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ROYAL COURT
(Samedi Division)
22nd November, 1996

219.

Before: The Judicial Greffier

Between	Thomas Cecil Peters	Plaintiff
And	Kevin Molloy	Defendant

Application of the Plaintiff for the issue of liability (including contributory negligence) to be tried separately from the issue of the quantum of damages.

Advocate D.M.C. Sowden for the Plaintiff.
Advocate C.J. Dorey for the Defendant.

THE JUDICIAL GREFFIER: This action arises from an incident which occurred at the Royal Jersey Golf Course when the Defendant was teeing off from the tenth tee whilst the Plaintiff was completing play on the ninth hole. The Defendant's ball was mis-hit and struck the Plaintiff in the eye and the Plaintiff is claiming both special and general damages as a result of the injuries to his eye.

The Defendant's advocate firstly raised the issue of whether I had the necessary jurisdiction to make the Order sought. She argued that the terms of Rule 6/19 of the Royal Court Rules, 1992, as amended, did not fit the present case. That Rule reads as follows:-

> *"References of questions to court before setting down for hearing.*
>
> *6/19. Where in any action on the pending list it appears to the Greffier that a question raised by a pleading should be determined before the action is set down for trial or hearing, he may refer such question to the Court and may give such directions as he deems appropriate for securing the attendance of the parties before the Court."*

Advocate Dorey's contention was that this Rule was really intended in relation to a preliminary issue and not in relation to the determination of liability. I agreed with her upon that point.

Rule 6/21(2) reads as follows:-

> *"(2) On any application under this Rule, the Greffier shall, if he is satisfied that the action is ready for trial or hearing, make any order that he deems appropriate for sending the case to proof or for determining the issues to be tried, set it down on the hearing list and notify every party to the action that he has done so."*

Advocate Dorey's contention here was that, although the Greffier would have the necessary power upon the making of an application to set the action down on the hearing list, the Summons before me was not brought in this context. Advocate Dorey was aware of the fact that an application had previously been made to me for setting down and that I had refused so to do until such time as the damages sought by the Plaintiff had been fully and properly particularised. Advocate Dorey argued that even if I were able to treat the present Summons in the context of an application to set down, I could not set the action down because it was not yet ready for trial and, therefore, my power to make an appropriate Order for sending the case to proof or for determining the issues to be tried, did not come into play.

I was unable to agree with Advocate Dorey that I lacked the necessary jurisdiction in relation to this matter. Firstly, I have on a number of occasions made setting down Orders which have been limited to the issue of liability in an action and have then limited discovery to that issue. I have done this both under the terms of Rule 6/21(2) and under the inherent jurisdiction of the Court. It was, in my view, perfectly open to Advocate Sowden to ask me to consider the present application in the light of the previous application to set down and on such an application I would clearly have the necessary power to make the Order sought. Alternatively, I clearly have the necessary power under the inherent jurisdiction of the Court. It would be rather a strange situation if the Court, for purely technical reasons, were to be unable to make a decision as to a method of cutting costs in relation to an action until after a further procedural step had occurred which led to those costs being incurred and that is precisely the situation which would arise here in relation to the production of reports if the Defendant's very technical arguments were to be followed.

In England there is a precise Rule to deal with this situation which is Order 33, Rule 4(2A) which begins as follows:-

> *"(2A) In an action for personal injuries, the Court may at any stage of the proceedings and of its own motion make an order for the issue of liability to be tried before any issue or question concerning the amount of damages to be awarded ...."*

Although, in Jersey, we do not have that rule, it is clear from a number of cases including that of Barreto v. Sanguy (2nd May, 1990) Jersey Unreported that we look to English principles in relation to the splitting of the trial of different issues.

Accordingly, both counsel drew my attention to Section 33/4/7 on page 593 of the 1997 White Book and, in particular, to the following section:-

> *"Separate trials of issues of liability and damages - An order for the separate trials of the issues of liability and damages will only be made if there is a clear line of demarcation between these issues on the pleadings, and not where they interact upon each other (Polskie, etc. v. Electric Furnace Co. Ltd [1956] 1 W.L.R. 562; [1956] 2 All E.R. 306, C.A.; and see Dent v. Sovereign Life Assurance Co. (1879) 27 W.R. 389).*
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> *While the normal procedure should still be that liability and damages should be tried together, the Court should be ready to order separate trials of the issues of liability and damages whenever it is just and convenient to do so (Coenen v. Payne [1974] 1 W.L.R. 984; [1974] 2 All E.R. 1109, C.A.). However an order to separate trials of the issues of liability and damages, by way of exception to the general rule, was only to be made in exceptional cases where there was a clear line of demarcation between the issues of liability and quantum (Marks v. Chief Constable of Greater Manchester Police (1992) 156 L.G.Rev. 900; The Times, January 28, 1992, C.A.).*
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> *On the other hand, where the issue of liability is separate and distinct from the issue of damages, litigants should take advantage of the facilities which are afforded of having the question of liability decided as a preliminary issue before the issue of damages, see. per Romer L.J. in Gold v. Patman and Fotheringham Ltd [1958] 1 W.L.R. 697; [1958] 2 All E.R. 497, 503; and this is specially so where the issue of damages is detailed and complicated and may have to be referred to an Official Referee or Master (Smith v. Hargrove (1885) 16 Q.B.D. 183).*
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> *In actions for damages for personal injuries, the issue of liability may be ordered to be tried before the issue of damages where there is an element of uncertainty about the plaintiff's future (see, per Winn L.J. in Stevens v. William Nash Ltd. [1966] 1 W.L.R. 1550; [1966] 3 All E.R. 156) or where no firm prognosis is possible until some years after the accident (see, per Winn L.J. in Hawkins v. New Mendip Engineering Ltd. [1966] 1 W.L.R. 134; [1966] 3 All E.R. 288). In considering whether to order the separate trial of the issue of liability before damages, regard will be had to the benefits that will thereby accrue to the parties, e.g. an earlier determination on liability while the facts are fresher in everyone's memory, as against the hardship or prejudice that may thereby be occasioned to them, and terms may be imposed to*

purposes of costs, the two hearings on liability and damages be treated so far as practicable as part of one trial. Another factor to be considered in deciding whether to order the separate trial of the issue of liability before damages in an action for personal injuries is that a judgment on the issue of liability for damages to be assessed affords a ground for an order for interim payment under O.29,r.11."

The Plaintiff's advocate submitted that this was an appropriate case for the ordering of a separate trial of the issues of liability (including contributory negligence) for the following reasons:-

(1) Because there was a clear line of demarcation between those issues and the issue of the quantum of damages and the two matters did not interact upon each other;

(2) the issue of damages in this case would be quite complicated because the Plaintiff had been running his own business and the Plaintiff would need to obtain expert reports from an accountant in relation to the performance of the business which reports would be expensive and the Plaintiff could not financially afford to obtain such reports at this stage; and

(3) there would not be, on the trial of liability, much evidence as the case would mainly revolve around legal submissions as to the duty of golfers to each other and that, therefore, neither the consideration that an earlier trial of liability would enable the trial of liability to take place whilst the facts were fresher in everyone's memory nor the consideration that at one combined trial the Judge would have the benefit of considering the credibility of the evidence of the Plaintiff by reference to his claim for damages, would particularly apply in this case.

In relation to the first point above, the Defendant's advocate submitted that there was not a clear line of demarcation between the issues of liability and quantum of damages. In particular, she indicated that the issue might well arise of whether the problems caused to the Plaintiff's eye all resulted from the ball striking it or whether some of these problems would have occurred in any event. She submitted that the issue of the causation of the problems with the eye was part of the issue of liability. I am unable to agree with that submission. It seems to me that the issue of liability (including contributory negligence) will simply determine whether the Defendant had a duty of care and was in breach thereof and whether the Defendant is fully responsible for the pain, injury, loss and damage which flowed from the ball striking the eye of the Plaintiff. The issue of causation of the actual problems with the eye is, in my view, clearly part of the issue of the quantum of damages.

In relation to the second point above, the Defendant's advocate submitted that if the Defendant were short of money then the Defendant could apply for legal aid and would probably be allocated the same lawyer on legal aid and would be able to apply to my Deputy for the payment of the costs of the necessary report out of the legal aid disbursements fund. The Defendant's advocate also submitted that it was at this stage in time, with the very poor particularisation of damages currently contained in the Order of Justice, difficult to say what the ratio would be between the original trial, which both parties estimated would take about two days, and the assessment of the quantum of damages. It seemed to me that I was able to take into account both my own assessment that the assessment of the quantum of damages would take about the same length of time as the trial of liability and the factor that considerable expense would need to be incurred in relation to the obtaining of reports relating to the business for the purposes of the trial of the quantum of damages as factors to be weighed in the overall decision.

The Defendant's advocate agreed with the third point set out above.

In Barreto v. Sanguy I considered some of the criteria for determining when it is just and convenient to depart from the normal procedure and to order separate trials of the issues of liability and damages and came to the conclusion that the matters to take into account included the following principles:-

"(a) an order for the separate trials of the issues of liability and damages will only be made if there is a clear line of demarcation between these issues on the pleadings, and not where they interact upon each other;

(b) where the issue of liability is separate and distinct from the issue of damages, litigants should take advantage of the facilities which are afforded of having the question of liability decided as a preliminary issue before the issue of damages;

(c) this is especially so where the issue of damages is detailed and complicated;

(d) in actions for damages for personal damages, the issue of liability may be ordered to be tried before the issue of damages where there is an element of uncertainty about the plaintiff's future or where no firm prognosis is possible until some years after the accident;

(e) in considering whether to order the separate trial of the issue of liability before damages, regard will be had to the benefits that will thereby accrue to the parties, e.g. an earlier determination on the

liability while the facts were fresher in everyone's memory, as against the hardship or prejudice that might thereby be occasioned to them."

In that case I also drew from the case of Coenen v. Payne (1974) 1 W.L.R. 984; (1974) 2 All E.R. 1109 C.A., the further principle that often it helps the Judge to assess the credibility of the Plaintiff if he can hear what the Plaintiff has to say not only about his accident but also about his injuries and financial loss. As I have already said, the latter factor will not be important in this case due to the fact that the amount of evidence in relation to the issue of liability will be small. In the five principles set out above from Barreto v. Sanguy I omitted any mention of the factor mentioned in the last sentence of the quotation above from section 33/4/7 that a decision on the issue of liability for damages afforded a ground for an Order for interim payment. I probably did this because in 1990 the procedure of applying for an interim payment did not exist in Jersey whereas it now exists.

It seems to me that the relevant factors here are as follows. The normal procedure remains that liability and damages should be tried together but the Court should be ready to order separate trials for the issues of liability and damages whenever it is just and convenient to do so. Advocate Dorey urged upon me that the case of Marks v. Chief Constable of Greater Manchester Police (28th January, 1992) 1 T.L.R., which made reference to these issues only being separated in exceptional cases where there was a clear line of demarcation between the issues of liability and quantum, was setting a higher standard to that set out in Coenen v. Payne. I do not think that that is so. The reporting of the Marks case is extremely brief and it does not seem to me that the Court of Appeal in England was saying more than that the ordering of separate trials of the issues for liability and damages was by way of exception to the general rule and that the use of the words "in exceptional cases" must be merely understood as being another way of saying by way of exception to the general rule. Following the various principles to be applied in determining whether it is sufficiently just and convenient in this case to order the splitting of the trial as a departure from the normal procedure, I have come to the following conclusions:-

(1) there is a clear line of demarcation between the issues of liability and quantum of damages and they do not interact upon each other;

(2 the issue of damages will be quite detailed and complicated and considerable costs will have to be incurred in obtaining an accountant's report on the profitability of the business; the complexity of the issue of damages may well be increased by any arguments of the Defendant that there was a pre-existing problem with the eye as such arguments relating to causation are

(3) there is no question here in relation to an uncertai prognosis for the injury to the eye;

(4) there is no particular advantage here in relation to a earlier trial relating to fresher memories;

(5) there is no particular issue here in relation to the nee to hear the Plaintiff on the matter of damages as a mean of determining his credibility in relation to the issu of liability; and

(6) if the issue of liability is determined in favour of th Plaintiff then this will lead to the Plaintiff being abl to obtain an interim payment which will in turn assis the Plaintiff with the financing both of the specialis reports and of the conduct of his case.

Taking all these factors into account it appears to me tha this is a case in which it is clearly appropriate to depart fro the normal rule as it is both just and convenient to order tha the issue of liability (including contributory negligence) b tried first. Accordingly, I am so ordering and am also orderin that the action be set down on the hearing list on the issue o liability only and that the normal order for mutual discovery b made within twenty-eight days from the date hereof in relation t the issue of liability only.

Authorities

Sanguy (2nd, May 1990) Jersey Unreported.

R.S.C. (1997 Ed'n): 0.33, r.4; 0.35, r.3.

Royal Court Rules 1992: Rule 6/19, 21(3), 8/5.

Finance and Economics Committee v Bastion Offshore Trust Company Limited (9th October, 1991) Jersey Unreported CofA; (1991) JLR N.1.

Coenen -v- Payne [1974] 2 All ER 1109 C.A.; 91974) 1 WLR 984.

Polskie -v- Electric Finance Company Limited [1956] 2 All E.R. 306.

Marks -v- Chief Constable of Greater Manchester Police (28th January, 1992) T.L.R.