[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

1973
Oct. 26

ARISTOS SKREKAS,

Appellant-Defendant,

v.

ANDREAS NICOLAOU, AN INFANT, THROUGH HIS FATHER NICOS ANDREOU,

Respondent-Plaintiff.

ARISTOS SKREKAS v. ANDREAS NICOLAOU AN INFANT THROUGH HIS FATHER NICOS ANDREOU

(*Civil Appeal No.* 5079).

Contributory negligence—Negligence—Apportionment of liability—Appeal—Principles upon which the Court of Appeal will intervene—Pedestrian knocked down by motor vehicle—Two conflicting versions—Defendant driver not giving evidence—Plaintiff's version believed—Real evidence—Equally consistent with the accident having taken place as found by the trial Court on the basis of the plaintiff's (pedestrian's) evidence—Appeal dismissed.

Negligence—Contributory negligence—Findings of fact—Approach of the Court of Appeal—See supra.

Road accident—See supra.

The facts of the case sufficiently appear in the judgment of the Court dismissing this appeal by the defendant driver.

Cases referred to :

Andrews v. *Freeborough* [1966] 3 W.L.R. 342, at pp. 346, 347 ;

Ekrem v. *McLean* (1971) 1 C.L.R. 391 ;

Ioannou v. *Mavridou* (1972) 1 C.L.R. 107.

Appeal.

Appeal by defendant against the judgment of the District Court of Paphos (Loris, Ag. P.D.C. and Boyadjis, D.J.) dated the 18th April, 1972, (Action No. 1028/70) whereby he was adjudged to pay to the plaintiff the sum of £910 as special and general damages for injuries suffered by the plaintiff in a traffic accident.

L. Papaphilippou, for the appellant.

P. Sivitanides with *A. Spyrou*, for the respondent.

The judgment of the Court was delivered by :—

TRIANTAFYLLIDES, P.: The appellant challenges the decision of the District Court of Paphos as regards liability for a traffic accident.

It is not disputed that the appellant was negligent, but it has been submitted on his behalf that it should have been found that the respondent was guilty of contributory negligence.

The facts of this case are, briefly, as follows :—

On the 27th September, 1969, at about 6.30 a.m., the respondent—who was at the time seventeen years old—was walking on the pavement of Apostolos Pavlos Avenue, which leads from Kato Paphos to Ktima ; as he was bending down slightly in order to pass under a tree on the pavement he was knocked down by the motor-car of the appellant, which was coming from behind and was, obviously, being driven very close to the pavement.

The trial Court found, on the basis of the evidence of the respondent, that he was knocked down while he was walking on the pavement, and not in the road.

The appellant did not give evidence at the trial. In a statement to the police he had said that he had noticed the respondent proceeding on the pavement ahead of him and that when he had approached him he saw him suddenly, without having had time to realize what happened, on the wind-screen of his car, which was smashed as a result of the collision.

To a witness, who gave evidence at the trial, the appellant said, when he was asked about what had happened, that he had not noticed the respondent.

A witness who was called by the appellant was found by the trial Court to be entirely unreliable.

The main argument advanced by counsel for the appellant has been that the real evidence, and particularly blood-stains and broken glass which was found at the place of the accident, as well as the injuries suffered by the respondent, are, on the balance of probabilities, consistent only, or in any case more consistent, with the view that the respondent had stepped into the road, in front of the oncoming motor-car of the appellant and that, as this must have happened very suddenly, the appellant found himself unable to avoid the accident ; and it has been submitted that, in such circumstances, the respondent had been guilty of contributory negligence.

In our opinion the real evidence in this case is, to say the least, equally, consistent with the accident having taken place as the trial Court has found, on the basis of the evidence of the respondent ; since the respondent was thrown, as a result of the collision, on to the bonnet of the car of the appellant and its wind-screen was smashed, the places where broken glass and blood-stains were found, as well as the injuries suffered by the respondent, cannot be treated as excluding the probability that the respondent was struck while he was walking on the edge of the pavement, and not in the road ; and the trial Court has accepted as true the version of the respondent that he was hit while he was on the pavement.

We have been referred, by counsel for the respondent, to *Andrews* v. *Freeborough* [1966] 3 W.L.R. 342 ; there the facts were, to a considerable extent, quite similar to those of the present case and the Court of Appeal refused to interfere with the finding of the trial Judge—(who had had the advantage of seeing and hearing the witnesses)—that the plaintiff was hit while he was on the kerb, and not in the road as testified by the defendant driver.

In the present case, unlike what was the position in the *Andrews* case, no evidence at all was given by the appellant driver in support of his allegation that the respondent was in the road, having stepped off the pavement before he was hit.

It is useful, we think, to quote the following passage from the judgment of Willmer L.J. in the *Andrews* case, *supra* (at pp. 346, 347) :—

> " In the circumstances Lloyd-Jones J. declined to find that the child had stepped off the kerb. He found that in some way, while standing on the kerb, she was caught up, or swept up, by the defendant's car as it passed. This necessarily involved that the defendant's car must have been driven too close to the kerb. As I read his judgment, the Judge thought that the defendant was to blame, (*a*) for not sounding her horn, (*b*) for failing to reduce her speed and if necessary to stop on seeing the children, and (*c*) for driving too close to the kerb. He declined to find any contributory negligence on the part of the deceased child, even on the assumption that she was old enough to be capable of negligence.
>
> On this appeal, as I have already said, it has not been contended that the defendant was entirely free

from blame. But we have been invited to say that the deceased child was guilty of contributory negligence so that the plaintiff should recover only a proportion of the damages. It has been submitted that we ought to set aside the finding of Lloyd-Jones J. as to how the accident happened, and substitute a finding that the deceased child did step off the kerb as the defendant alleged. It has been admitted that, even if that were so, the defendant would have to be found partly to blame for the accident for not sounding her horn. It is indeed tempting to accept the invitation put forward by the defendant, since the accident could easily be explained on the basis that the child stepped off the kerb into the road. I confess that I find it quite difficult to appreciate just how the accident happened if the child remained throughout standing on the kerb. But the Judge was fully alive to the difficulties of the plaintiff's case. He had the advantage, denied to us, of seeing and hearing the witnesses, particularly the defendant herself. He came to the conclusion that the plaintiff's case, with all its difficulties, should be accepted. His finding that the child did not step off the kerb was a finding of primary fact, based largely on his view of the quality of the evidence which he heard. In my judgment it is not a finding with which this Court could properly interfere. That being so, I find myself unable to say that any case of contributory negligence on the part of the deceased child has been made out. The defendant was in my view rightly held liable for the whole of the damages sustained by the child, whatever they may be."

The principles which should guide an appellate tribunal in deciding whether or not to interfere with the decision of a trial Court as regards the issue of contributory negligence have been referred to by this Court in, *inter alia*, *Ekrem* v. *McLean* (1971) 1 C.L.R. 391, and *Ioannou* v. *Mavridou* (1972) 1 C.L.R. 107.

In the light of these principles we are not, as in the *Andrews* case, prepared—(irrespective of what we might or might not have decided had we been dealing with the present case as a trial Court)—to interfere with the judgment of the trial Court as regards the issue of liability for the accident in which the respondent was injured; as a result this appeal has to be dismissed with costs.

Appeal dismissed with costs.