[VASSILIADES, TRIANTAFYLLIDES AND JOSEPHIDES, JJ.]

FAHRI RADIF,

Appellant-Defendant,

v.

PANICOS ELIA PAPHITIS, AN INFANT, BY ELIA PAPHITIS, AS HIS NEXT FRIEND,

Respondent-Plaintiff.

(*Civil Appeal No.* 4472)

Civil Wrongs—Negligence—Road accident—Contributory negligence of the plaintiff, a boy of nine—Apportionment of blame—Errors of judgment as distinct from negligence—In this case the defendant was negligent in that he was driving his vehicle fast without bearing in mind the probability of animals or children coming on to the road from the adjacent properties—But the plaintiff-infant was also held in this case to have been negligent—Both parties to be blamed equally—With the result that the infant plaintiff got half the damages as correctly assessed—

Civil Wrongs—Negligence—Personal injuries—Quantum of general damages—Appeal—The assessment of the general damages by the trial Court in this case was not disturbed by the Supreme Court on appeal—Because the Appellate Court were not inclined in the circumstances of this case to say, that the assessment of the trial Court was obviously *excessive.*

This is an appeal by the defendant against the judgment of the District Court of Paphos, whereby damages were awarded to the infant plaintiff (respondent), for the injuries sustained by him on being knocked down by a car driven by defendant (appellant) at about noon of September 24, 1960.

The main issues raised by the pleadings were the negligence of the two parties involved, *i.e.* the plaintiff, a boy of nine, and the defendant-driver ; and in case of liability, the amount of damages.

The plaintiff (respondent in this appeal) alleged that the collision was due entirely to the negligence of the defendant driver (the appellant) ; and, in his turn, the latter alleged in his defence that the accident was due to the negligence of the plaintiff-boy.

Upon the facts of the case as found by it, the District Court apportioned the blame, in 60% on the appellant-driver and 40% on the respondent-boy. This apportionment is attacked by both sides. Counsel on behalf of the respondent, submitted that the negligence of the boy should not have been found at more than 10%, in any case.

Held, (1) (*a*) there is no material on record to justify upsetting the finding that the accident was directly connected with negligence on both sides. There was evidence upon which the trial Court could come to that conclusion, and it was open to them to do so.

(*b*) As far as the facts are concerned, we take them as found by the trial Court.

(2) We do not forget that error of judgment is one thing and negligence is another. But there can be no doubt that the appellant-defendant was driving faster than he says, and he was negligent in not bearing in mind the probability of animals or children coming on to the road from the adjacent properties, where they were in fact found.

(3) Coming now to the respondent-boy, there is no doubt that together with two other younger boys, he was in a field next to the road. They were all children under nine playing upon an old tractor. Someone in that field ordered others to get away. Apparently in consequence of that the boys left the tractor, and went down the road when appellant's van was not far from them. When the three boys were faced with the emergency of the fast approaching vehicle, the two younger remained where they were. But the respondent continued his attempt to cross the road. That attempt constituted, in the circumstances, the main negligence of the plaintiff-respondent boy.

(4) (*a*) The circumstances in this case present no justification for blaming the one side more than the othe..

(*b*) Therefore, we allow the appeal to the extent of varying the part of the judgment going to the apportionment of the liability for the very unfortunate consequences of this accident.

(5) As to the quantum of damages we take the view that what we have heard in this appeal, does not justify disturbing the assessment of the trial Court. The special damages

were very carefully examined ; and as to the general damages we are not inclined to say that, in the circumstances of this case, the assessment of the trial Court is obviously excessive.

(6) Therefore the appeal againt the assessment of damages must fail.

(7) In the result the appeal is allowed to the extent of dividing the liability equally between the two sides, and after apportionment of the damages accordingly, the judgment to be varied for the amount payable by appellant to the respondent-plaintiff, *i.e.* to be for one-half of the total amount of damages found by the trial Court.

Appeal allowed to the extent as aforesaid.

Appeal.

Appeal against the judgment of the District Court of Paphos (Mavrommatis and Ilkay, D.JJ.) dated the 18.9.63 (action No. 1599/60) whereby judgment was given for plaintiff for £3,333 with costs, as damages for the injuries sustained by him on being knocked down by a car driven by defendant.

A. M. Berberoghlou, for the appellant.

St. G. McBride, for the respondent.

The judgment of the Court was delivered by :—

VASSILIADES, J.: This is an appeal in an accident case where a boy of nine was knocked down on a main road by a van and sustained serious injuries.

The main issues raised by the pleadings were the negligence of the two parties involved, *i.e.* the plaintiff-boy and the defendant-driver ; and in case of liability, the amount of damages.

The plaintiff—respondent in this appeal alleged that the collision was due entirely to the negligence of the appellant-driver ; and, in his turn, the latter alleged in his defence that the accident was due to the negligence of the respondent-boy.

As it is often the case in such disputes, the evidence at the trial showed that both parties were guilty of negligence, each side contributing to the cause of the accident, in proportion to the degree of the respective negligence.

Counsel before us, both on the part of the appellant and on the part of the respondent, endeavoured to upset this finding of the trial Court. Without going into detail, we can say that, as both counsel must have realised in the course of the argument, there is no material on record to justify upsetting the finding that the accident was directly connected with negligence on both sides. There was evidence upon which the trial Court could come to that conclusion, and it was open to them to do so. As far as the facts are concerned, we take them as found and described in the judgment of the trial Court. Upon those facts the District Court apportioned the blame, in 60% on the appellant-driver and 40% on the respondent-boy. This apportionment is also attacked by both sides. Mr. McBride on behalf of the respondent, submitted that the negligence of the boy should not have been found at more than 10%, in any case.

We have tried to get from each side any reasons leading to a definite conclusion that there was more blame on the one side than on the other. The more we heard counsel arguing their side of the case, the more it appeared that on the findings of the trial Court there is no justification in placing more blame on the one side and less on the other. On the one hand we have the driver who, while driving his van on a main road, was suddenly faced by three boys attempting to cross the road when the distance between them and the vehicle was dangerously short (he described it as 23 or 25 feet) but on the other, we have the fact that, considering all relevant circumstances, he was driving dangerously fast, at the time. It is true that he managed to avoid the other two children but on account of his speed and probably his sudden fright also, he was unable to avoid the respondent.

We do not forget that error of judgment is one thing and negligence is another ; and in this case, we are concerned with negligence. But there can be no doubt that the driver was, in the circumstances, driving fast. He was driving faster than he says, and he was negligent in not bearing in mind the probability of animals or children coming on to the road from the adjacent properties, where they were in fact found.

Coming now to the respondent-boy, there is no doubt that together with the two other younger boys, he was in a field next to the road playing upon an old useless tractor near the road. They were all children under nine. Someone in the field ordered them to get away from the tractor. Apparently, in consequence of that, the boys left the tractor, and went down to the road when appellant's van was not far from them. When the three boys were

faced with the emergency of the fast approaching vehicle, the two younger remained where they were. But the respondent continued his attempt to cross the road in the direction shown on the plan. That attempt, in the circumstances, constituted the main negligence of the respondent-boy. He went from the field on to the road without making sure that there was no approaching car, and when he noticed the approaching vehicle, he rushed to the other side of the road to avoid getting run over. In these circumstances, we are of the opinion that the trial Court was correct in finding negligence on both sides ; but, we can find no justification for their conclusion that the one side was more negligent than the other. One can understand that the sympathy of the witnesses and probably the sympathy of the court would, in a case like this, lie on the side of the small boy. But sympathy cannot properly affect in any way the apportionment of the blame.

We are unanimous in the view that the circumstances in this case present no justification for blaming the one side more than the other. Therefore, we allow the appeal to the extent of varying the part of the judgment going to the apportionment of the liability for the very unfortunate consequences of this accident.

As to the quantum of damages we take the view that what we have heard in this appeal, does not justify disturbing the assessment of the trial Court. The special damages were very carefully examined ; and as to the general damages we are not inclined to say that, in the circumstances of this case, the assessment of the trial Court is obviously excessive. Therefore, the appeal against the assessment of damages must fail. In the result the appeal is allowed to the extent of dividing the liability equally between the two sides, and after apportionment of the damages accordingly, the judgment to be varied for the amount payable by appellant to the respondent-plaintiff, *i.e.* to be for one-half of the total amount of damages found by the trial Court.

As regards costs, we do not propose disturbing any order made in the District Court for costs in the action. But the appellant is, we think, entitled to one half of his costs in the appeal ; and we make order accordingly.

Appeal allowed. Order for costs as aforesaid.