1955
July 29

ERODOTOS GEORGHIOU ELLINAS
v.
MAROULLA NICOLAIDES

[GRIFFITH WILLIAMS, Ag. C.J. and ZEKIA, J.]
(July 29, 1955)

ERODOTOS GEORGHIOU ELLINAS, of Limassol,
Appellant,

v.

MAROULLA NICOLAIDES, of Limassol,
Respondent.

(Civil Appeal No. 4135)

Tort—Exemplary damages—Evidence of defendant's means relevant.

The respondent assaulted the appellant in circumstances which warranted the award of exemplary damages. During the trial the presiding judge questioned the respondent as to his financial position.

Held: In criminal cases where fines are imposed, a knowledge of the offender's means is relevant; the award of exemplary or vindictive damages involves a penal element and the means of the tortfeasor are also relevant.

The statement in Clerk and Lindsell on Torts, 11th Edition, 120 that "in actions of tort, evidence of the defendant's means is disallowed....." must be restricted to cases (such as divorce and criminal conversation) where damages are consolatory and cannot be punitive.

Appeal dismissed.

Appeal by defendant from the judgment of the District Court of Limassol (Action No. 1030/54).

G. Cacoyannis for the appellant.

Chr. Demetriades for the respondent.

The facts sufficiently appear in the judgment delivered by:

GRIFFITH WILLIAMS, Ag. C.J.: This appeal is against a judgment of the District Court of Limassol awarding damages to the Respondent for assault and false imprisonment. The facts not disputed were as follows:

The respondent is the owner of a house in Limassol town and the appellant's wife is owner of the adjoining plot, on which formerly stood an old house that she and appellant demolished. The house of the respondent was a comparatively new stone built one and adjoined the old house of the appellant before the latter's demolition. The appellant throughout the demolitions acted as agent for his wife. After the demolition of the old house nothing remained, but the wall separating it from the house of respondent.

This was the position when on the 16th August, 1954, the appellant and his workmen began to demolish the wall between the two houses, which now appeared to constitute the outside wall of part of the respondent's house. This

wall of mud-brick, was claimed by the respondent as her property; and on seeing the appellant and his workmen begin to attack it, she went down and spoke to appellant and the workmen, and did what she could to prevent them knocking it down.

The appellant instead of attempting to come to an agreement with the respondent, or waiting until her claim could be decided by a Court of Law, got very angry and determined arbirtarily to continue with his work apparently at all costs. He pushed the respondent so that she fell on the ground; then having tied her up with rope, he with his workmen went on with the demolition.

After 5 or 10 minutes a spectator, who later gave evidence in Court, untied and released the respondent, the demolition stopped, and the incident came to an end. It was in evidence that the building plot of the appellant, where the assault took place was on a street corner in the market quarter of Limassol, a place much frequented; and that it happened at a time of day when many people were about and must have witnessed the incident.

The learned P.D.C. gave judgment in favour of the respondent for assault and false imprisonment, and awarded her £150.

Mr. G. Cacoyannis before us abandoned the first ground of appeal (viz. that the trial Court should not have accepted entirely the evidence of the respondent) and confined himself to the ground that the damages were excessive and awarded on a wrong principle of law. He also disputed the award of a lump sum of £50 as costs on the ground that it was not in accordance with the Rules of Court.

The main point argued for the appellant was that the learned P.D.C. in awarding damages took into account the means of the appellant which he himself had ascertained by improper questions, and that in doing so he had acted on a wrong principle of law. The fact that he did take into account the means of the appellant he deduced from the question the learned P.D.C. asked the plaintiff-respondent which elicited the answer (at page 6): "The defendant has a grocery" and the questions he asked the appellant himself: "Are you a person of means?", eliciting the answer "I am", and "You own immovable property?" receiving the answer, "Yes, I own both movable and immovable property."

There was no claim to special damages as the respondent did not suffer any; the action was therefore for general damages only, and the Court awarded what it called substantial and exemplary damages, being of the opinion that the action of appellant was "a very brutal and beastly way of treating a woman".

We were referred to a number of authorities in support of the proposition that, in cases where general damage is awarded the financial position of the defendant is not admissible in evidence. Firstly our attention was drawn to the statement in Clerk and Lindsell on Torts 11th Ed. p. 170 referring to "goods seized maliciously with an intent thereby to defame"; where damages for injury to reputation may be recovered as a matter of aggravation. The passage states: "These extra damages are generally spoken of as exemplary, as though the object of allowing them were punitive and to deter others offending like cases. But it is doubtful whether the better view is not that they are consolatory rather than penal, resting on the principle that where there is malice the plaintiff suffers from a sense of wrong and is entitled to a solatium for that mental pain. And this latter view seems to be more in accord with the modern practice, according to which in actions of tort evidence of the defendant's means is disallowed, on the ground that it is nothing to the purpose "that damages are taken from a deep pocket" per Alderson B. in *Short* v. *Stoy* 1836 1 Roscoe N.P. 20th Ed. p. 89. Other cases referred to on this point were ***Hodsoll*** v. ***Taylor*** 1893 L.R., Q.B.D. 79, *Keyse* v. *Keyse & Maxwell* 1856 11 P.D., 100.

In *Keyse* v. *Keyse* it was held that the pecuniary position of the co-respondent in divorce proceedings has no bearing on the question of the amount of damages. In this case the President (Sir James Harman) explained: "The only question is what damage the petitioner has sustained, and that damage is the same whether the co-respondent is a rich or a poor man".

Salmond on Torts 10th Ed. p. 125 (11th Ed. p. 147) under the heading of compensatory and exemplary damages states: "Damages are further distinguishable as being either compensatory or exemplary. The latter are also known as vindictive or punitive. Compensatory are damages awarded as compensation for, and are measured by, the material loss suffered by the plaintiff. Exemplary damages on the other hand, are a sum of money awarded in excess of any material loss, and by way of solatium for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of..... exemplary damages therefore are given only in cases of contumelious disregard of another's rights. They may be given even in cases of trespass to land or goods". The passage then continues: "It is often said that exemplary damages.... are awarded not by way of compensation for the plaintiff but by way of punishment for the defendant". There was a reference to the case of ***Butterworth*** v. ***Butterworth*** (1920) pp. 136-7. In that case McCardie J. said: "A basic question is whether the damages are compensatory only or whether they may be what the Law calls exemplary or punitive damages. If the former, the powers of the assessing

tribunal are far more limited than in the case when exemplary damages may be given. That the damages are 'at large' is clear. But to say that the damages are 'at large' merely avoids the difficulty of deciding whether they are merely compensatory or whether they may be exemplary". He then quoted with approval Sedgwick on Damages 9th Edition (1913) s. 347 as follows: "In actions of tort where gross fraud, wantonness, malice or oppression appears, the jury are not bound to adhere to the strict line of compensation but may, by a severe verdict, at once impose a punishment on the defendant and hold him up as an example to the community.... damages assessed on this principle are called exemplary, punitive or vindictive damages". This principle is expressed in Halsbury 2nd Edition Vol. X at p. 87 as follows: "Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Such damages are said to be 'at large' and, further, have been called exemplary, vindictive, penal, punitive, aggravated or retributory".

One question argued before us was whether, when damages were at large, they could be divided into two classes viz. consolatory, i.e. as compensation to the plaintiff for wounded pride and injured feelings, and punitive, i.e. as punishment to the defendant. It was suggested that in some cases where damages were said to be exemplary, they were in fact consolatory and contained within them no punitive intention. Such would appear to be the nature of the damages as awarded in *Butterworth* v. *Butterworth*. In the judgment at page 137 McCardie J. stated: "I must therefore take it now to be the settled rule of this Court (in spite of heavy verdicts given by certain juries) that compensatory damages only can be given, and that exemplary or punitive damages are not permissible." (Here McCardie J. seems to be referring only to the Divorce Court). "That it is not the function of the Court to punish adultery as such, etc. etc."

These merely follows the decision in *Keyse* v. *Keyse*, that damages being merely compensatory, the pecuniary position of the co-respondent had no bearing on the amount of damage sustained, and the petitioner was entitled to full compensation without regard to the co-respondent's means.

From this it is clear that we must not look to damages awarded in divorce proceedings against co-respondents or to the older actions for criminal compensation in order to understand what are exemplary or vindictive damages, and

on what principles they are awarded; because in such cases true exemplary damages are not awarded.

In the case before us the learned trial Judge said it was a case for substantial and exemplary damages. In awarding £150 damages we feel that he was doing more than giving consolatory or compensatory damages for the injured feelings of the respondent, which could probably have been solaced by a considerably smaller sum. Indeed it would appear that he intended by his award to punish the defendant. In the passages from Sedgwick and Halsbury already quoted it is affirmed that in certain cases of tort damages may be inflicted by way of a punishment.

That the present is a case in which exemplary damages could rightly be awarded is not disputed by the appellant, but only the meaning and scope of the word "exemplary". Damages against a co-respondent, though in the past frequently regarded as exemplary, should now apparently be treated as outside that category. ***Butterworth*** v. ***Butterworth.***

To us it seems that the passage in Salmond at p. 125 already quoted does not accurately set out the position. Salmond says: "exemplary damages - are a sum of money awarded in excess of any material loss and by way of solatium for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of". Here Salmond treats the words "exemplary damages" as equivalent to "damages at large" and as if they contained no punitive element. This of course renders meaningless the names "exemplary", "punitive", "vindictive", "retributory" etc. as descriptive of the kind of damage we are considering.

Now it is stated at Salmond p. 126 that "evidence is not admissible as to the means of the defendant for the purpose of increasing or diminishing the damages to be awarded". In support of this *Keyse* v. *Keyse* (above) is referred to. This case as already explained should not be a case on exemplary damages, as it was a divorce case in which damages were claimed against a co-respondent; and as McCardie J. pointed out in Butterworth's case these are not exemplary damages but compensatory.

The other cases referred to in support of the principle are also cases where the penal element is lacking viz. *Hodsoll* v. *Taylor* (1873) L.R. IX, Q.B. 79, a case of seduction where the considerations for an award of damages would be practically identical with those against a co-respondent. In this case an interrogatory asking the means of defendant was disallowed; Blackburn J. stating "I am clearly of opinion that the first interrogatory asking the defendant in effect 'How rich are you?' is not admissible as in any way assisting the plaintiff's case.....

The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained..... and in an action of tort it should be immaterial as Lord Mansfield said, whether the damages came out of a deep pocket or not."

Another case referred to *Gower* v. *Hales* (1928) 1 K.B. 191, related to the question of whether an insurance company could be brought into a motor car accident case as a third party, it being an established rule of practice that juries should not be informed of the fact of the car involved in the accident being insured. The knowledge of the defendant's car being insured would of course have the same effect as knowledge of the defendant's means. This case was not one of exemplary damages. *Grinham* v. *Davies* 1928 44 T.L.R. 523 and *Askew* v. *Grimmer* 43 T.L.R., 354 were also referred to. These cases merely illustrate Lord Mansfield's dictum. In all these cases it is the plaintiff's loss that must be compensated, and therefore the means of the defendant are not only irrelevant, but may prejudice the correct estimate by a jury of the actual loss. There is a complete absence of any punitive element in all of them and they seem merely to illustrate the general rule that damages in cases of tort are by way of compensation.

It seems to us that the most satisfactory statement of the principles on which exemplary damages are given is contained in Pollock on Torts 15th Ed. at p. 141. He says: "We come to cases where there is great injury without the possibility of measuring compensation by any numerical rule, and juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive. The kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries but *injuriae* in the strictest Roman sense of the term. The Greek "ὕβρις" perhaps denotes with still greater exactness the quality of the acts which are thus treated. 'The tort is aggravated by the evil motive'. An assault and false imprisonment under colour of a pretended right in breach of the general law, and against the liberty of the subject; a wanton trespass on land, persisted in with violent and intemperate behaviour; the seduction of a man's daughter with deliberate fraud, or otherwise under circumstances of aggravation; such are the acts which, with the open approval of the courts, juries have been in the habit of visiting with exemplary damages. Gross defamation should perhaps be added; but there it is rather that no definite principle of compensation can be laid down than that damages can be given which are distinctly not compensation..... There are other miscellaneous examples of

an estimate of damages coloured, so to speak, by disapproval of the defendant's conduct (and in the opinion of the Court legitimately so), though it be not a case for vindictive or exemplary damages in the proper sense." He then gave a number of examples where though damages could not be called exemplary the judge might properly authorise a jury to take into consideration the words and conduct of the defendant as having a contempt of the plaintiff's rights and of his convenience.

As regards defamation, Lord Atkin said: "Damages for defamation are not arrived at by determining the 'real' damage, and adding to that a sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible..... to weigh at all closely the compensation which will recompense a man or woman for the insult offered or the pain of a false accusation..... The 'punitive' element is not something which is or can be added to some known factor which is non-punitive". *Ley* v. *Hamilton* (1935) 153 L.T. 386. In this case Atkin L.J. is clearly considering defamation in the light of an ordinary tort where though damages are 'at large' they are not exemplary.

It is interesting to contrast this dictum of Lord Atkin with the judgment of the C.A. in the recent case of *Loudon* v. *Ryder* (1953) 1 All E.R. 741 in which Singleton L.J. who gave the principal judgment of the C.A. says at p. 744: "Nor am I prepared to say that the jury in awarding £4,000 in respect of the assault must be held to be wrong because they have said £1,000 for the assault plus £3,000 by way of exemplary damages. They have thought the matter out for themselves, and that I suppose was their way of arriving at the result in determining the right figure as damages for the assault".

This case followed with approval the leading case of *Merest* v. *Harvey* (1814) 5 Taunt. 442 in which the very heavy damages of £500 were awarded against the Defendant for trespass, the Court holding "that upon a declaration for breaking the plaintiff's close, treading his grass, and hunting for game, and other wrongs, £500 were not excessive damages for a trespass in sporting, persevered in in defiance of notice, and accompanied with indecent and offensive demeanour." In that case Sir Vicary Gibbs, C.J. said, "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages".

From all these authorities it seems quite clear to us that the exemplary damages in cases of false imprisonment and the like contain a punitive element in addition to a consolatory and compensatory one. And we have been quite unable to find any case to support the statement in Clerk and Lindsell already quoted, that the better view is that 'exemplary damages' (in the sense we deduce from

Pollock) are consolatory rather than penal, resting on the principle that "where there is malice the plaintiff suffers from a sense of wrong and is entitled to a solatium for mental pain", or the further statement that "this latter view seems to be more in accord with the modern practice according to which in actions of tort evidence of the defendant's means is disallowed, on the ground that it is nothing to this purpose that damages are taken from a deep pocket".

In ordinary cases of damages for tort, the measure of damage is the amount required to put the plaintiff in the same position in which he was before the tortious act. Where compensation cannot be easily estimated as in a large class of cases and the plaintiff may be entitled to receive a solatium or perhaps exemplary damages in the sense understood by Salmond for his injured feelings, damages are "at large", but here the object of the award is compensatory. In such cases the means of the defendant are not relevant, the only consideration being the estimate formed by the Court or jury of the plaintiff's loss. It is only in cases such as these that the statement quoted from Clerk & Lindsell appears to apply. But we have been unable to find any case coming under those classes of tort given in Pollock in which exemplary or vindictive damages may be given, where the means of the defendant have been considered to be irrelevant. In criminal matters where fines are imposed on rich and poor as punishment for the same class of offence, to make the punishment fair, the fine must to some extent be dependent on the means of the offender; and a knowledge of the offender's means is therefore relevant. It seems to us therefore that the same must apply where exemplary or vindictive damages containing as it does a penal element are awarded against a tort-feasor.

Whether our views as to the relevancy of the evidence elicited by the learned P.D.C. are correct or not, there is nothing on the record to show whether he made use of the information he obtained. The award of £150 damages does not seem to us to be excessive in the circumstances, and we hold that a considerable part of those damages must be regarded as punitive.

As regards the award of a lump sum of £50 for costs, though it is more usual for there to be an order for costs to be taxed (save where it is considered advisable to limit the amount of costs by avoiding the additional costs of a taxation) costs are a matter in the discretion of the trial Court: Order 59, r. 12. We do not think we should interfere, particularly as the amount awarded seems a reasonable estimate of what the plaintiff would have been allowed on a taxation.

The appeal is dismissed with costs.