiplier and multiplicant—Award of £750 increased to £2,500.

Damages—General damages—Personal injuries—Refusal of person injured to undergo operation—Effect of an unreasonable refusal—Refusal in this case reasonable. 15

Damages—Interest thereon—The Civil Wrongs Law, Cap. 148, section 59A (introduced by section 5 of Law 156/85).

The accident, which gave cause to these proceedings, occurred in the evening of 8.4.78 on a junction between the old main Nicosia-Limassol road with a side road in the village of Nissou. The respondent was at the material time crossing the said main road, which he had entered from the said side road, riding his donkey, which was also loaded with a plough, and pulling his cow with a rope tied around her neck. After he had nearly reached the opposite side of the road, he and his animals were hit by a car driven by the appellant along the main road on its near side with its lights at the dipped position. The asphalted part of the road was 20 feet wide with a berm of 3 feet on each side. The visibility on either direction was 300 meters. The point of impact was 15'6" from the right hand side edge of the asphalt. There was no street illumination at the scene of the accident and darkness was prevailing. 20 25 30 35

The trial Judge found that the appellant was negligent in that he did not switch the headlights of his car—there being nothing to prevent him from doing so—and in that

he was not driving within the limits of vision allowed by the lights of his car. The trial Judge also found that the respondent was guilty of contributory negligence in that, if he had looked properly or at all into the main road, he
5 would have seen appellant's car. In the light of his said findings the trial Judge apportioned liability between the parties equally.

As a result of the accident the respondent sustained the injuries hereinabove described. The trial Judge awarded
10 by way of general damages £4,250, that is £3,500 for the pain, suffering, disability etc. and £750 for the respondent's diminution of his future earning capacity.

At the time of the accident the respondent was 67 years old. The hearing of the action was concluded in 1984,
15 when the respondent was 73 years old. The respondent was unable to work for a period of 18 months after the accident. His earnings before the accident were in accordance with the findings of the trial Judge £16 - £20 per week from his employment as labourer with the Electri-
20 city Authority and £6.- per day from the cultivation of his fields. The trial Judge accepted that after the expiration of the said period of 18 months the respondent could resume some work, but his future earning capacity will be diminished by reason of his permanent disability.

25 In the light of the above findings and the admissions made by the parties the trial Judge made the following awards by way of special damages: (a) £1,555 agreed before the hearing and including medical expenses, transport expenses and loss of wages at £30 per week till
30 22.3.79, (b) £520.- further loss of wages for six months after March 1979 at £20.- per week, (c) £1,000 for loss of wages thereafter till trial, (d) £250 for loss of animals, and (e) £45.- for additional admitted medical expenses.

It should be noted that as regards item (c) above the
35 trial Judge arrived at the sum of £1,000 by making certain speculations on the matter.

The appellant filed this appeal complaining both as regards the quantum of damages and the apportionment of liability made by the trial Judge. The respondent filed
40 a cross-appeal. One of appellant's arguments was that if

the respondent had consented to undergo a bone grafting operation both his permanent incapacity and the diminution of his earning ability would have been reduced to the minimum and as a result the damages would have been much less. 5

Held, dismissing the appeal and allowing the cross-appeal in part: (1) The apportionment of liability by a trial Court should not be interfered with on appeal, unless a very strong case is made out justifying review of the apportionment and provided this Court is satisfied that 10 the trial Court has erred in principle or has made an apportionment which is clearly wrong. In the light of these principles and the facts of this case both the appeal and cross-appeal on this issue fail.

(2) Items (a) and (e) of the special damages were 15 not contested on appeal. In the light of the evidence item (d) was justified. As regards item (b) and bearing in mind that for the first twelve months after the accident the parties had agreed that the loss of earnings amounted to £30 per week, there was no reason why 20 an additional sum of £10 per week for loss of earnings from agricultural work should not have been added making the total for the period £780.

(3) An award for special damages for loss of earnings may be made down to the date of trial. But it is ju- 25 dicially open to a trial Court either to assess such a loss down to such date or to include such damages after a certain date in the amount of general damages. What emanates from the conclusion of the trial Court regarding item (c) of the special damages is that such loss had 30 neither been proved nor was it "generally capable of substantially exact calculation" as suggested in *British Transport Commission* v. *Gourley* [1956] A.C. 185. In the circumstances of this case and bearing in mind the uncertainties in assessing loss of earnings till the trial, 35 the respondent's age, the fact that his condition crystallised 18 months after the accident, the period that elapsed from the date of the accident until the date of trial and that, though unable to do heavy farming work, he could still work with the Electricity Authority, pro- 40 vided he would have been employed by the latter in view

of his advanced age, this Court reached the conclusion that the loss of earnings for the period in question should not have been separately assessed, but should have been included in the general damages.

5 (4) The award of £3,500 for pain, suffering, permanent disability, loss of amenities and the other items in respect of which it was awarded was reasonable in the circumstances.

(5) There are cases in which the assessment of damages 10 in respect of future loss of earnings on a strictly mathematical basis on the established formula of multiplier and multiplicant is not always possible and in this case the trial Judge was right in not adopting such method. The presumption in the case of any injured person is that 15 such person was an average normal person, unless the contrary is proved. In the circumstances of this case and taking into consideration that the loss of earnings from the end of September, 1979, to the date of trial should have been included under this heading the proper award 20 is £2,500.

(6) If an injured person unreasonably refuses to have an operation, which might improve his condition, the continuing effects are not chargeable against the tortfeasor. In this case, however, the refusal of the appellant to un- 25 dergo a grafting operation was, in the light of the evidence, a reasonable one.

(7) In the light of the above the total award for special damages will be £2,630 and the total award for general damages £6,000 and, consequently, there will be judg- 30 ment for the respondent for £4,315.

(8) In the light of section 58A of the Civil Wrongs Law, Cap. 148 (section 5 of Law 156/85) the amount of special damages will bear interest at 6% p.a. from the time of their crystallisation (1.10.79) to the date when the judg- 35 ment of the trial Court was given (17.10.84) and, thereafter, the whole amount shall bear interest at the said rate.

Appeal dismissed.
Cross-appeal allowed in part.
40 *Costs in favour of respondent.*

Cases referred to:

Papadopoullos v. *Pericleous* (1980) 1 C.L.R. 576;

The Municipality of Nicosia v. *Kythreotis* (1983) 1 C.L.R. 154;

G.I.P. Constructions Ltd. v. *Neofytou and Another* (1983) 1 C.L.R. 669; 5

Tavellis v. *Evangelou* (1984) 1 C.L.R. 460;

Nicolaou v. *Louca* (1985) 1 C.L.R. 91;

Despotis v. *Tseriotou* (1969) 1 C.L.R. 261;

Kemal v. *Kasti*, 1962 C.L.R. 317; 10

Ioannou and Paraskevaides Ltd. v. *Neokleous* (1973) 1 C.L.R. 141;

British Transport Commission v. *Gourley* [1956] A.C. 185;

Constantinides v. *Hadji Ioannou* (1966) 1 C.L.R. 191;

Philipps v. *London and South Western Rly* [1879] L. R. 5, C.P.D. 280; 15

Joyce v. *Yeomans* [1981] 2 All E.R. 21;

McAuley v. *London Transport Executive* [1957] 2 Ll. L. R. 500.

Appeal and Cross-appeal. 20

Appeal and cross-appeal against the judgment of the District Court of Nicosia (Nikitas, P.D.C.) dated the 17th September, 1984 (Action No. 4479/78) whereby the defendant was found liable for damages to the respondent and liability was apportioned equally between the parties. 25

St. Erotokritou (Mrs.), for the appellant.

M. Iacovou with *R. Schizas*, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Savvides. 30

SAVVIDES J.: The appellant has filed the present appeal against the decision of a President of the District Court of Nicosia by which the appellant was found liable for damages to the respondent in respect of a road traffic accident and the liability was apportioned equally between the parties.

The appeal is against both the amount of damages and the apportionment of liability. It is the contention of the appellant that the trial Court wrongly found the appellant liable to the percentage apportioned or at all and that the amount of damages awarded is excessive.

On the other hand the respondent by Notice under Order 35, rule 10 of the Civil Procedure Rules cross-appealed both on the award of damages and the apportionment of liability contending that the amount of damages is manifestly low and that the apportionment of any liability on the respondent was wrong.

The questions which pose for consideration in these appeals are: (a) Whether the apportionment of liability between the parties is correct. (b) Whether the award of damages is the proper one.

The accident which gave cause to the present action occurred on the old main Nicosia-Limassol road through Nissou village and in fact near the eastern entrance to the village on a junction between the main road with a side road of the village, in the evening of the 8th April, 1978, at about 7.00 p.m. As found by the trial Judge and such finding is justified in the light of the evidence accepted by him, there was no street illumination at the scene and at the time of the accident darkness was prevailing. Such findings of the trial Court have not been strongly contested.

The main road was twenty feet wide, asphalted and with three feet berm on each side. It goes slightly curvy which however does not obstruct the visibility on either direction, which was clear for a distance of at least 300 metres in the direction of Limassol from where appellant was driving his car to the point of impact and about the same from the opposite direction. The maximum speed limit in the area was 40 miles per hour.

The respondent, after he had finished his work in the fields rided his donkey and pulling his cow with a rope tied around her neck, started his way to the village proceeding along the side road. Loaded also on the donkey there was a plough. After the respondent had reached the junction he went on to cross the main road. After he had managed to cross most of it and had nearly reached the opposite side of the road and his animals were hit by a car driven by the appellant along the main road and travelling on its near side of the road. As a result of the accident the donkey died and the cow was so seriously injured that it had to be sold for slaughtering. The respondent also suffered extensive injuries with which we shall deal when examining the question of damages.

Appellants' car also sustained damages which according to the police constable (P.W. 1), who arrived at the scene soon after the accident, were caused by the plough of the respondent and were on the right front part of the car, on the right mudguard upto the driver's position, the front windscreen was smashed and the roof was dented. He found both animals resting on their knees, the donkey near the right front mudguard of the car and the cow near the left front mudguard of the car. In front of the car he saw also the plough lying on the road. According to the sketch plan prepared by him the point of impact was in a position 15'6" from the right hand side of the asphalt and was marked by him with letter "X" on his plan. Such point was pointed out to him by the appellant, but he also found there the spectacles and the artificial teeth of the respondent as well as broken glass which had fallen from the smashed windscreen of the car. The position of the car was slightly oblique to the left with the front right part at a distance of 15'6" and the rear part at a distance of 15' from the right hand side of the road. The front near side part of the car was resting at a position which was one foot within the near side berm. The width of the car was six feet. He examined the area for a distance of 100 metres prior to the point of impact for any brake marks of the car but he found none in the area.

It was the version of the appellant, before the trial Court, that he was driving his car at a speed of 25 - 30

miles an hour with the lights at a dipped position. Whilst so driving he noticed at a distance of 7 - 8 metres ahead of him, in the middle of the road, a cow and a donkey carrying a plough on his back. He swerved to the left and stopped. At that time a car which was coming from the opposite direction applied its brakes abruptly as a result of which the animals were frightened and the cow pulled the donkey and they both fell on his car.

The version of the respondent, on the other hand, was that when he reached the junction riding his donkey and pulling his sow he looked to the direction of Limassol and saw no car coming on the main road. He then proceeded to cross the road and after he had crossed the middle of the road and had nearly reached the opposite side he saw for the first time the car of the appellant driven towards him and he was finally hit and thrown off his animal.

The learned trial Judge after an extensive analysis of the evidence before him and in dealing with plaintiff's version arrived at the following conclusions:

"Though the defendant was aware, being an inhabitant of the area, that he was aproaching a crossroad he did not switch the headlights of the car in full position, to make sure that the road was clear, and thus be in a position to take steps in time to avoid the accident, bearing in mind that the plaintiff was crossing from right to left at low pace. The traffic code which was enacted by virtue of Regulation 70 of the Motor Vehicles and Road Traffic Regulations (Not. 159/73) requires of drivers to switch on the head lights in dark roads. The unknown car which the defendant mentioned, arrived at the scene after he had stopped and, given that there was a berm, there was nothing to prevent the defendant of making use of the head lights of his car at the proper time. Therefore, such omission of the driver amounts to negligence. But there is a further element of negligence. Once the defendant chose to drive with the lights of the car in a dipped position, he should have driven in such a way as to be able to face a sudden emergency

It is clear in the present case that the defendant was not driving within the limits of vision allowed by the lights of his car with the result that he was unable to stop or he did not look carefully to understand what was going on ahead of him." 5

Then the learned Judge dealt with respondent's version and concluded as follows:

"The next question is whether the plaintiff failed to take any measures for his own safety, in other words, whether he is guilty of contributory negligence. 10 The answer should be in the affirmative. If, in fact, the plaintiff, looked at all or properly into the road, surely he would have seen the lights of the car, given that the visibiity was not obstructed for sufficient disstance, and he would not have led his animals into 15 the road to cross it. The plaintiff had an increased duty to be more careful because he was about to cross a main road riding and at the same time pulling another animal, and carrying a plough, without having a light with him as required by the traffic code." 20

In view of his finding he apportioned liability between the parties equally. Hence, this appeal and cross-appeal in this case.

The approach of this Court to appeals of this nature is well settled. Where a trial Court has apportioned liability 25 its apportionment should not be interfered with on appeal unless a very strong case is made out justifying such review of apportionment and provided it is satisfied that the trial Court has erred in principle or has made an apportionment of liability which is clearly wrong (see, in this 30 respect, inter alia, *Papadopoullos* v. *Pericleous* (1980) 1 C.L.R. 576 at p. 579; *The Municipality of Nicosia* v. *Kythreotis* (1983) 1 C.L.R. 154; 175; *G.I.P. Constructions Ltd.* x. *Neofytou & Another* (1983) 1 C.L.R. 669; *Tavellis* v. *Evangelou* (1984) 1 C.L.R. 460; *Nicolaou* v. *Louka* (1985) 1 C.L.R. 91). And an appellate Court will not 35 readily substitute its own discretion for that of the trial Court (see: *Despotis* v. *Tseriotou* (1969) 1 C.L.R. 261, 263 and the cases referred to therein).

We agree with the trial Judge that both parties in the 40

present case are to blame for the accident. His findings as to the cause of the accident and the conduct of the parties prior to the accident were reasonably open on the evidence before him and we find no reason to disturb them.

5 Bearing in mind the facts of the case in the light of the findings of the trial Judge, we have not been satisfied that the trial Judge has erred in principle or that his apportionment of liability is wrong so as to justify any interference by this Court. In the result, both the appeal 10 and the cross-appeal on this issue fail.

We come next to consider the second leg of this appeal and cross-appeal that is, whether the award of damages is the proper one.

The injuries suffered by the respondent, as a result of 15 the accident, consisted of a comminuted fracture of the upper third of the left tibia and fibula, a 3 cm. laceration of the left eyebrow, cerebral concussion with loss of consciousness scratches and bruises and pain at his back. The laceration was stitched and the fracture was immo-20 bilized in plaster which the respondent carried for three months. He was kept as an in-patient in the hospital for 22 days and then he was treated as an out-patient. After the plaster was removed and for a period of two months thereafter he was undergoing physiotherapy treat-25 ment at the hospital.

The case was hotly contested on the question of the permanent injuries of the respondent-plaintiff. Five doctors who examined the respondent in this respect gave evidence before the trial Court and the reports of three of them were produced and were put in evidence by con-30 sent. They were Dr. Stelios Georghiou (P.W. 4), a Government Orthopaedic Surgeon who attended the respondent at the hospital; Dr. Achilleas Perdios (P.W. 8), a specialist Neuro-Surgeon who examined the respondent for the last 35 time on 22.4.1983 for the purpose of assessing his condition and Dr. Leontios Papasavva (P. W. 2), a specialist Orthopaedic Surgeon who examined the respondent on 13.7.1978, 10.3.1979 and 1.2.1982. All three of them were called by the respondent-plaintiff.

Two doctors were called by the appellant-defendant, namely, Dr. Antonis Pelides (D.W.4), an Orthopaedic surgeon who examined the respondent and assessed his condition as on 12.2.80 and Dr. Vasos Pyrgos (D.W.5) a Specialist Neuro-Psychiatrist who examined the respondent on 12.2.1980.

A summary of the evidence of all five doctors is to be found in the judgment of the trial Court on the basis of which the trial Judge made his findings that the respondent was left with the following permanent incapacity: Shortening of the left leg by 2 cm. with muscular atrophy of 2 cm.; flexion of the knee joint was affected by one-third; permanent limping when walking which can be reduced by the use of a special shoe; osteoarthritic changes to the spine which, though pre-existing the accident, were accelerated to some degree as a result of the accident; complaints of giddiness due to postconcussional syndrome must have improved considerably; the scar on the left eye-brow, though now unsightly, is permanent; the fractures of the upper third of the fibula and tibia were soundly united at the expense of some deformity.

After making his findings on the medical evidence, the learned trial Judge concluded as follows:

> "Bearing in mind my above findings, regarding the consequences of the injuries, the pain and suffering which the plaintiff had suffered and will suffer in the future and also the fact that the after-effects of his injuries will affect to some degree the ability of the plaintiff to enjoy the happiness of life, notwithstanding his age, I adjudge £3,500 as general damages, an amount which I consider just and reasonable in the case."

Then the learned Judge after dealing with the evidence before him as to the earnings of the plaintiff, found as follows:

> "This evidence was not contested and it is admitted that for 27 continuous weeks immediately before the accident the plaintiff was working at the Electricity Authority as a labourer with weekly emoluments ranging from £16 - £20. From the aforesaid evidence it also emanates that for a total period of nine months

in the course of the three years the Plaintiff was paying contributions to the Social Insurance Fund as a self-employed farmer.

5 The Plaintiff alleged that from ploughing he was earning £8 per day and that he was working in the fields daily even on weekends and that he was using his spare time after four o'clock for the same work, being paid the same amount. It is abundantly clear that there were no sufficient time limits to enable him 10 to earn full wages and, in the absence of any supporting evidence, I reject the last contention of the plaintiff. Furthermore, the fact that the plaintiff was working for long periods as a labourer indicates or at least amounts to a serious indication that he did 15 not have a definite daily income from ploughing and he was bound to work as a labourer. Concerning his income, I am not satisfied that he was earning £8 especially since in his Statement of Claim he claims for loss of wages £7 per day. I think that a sum of £6 20 is more reasonable."

In dealing with the contention of the plaintiff that after the accident he is completely incapable of doing any work, he came to the conclusion, bearing in mind the evidence of P.W. 2 and P.W. 4, that the plaintiff 25 cannot in the future be engaged in the cultivation of fields but he can do slight agricultural work and, with some inconvenience, work as a labourer provided he does not walk on uneven ground, and went on as follows:

30 "Undoubtedly the ability of the plaintiff for work has been reduced to the degree which I have mentioned due to the incapacity left as a result of the accident which places him in a disadvantageous position in the search of employment. Also, un- 35 doubtedly his inability to cultivate fields will have the effect of loss of future earnings. As the evidence stands, it is not easy to assess on a strictly mathematical basis on the classic formula of multiplier and miltiplicand. It would, however, be just that an 40 amount be given for the fact that his future earning capacity has been prejudicially affected. Bearing in

mind all relevant factors and the age of the plaintiff, I believe that a sum of £750 would be a just compensation for the plaintiff in this respect."

According to the learned trial Judge the plaintiff was unable to work for 18 months after the accident and that after such period he was in a position to carry out certain work. This is in line with the medical evidence and the medical reports before him which indicate that the condition of the respondent-plaintiff and his partial permanent incapacity had crystallized by the end of such period.

In making his assessment of loss of earnings on the basis of the above and bearing in mind the fact that loss of wages upto 22.3.1979 had been agreed, he concluded as follows:

"The assessment of loss of wages for the period after March, 1979 presents difficulties as the evidence has certain lacuna. The primary question is when was the plaintiff in a position to work. I have already mentioned the opinion of D. W. 4 but I think I cannot rely on it. Bearing in mind the serious injuries of the plaintiff in conjunction with my conclusion which concern the post-concussional syndrome, I find that the plaintiff could resume some work in about 18 months after the accident. Consequently the plaintiff is entitled to additional wages of about 26 weeks which I shall assess on the basis of his last weekly wages with the Electricity Authority of Cyprus, at £20.- that is, 26X20=£520. Thereafter and till the trial any calculation is still more difficult. The engagement of the plaintiff as a labourer was not continuous or steady and when he was self-employed he had a higher income and for the period in question I accept that his daily remuneration was increased to £7.-".

Then the learned trial Judge proceeded and by making certain speculations on the matter with which we shall deal later in our judgment, assessed the loss of earnings as from the above date to the date of the trial at £1,000.-.

In the result he made his final award of damages as follows:

"The total of the items which have been approved by the Court as special damages together with the agreed sum of £1,555 amounts to £3,370 to which, if the amount of general damages is added, makes a total of £7,620."

What emanates from the above, is that the learned trial Judge assessed the damages as follows:

Special Damages

(a)	Agreed before the hearing and including medical expenses, transport expenses and loss of wages till 22.3.79	£ 1,555.-
(b)	*Further loss of wages for six months* after March, 1979	£ 520.-
(c)	Loss of wages thereafter till the trial ..	£ 1,000.-
(d)	Loss of animals	£ 250.-
(e)	Additional medical expenses (admitted at the trial)	£ 45.-
	Total	£ 3.370.-

General Damages

(a)	Pain, suffering, disability etc.	£ 3.500.-
(b)	Diminution of his future earning capacity	£ 750.-
	Total	£ 4.250.-

We shall deal first with the award of special damages. It was reasonably open to the trial Court on the evidence before him to assess plaintiff's loss in respect of his animals at £250.-. The other items with the exception of (b) and (c) have not been disputed.

We come now to consider the award of special damages under (b) and (c) hereinabove.

The learned trial Judge awarded £520.- for loss of wages for a period of six months after March, 1979, which was found on the basis of calculation of the emoluments of the plaintiff during such period at £20.- per week which is the amount, as found by him, representing

wages for employment with the Electricity Authority of Cyprus. Nothing has been awarded in respect of loss of earnings for agricultural work notwithstanding the fact that he found that the plaintiff was occasionally engaged in agricultural work and when so engaged during such period he was earning £6.- per day. Bearing in mind the fact that for the first 52 weeks the loss of earnings as claimed under paragraph 9(c) of the Statement of Claim was agreed between the parties as being £30.- per week we see no reason why an additional sum of £10.- per week for loss of earnings from agricultural work should not have been added to the period of 26 weeks after March, 1979 till the end of September, 1979. A reasonable award therefore for the period of the said 26 weeks should have been £780.- (26X30) and not £520.-.

We come next to consider the award of £1,000.- in respect of speculative loss of wages due to the diminution of the earning capacity of the plaintiff after the period of 18 months from the date of the accident.

It clearly emanates from our case law, following in this respect decided cases in England, that an award for special damages in respect of loss of earnings may be made down to the date of trial (see *Kemal* v. *Kasti,* 1962 C.L.R. 317; *Ioannou & Paraskevaides Ltd.* v. *Neokleous* (1973) 1 C.L.R. 141 at pp. 144 - 145. In *Ioannou & Paraskevaides Ltd.* (supra) reference was made to the following dictum of Lord Goddard in *British Transport Commission* v. *Gourley* [1956] A.C. 185 (at p. 206):

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

In *Constantinides* v. *Hji Ioannou* (1966) 1 C.L.R. 191, the point was raised as to whether the trial Court had erred by including special damages in respect of loss of earnings in the global figure of general damages; it was held on appeal that it was judicially open to the trial Court either to assess special damages up to the hearing or to include such damages after a certain date in the amount of general damages. 5

Before concluding on the matter useful reference may be made to the following observations of Brett L. J. *in Phillips* v. *London & South Western Ry* [1879] L. R. 5, C.P.D. 280 (C. A.) at p. 251: 10

> "Bramwell L. J. has described how the earnings of a working man ought to be dealt with. I agree with his view subject to this remark, that his description assumes that no circumstances existed, which would have prevented the working man from earning the same wages during the time when he was in fact disabled. If the plaintiff had resided in Lancashire and had earned his livelihood by working at the mills there, and if all the mills in Lancashire had been closed from the time of the accident, the jury would have to weigh that fact and consider whether he could have continued to earn his ordinary wages." 15 20

The learned trial Judge in arriving at the figure of £1,000.- said the following: 25

> "It is correct that the plaintiff has by law the burden to prove the special damages with concrete evidence. I believe, however, that strict compliance with this rule in this case would lead to unjust results given that, according to my findings, the plaintiff would have in any case higher income every time he would work for his account and, in consequence, a corresponding loss of income. The period during which the plaintiff would have been engaged is unknown but taking as a basis and indication the period of three years prior to the accident and making the most strict assessment allowed by the unforeseen elements in this case, I adjudge for the rest of the period the sum of £1,000.-". 30 35 40

What emanates from the above conclusion of the trial Court is that the special damage in respect of such loss had neither been *proved* nor was it *"generally capable of substantially exact calculation"* as suggested in the *British Transport Commission* v. *Gourley* (supra) the relevant dicta of which had been incorporated in a number of decided cases of this Court.

The plaintiff was at the time of the accident 67 years old and he has been awarded total loss of earnings for 18 months which brings him to the age of nearly 69. The accident occurred on 8.4.1978 and the action was filed on 8th November, 1978; the hearing was concluded on 5.6.1984 and judgment was delivered on 17th September, 1984 by which time the plaintiff was more than 73 years old. In the circumstances of the case and bearing in mind the uncertainties in assessing loss of wages till the date of trial as found by the trial Court, the advanced age of the appellant and the fact that his condition had crystallized 18 months after the accident, that is about the end of September, 1979, in respect of which special damages for total loss of earnings have been awarded, and that after such date though he would not do heavy farming work on uneven ground he nevertheless could do work as a labourer with the Electricity Authority though at some pain, provided he would be employed by such authority in view of his advanced age, and also the fact that more than six years had passed from the date of the accident till the date of trial we find that it would have been safer in the circumstances of the case that any speculative loss of earnings after the end of September, 1979, should have been included in the award of general damages for permanent partial diminution of his earning capacity and should not have been separately assessed.

We come next to consider the award of general damages. As to the amount of £3,500.- for pain, suffering, permanent partial incapacity, loss of amenities and other items in respect of which it has been awarded and to which reference has already been made we consider it reasonable and we find no reason to interfere with same.

The item which poses for consideration is the award of £750.- for the effect of his permanent partial incapacity on his future earnings.

We agree with the learned trial Judge that there are 5 cases in which the assessment of damages on a strictly mathematical basis on the established formula of multiplier and multiplicand is not always possible and that in the present case he was right in not adopting such method. In *Joyce* v. *Yeomans* [1981] 2 All E.R. 21, Waller, 10 L.J. in dealing with the assessment of general damages in the circumstances of that case had this to say in this respect at p. 26:

"I have already said that I do not accept the multiplier multiplicand method of calculation. There are 15 so many imponderables. For example, how long will the plaintiff live? What job will be in fact get? What sort of job would he have got if he had had the epilepsy later in his life? All of those are capabe of a wide variety of answers.

20 I therefore would assess a figure which in my judgment would properly compensate for all those matters..."

The plaintiff was before the accident 67 years old. He was a healthy man and besides casual work as a labourer 25 with the Electricity Authority, he was ploughing fields with animals, which is rather heavy agricultural work, and also doing other heavy manual work such as assisting his daughter in the construction of her house. In fact on the day of the accident he was returning from the fields with 30 his animals and plough having had worked in the ploughing of fields. There was evidence in this respect before the trial Court. It should be however added that the presumption in the case of any person who has been injured, should normally be that he was an average normal person, 35 unless the contrary be proved (*Constantinides* v. *HjiIoannou*

(1966) 1 C.L.R. 191, 196). The appellant has not adduced any evidence to either contradict the plaintiff on his condition of health or rebut the presumption about his good health.

In assessing damages under this item and bearing also in mind our finding that in the circumstances of the present case loss of earnings as from the end of September, 1979, till the trial should have been included under this heading, as well as all relevant factors including the advanced age of the plaintiff, we have reached the conclusion that a fair and reasonable compensation in respect of such loss is a sum of £2,500.-.

It has not escaped our attention that this Court does not interfere on appeal with an award of general damages by a trial Court unless the Court acted on some wrong principle of law or that the amount awarded is so extremely high or so very small as to make it an entirely erroneous estimate of damages. We have indeed reached the conclusion that the amount to be awarded by the trial Court in respect of such amount should have been not less than £2,500.-.

Before concluding with this appeal we find it necessary to deal briefly with the contention of counsel for appellant that had the respondent consented to undergo a bone grafting operation both his permanent incapacity and the diminution of his earning capacity would have been reduced to the minimum and as a result the award of general damages would have been much less. In support of his contention, counsel for appellant sought to rely on the evidence of Dr. Papasavvas (P. W. 2) who said in cross-examination that he recommended a bone grafting operation by which the overlapping of the bones might be improved and the shortening reduced to some degree. This witness went on to say that bearing in mind the age of the plaintiff there were risks in the operation and that the plaintiff was afraid to undergo same. The witness further admitted that even if the operation was successful there would still remain a shortening of the leg, reduced to

some degree from the present one, and that the complaints would not have been disappeared completely but would be considerably reduced.

As against the above evidence, Dr. Pelides (D. W. 4) expressed his opinion against a bone grafting operation in the case of the plaintiff taking into consideration his advanced age (67 years at the time). The opinion of this witness was as follows:

> "On the basis of my experience, which is not short, I would apply a conservative treatment because the condition of the bone at such age is such as by inserting a platinum nail in it will not support the fracture and I never propose an operation for such purpose on a person over the age of 60 . . . The bones of a person over 65 become porous and it is better to adopt a conservative method in treating them; but if after the conservative treatment we come to the conclusion that we have done everything possible and no results are achieved then we may take the risk of carrying out an operation."

From what emanates from a line of decided cases in England is that if an injured person unreasonably refuses to have an operation which might improve his condition the continuing effects are not chargeable against the defendants. Useful reference may be made to the case of *Mc Auley* v. *London Transport Executive* [1957] 2 Ll. L. R. 500 with respect to the disregard by an injured person of medical advice. The plaintiff in that case sustained injuries culminating to severance of ulnar nerve while employed by defendants. Plaintiff was advised to have operation which had 90 per cent chance of successfully restoring mass action of fingers and 35 per cent chance of restoring fine movement of fingers. Pearson J. who tried the case in the first instance, found as follows (p/ 503):

> "Whatever the truth may be, it is obviously well established and obviously a matter of ordinary com-

mon sense that, if the continuance of an injury is due to the plaintiff's unreasonable refusal to have an operation, the continuing effects are not chargeable against the defendants. They are not due to the initial cause but due to the *intervening cause of the unreasonable* refusal. I therefore hold that the continuing disability is not due to the accident but due to this unreasonable refusal."

On appeal the decision in the above case was affirmed and it was held (per Jenkis L. J. at p. 505 [1957] 2 Ll. L.R.) that:-

"It is not in dispute that, inasmuch as in a case of this sort it is the duty of the injured party to mitigate damages, it is his duty to act on any medical advice he receives to the effect that this or that treatment will give this or that prospect of success. If he receives medical advice to the effect that an operation will have a 90 per cent chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think that he has acted unreasonably, and that the damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it."

What emanates from the evidence before the trial Court in the present case is that the doctor who examined and treated the respondent at the General Hospital did not think fit to carry out a bone grafting operation on him but instead he fixed his fracture in the way described by him in his evidence. Doctor Papasavvas in whose opinion a *bone grafting operation might improve the condition* of the respondent and had expressed his opinion when he saw the plaintiff a long time after the accident and after his fracture had already united. If such operation was carried out it meant that the bones had to be broken again and a bone grafting carried out on the plaintiff which in the opinion of Dr. Pelides would have been very risky bearing

in mind that the plaintiff was over 65 years of age and an operation on persons of his age might have very bad results as there was a risk for the bones not to unite due to their condition. On the evidence as it stands we find that the refusal of the plaintiff to undergo such an operation after the bones had already united was a reasonable one. In any event even if such an operation was carried out and was successful the disability and the shortening of his leg would not have completely been eliminated but only reduced to a certain degree. Therefore, we find that the appellant's contention in this respect is untenable.

On the basis of our findings as above we sum up the amount of damages awarded as follows:

Special Damages:

(a)	Agreed before the hearing	£ 1,555.-
(b)	Loss of earnings as from end of March, 1979 till end of September, 1979 (26 weeks @ £30)	£ 780.-
(c)	Additional Medical expenses admitted by appellant's counsel	£ 45.-
(d)	Damage in respect of two animals	£ 250.-
	Total	£ 2,630.-

General Damages.

(a)	For pain, suffering, etc.	£ 3,500.-
(b)	Diminution of earning capacity due to his partial permanent incapacity including loss of earnings as from the end of September, 1979 till trial of the action	£ 2,500.-
	Total	£ 6,000.-

The above makes a total of £8,630.-. 50% of which amounts to £4,315.-.

In conclusion, the appeal on damages fails and is hereby dismissed. The cross appeal succeeds as above. In the result the amount of damages awarded by the trial Court is set aside and substituted by the sum of £4,315.- with costs on that amount both before the trial Court and on appeal. 5

Interest: In the light of the provisions of section 58A of the Civil Wrongs Law, Cap. 148, which has been introduced by section 5 of Law 156/1985, we award interest at the rate of 6% per annum on the amount of special damages recovered, that is on £1,315.- as from 1st October 10 1979 when such damages had finally chrystallized till 17th October. 1984, when judgment was delivered and 6% on the whole amount recovered as from 17 October, 1984 till payment excluding interest on any amount paid in the meantime as from the date of its payment. 15

Appeal dismissed.
Cross appeal allowed.
Order for costs as above.