C.A. 176/53

MORDECHAI ATIA

v.

MOSHE ROSENBAUM

In the Supreme Court sitting as a Court of Civil Appeal
[September 24, 1954]
Before Goitein J., Landau J., and Berinson J.

Tort - Factories Ordinance, 1946, *s.* 18(1) - *Breach of statutory duty - Dangerous machinery - Failure to fence - Injury to employee - Liability of employer - Assessment of damages - Expectation of life - Loss of future earnings - Pain and suffering.*

The plaintiff was employed by the defendant to work an electrically-driven wool-teasing machine. On January 17, 1951 the plaintiff was cleaning the machine when his hand got caught and, before it could be released, was seriously injured. The plaintiff sued the defendant for damages for negligence and breach of the statutory duty to fence securely every dangerous part of any machinery or to provide the other safety measures set out in s. 18(1) of the Factories Ordinance, 1946.[1)]

The Court of first instance, in dismissing the claim, held that there had been no breach of statutory duty because the employer had put the necessary fence on the machine and although there might be greater protection for the worker by use of a morticed lock, in fact no such lock was in use or available in Israel nor was it used to a great extent outside Israel.

Held, allowing the appeal, that the duty to secure the safety of the employee was absolute, and that this duty was not discharged by employing a method by which the safety of the employee was in fact not secured although such method was the one generally employed.

The appellant was awarded IL.15,000.- as damages for the injuries received.

[1)] The text of this section is set out infra p. 441.

Israel cases referred to:

(1) *C.A.* 70/52 *Yehoshua Grossman and Egged Ltd. v. Henry Roth* (1952), 6 *P.D.* 1242.

(2) *C.A.* 62/53 *Yehoshua Daum and Egged Ltd. v. Nissim Aharonof and Others* (1954), 8 *P.D.* 128.

English cases referred to:

(3) *Dennistoun v. Charles E. Greenhill Ltd.;* [1944] 2 *All E.R.* 434.

(4) *Davies v Thomas Owen and Company, Ltd.;* [1919] 2 *K.B.* 39.

(5) *Pugh v. Manchester Dry Docks Company, Ltd.;* [1954] 1 *All E.R.* 600.

(6) *Carroll v. Andrew Barclay and Sons, Ltd.;* [1948] 2 *All E.R.* 386.

(7) *Sutherland v. Executors of James Mills, Ltd.;* [1938] 1 *All E.R.* 283.

(8) *Harris v. Bright's Asphalt Contractors, Ltd.;* [1953] 1 *All E.R.* 395.

(9) *Roach v. Yates;* [1937] 3 *All E.R.* 442.

(10) *Rowley v. The London and North Western Railway Company;* (1873), 29 *L.T.* 180.

(11) *The "Swynfleet";* (1947), 81 *Lloyd's List Law Reports* 116.

Katz for the appellant.
Rotenstreich for the respondent.

BERINSON J. giving the judgment of the court. The appellant was employed as a labourer by the respondent, the owner of a wool factory for a period of about two months. During this time he was engaged in various tasks, including the operation of a wool-teasing machine.

On January 7, 1951, the appellant was temporarily engaged in operating the machine in question. He started this work at 4 p.m. and at 8 p.m. he put his left hand into the machine while cleaning it. His hand was caught in one of the wheels of the machine and was severely injured.

The appellant sued his employer under the Civil Wrongs Ordinance for damages in respect of the physical injury suffered by him, basing his claim upon two causes of action:

(a) breach of the statutory duty imposed upon the employer by sections 10(1)[1)] and 18(1) of the Factories Ordinance, 1946 relating to the illumination and fencing of dangerous machines in places of work:

(b) negligence.

The learned judge held that not only had the plaintiff failed to establish even one of the causes of action upon which he relied, but that it was his own negligence that had caused the accident. He therefore dismissed the claim. The appellant appealed to this court. Before us his counsel confined his submissions to one point alone, namely, the breach by the respondent of his statutory duty to fence the machine operated by the appellant - a duty imposed upon him by section 18(1) of the Factories Ordinance, 1946 (hereinafter called "the Ordinance"). That section provides as follows:

> "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:
>
> Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

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1) Factories Ordinance 1946, s. 10(1):

Lighting 10(1) Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing.

Before dealing with the accident itself, it is desirable that we have a clear picture of the machine involved in the accident and the way in which it works. We adopt the description of the learned judge in the court below who said:

> "I held an inspection *in loco* on two occasions. I examined the machine and found it to be composed of the following parts: 1) a table which oscillates while the machine is being operated; 2) a wooden cylinder at the end of the table; 3) a metal rod; (Note: there are in fact two metal rods, one above the other). 4) a cog wheel; 5) a guard above the cog-wheel.

The method of operating the machine is as follows: the workman stands in front of the table and places the wool upon it. The wool is then conveyed towards him (by the oscillating table) from under the wooden cylinder, it enters the metal rod and is conveyed to the cog-wheel. The metal pivot is protected by a metal guard. The cog-wheel remains clean, but the wool accumulates under the metal rod and must be extracted from time to time with the help of a device called by the workmen a "hook".

The machine is operated by electric power, the starter switch being situated close to it. To stop the machine completely, however, one operates another switch. situated about three meters from the machine. Even when the electric current is cut off, the machine continues to work - that is to say, the table still oscillates and the wheel, the rod and the cylinder continue to revolve for some seconds."

This is the description given by the judge, to which must be added two important details which also emerge from the evidence:

a) the table moves at a relatively slower speed than the cogwheel, which oscillates at a great speed. When the electric current is cut off, the various parts of the machine continue to move under their own power, but the table - which is a slow-moving object - comes to a stop before the cog-wheel which moves at a higher speed. A person unaware of these facts may therefore fall into error and think that when the table stops moving the wheel also

stops. In fact however, the cog-wheel continues to revolve at a high speed for some time after the table has ceased to oscillate.

b) The workman operating the machine stands facing it in front of the moving table. and in that position his hands - even when stretched straight out - do not reach the metal rods and also, therefore, do not reach the cog-wheel, which is even further away from them.

How did the accident occur? The appellant was the only workman at the machine which stood in a room by itself. There was no eye-witness to the accident nor to what preceded it. The appellant stated in his evidence that on the day of the accident, at about 8 o'clock in the evening, the wool accumulated in the machine, and new material could not be served to it but kept flying back towards him. He therefore cut off the electric current by operating the two switches. and when the machine had stopped altogether he put in his left hand in order to clean away the wool. He did not see then that the cog-wheel was still turning since it was full of wool. and this wheel drew his hand inwards. The appellant added that the metal guard over the rods was not in position and that "had the guard been in position then, the wool would not have blown towards me and I would have been able to see the wheel". Under cross examination, however, he said that he could not remember if the guard was there at that time.

The learned judge repeats the story of the appellant in his judgment, his only comment relating to the question of the metal guard. He says that he prefers the version of the respondent that the guard was in its place on the day of the accident, such version being supported by the clear evidence of the respondent and the works manager whose evidence on this point was unshaken.

The remaining details in the appellant's story of the occurrence are not only uncontradicted by the other witnesses, but are in fact supported in the main by the witnesses Pessah Cohen and Simha Sverdlik. These witnesses, who are also workmen in the factory, were attracted to the scene by the cries of the appellant immediately after the accident, and it is they who dismantled the machine and removed the injured hand of the appellant. Moreover during one of the visits of the learned judge to the factory Sverdlik demonstrated the position in which he found the appellant after the accident and this

demonstration coincided with the appellant's story. From all this it must be assumed that the learned judge accepted this portion of the appellant's evidence.

The findings of the learned judge that the machine operated by the appellant is dangerous and that the metal rods were guarded on the day of the occurrence were not disputed before us. The real dispute, however, related to the question whether the guard conformed with the requirements of the law. The learned judge reached the conclusion that the respondent had discharged his duty by providing "reasonable means to make that portion of the machine safe". Counsel for the respondent, of course, supports this view of the matter while counsel for the appellant, in arguing against this finding, submits that reasonable means are not sufficient. Section 18(1) of the Ordinance requires, that the dangerous part of the machinery be securely fenced" or, in certain circumstances, that alternative means be taken to provide the same measure of safety. If, by reason of the nature of the operation, the safety of a dangerous part of the machinery cannot be secured by means of a fixed guard, it is necessary to provide what is called an interlocking guard. This device automatically prevents the operator of the machine from coming into contact with the dangerous part while it is in motion since the lifting of the guard in itself brings the machine to a standstill.

The English courts[1)], on the basis of a similar provision in the English statutes requiring safety in the operation of dangerous machinery, have held repeatedly over a period of decades that the duty of fencing machines securely is an absolute duty in the sense that the safety to be provided by the fencing must be absolute. In other words, the fencing must provide the workers who come into contact with the machine with an absolute guarantee that they will not be injured by it. The factory owner, therefore, does not discharge this duty even if he fences the dangerous machine in accordance with the best and most modern system known at the time if, in fact, the machine is not guarded thereby as the law requires (see *Dennistoun v. Charles E. Greenhill Ltd.* (3)). In the same way the factory owner does not discharge his duty if he does not provide the safety required for his workmen because to do so is technically impossible or commercially unfeasible. It has accordingly been held by the English courts that in cases such as these there is no

[1)] The law in England has since been changed.

alternative but to withdraw the machine from use. *(Davies v. Thomas Owen and Company Ltd.* (4), and *Pugh v. Manchester Dry Docks Company, Ltd.* (5).)

In the case before us evidence was given by two labour inspectors who are responsible for ensuring compliance with the provisions of the Ordinance. They both stated that the guard over the metal rod is inadequate because it is possible to raise it while the machine is working without thereby stopping the machine. Both these experts stated, therefore, that there can be no absolute protection for the operator of this machine unless by means of an interlocking guard (by the raising of which the operation of the machine is stopped automatically, while it is impossible to set the machine in motion unless the guard is in position) although they had not demanded up to that time that such a guard be provided. The learned judge, however, did not accept these opinions but upon the evidence of the defendant and an expert engineer called Avni, who gave evidence on the defendant's behalf, he reached the conclusion that in providing the guard as it was, the defendant had taken reasonable steps to discharge his statutory duty. The defendant, who is very experienced in his profession, stated in evidence that he had visited many factories of the same kind in the country and that in not a single one had he seen an interlocking guard. He also said that "the guard must be free and flexible so that it can be raised with ease" - in other words, that in view of the nature of the work it is impossible to use a guard that is absolutely rigid. The engineer Avni also confirmed that the guard in the present case must be flexible, so that it can be raised in order to enable the wool to pass in accordance with the thickness of the material and that it is therefore impracticable to operate this machine with a morticed fence. He also stated that he had not seen such a fence on machines of this kind either in this country or elsewhere, and that only recently he had seen a modern machine of this type made in Belgium, and that even on that machine there had been no interlocking guard. On the basis of this evidence the judge concluded that the metal guard constituted reasonable protection, sufficient to satisfy the requirements of section 18(1) of the Ordinance, and that there is no necessity in this case for an interlocking guard in terms of the proviso to that section.

It seems to us for more than one reason that the learned judge erred in his conclusion.

In the first place it is clear that the metal guard does not allow for the machine to be "securely fenced". It moves up and down according to the amount of material which enters the machine, and sometimes it rises to such an extent as to enable the operator of the machine to put in his hand and reach the point between the two metal rods which revolve at a high speed (see the evidence of the labour inspector Stein and of the defendant). In other words, the guard does not constitute a reliable and fixed partition which would prevent a workman from coming into contact with the dangerous parts of the machine, and as long as this is so the requirement that the machine should be securely fenced has not been fulfilled (see, for example, the remarks of Lord Porter in *Carroll v. Andrew Barclay & Sons Ltd.* (6) at pp. 390-1). Moreover, when the metal guard is lowered it covers the metal rod and protects the workman from the cog wheel, but when it is raised - and there is no difficulty or impediment in raising it at any time - it exposes both of them, and there is then nothing to prevent the workman from coming in contact with them. This arrangement does not fulfil the requirements of section 20 of the Ordinance which provides, inter alia, that all fencing or other safeguards provided in pursuance of that Part, namely Part IV of the Ordinance, shall be constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, save in certain exceptional circumstances which are not relevant to the present case. In the case before us, as we have seen, it is possible to raise the guard with ease and expose the dangerous parts even when they are in motion, and we know from the story of the appellant that his hand was drawn towards the cog wheel while it was still in motion.

In the second place, it is clear from the evidence of the respondent and the engineer Avni - which was accepted and relied upon by the learned judge - that because of the nature of the machine it is impossible to secure the safety of the workman from the metal rods. Their evidence was that the guard must be flexible and free, so as to be raised and lowered in accordance with the thickness of the layer of wool entering the machine. In this case, therefore, the proviso to section 18(1) of the Ordinance applies, in terms of which a device is to be provided which automatically prevents the operator from coming into contact with the dangerous part of the machine, viz., a device called an interlocking guard. There is no doubt that it is a matter of great, if not insuperable, difficulty to fix an interlocking guard to this type of machine. As we have already seen, however, there is no solution other than to fulfil the statutory obligation or to cease to use the machine. The fact that this machine has

been used as it is in the respondent's factory and in other factories for a considerable time without any accident having occurred, and that the labour inspector did not demand an interlocking guard on this type of machine, is immaterial. See *Sutherland v. Executors of James Mills, Ltd.* (7).

This brings us to the second question, namely, whether the appellant was negligent, and if it was his negligence which caused the accident. The learned judge found that the appellant well knew from the directions and instructions which he had received from the respondent and the Works Manager that the machine was to be cleaned by means of a hook, and not by hand, and that the appellant's negligence consisted in acting against this directive. The learned judge found additional negligence on the part of the appellant in his standing at the side of the machine instead of facing it - as he was obliged to do - and in his introducing his hand under the metal rod, although this part of the machine is always free of wool. Had there been some foundation in the evidence for the findings of fact upon which the judge based his conclusion of negligence we could not have interfered with that conclusion. However, after having examined and re-examined the evidence in its entirety, we have been unable to discover any basis for the findings of the learned judge. We shall deal with them separately.

(a) The appellant acted against the directions and instructions which he received. In connection with this the respondent stated in evidence: "When the appellant started to work, I showed him how to clean the machine and I explained to him that the electric current must be stopped before the cleaning and that he must not touch any part of the machine as long as it is in motion... I told him that when the machine is already working he must only use the hook in order to clean it and must not use his hands..... The worker who operates this machine is the one who must clean it and he is not to rely on any one else to do it". And the Works Manager stated in evidence: "When it is desired to clean the machine it must be turned off. It is possible to remove the wool both with the hook and also by hand where there are no cogs... I told the plaintiff that it was forbidden to introduce the hand while the machine was in motion.. ."

And what did the appellant do? He first turned off the electric current with both switches, and when it seemed to him that the machine was no longer in motion he started to

clean it by hand. This was in accordance with the instructions given to him and not contrary to them. The appellant did not know that the cog wheel continues to move for some little time after the current is turned off, and there was no evidence that instructions were given to him not to approach the machine for some time after the current had been turned off.

(b) The appellant stood at the side of the machine at a time when he should have stood facing it. It is true that the appellant stood at the side of the machine while he was cleaning it, and not facing it, but according to all the evidence he was not obliged to stand facing the machine at that time. It is only while the machine is in motion and the workman is operating it or cleaning it with a hook, that he is obliged to stand facing it. When, however, he has to clean it by hand after it has ceased to operate, he is obliged to stand to one side, otherwise his hand cannot reach the machine at all.

(c) The appellant introduced his hand underneath the metal rod, although that part of the machine is always clear of wool. In point of fact the appellant did not introduce his hand into that portion of the machine. The eye-witnesses, Pessah Cohen and Simha Sverdlik, who helped to extract the appellant's hand from the machine immediately after the accident, stated clearly that "the hand was caught between the big cylinder and the cogs" and that "he held his hand above the cylinders between the drum (that is to say, the cog wheel) and the upper cylinder (that is to say, the rod)..."

It is clear, therefore, that there is no proof of negligence on the part of the appellant which caused the accident. The accident was caused in fact by the breach of the statutory duty imposed upon the appellant relating to the fencing of the machine.

The plaintiff, in his Statement of Claim, claimed damages in an inclusive sum of I.L. 17,000.- Of this amount I.L. 500.- were claimed as special damages for loss of past wages, that is to say, from the date of the accident, January 7, 1951, until the date of the institution of action, July 1, 1952, less the amount received by him until then, and general damages in an amount of I.L. 16,500.-.

In the course of argument before the District Court counsel for the plaintiff amended this account and argued that on the basis of the evidence led by him his client was entitled to damages for loss of wages until that date (April 1, 1953) in an amount of I.L. 1,534.-. In this court counsel for the appellant again amended the account for damages and in his written argument filed in this court on June 10, 1954, claimed an amount of approximately I.L. 4,000.-. He based his claim for this sum on his client's total inability to work during the whole period, and he argued that this amount should be awarded to his client in full as the actual loss which he had sustained for the period which had already passed, as special damages.

It is clear that this contention is erroneous. Special damages must be proved in a trial as the actual loss or expense sustained by the plaintiff until the date of his claim or, at the latest, until the date upon which the case is heard. All other loss, expense, or damages which are anticipated in the future form a portion of the general damages.

The learned judge dealt with the question of damages only to meet the eventuality of an appeal, and he expressed the opinion that the loss of past wages should be assessed in the amount of I.L. 500.-and that the claim for general damages in the amount of I.L. 16,500.-should be dismissed for lack of proof.

We do not think it would be right in this case to vary the amount awarded by the learned judge in respect of damages for loss of past wages - down to the date of the institution of the action - in the sum of IL. 500.-, since this is the sum which was claimed by the plaintiff in his Statement of Claim, and he did not claim that damages under this head should be calculated until the date of the hearing of the case.

We turn now to the question of general damages. The plaintiff in his Statement of Claim did not claim the general damages claimed in the amount of I.L. 16,500.- under the two heads of damage of which they are composed, namely, loss of wages or profits in the future, and pain and suffering. Only in the course of argument in the District Court was it stated by counsel for the plaintiff that, in accordance with the accepted standard in the courts of this country in such matters, it was in his opinion proper to fix the amount of damages for pain and suffering caused to the plaintiff at I.L. 5.000.-and damages for loss of

wages from the date of the institution of action until the end of the plaintiff's life in the amount of I.L. 11,500.-as was done in the case of *Grossman & Egged Ltd. v. Henry Roth* (1) and the case of *Daum & Egged Ltd. v. Aharonof* (2).

As far as damages for pain and suffering are concerned it seems to us that the damage in this case is less serious than in that of *Grossman,* in which the damages awarded were fixed at I.L. 5,000.-and in that of *Daum,* in which the greater part of the sum of nine thousand two hundred and thirty pounds was awarded. In *Gross man's* case the left hand of the injured man was amputated completely leaving only a stub the length of which was 16 cm. In the case of *Daum* the victim suffered severe injuries to his head and remained with a deep hollow in his forehead. After an operation and lying in hospital for twenty-six days, a further period of five months elapsed before he started any work at all. He lost his sense of taste and his sense of smell, and at times even his sight was affected. The doctors were also of opinion that it was possible he would become epileptic as a result of the accident. It is true that in the case before us the appellant lay in hospital on more than one occasion and underwent four operations in the course of nine months, and that after all this he remained with a permanent disability in his hand. The hand itself, however, was not amputated, although it has remained patently deformed. Having regard to all the circumstances of the case it seems to us that an amount of I.L. 4,000.-is a reasonable sum of damages under this head.

It remains to consider the measure of damages to be awarded for loss of ability to work in the future. There is no rigid rule to be applied to this matter and the court will assess these damages to the best of its judgment having regard to all the circumstances and the factors affecting the case before it. As a general rule the court must assess "how much the injured man would have earned but for his disability and how much he is likely to earn with his disability" during the rest of his life, and must determine the damages upon the basis of the difference between these two amounts. See *Grossman's* case (1).

It follows that the learned judge was correct in saying that it was for the plaintiff to prove his age and his prospects of living in order to estimate thereby his expectation of life. We are not however, in agreement with the conclusion of the learned judge that the plaintiff's prospects of life were not proved.

It is true that these two elements, namely, the age of the plaintiff and the length of life which he could be expected to live were not mentioned in his Statement of Claim. The plaintiff stated in evidence, however, that he is twenty one years of age and that he completed his army service with medical category "A" about three months before the accident. Counsel for the defendant did not object to this evidence at the time nor did he bring any evidence to contradict it. In these circumstances there was nothing to prevent the learned judge from accepting the age of the appellant and his state of health in general, as facts which had been proved.

What, however, is the appellant's expectation of life for the purpose of assessing general damages? No positive evidence on this point was adduced, but in his argument before the lower court, counsel for the plaintiff relied upon the statistical tables published in Bingham's book on Claims in Vehicle Cases, second edition, p. 372, and on the Israel Statistical Monthly, from which it appears that the average expectation of life of a normal man of twenty one years of age in England and in Israel is about 45 years. The learned judge, however, apparently following an obiter dictum of Cheshin J. in *Grossman's* case (1), paid no attention to all this and did not even mention it in his judgment. In our opinion once the judge had seen the plaintiff in the witness box and his age and state of health were known to him, there was no reason not to estimate the expectation of life of the plaintiff - upon the basis of his general knowledge of the average and usual length of life of the inhabitants of this country. It has been an accepted practice in the courts of England in recent times to estimate the expectation of life of a plaintiff upon the basis of their general knowledge and experience without any additional positive evidence. (See *Harris v. Bright's Asphalt Contractors Ltd.* (8), and *Roach v. Yates* (9).)

That is also the law in the United States, as appears from Sherman and Redfield on Negligence, Revised Edition (1941), vol. 4, p. 1972, in which the following two cases are cited:

> "Where the plaintiff was personally present held that the jury might judge her life expectancy without any other evidence on the subject."

> "Where the evidence discloses the age and health of the deceased, it is competent for the jury to estimate his probable duration of life without the assistance of mortality tables".

After all, every case of the possible expectation of life of a particular person is in the realm of conjecture, even after consideration of tables of life and mortality, and evidence of experts regarding them. In the absence of special circumstances pointing to the necessity of departing from the general rule in respect of any particular person, the expectation of life of an ordinary man must be assessed according to the average that is proved in the case or which is determined by the court upon the basis of its own knowledge and personal experience.

> "If there are special considerations such as these, the party who relies upon them to reduce the period of life must prove that they exist." See *Rowley v. The London & North Western Railway Company* (10), at p. 184.

In the present case the respondent has not established the necessity of departing from the general rule in the case of the appellant. It seems to us, therefore, that it would be right to fix his future expectation of life at 40 years.

As far as the wages of the appellant at the time of the accident - and thereafter - are concerned, it has been proved that his daily wage at the time of the accident was I.L. 1.659.- and that the daily wage of a healthy workman of the type of the appellant at the time of the institution of action in July, 1952, had risen to I.L. 4.333. When this evidence was heard in January 1953, the daily wage was I.L. 4.854. As is known, wages in general have continued to rise, regularly and continuously, but since we must take into account a length of life of 40 years which the appellant may expect from July, 1952, and that there may be in the course of that time both rises and falls in the wages which can by no means be anticipated, it seems to us that we are entitled to assume, on the basis of the position of today, that were it not for the appellant's disability he would in the course of the whole period mentioned earn an average of I.L. 5.- per day, together with the rises and increments

which he would receive as a result of expert knowledge and progress in his work which would increase with time.

In view of the judgment in the case of The *"Swynfleet"* (11), it is clear that in fixing the estimated wage which would be earned by an injured man for the rest of his life were it not for the accident, we are not entitled to disregard the general changes which operate in the meantime on the wages of workmen of the same type as the injured man. We must take them into account as the basis of our assessment in place of the actual wage earned by the injured man at the time of the accident. In that case the damages payable to the family of two workmen in a French ship who lost their lives when the ship sank as a result of a collision with the British ship "Swynfleet" in December 1939, fell to be considered. By reason of the second World War the matter came to trial only in 1947, and a number of major changes in the wage of shipworkers of the type of the two deceased persons (and also in the rate of exchange between the French franc and the pound sterling) had taken place in the meanwhile.

The court held that in assessing the damages payable to the families of the victims the wage which the victims would have earned had they remained alive until the hearing of the case was to be taken into account. In so holding the court based itself upon the principle that damages must replace what the deceased would have given his family had he remained alive and continued to support them. The same principle applies in the case of bodily injury in which case, too, the damages must compensate the injured man as far as possible for the anticipated loss which was caused to him by his injury. Since we know today, more than three and a half years after the occurrence, what has happened in the meantime in regard to wages generally, we must make use of this knowledge and not be content with considering the state of affairs that existed at the time of the accident as if nothing had happened since.

It is more difficult to assess what the appellant is likely to earn, with his disability, for the remaining portion of his life. More particularly is this so since up to the date upon which he gave evidence he had not yet succeeded in obtaining any kind of work, despite continuous efforts to do so, nor has it been proved what his prospects of work are in the future. In the absence of any other criterion, we may derive assistance from the evidence of the doctors who stated that the appellant - as a result of the accident - suffered at least a

thirty-five per cent disability in his capacity to engage in physical labour, and take this finding as a measure of his loss of wages. On the basis of I.L. 5.- per diem and an average of 300 working days per annum for a period of forty years, the loss - at the rate of 35 per cent of this sum - amounts to I.L. 21,000.-. Taking into account that the appellant will receive his damages in one lump sum instead of in weekly payments, and also having regard to the other factors and occurrences which may operate to reduce his income (sickness, unemployment, and other expected and unexpected eventualities), we fix the sum of damages under this head at half the estimated loss, namely, the sum of I.L. 10,500.-.

In conclusion there remains the argument of the respondent that in view of the provisions of section 62 of the Civil Wrongs Ordinance, 1944, the appellant is precluded from bringing his present claim for damages since he has received damages for a year and a half under the Workmen's Compensation Ordinance. We see no substance in this submission.

Section 62 of the Civil Wrongs Ordinance provides as follows:

> "Notwithstanding anything contained in the Workmen's Compensation Ordinance or any enactment as to workmen's compensation in force in Palestine for the time being, no workman (which term, for the purpose of this section, shall be deemed to include his dependants) shall, by reason of the happening of any event, recover from his employer both compensation under the provisions of this Ordinance and compensation under the provisions of the Workmen's Compensation Ordinance or such other enactment for any injury or damage caused by such event.
>
> For the purposes of this section, the expression 'dependents' has the same meaning as it has in section 2(1) of the Workmen's Compensation Ordinance."

It is not disputed that the appellant received from the respondent and his insurance company various sums amounting to I.L. 647.- which were paid to him regularly from

February, 1951, until June, 1952. These sums however were not payments of damages under the Workmen's Compensation Ordinance, and in the receipts signed by the appellant (which were submitted to the court) it is merely said that the amounts in question were paid "in respect of damages" without stating whether they were paid under the Workmen's Compensation Ordinance or The Civil Wrongs Ordinance. It was also not proved in evidence that the injured man knew and agreed to receive this money as damages under the Workmen's Compensation Ordinance.

The result is that we allow the appeal, set aside the judgment of the District Court, and award to the appellant an amount of damages of fifteen thousand pounds as follows:

For loss of past wages	I.L. 500.-
For pain and suffering	I.L. 4000.-
For loss of wages in the future	I.L. 10500.-
Total	I.L. 15000.-

We also award costs against the respondent both in this court and in the District Court together with an inclusive amount of I.L. 200-. as counsel's fees in both courts.

Appeal allowed, and damages awarded to the appellant in the sum of I.L. 15,000.-.
Judgment given on September 24, 1954.