1978 December 29

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

CURIUM PALACE HOTEL LTD.,

Appellants–Defendants,

v.

ANDREAS ERACLEOUS,

Respondent–Plaintiff.

(*Civil Appeal No.* 5847).

Civil Procedure—Pleadings—Statement of claim—Claim for injuries suffered in the course of employment—Allegation that plaintiff was ordered to do work at threat of dismissal—Not expressly pleaded but plaintiff giving evidence, and cross-examined, thereon without objection taken to its admissibility—Pleadings as a whole wide enough to cover the alleged orders—Non express reference to the latter a mere technicality or just a variety and development of what had already been averred—Defendant not embarrassed or taken by surprise—Order 19 *rule* 4 *of the Civil Procedure Rules.* 5

Negligence—Contributory negligence—Master and servant—Fall of servant from ladder—Servant climbing up ladder, under threat of dismissal by master, whilst no one was holding it—Usual course of things was for a fellow servant to hold it—Trial Court not dealing expressly with contributory negligence—But drawing the inference on the primary facts, as accepted by it, that master was solely to blame for the accident—Court of Appeal not prevented from interfering with the said inference—Servant fully aware of the risks that the use of the ladder, in the way it was used, would entail to his own safety—On the facts as found by trial Court servant guilty of contributory negligence to an extent of 10 *per cent.* 10 15 20

Inferences—Inferences drawn by trial Court on the primary facts as accepted by it—Court of Appeal not prevented from interfering with such inferences.

Damages—General damages—Personal injuries—Loss of future earnings—Mason aged 29 *at the time of the accident and* 35 *at the* 25

time of judgment—Multiplier of 12 *years not so high as to render the amount of damages manifestly excessive.*

The respondent–plaintiff was injured through falling from a ladder whilst in the employment of the appellant–defendant company. He was engaged as a mason by the appellant company for about three months prior to the accident which occurred when he was doing the finishing work on the outer walls of a hotel. This entailed the setting up of scaffolding which was, as a general rule, effected by the concerted action of three labourers. One would climb up a 13ft. high metal ladder leaning against the wall, the second labourer would hold the ladder and the third one would hand up the pipes to the labourer on the ladder and the latter would screw them together, thus constructing the scaffolding. The respondent contended that on the morning of the accident, as there was only one labourer available to assist him, he asked the foreman of the appellant company for the third labourer who would be holding the metal ladder; that the Managing Director of the appellant company, who happened to be present, said to the foreman: "If he cannot do it by himself, tell him to leave the work"; and that upon this the foreman said to the respondent: "Do you hear, if you cannot, leave work (sholasc)". The respondent further alleged that as he had no alternative—he would have been sacked if he did not comply—he climbed up the ladder after placing underneath a sack which would make the floor, consisting of tiles, less slippery. When, however, he was on the eighth step of the ladder, it slipped and fell, causing him to fall on the ground as well and as a result he was injured on the right wrist.

The trial Court found that the appellants failed to provide the respondent a safe place and system of work and adequate supervision; that they exposed him to unnecessary risks by ordering him to climb up a ladder, without providing an assistant to hold the ladder; that they not only failed to provide such assistance but they threatened the respondent with dismissal if he went on insisting to ask for an assistant; and that they could not availt hemselves of the defence of volenti non fi tinjuria and they were entirely to blame for the accident. (See pp. 32–33 *post*).

The respondent was awarded the sum of £4638 damages as follows:

(a) £268 special damages;

(b) £1250 for pain and suffering, past and future;

(c) £3120 for loss of future earnings. (This loss was calculated at £260 per year and the multiplier allowed was 12 years. The respondent was aged 29 at the time of the accident and 35 at the time of judgment). 5

Upon appeal by the defendant company Counsel for the appellant contended:

(a) That nowhere in the statement of claim* was there any averment justifying the admission of evidence to 10 the effect that the respondent was, under the threat of dismissal, ordered to do the work without the assistance of another labourer; that such a serious allegation could not be left to be implied from a rather vague pleading; that the Court ought not to have 15 allowed this piece of evidence; that once it allowed it, it should at the time of giving judgment disregard it; and that this Court, on appeal, ought to strike from the record this evidence.

(b) That the trial Court failed to consider one of the main 20 defences raised in the pleadings, namely, that of contributory negligence and erroneously approached the case on the assumption that the defence was only volenti non fit injuria.

(c) That the multiplier adopted by the trial Court in asses- 25

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* Though in the statement of claim 19 separate instances are given as particulars of negligence and/or breach of statutory duty, the only particulars in the statement of claim which have some relation to the said allegation are the following:

"(b) Exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

(d) Ordering and/or allowing and/or permitting the plaintiff to work at or near a place which was not a safe place.

(g) Failing to place another employee and/or person to hold and/or support the said ladder while the plaintiff was standing on it, as aforesaid.

(e) Failing to warn the plaintiff of the danger.

(n) Ordering and/or allowing and/or permitting the said ladder to be placed in a slippery place.

(r) Although the foreman was present, he failed to warn and/or advise and/or instruct the plaintiff as to his safety".

sing the loss of future earnings was so high as to render the amount of damages manifestly excessive.

Held, (1) that considering the pleading as a whole in its proper perspective, (see particularly paragraphs (d) and (n) of the particulars) this Courts finds that it was wide enough to cover the alleged orders and infer therefrom the consequence to the non obeying them; that the non express reference to the latter was obviously treated as a mere technicality or just a variety and development of what had already been averred and it does not appear to have embarrassed or taken the appellant company by surprise, hence the fact that no objection was taken to its admissibility, and that the respondent was cross-examined on this issue. (Order 19, rule 4 of the Civil Procedure Rules and the meaning of the word "material" referred to therein considered; *Ellinas* v. *Yianni and Others,* 23 C.L.R. 22 and *Georghiades and Another* v. *Patsalides and Another,* 24 C.L.R. 275 *distinguished*).

(2) That this Court does not subscribe to the view that the trial Court completely ignored the defence of contributory negligence in this case, though it did not expressly deal with it; that from the tenor of its judgment it appears that it drew the inference on the primary facts, as accepted by it, that the appellant company was solely to blame for the accident; that this does not prevent this Court from interfering with the inference drawn by the trial Court.

(3) That on the facts, as found by it, and bearing in mind that the respondent was fully aware of the risks that the use of the ladder, in the way it was used, would entail to his own safety, viewed on the totality of the circumstances of the case, including his experience in that respect, this Court has come to the conclusion that the respondent contributed to his accident to an extent of 10 per cent and that the findings of liability of the trial Court should be varied and apportioned accordingly.

(4) That the multiplier in assessing the loss of future earnings was not so high as to render the amount of damages manifestly excessive; that, on the contrary, it was a reasonable figure, considering that the respondent was 29 years old at the time of the accident and bearing in mind all other factors relevant

to this issue; and that, accordingly, this ground of appeal will be dismissed.

Appeal partly allowed.

Cases referred to:

Ellinas v. *Yianni and Others*, 23 C.L.R. 22; 5

Georghiades and Another v. *Patsalides and Another*, 24 C.L.R. 275;

Bruce v. *Odhams Press Ltd.*, [1936] 3 All E.R. 294.

Appeal.

Appeal by defendants against the judgment of the District 10 Court of Limassol (Loris, P.D.C. and Hadjitsangaris, S.D.J.) dated the 20th April, 1978, (Action No. 3892/71) whereby the defendants were adjudged to pay to the plaintiff the sum of £4,638.– as damages for injuries he sustained while in the employment of the defendants. 15

G. Cacoyiannis, for the appellants.

An. Lemis with *G. Mitsides*, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. This is an appeal from the judgment of the Full District Court 20 of Limassol by which the appellant Company was adjudged to pay the sum of C£4,638.– to the respondent as damages for the injuries he sustained in an accident at work and the costs of the action.

The grounds of appeal are the following:– 25

(a) That the trial Court in considering the question of liability acted on evidence which had not been pleaded and which took the defendants by surprise.

(b) That the trial Court failed to consider one of the main defences raised in the pleadings, namely, that 30 of contributory negligence and erroneously approached the case on the assumption that the defence was only volenti non fit injuria.

(c) That the multiplier adopted by the trial Court in assessing the loss of future earnings was so high as to 35 render the amount of damages manifestly excessive.

This action was originally instituted against the appellant Company. Subsequently, its Managing Director was added as defendant 2 and upon his death, the title of the action was amended by order of the Court to the effect that he was substituted by his personal representatives. Before, however, the commencement of the hearing of the action, counsel appearing for the appellant Company conceded that if any liability was established for this accident, same should lay only against the appellant Company; upon this, the action was withdrawn against the second defendant; moreover, special damages were agreed at C£268.- on a full liability basis.

The facts relevant to this appeal are, briefly, as follows:-

The respondent was engaged as a mason by the appellant Company for about three months prior to the accident which occurred when they were doing the finishing work on the outer walls of the hotel, namely, the plastering by means of what is described as "sprits". This entailed the setting up of scaffolding which was, as a general rule, effected by the concerted action of three labourers. One would climb up a 13ft. high metal ladder leaning against the wall, the second labourer would hold the ladder and the third one would hand up the pipes to the labourer on the ladder and the latter would screw them together, thus constructing the scaffolding. On the morning of the accident, as there was only one labourer available to assist him, the respondent asked the foreman of the appellant Company for the third labourer who would be holding the metal ladder; upon hearing that, the late Managing Director of the appellant Company who was present, remarked that if the respondent could not do the work without a third labourer holding the ladder, he should leave and somebody else could be employed to replace him. The foreman asked the respondent if he heard what the Managing Director of the appellant Company had said. On this, the trial Court commented by saying that this meant "that the plaintiff was to climb up the ladder without any assistant holding it". The respondent then said that as he had no alternative—he would have been sacked if he did not comply—he climbed up the ladder after placing underneath a sack which would make the floor consisting of tiles, less slippery. When, however, he was on the eighth step of the said metal ladder, it slipped and he fell on the ground, as a result of which he was injured on the right wrist.

The trial Court after dealing with the evidence of the main witnesses, concluded as follows:-

"......... It is crystal clear to us that the defendant company failed to provide to the plaintiff, their employee at the time, a safe place of work, a safe system of work and an adequate supervision; on the contrary, they exposed him to unnecessary risks by ordering him to climb up a ladder in order to set up the scaffolding without providing an assistant to him in order to hold the ladder, a work which (a) according to their own witness was a dangerous one, and (b) according to their pleadings and their evidence, ought to have been carried out with the assistance of another labourer holding the ladder.

We are satisfied that the defendant company not only failed to provide such assistance, but the Managing Director thereof threatened the plaintiff with dismissal from the work of the defendants if he was insisting to ask—as the plaintiff was asking at the time—for an assistant to hold the ladder for him, and the defendants cannot in this respect avail themselves of the defence of 'volenti non fit injuria' as the plaintiff, their employee who was definitely not engaged to act as an acrobat, could not refuse to obey the express orders of the Managing Director of the Company as otherwise he would have been dismissed—and he was so threatened—and he would find himself unemployed and unable to support not only himself but also his family (consisting of his wife and a minor child at the time) of which he was the sole bread winner. In this respect, the legal position is abundantly clear and it has been so stated by Lindley L.J. in *Yarmouth* v. *France* 19 Q.B.D., 647, 'A workman, never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it .... if nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before, in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense

of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred...'

For all the above reasons we hold the view that the defendant company is entirely to blame for this accident."

5 Learned counsel for the appellant Company maintained that nowhere in the statement of claim was there any averment justifying the admission of evidence to the effect that the respondent was ordered to do the work without the assistance of another labourer and at that under the threat of dismissal, if 10 he refused to do it.

In the statement of claim nineteen separate instances are given as particulars of negligence and/or breach of statutory duty. However, the only particulars which could have some relation to the allegation are those to be found under para- 15 graphs:

"(b) Exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

(d) Ordering and/or allowing and/or permitting the plaintiff to work at or near a place which was not a safe 20 place.

(g) Failing to place another employee and/or person to hold and/or support the said ladder while the plaintiff was standing on it, as aforesaid.

(e) Failing to warn the plaintiff of the danger.

25 (n) Ordering and/or allowing and/or permitting the said ladder to be placed in a slippery place.

(r) Although the foreman was present, he failed to warn and/or advise and/or instruct the plaintiff as to his safety."

30 It was urged on behalf of the appellant Company that such a serious allegation could not be left to be implied from a rather vague pleading; the Court ought not to have allowed this piece of evidence, that once it allowed it, it should, at the time of giving judgment disregard it and that this Court, now on appeal, 35 ought to strike out from the record this evidence. The authori-

ty given for this proposition was that of *Ellinas* v. *Yianni & Others*, 23 C.L.R., p. 22, followed in *Georghiades and Another* v. *Patsalides and Another*, 24 C.L.R., p. 275, where it was held that it is the duty of a trial Court and on appeal of the Supreme Court, to reject inadmissible evidence even if it is received without objection. 5

It is not denied that objection was not taken at the hearing to this piece of evidence which was conducted on behalf of the appellant Company by another counsel, though objection was shortly taken before that, as to what the Managing Director 10 had said to the foreman on the ground that it was hearsay and which, objection, was argued and decided upon by the trial Court.

The suggestion of counsel was that the pleading would have been in order if it stated, for example, that "the plaintiff was 15 ordered at the threat of dismissal to climb up the ladder."

It is true that under Order 19, rule 4 of our Civil Procedure Rules, "every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies in his claim or defence, but not the evidence by which they 20 are to be proved." The word "material" was considered in the case of *Bruce* v. *Odhams Press Ltd.* [1936] 3 All E.R. at p.294, as meaning, "necessary for the purpose of formulating a complete statement of claim."

In the present case, the allegation that the respondent was 25 ordered to do the work—as it was done—is to be found in the Particulars of Negligence under paragraphs, to say the least, (d) and (n) hereinabove set out. What were not alleged were the words of the Managing Director: "If he cannot do it by himself, tell him to leave the work" and the remark of the 30 foreman to the respondent:"Do you hear, if you cannot, leave work (sl olase)."

Considering t e pleading as a whole in its proper perspective, we find that it w s wide enough to cover the alleged orders and infer therefrom th consequence to non obeying them. The 35 non express, refere ce to the latter was obviously treated as a mere technicality o just a variety and development of what had already been averred and it does not appear to have embarrassed or taken the appellant Company by surprise, hence, the

fact that no objection was taken to its admissibility, although the objection was taken a little earlier, as already pointed out in this judgment. Moreover, the respondent was cross-examined on this issue and the line put to him was that such orders and 5 threats were never uttered.

It seems to us that the case was fought throughout on that basis and the appellant Company must be taken to have assented to having their rights decided in the way they were done; otherwise, they would have objected to the reception of this piece of 10 evidence. The cases of *Ellinas* v. *Yianni and others* and *Georghiades and another* v. *Patsalides* (*supra*) relied upon by counsel for the appellant Company, should be distinguished because of the differences in the facts and the legal nature of the otherwise inadmissible evidence admitted and relied upon by the trial 15 Courts in those cases. For all these reasons, the first ground of appeal fails.

We turn now to the second ground of appeal, whether the trial Court erroneously approached the main defence raised in the pleadings, i.e. that of contributory negligence, and examined 20 only the case on the assumption that the only defence raised was that of volenti non fit injuria, and, whether, on the facts as accepted by it, an inference that the respondent contributed to his injuries would have been justified in the circumstances.

We do not subscribe to the view that the trial Court complete-25 ly ignored the defence of contributory negligence in this case, though it did not expressly deal with it. It appears from the tenor of its judgment that it drew the inference on the primary facts, as accepted by it, that the appellant Company was solely to blame for the accident. This, however, does not prevent us 30 from interfering with the inference drawn by the trial Court. On the facts, as found by it, and bearing in mind that the respondent was fully aware of the risks that the use of the ladder, in the way it was used, would entail to his own safety, viewed on the totality of the circumstances of the case, including his ex-35 perience in that respect, we have come to the conclusion that the respondent contributed to his accident to an extent of 10 per cent, and the findings of liability of the trial Court should be varied and apportioned accordingly. No doubt, the apportionment of blame is a matter determined always having regard 40 to the facts of each particular case, and a person is guilty of

contributory negligence, if he ought to have foreseen that if he did not act as a reasonable prudent man he might hurt himself.

With regard to the last ground of appeal, we have no difficulty in dismissing it as the multiplier in assessing the loss of 5 future earnings was not so high as to render the amount of damages manifestly excessive. On the contrary, it was a reasonable figure, in the circumstances, considering that the respondent was twenty-nine years old at the time of the accident, and bearing in mind all other factors relevant to this issue. 10

For all the above reasons, the appeal succeeds only in part, i.e. to the extent of finding that the respondent contributed to this accident by 10 per cent, and the judgment of the trial Court is varied accordingly.

In the circumstances, however, we make no order as to costs 15 in this Court and we do not interfere with the order of the costs by the trial Court.

Appeal partly allowed. No order as to costs.