1975
Nov. 6

EFTHALIA EVDOKIMOU

v.

DAMIANOS IOANNOU ROUSHIAS

[TRIANTAFYLLIDES, P., L. LOIZOU, MALACHTOS, JJ.]

EFTHALIA EVDOKIMOU,

Appellant-Plaintiff,

v.

DAMIANOS IOANNOU ROUSHIAS,

Respondent-Defendant.

(Civil Appeal No. 5460).

Evidence—Further evidence—Matters occurring after trial and the delivery of judgment appealed from—Principles governing hearing of further evidence on appeal as to —Discretion of Court of Appeal—Damages for personal injuries—Application to adduce evidence as regards further developments concerning appellant's state of health —Such developments not amounting to events which have "materially falsified the expectations" on which the trial Court assessed the damages—Up to appellant, at the trial, by using due diligence to place before Court below all the then foreseeable consequences of the injuries which she had suffered—Application refused—Civil Procedure Rules Order 35, rule 8.

Court of Appeal—Further evidence—Principles governing hearing of.

Damages for personal injuries—Further evidence on appeal as to matters relating to assessment of.

The appellant (plaintiff) appealed against the award of general damages by the Court below, in respect of injuries she has sustained in a traffic accident. At the commencement of the hearing of her appeal she applied for leave to adduce further evidence in relation to events which, allegedly, occurred after the delivery of the judgment appealed from.

The events in question are stated as follows in an affidavit in support of the application sworn on October 21, 1975:

"On the 27.6.75 a medical report signed by Dr. G. Malekides of the psychiatric wing of the Nicosia Ge-

neral Hospital states that the appellant needs further following and treatment and that there is a slight possibility of developing a post traumatic epilepsy. This possibility in the opinion of her Doctors still exists, and that is why she was admitted about a week ago as an in-patient in the said Hospital".

The judgment of the Court below was delivered on May 31, 1975, after the case had been heard on May 26, 1975.

The view taken by the trial Court regarding the nature and after-effects of the injuries suffered by the appellant was based on four medical reports which were put in by consent; two by the appellant's side and two by the respondent's side. One of these reports, which was put in by the appellant, was a report by the said Dr. Malekides. No oral medical evidence was heard.

It appeared from the said medical reports, and especially from that of Dr. Malekides and that of Dr. Sofocleous that the appellant suffered a concussion which resulted in loss of consciousness and post-traumatic amnesia and that she was still suffering, and recovering from the effects of such concussion, when the trial took place. Also, that she was examined by means of electroengephalograms (E.E.Gs) on at least two occasions prior to the trial and, on both occasions, they turned out to be abnormal.

It was not, however, stated in any of the medical reports, as it now appears to be stated by the new report of Dr. Malekides, which was prepared on June 27, 1975 and after judgment was given by the trial Court, that there exists a slight possibility of post-traumatic epilepsy developing, if the abnormalities of the E.E.Gs are to be taken into account.

On the other hand, it has been, conceded by counsel for the appellant, after he had consulted one of the specialists who were treating the appellant, that the possibility of post-traumatic epilepsy developing after a trauma to the brain, such as concussion, is always there, from the very beginning, but apparently this was not mentioned in the earlier medical reports put in at

the trial, because the specialists were waiting to see whether the E.E.Gs would continue to be abnormal.

Counsel for the appellant in arguing in support of the application has relied on rule 8 of Order 35 of the Civil Procedure Rules (quoted in the judgment at p. 308 *post*).

Held, (after stating the principles governing the hearing of further evidence on appeal—vide pp. 309-312 *post*). 1. This is not a proper case in which to exercise our discretion in favour of allowing the calling of evidence as regards further developments concerning the state of health of the appellant, because such developments do not amount, in our view, to events which have "materially falsified the expectations" on which the trial Court assessed the damages payable to the appellant. (See *Mulholland and Another* v. *Mitchell* [1971] 1 All E.R. 307).

2. The further evidence to be adduced on appeal must be shown to be evidence which could not have been obtained, with reasonable diligence, for use at the trial. (See *House* v. *Haughton Brothers (Worcester) Ltd.* [1967] 1 All E.R. 39 at p. 41 and *Ladd* v. *Marshall* [1954] 3 All E.R. 745).

3. This is a case where it was up to the appellant, at the trial, by using due diligence to place before the Court below all the then foreseeable consequences of the concussion which she had suffered; one of such consequences was, as it still is, a slight possibility of post-traumatic epilepsy. (Passage from the judgment of Lord Pearce in *Murphy* v. *Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023 H.L. (at p. 1027) cited with approval, as very lucidly stating the approach of Appellate Courts in England, and similarly of our Supreme Court, to questions arising regarding further evidence on appeal in relation to damages awarded at the trial).

Application refused.

Cases referred to:

Paraskevas v. *Mouzoura* (1973) 1 C.L.R. 88;

Mulholland and Another v. *Mitchell* [1971] 1 All E.R. 307 at p. 309;

McCann v. *Sheppard and Another* [1973] 2 All E.R. 881 at p. 888;

Agrotis v. *Salahouris*, 20 (I) C.L.R. 77 at p. 79;

Papadopoullos v. *Kouppis* (1969) 1 C.L.R. 584 at p. 586;

Moumdjis v. *Michaelidou and Others* [1974] 1 C.L.R. 226;

Pursell v. *Railway Executive* [1951] 1 All E.R. 536;

House v. *Haughton Brothers (Worcester) Ltd.* [1967] 1 All E.R. 39 at p. 41;

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

Murphy v. *Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023 at p. 2027.

Application.

Application by appellant (plaintiff) for leave to adduce further evidence on appeal in an appeal against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C.) awarding to her the sum of £400.- damages in respect of injuries which she suffered in a traffic accident.

G. Ladas with *A. Paikkos*, for the appellant.

S. Erotokritou (Mrs.), for the respondent.

The decision of the Court was delivered by :-

TRIANTAFYLLIDES, P. : At the commencement of the hearing of this appeal we had to deal with an application by counsel for the appellant—(the plaintiff at the trial)—for leave allowing further evidence to be adduced by her in relation to events which, allegedly, occurred after the delivery of the judgment which is appealed from.

The events in question are stated as follows in an affidavit sworn by the husband of the appellant and dated October 21, 1975 :-

"On the 27.6.75 a medical report signed by Dr. G. Malekides of the psychiatric wing of the Nicosia General Hospital states that the Appellant needs further following and treatment and that there is a

slight possibility of developing a post traumatic epilepsy. This possibility in the opinion of her Doctors still exists, and that is why she was admitted about a week ago as an in-patient in the said hospital."

It appears that her admission into hospital took place on or about October 15, 1975, due to a relapse of a post-concussional condition.

The appellant has been awarded damages in respect of injuries which she has suffered in a traffic accident on December 26, 1973; the judgment of the trial court was delivered on May 31, 1975, after the case had been heard on May 26, 1975.

The view taken by the court below regarding the nature and after-effects of the injuries suffered by the appellant was based on four medical reports which were put in by consent; two by the appellant's side and two by the respondent's side. One of these reports, which was put in by the appellant, was, actually, a report by the said Dr. Malekides. No oral medical evidence was heard.

In arguing in support of the application for leave to adduce further evidence counsel for the appellant has relied on rule 8 of Order 35 of the Civil Procedure Rules, which in its material part reads as follows:-

> "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Trial Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court."

This rule, when it was made, corresponded to rule 4 of Order 58 of the Rules of the Supreme Court in

England; the now corresponding rule in England is rule 10 of Order 59.

An, also, relevant provision is section 25(3) of our Courts of Justice Law, 1960 (Law 14/60).

It is clear from the wording of the above quoted rule 8 that as regards matters occurring subsequently to the trial it is not necessary to put forward special grounds justifying the calling of further evidence on appeal, and, actually, this was the view taken in *Paraskevas* v. *Mouzoura* (1973) 1 C.L.R. 88 (see, further, the English cases of *Mulholland and Another* v. *Mitchell* [1971] 1 All E.R. 307, 309, and *McCann* v. *Sheppard and Another* [1973] 2 All E.R. 881, 888).

The principles governing the hearing of further evidence on appeal, and in particular concerning events which have supervened after the trial and the delivery of the judgment appealed from, have been reviewed at length in the case of *Paraskevas, supra*; useful reference may be made, also, to *Agrotis* v. *Salahouris*, 20 (I) C.L.R. 77, 79, to *Papadopoullos* v. *Kouppis* (1969) 1 C.L.R. 584, 586, and *Moumdjis* v. *Michaelidou and Others* (1974) 1 C.L.R. 226.

The law, in this respect, is in Cyprus the same as in England; in the *Mulholland* case, *supra*, it was stated by Lord Pearson as follows (at p. 314) :-

> "..... the Court of Appeal has a discretionary power to admit evidence as to matters which have occurred after the date of the trial or hearing. As was said in *Murphy* v. *Stone-Wallwork (Charlton) Ltd.*, [1969] 2 All E.R. 949 at 960, the question whether or not the fresh evidence is to be admitted has to be decided by an exercise of discretion, and the question is largely a matter of degree, and there is no precise formula which gives a ready answer. There is, however, to be taken into account in exercising the discretion an important factor, to which attention has been directed in several cases. It is in general undesirable to admit fresh evidence on appeal, because there ought to be finality in litigation. *Interest rei publicae ut sit finis litium : Curwen* v. *James*, [1963] 2 All E.R. 619 at 624, *Jenkins*

v. *Richard Thomas & Baldwins Ltd.*, [1966] 2 All E.R. 15 at 18, per Salmon LJ and *Murphy* v. *Stone-Wallwork (Charlton) Ltd.*, [1969] 2 All E.R. at 952, 953, 956, 960. The normal rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing. When the assessment is made, the court has to make the best assessment it can as to events that may happen in the future. If further evidence of new events were too easily admitted, there would be no finality in such litigation (*Curwen* v. *James*, [1963] 2 All E.R. at 624).

That is the present principle, the present practice. There is much advantage in finality. The case is finished, the claim is settled, and there will normally be no more expenditure of time and money on litigation. Moreover, an end to litigation may in many cases (not this case, where the injuries are too serious) remove an impediment to a plaintiff's recovery. It is a familiar experience to hear a medical witness saying, in a case where the plaintiff's bona fides is not at all impugned, that substantial improvement in the plaintiff's condition can be expected when his claim has been disposed of. Of course the finality of a judgment at first instance is not absolute in view of the possibility of an appeal. But an appeal normally involves only a review of the judge's decision on the evidence given at the trial. A partial retrial with further evidence added is not a normal function of the Court of Appeal. There are, however, exceptional situations in which it is right for the Court of Appeal or your Lordships' House to admit further evidence, as appears from the three cases cited above (although there are doubts as to the correctness of the course adopted in *Jenkins* v. *Richard Thomas & Baldwins Ltd.* [1966] 2 All E.R. 15.

In the present case, notice of appeal was duly given and, before the time for hearing of the appeal had come, events happened which very materially falsified the expectations on which the judge had assessed the damages relating to the cost of nursing services."

In exercising our discretion in the present case we have, to a certain extent, found useful guidance in the case of *Pursell* v. *Railway Executive* [1951] 1 All E.R. 536, where the plaintiff had sued the defendants for damages for personal injuries due to their negligence and, the defendants having admitted liability, the only question in issue was the quantum of damages; an agreed medical report was put in evidence which indicated that a steady improvement in the plaintiff's condition was likely; after the damages had been assessed by the trial court the plaintiff gave notice of appeal claiming that the amount awarded was inadequate, and she sought to call evidence that the doctor had admitted that his earlier view was mistaken and that her condition was not likely to improve. The appellate court refused to grant leave to call further evidence; it is very useful to quote the judgment of Birkett L.J. (at p. 537) :-

"It seems to me that the agreed case before the learned judge, in effect, was this. The doctor said: 'I think that the circumstances of this case are such that improvement will take place over the next twelve months. That is my view, but, of course, in a case of this kind it is not easy to be dogmatic. It is the kind of case where one must be guarded. It may very well be that this view is not right in the sense that events will not justify it, and I, therefore, desire to guard myself against that contingency. She might get worse'. The judge must be supposed to have taken into account what was, in fact, agreed, namely, that this injury was susceptible of improvement within the next twelve months, but that an eminent surgeon could by no means be dogmatic about it. By this application the plaintiff now seeks to say to this court: 'We were not satisfied with the assessment of the damages by the learned judge on the agreed statement of facts, but after we had put in our notice of appeal, we had a further opinion from Sir Hugh Griffiths, and we desire to put this opinion before the Court of Appeal': 'In the court below I, Sir Hugh Griffiths, gave it as my opinion that there was a reasonable prospect of improvement, though I did guard myself against future contingencies, but I now find that that opinion was mistaken'.

Counsel for the plaintiff says that in view of that statement he desires this court to make a re-assessment of damages, not on the footing that the learned judge dealt in any way wrongly with the agreed facts before him, but on an entirely different state of affairs. If that application was to succeed on appeal I can foresee a perfect sea of litigation in cases of this kind, and 'agreed' reports, especially, would become unworthy of the name."

It is correct that in the present instance the medical reports were not put in as *agreed* medical reports, but it might be said that they were put in as showing, subject to such slight differences as existed among them, the agreed medical position concerning the effect on the health of the appellant of the injuries which she had suffered in the traffic accident in question.

It appears from the said medical reports, and especially from that of Dr. Malekides and that of Dr. Sofocleous (who is a specialist in the same field as Dr. Malekides, and whose report was put in by the respondent's side) that the appellant suffered a concussion which resulted in loss of consciousness and post-traumatic amnesia and that she was still suffering, and recovering, from the effects of such concussion when the trial took place. Also, that she was examined by means of electroengephalograms (E.E.Gs) on at least two occasions (on November 13, 1974, and February 21, 1975) prior to the trial and, on both occasions, they turned out to be abnormal.

It was not, however, stated in any of the medical reports, as it now appears to be stated at the end of the new report of Dr. Malekides (that of June 27, 1975), which was prepared after judgment was given by the trial court, that there exists a slight possibility of post-traumatic epilepsy developing, if the abnormalities of the E.E.Gs are to be taken into account; and it is, also, stated in his said report that on June 16, 1975, a further E.E.G. examination was made and it was still abnormal.

On the other hand, it has been, very fairly indeed, conceded by counsel for the appellant, after he had consulted Dr. Onisiforou (who is a specialist at the Nicosia General Hospital and is now following and

treating the appellant together with Dr. Malekides) that the possibility of post-traumatic epilepsy developing after a trauma to the brain, such as concussion, is always there, from the very beginning, but apparently it was not mentioned in the earlier medical reports, put in at the trial, because the specialists were waiting to see whether the E.E.Gs would continue to be abnormal.

It seems that the condition of the appellant, which was expected to improve gradually in so far as the post-concussional syndrome was concerned, has now, as it appears from the latest medical report, become, after some improvement, more or less static.

Bearing all the above in mind, we have reached the conclusion, that this is not a proper case in which to exercise our discretion in favour of allowing the calling of evidence as regards further developments concerning the state of health of the appellant, because such developments do not amount, in our view, to events which have "materially falsified the expectations" * on which the trial court assessed the damages payable to the appellant.

We should, also, add that it seems to us that this is a case where it was up to the appellant, at the trial, by using—(through counsel who was appearing at the time for her, and who is not the same as counsel appearing for her in this appeal)—due diligence to place before the court below all the then foreseeable consequences of the concussion which she had suffered; one of such consequences was, as it still is, a slight possibility of post-traumatic epilepsy. In this connection it is useful to refer to *House* v. *Haughton Brothers (Worcester), Ltd.* [1967] 1 All E.R. 39, where (though a different course had to be adopted than the one which we are adopting in the present case) the following were stated by Winn L.J. (at p. 41), after he had referred to a dictum of Denning L.J. in *Ladd* v. *Marshall* [1954] 3 All E.R. 745, to the effect that the further evidence to be adduced on appeal must be shown to be evidence which could not have been obtained with reasonable diligence, for use at the trial :-

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* See the *Mulholland* case, *supra*.

"That is very often in my own experience paraphrased by saying it must be shown that the witness was not available at the trial. I venture to think that had the mind of Denning, L.J., been then specifically directed to the point, he might well have added by way of amplification what I myself deliberately now add: that the evidence or witness may not have been available or the evidence 'could not have been obtained with reasonable diligence for use at the trial' where, although the witness is called at the trial, is physically present in the witness box and gives evidence about some matters relevant in that trial, he has not told the party who caused him to be called as a witness or that party's solicitors, what he, the witness, is able to say about some issue in the trial. In that situation his evidence on that issue 'cannot have been obtained with reasonable diligence', if it can be assumed that the solicitors are not shown to have been careless or neglectful or dilatory in the manner in which they interviewed the witness to see what evidence could be given by him at the trial."

We would like to conclude this decision of ours by referring to a passage from the judgment of Lord Pearce in *Murphy* v. *Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023 where he stated (at p. 1027), in the House of Lords, the following :-

"Our courts have adopted the principle that damages are assessed at the trial once and for all. If later the plaintiff suffers greater loss from an accident than was anticipated at the trial, he cannot come back for more. Nor can the defendant come back if the loss is less than was anticipated. Thus, the assessment of damages for the future is necessarily compounded of prophecy and calculation. The court must do the best it can to reach what seems to be the right figure on a reasonable balance of the probabilities, avoiding undue optimism and undue pessimism. Although periodic payments and a right of recourse whenever circumstances change might seem an attractive solution of the difficulty, yet they, too, have serious drawbacks such as an unending possibility of litigation which, in the view of the law,

have hitherto been held to outweigh the disadvantages of an assessment of damages once and for all."

This passage very lucidly states, in our view, the approach of appellate courts in England, and, similarly, of our Supreme Court, to questions arising regarding further evidence on appeal in relation to damages awarded at the trial.

For the reasons which we have set out hereinbefore the application for leave to adduce further evidence before us, for the purposes of this appeal, is refused.

Application refused.