1988 March 31

(A. LOIZOU, DEMETRIADES, KOURRIS, JJ)

PETROS TZIANNAROS,

Appellant-Defendant,

v.

SAVVAS CONSTANTINOU KAMELARIS,

Respondent-Plaintiff.

(Civil Appeal No. 6771).

Appeal — Fresh evidence — The Civil Procedure Rules, 0.35, r.8 — Discretion of Court — Principles governing its exercise, especially as regards assessment of damages for personal injuries.

The respondent/plaintiff filed an action against the appellant/defendant for damages for personal injuries suffered by him in an accident as a result of the negligent driving of the appellant/defendant.

The trial court awarded to the plaintiff, inter alia, £9,000 for future loss of earnings.

The appellant/defendant applied «for leave to produce further oral and documentary evidence to prove facts which arose after the trial and/or the judgment of the trial court».

The affidavit in support of the application states that the respondent/plaintiff as from May, 1984, to February, 1985, was regularly working and had no loss of wages. In support thereof a table containting the earnings of the respondent/plaintiff was appended to it, which are also set out in its paragraph 7, showing earnings ranging from £644 per month to £1,244.-

There is, however, no comparable table as regards the earnings of the other two witnesses as was the case of Exhibit 12 for the months of October 1982, to January, 1983, which had been taken into account by the trial court. Nor is there any evidence to show what was the increase in the rate of remuneration of all port workers since two years had elapsed between the period covered by Exhibit 12 and the period covered by this new fresh evidence.

Held, *dismissing the application*: (1) It appears that, in the light of the authorities, though the Court has a discretion to receive further evidence, where there has been a «dramatic change of circumstances» after the date of the trial, such that the basis on which the case was decided was suddenly and materially falsified, nonetheless there should be a finality in litigation - interest republicae ut sit finis litium - especially so in personal injury cases where damages must be assessed once and for all.

(2) Any possibilities of an increase or decrease of an injured plaintiff's earning capacity or of wages paid to persons in his profession, or in the cost of living or in the supply and demand for such persons, or changes for the better or worse of his state of health are among the contingencies taken into consideration by the trial Court when assessing damages and therefore such awards should not be disturbed as a result, so long as such changes do not dramatically change the basis on which the trial Court made its assessment.

(3) In this case the increase of the respondent's earnings after trial does not necessarily amount to events which «materially falsify the expectations» on which the trial court assessed the damages payable to the respondent.

Application dismissed with costs.

Cases referred to:

Pourikkos (No.2) v. Fevzi, 1962 C.L.R. 283;

Ashiotis v. Weiner (1966) 1 C.L.R. 274;

Evdokimou v. Roushias (1975) 1 C.L.R. 304;

Kyriakou v. C.D. Hay and Sons (1978) 1 C.L.R. 100;

Athanasiou v. Attorney-General (1966) 1 C.L.R. 160;

Kolias v. Police (1963) 1 C.L.R. 52;

Felekkis v. Police (1968) 2 C.L.R. 151;

Ladd v. Marshall [1954] 3 All E.R. 745;

Mulholland v. Mitchell [1971] 1 All E.R. 307.

Application.

Application by appellant for leave to produce further oral and documentary evidence.

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

K. Hadjipieras, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. This is an application by the appellant/defendant «for leave to produce further oral and documentary evidence to prove facts which arose after the trial and/or the judgment of the trial Court, which evidence may be given by the examination viva voce before the Court, of Andreas Savva and Andri Makri of Limassol».

The application is based on the Civil Procedure Rules, Order 35, rule 8 Section 25(3) of the Courts of Justice Law 1960, Law No. 14 of 1960.

The facts relied upon are set out in the affidavit of one of the managing directors of K.M. Tillis and Co. Ltd., which represented in Cyprus, the «Kosmos» Insurance Company with which the vehicle of the appellant/defendant was insured under the provisions of the Motor Vehicles (Third Party) Insurance Law, Cap. 333.

They are briefly these. The respondent/plaintiff had filed an action against the appellant/defendant for damages for personal injuries suffered by him in an accident as a result of the negligent driving of the appellant/defendant. The hearing of the case was concluded on the 21st January, 1984. The trial Court reserved its judgment which it delivered on the 30th May, 1984. By it the respondent/plaintiff was awarded on a full liability basis £23,400.- general and special damages. Out of this amount the amount of £9,600.- was awarded for future loss of earnings. The relevant passage of the judgment of the Court reads as follows:

«I have further considered the arguments of both Counsel and the cases cited concerning the issue of damages. Justice and fairness are the guiding principles to the award of damages. (See dicta of Geoffrey Lane, L.J. in *Service Europe Atlantique v. Stockholmes* [1979] 2 All E.R. 764). A sum must be found in each case that does justice to the loss of the injured party but fair to the defendant as well, in the sence that it should not impose a socially unacceptable burden upon him. (See *Fletcher v. Autocar and Transporters Ltd.*, [1968] 1 All E.R. 726; *Constantinou v. Salahouris* (1969) 1 C.L.R. 416).

Applying the above criteria to the case in hand and, in particular, bearing in mind that the plaintiff is fifty-two years of age, the nature of his work and the hazards involved, I have arrived at the conclusion that eight is the appropriate multiplier. Thus, the

further loss of earnings of the plaintiff amount to £100 x 12 = £1,200 per year. Therefore the multiplicand is £1,200 per year which, if multiplied by eight, gives us the total sum of £9,600 for future loss of earnings.»

It was contended on behalf of the appellant/defendant that the trial Judge in assessing the alleged future loss of earnings relied on the evidence of plaintiff's witness No. 11, Andreas Savva, an employee of the Provident Fund of the Port Workers in Limassol, who produced Exhibit 12, which related to the earnings of the respondent/plaintiff between October 1982 and September 1983 and that of two other colleagues of the appellant, namely port workers 23 and 24 for the same period. On this issue the trial Court had this to say:

«As a result of this partial incapacity, the Plaintiff adduced evidence to the effect that his income has been reduced. The Plaintiff was not in a position to substantiate his loss and for this purpose P.W.11 Andreas Savva produced Exhibit 12 which indicates the income of the Plaintiff from October, 1982 to September 1983, as well as the income of two other stevedores, who have a serial number close to No. 26 which is the number of the Plaintiff and which is relevant to the gangs that are formed and are sent to work on board the ships. These people are usually employed together and they do the same work, thus they are expected more or less to have the same income. From this evidence it appears that the Plaintiff during that year, which is the time when he was not helped by his colleagues, lost fifty-seven days wages and his loss was about £3,125.

In the light of the evidence adduced on this issue and bearing in mind the argument of learned Counsel for the Defendant as well as the authorities cited, I am of the view that the Plaintiff proved that loss, but, as in the Statement of Claim he is only claiming an amount of £100 per month, his loss is limited to that amount.

The condition of the Plaintiff will not only remain unchanged permanently, but, due to the post-traumatic osteoarthritis, it will gradually get worse; thus, the future loss of the Plaintiff continue to be at least £100 per month. Proceeding, therefore, to the quantification of general damages, I propose to decide separately the two components

that comprise the general damages in this case, namely the future loss of earnings and damages for pain and suffering and loss of amenities.»

It was further alleged in the said affidavit that the respondent/plaintiff as from May, 1984, to February 1985, was regularly working and had no loss of wages. In support thereof a table containing the earnings of the respondent/plaintiff was appended to it which are also set out in its paragraph 7, showing earnings ranging from £644 per month to £1,244.-. There is, however, no comparable table as regards the earnings of the other two witnesses as was the case of Exhibit 12 for the months of October 1982, to January 1983. Nor is there any evidence to show what was the increase in the rate of remuneration of all port workers since two years had elapsed between the period covered by Exhibit 12 and the period covered by this new fresh evidence.

The application has been opposed and we had the advantage of extensive argument reference to practically every decided case of this Court on the question of admitting further or fresh evidence on appeal, both in civil and criminal cases, as well as to the relevant English authorities most of which were cited with approval and followed by this Court. As far as the Cyprus cases are concerned reference may be made to *Yiannis Pourikkos (No. 2) v. Fevzi*, 1962 C.L.R. 283; *Yiannis Ashiotis v. Michael Weiner* (1966) 1 C.L.R. 274; *Efthalia Evdokimou v. Damianos Roushias* (1975) 1 C.L.R. 100; *Savvas Athanasiou v. Attorney-General* (1966) 1 C.L.R. 160; *Periklis Kolias v. The Police* (1963) 1 C.L.R. 52; *Nicos Felekkis v. The Police* (1968) 2 C.L.R. 151.

In considering the English authorities the basic principles have been stated by Lord Denning in the case of *Ladd v. Marshall* [1954] 3 All E.R. 745 to be as follows at p. 748:

«The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.»

It appears that though the Court has a discretion to receive further evidence where there has been a «dramatic change of circumstances» after the date of the trial such that the basis on which the case was decided was suddenly and materially falsified, nonetheless there should be a finality in litigation - interest reipublicae ut sit finis litium - especially so in personal injury cases where damages must be assessed once and for all.

In the words of Lord Wilberforce in *Mulholland v. Mitchell* [1971] 1 All E.R. 307 at p. 311:

> «The trial judge has to form an opinion, the best he can, as to these matters, and having done so, to express his opinion in the form of a lump sum or sums. The method commonly used is by applying a multiplier, which involves an estimate of duration and probability, to an annual figure of earnings or expenses, and small differences in the parameters may produce large differences in the final award. The judge has to take into account all the uncertainties, foreseen and unforeseen, of the future; it has been said that he must use a compound of prophesy and speculation.
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> This abbreviated and over-simplified description shows at least what limitations must inherently exist to the Court of Appeal's discretion to admit further evidence. It makes it clear that an impossible situation would arise if evidence were to be admitted of every change which may have taken place since the trial. In the nature of things medical condition will vary from year to year, or month to month: earning prospects may change, prices may rise, or even fall. If the Court of Appeal were to admit evidence of changes of this kind (and it must not be overlooked that a facility given to one side cannot be denied to the other), not only would a mass of appeals involve the hearing of evidence, but the Court of Appeal would merely be faced with the same uncertainties as faced by the judge, and of which the judge has, ex hypothesis, already taken account. In other words, an appellant's contention that factors such as these have changed since the trial must, in normal cases, be met with the answer that the judge, in his estimate, has already taken account of them.»

As to the law applicable in Cyprus, extensive reference has been made by this Court in the case of *Efthalia Evdokimou v. Damianos Roushias* (1975) 1 C.L.R. 304, where after dealing with the various

English authorities and the effect of rule 8 of Order 35 of the Civil Procedure Rules that as regard matters occurring subsequently to the trial it is not necessary to put forward special grounds justifying but the matter lies in the discretion of the Court, it was considered that it was not a proper case of exercising such discretion in favour of allowing the calling of evidence as regards further developments, as such developments did not amount to events which had «materially falsified the expectations on which the trial Court had assessed the damages payable to the appellant» *(Efthalia Case* supra p. 313), and furthermore that «the further evidence to be adduced on appeal could not have been obtained with reasonable diligence for use at the trial».

We feel that we need not expand on the principles further than we have done above as such have already been stated by this Court in the aforesaid decided cases.

Generally we also feel that great heed should be paid to the principle of finality of litigation, a principle which should apply equally to both sides and that damages should be assessed once and for all. Any possibilities of an increase or decrease of an injured plaintiff's earning capacity or of wages paid to persons in his profession, or in the cost of living or in the supply and demand for such persons, or changes for the better or worse of his state of health are among the contingencies taken into consideration by the trial Court when assessing damages and therefore such awards should not be disturbed as a result, so long as such changes do not dramatically change the basis on which the trial Court made its assessment and in the present instance they do not.

We consider therefore that, as already explained above, this is not a proper case in which to exercise our discretion in favour of allowing further evidence. Though it does appear that the overall earnings of the respondent/plaintiff may have increased, it does not necessarily amount to events which «materially falsify the expectations» on which the trial Court assessed the damages payable to the respondent In any event, in our mind, it does not necessarily lead to any conclusion as to whether such increase in his earnings was due to an increase in the rate of remuneration of port workers generally or whether it was due to changes in his physical capacity allowing him thus to earn more living.

For the reasons stated above, this application fails and is hereby dismissed with costs.

Application dismissed with costs.