1988 December 30

(DEMETRIADES, SAVVIDES, AND KOURRIS, JJ )

MITHEO LIMITED,

*Appellants-Defendants,*

v.

ACHILLEAS KOUDOUNAS,

*Respondent-Plaintiff.*

*(Civil Appeal No. 6956).*

---

*Damages — Loss of earnings due to injuries sustained by reason of negligence — Whether social insurance benefits received by the victim during the period of his temporary incapacity are deductible from the damages payable for loss of earnings - Question determined in the affirmative — Lincoln v. Hayman and Another [1982] 2 All E.R. 819 adopted.*

*Appeal — Apportionment of liability — Interference with, on appeal — Principles applicable*

*Negligence — Vicarious liability — Factory — Fellow employee setting machine in motion without first receiving pre-arranged signal for doing so — Respondent's fingers caught in the machine — Accident exclusively due to negligence of co-employee for which the employers were vicariously liable.*

The respondent was injured, whilst working in appellants' factory. The injury, as the trial Court found, was due to the fact that a fellow worker put a machine in motion without first receiving a signal - as was the established system of work - by the respondent and/or another fellow worker, that everything was ready ( εν τάξει) for the machine to be set in motion.

In the light of the said finding the trial Court found that the injury was due exclusively to the negligence of such co-employee, for which the appellants were vicariously liable.

By means of this appeal the appellants challenged the apportionment of liability and the refusal of the trial Court to deduct

from the amount of the award for loss of earnings, the amount received by the plaintiff (respondent) from Social Insurance.

*Held, allowing the appeal in part*: (1) There is no reason to interfere with the apportionment of liability.

(2) The Social Insurance Law, 1980 (Law 41/80), whereby the previous social insurance legislation was repealed, is silent on the point of deductibility of social insurance benefit received during the period of temporary incapacity due to an accident. Silent is also similar legislation in England.

(3) In England, the matter was settled in principle in *Lincoln v. Hayman and Another* [1982] 2 All E.R. 819 (C.A.). The ratio decidendi is that if supplementary benefits payable under National Assistance in circumstances as aforesaid are not deductible, the victim of the accident would receive double compensation for the same loss.

(4) This Court agrees with the opinions expressed in *Lincoln, supra* by Dunn, L.J. and Waller, L.J.* If the intention of the legislator had been to prohibit deduction of benefits received under Social Insurance Legislation during the period of incapacity for work by a victim of an accident from the damages payable to him, he should have said so expressly, as he did in the case of Law 156/85, amending s.58 of the Civil Wrongs Law, Cap. 148.

*Appeal allowed in part.*
*No order as to costs.*

*Cases referred to:*

*Lincoln v.Hayman and Another* [1982] 2 All E.R. 819;

*Plummer v. P.W. Wilkings and Son Ltd.* [1981] 1 All E.R. 91;

*Gaskill v. Preston* [1981] 3 All E.R. 427;

*Nabi v. British Leyland* (U.K.) Ltd. [1980] 1 W.L.R. 529;

*Foxley v. Olton* [1965] 2 Q.B. 306;

*Bassnett v. Jackson Ltd.* (1976) I.C.R. 63;

*Parsons v. BNM Lavoratories Ltd.* [1964] 1 Q.B. 95;

*Cheeseman v. Bowaters U.K. Paper Mills Ltd.* [1971] 3 All E.R. 513;

*Parry v. Cleaver* [1970] A.C. 1.

* *The relevant passages from their judgments are quoted at p.p. 803-804 post.*

**Appeal.**

Appeal by defendant against the judgment of the District Court of Limassol (Korfiotis, D.J.) dated the 23rd April, 1985 (Action No. 2999/81) whereby he was adjudged to pay to the plaintiff the sum of £1,830.- as damages for personal injuries sustained by him in an industrial accident.

*Gl. Raphael for A. Andreou*, for the appellant.

*A. Pelagia (Miss) for A. Lemis*, for the respondent.

*Cur. adv. vult.*

DEMETRIADES J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal from the judgment of the District Court of Limassol in an industrial accident case whereby the appellants were adjudged to pay to the respondent the sum of £1,830.- as damages for personal injuries.

The learned trial Judge found that the appellants were solely to blame for the accident and awarded the above sum against the appellants and in favour of the respondent.

The appeal is against the apportionment of liability and against that part of the judgment whereby the trial Court failed to deduct the social insurance benefits paid to the respondent during his temporary total incapacity, from the award of special damages, by holding that such benefits were not deductible from the special damages.

The facts of the case are briefly as follows:

The respondent is a metal worker. The appellants are the owners and/or occupiers of a metal workshop and/or factory within the meaning and for the purpose of the Factories Law, Cap. 134.

On or about the 14th May, 1981, the respondent with a fellow worker were sent by their employer to the workshop of the appellants in order to bend metal sheets and give them a Y-like shape by a specially adapted machine for such purpose. The said machine was under the exclusive control and operation of the appellants and was operated by one of appellants' employees. The said machine was operated in the following manner:

The metal sheets were place on the rollers of the machine one at a time and after it was ascertained by those placing the sheets that they were in their proper position and after the latter took their hands off the sheets and signified to the operator of the machine by calling out to him the words «εν τάξει» (O.K.), the operator was setting the machine in motion by pressing the starter which was on the machine on his side. As a result the sheets were pulled into the machine by the rollers and were held tight by a second set of rollers which was lowered on the top and was pressing the sheets and subsequently the machine was cutting the sheets in the desired shape. This was the normal process which was also followed on the day of the accident.

This process was repeated on that day for a number of times without any risk. On the last occasion and whilst the respondent and the other fellow worker were still in the process of placing the sheets on the rollers the operation of the machine before ascertaining that the process of placing the sheet had been completed and the respondent had taken his hand and without waiting for any signal from the respondent that the sheet was in order he set the machine in motion and as a result the hand of the respondent was caught into the rollers and his fingers were badly injured.

The learned trial Judge accepted the evidence of the respondent and that of his witness as true and reliable and rejected the evidence of the operator of the machine that he set the machine in motion after the respondent and his fellow worker had signified to him that everything was in order and he could set the machine in motion. As a result he found that the accident was the result of the sole negligence of the operator of the machine for which the appellants were vicariously liable and gave judgment in favour of the respondent - plaintiff against the appellants - defendants.

The special damages had been agreed between the parties as amounting to £830.- subject to an issue as to whether an amount of £238 which the respondent collected from the Social Insurance Fund during his absence from his work due to his injuries was deductible from the amount of special damages. The other issues which were before the trial Court were the quantum of general damages and the apportionment of liability between the parties.

The learned trial Judge found as follows:

(a) The general damages were assessed at £1,000.-

(b) There was no contributory negligence on the part of the respondent

(c) The amount of £238 - collected by the respondent from the Social Insurance Fund was not deductible from the special damages

The amount of general damages awarded by the trial Court is not in dispute in the present appeal What is challenged by this appeal is

(a) The apportionment of liability and the finding of the trial Judge that the appellants were solely to blame and

(b) That the social insurance benefits amounting to £238 - should have been deducted from the amount of special damages awarded

We shall deal first with the question of apportionment of liability

It has been held time and again that assessment of liability is primarily within the field of the trial Court and that this Court will not normally interfere with such assessment unless such assessment was manifestly wrong

It is also well settled that the findings of fact based on the evidence accepted by the trial Court should not be disturbed on appeal unless such facts are inconsistent with the evidence adduced or any inferences drawn from such facts are wrong

Counsel for both parties in this appeal drew our attention to the findings of fact of the learned trial Judge, the inferences drawn from such facts and his exposition of the law as appearing in his judgment We have carefully considered the judgment of the learned trial Judge and we have reached the conclusion that his findings as to negligence were reasonably open to him and warranted by the evidence accepted by him In the light of such findings the apportionment of liability on a full liability basis on the appellants, is the proper one and should not be disturbed

We come next to consider the remaining issue before us as to whether the amount payable as benefits from the social insurance is deductible or not from the amount of special damages awarded

The learned trial Judge had this to say in this respect

«In respect of the question as to whether the amount collected by the plaintiff (£238 -) from the Social Insurance

Fund should be deducted from the amount of compensation the Social Insurance Law 41/80 which repealed the previous Laws 2/64 and 28/68 does not embody any provision for such purpose. From this it can be inferred that this amount cannot be deducted otherwise there should have been a provision in the new law as there was previously.»

The Social Insurance Law of 1964, Law 2/64, did not contain any provision as to the deductibility of social benefits paid to a person during his temporary incapacity from the amount recoverable by him in an action for damages for negligence in respect of personal injuries. Such provision was introduced for the first time by Law 28/68 which brought about certain amendments to the Social Insurance Law of 1964. Thus under s.4 of the new Law, s.46 of Law 2/64, was amended by enacting a provision to the effect that when damages were awarded by a civil Court the Court should direct that an amount equal to 1/3rd of the benefits paid to a person under the Social Insurance Law should be deducted from the amount of special damages awarded in respect of loss of earning and such amount should be made payable to the Social Insurance Fund.

All the Social Insurance Laws were repealed by the Social Insurance Law, 1980 (Law 41/80) which enacted new provisions as to contributions and benefits from the Social Insurance Fund. The new law does not contain any provision as to deductibility or not of any benefits paid out of the Social Insurance Fund from the award of special damages in a civil action for negligence.

Law 41/80 is in this respect on the same lines as the various laws in England for social insurance benefits or supplementary benefits paid under the Social Insurance Schemes previously known as national assistance.

No reference was made by counsel to any decision of the Supreme Court on the subject since the enactment of Law 41/80 and we have not traced any decision in this respect. Useful assistance in this respect may be derived from the case law in England where similar legislation does not make provision as to deductibility of such benefits from an award of special damages.

In England till 1982 when the Court of appeal in *Lincoln v. Hayman and Another* [1982] 2 All E.R. 819, for the first time was given the opportunity of providing answers to some of the

problems on the question relating to the deductibility of supplementary benefits from special damages, the decisions appeared to be a little unsettled as many High Court decisions on the point were inconclusive. Some considered that supplementary benefit (previously known as national assistance) should be deducted in full because it would not be unfair to the plaintiff to deduct such payments as he cannot expect to receive double payment. Thus in *Plummer v. P.W. Wilkins & Son Ltd.* [1981] 1 All E.R. 91, it was held that payments of supplementary allowances, were deductible from the special damages awarded to a plaintiff for loss of earnings and if such allowances were not deducted, the plaintiff would have been in a better position than if he had not been injured. Latey, J. in his judgment, (at p.95) had this to say:

> «..... the purpose of damages is to compensate the victim for what he has suffered and lost as a result of the tortious act of the tortfeasor. It is not to fine the tortfeasor; it is not to put the victim in a better position than he would have been had there been no tortious act; it is to put him in the same position he would have been in had there been no tortious act. Unless the payments concerned are deducted, he would be in a better position than if there had been no tortious act. I add, parenthetically, that very different considerations apply in the case of a pension or charitable gifts or the like. As counsel for the defendant cogently put it, 'Would it be unfair to the plaintiff to deduct these payments?' Not in the slightest. From one source or another he has received all the compensation to which he is entitled to put him in the position he would have been had the accident not occurred. Is it unfair to him not to confer on him a windfall profit? Why should he receive double compensation?»

In the same vein *Gaskill v. Preston* [1981] 3 All E.R. 427 decided that family income supplement, as it was in the same category as supplementary benefit, was deductible from special damages. These two elements were considered to be identical to the employment benefit which under *Nabi v. British Leyland (U.K.) Ltd.* [1980] 1 W.L.R. 529 are deductible. However, in other cases it had been decided by the High Court that national assistance or supplementary benefits in view of their discretionary grant should be left out as these were too remote. (*Foxley v. Olton* [1965] 2 Q.B. 306; *Bassnett v. Jackson Ltd.* (1976) I.C.R. 63.)

The main problem apparently arises from the ratio decidendi of *Parsons v. BNM Laboratories Ltd.* [1964] 1 Q.B 95. a Court of Appeal case. in which it was decided that unemployment benefits since they are substitute for earnings are to be taken into consideration and deducted. In fact this was a wrongful dismissal case and its dictum in injuries cases etc. should be of doubtful authority. (See also *Cheeseman v. Bowaters U.K. Paper Mills Ltd.* [1971] 3 All E.R. 513). However, Lord Reid in *Parry v. Cleaver* [1970] A.C.1 questioned the validity of this authority, albeit obiter. Lord Wilberforce referred to the anomaly briefly.

Faced with all these complications the Court of Appeal in *Lincoln* (supra) decided to look at and consider the question of supplementary benefits on principle. Dunn, L.J. posed the question thus: «When the right to supplementary benefit was conferred, did Parliament intend that a plaintiff should enjoy it in addition to payment of the damages he will be entitled to». His Lordship's answer was «no».

Dunn, L.J. gave his reasons for so finding at p.822 as follows:

> «Where as here there is no indication in the statute as to the intention of Parliament I ask myself whether the payment of supplementary benefit is so remote from the damage caused in the accident that it should not be taken into account? The payments were made to the plaintiff because he was in need as a direct consequence of the injuries he suffered in the accident. They were made as of right, and if they are not deductible from his damages the plaintiff will pro tanto achieve double recovery, which is contrary to the basic principle of damages as compensation for loss actually suffered.
>
> To say that it is wrong that the tortfeasor should benefit from payment of supplementary benefit seems to me to ignore the realities of personal injuries litigation. In the great majority of the cases the damages will be paid by an insurance company, and the effect of not deducting supplementary benefit will be to increase premiums to employers and motorists, who together form a large section of the public. Moreover, if supplementary benefit is not deductible it will be in the

interests of plaintiffs not to proceed expeditiously with their claims, so as to increase the element of double recovery.»

Waller L.J. in the same judgment at p.823 had this to say:

«..... When he became unemployed he did not lose the total of his wages because part of that loss was replaced by supplementary benefit. If the supplementary benefit is not taken into account and deducted the plaintiff will recover more damages than he has suffered. It will be a fortuitous windfall. The fact that the defendant has to pay less damages as a result does not lead me to change this view. There are so many considerations in an award of damages for personal injuries which may make a difference to the award that I do not see anything intrinsically wrong in taking this into account. Nor does calling the defendant a wrongdoer affect this view, especially where the wrongfulness of the negligence may be minimal. Furthermore, although in a trial the question of insurance or not is irrelevant when considering broader principles, it is a matter to be considered. In cases of personal injury arising out of road traffic accidents the defendant will almost always be insured. The ideal answer might be that the insurers should get credit for the supplementary benefit but should be obliged to reimburse the Supplementary Benefit Commisssion for the benefit paid. This, however, cannot be done without legislation.».

We agree with the opinions expressed by L. Justices Dunn and Waller in *Lincoln (supra)* and with such opinion in mind we have come to the conclusion that for the reasons stated in the above cases the social benefits payable under the Social Insurance Fund are deductible from the special damages awarded. To find otherwise it would have amounted to allowing double indemnity which is contrary to the basic principle of damages as compensation for loss actually suffered.

The fact that there is no provision in the law for the deduction or not of such amount cannot be construed as excluding or prohibiting such deduction as suggested by counsel for the respondent and as found by the trial Court. Whether the intention of the legislator was that any benefits from any source should be disregarded in assessing damages he should have expressly provided so as he did under s.58 of the Civil Wrongs Law, Cap. 148 as amended by s.2 of Law 156/85 where express provision is

made that in assessing damages in respect of a person's death there would not be taken into account any benefit, pension or gratuity which has been or will or may be paid as a result of the death. Once there is no statutory provision in respect of benefits from the Social Insurance Fund paid to a person who has been injured in an accident it must, therefore, be assumed that the legislature left the question to the Judges to be decided on principle. (See in this respect *Lincoln v. Hayman* (supra) at p. 822).

In the result the appeal in this respect succeeds and the amount of £238.- should be deducted from the amount of special damages. The appeal is therefore allowed to that extent and the judgment of the trial Court is varied accordingly.

Bearing in mind the fact that this appeal is partly successful we make no order for costs.

*Appeal partly allowed. No order as to costs.*