[ZEKIA, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

1965
Nov. 25, 26
1966
Jan. 27
—
TESSI CHRISTODOULOU
v.
NICOS SAVVA MENICOU AND OTHERS

TESSI CHRISTODOULOU, MINOR, THROUGH HER MOTHER ATHINOULLA CH. ATHANASIADOU, AS HER NATURAL GUARDIAN OR NEAREST FRIEND,

*Appellant-Plaintiff.*

v.

NICOS SAVVA MENICOU AND OTHERS,

*Respondents-Defendants.*

(*Civil Appeal No.* 4531).

*Civil Wrongs- Negligence--The Civil Wrongs Law, Cap.* 148, *section* 51--*Contributory negligence—Section* 57 *of the said statute--Apportionment of liability – Motor traffic--Negligent driving –Injury to passenger for reward--Duty not to be negligent owed to passenger for reward by the owner of the vehicle*

*Section* 51 (2) (*c*) *of Cap.* 148 (supra)---*Onus—If passenger suffered an accident of a type which would not normally have occurred if the vehicle had been properly driven, then the onus is on the defendant to show that he was not negligent- Negligence--Standard of negligence is not in all cases an absolute one But it is dependant upon the attendant circumstances – And in the case of contributory negligence consisting of neglect of ones own personal safety regard must be had to the distractions of the plaintiff (or deceased) at the time of the accident and to the strain and fatigue etc.– Contributory negligence—It is not necessarily a conduct amounting to breach of any duty owed to the defendant—It is sufficient to show a lack of reasonable care by the passenger for his own safety.*

*Civil Wrongs - Negligence-- Damages—General damages – The Court is entitled to award a global sum without apportioning it under the various heads of damage.*

*Civil Wrongs - Negligence- Contributory negligence—Apportionment of degrees of liability- In assessing degrees of liability the common sense approach has to be adopted.*

*Practice - Contributory negligence — Pleadings — Contributory negligence must be specially pleaded and full particulars given— The Civil Procedure Rules, Order* 19, *rule* 13; (*cfr. Order* 19, *rule* 15 *of the English Rules of the Supreme Court prior to*

1965
Nov. 25, 26
1966
Jan. 27
—
FESSI
CHRISTODOULOU
v.
NICOS SAVVA
MUSCOU AND
OTHERS

*their recent revision). In the instant case, however a mere departure from the rule was held not to be fatal in view of the fact that in the way the defence was drafted the plaintiff was not taken by surprise.*

*Practice: Appeal: Damages: Principles upon which the Appellate Court will disturb findings of trial Court regarding general damages.*

*Practice: Appeal: Findings of fact by trial Courts will not be reversed by the Appellate Courts when supported by adequate evidence.*

In this case the plaintiff claimed damages for the severe injuries sustained by her while a passenger for reward in the bus of the second defendants due to negligent driving of the first defendant. The special damages were agreed at £1,000 and the Full District Court of Kyrenia assessed the general damages at £4,000 but found that the plaintiff (now appellant) was 60% to blame for the accident, reduced the damages accordingly, and awarded her the sum of £2,000. The circumstances of the accident are shortly as follows:

The accident took place in Phryne street, Lapithos on the 5th December 1962 at about 6 p.m. At the time the plaintiff a 17 years old girl was a passenger for reward in the bus of second defendants which was being driven by the first defendant. The plaintiff was sitting in the third row of seats on the left hand side of the bus, close to the window reading a magazine which she was holding in such a way as to have her lower left arm resting on the frame of the window. When the bus reached Lapithos and whilst it was proceeding in Makarios II Street, someone in the bus called out to the driver "Take Fessie (the plaintiff) home in Phryne Street". Thereupon the driver (second defendant) swerved and drove into Phryne Street and he had proceeded for a distance of about 33 feet when the accident happened. This was at a point marked "B" on the plan produced at the trial. Phryne Street is a narrow street and a very narrow one at the point "B" (*supra*). On the left hand side of that street there is a nine-foot well beginning from the junction of the two said streets viz. Makarios Street and Phryne Street and extending beyond point "B" which is 33 feet from that junction. The street at point "B" was bumpy and had potholes. The width of the street at the same point is 8 feet paved surface and 1 foot and 9 inches berm made by big

river stones The width of the bus was 7 feet 2 inches and its length 23 feet The driver was not acquainted with Phryne Street The plaintiff's house is situated in that street and she was, therefore well aware that it was a very narrow street at point "B" It is common ground that the plaintiff's left arm was crushed at that point on the wall There was no impact, however between the bus and the wall The plaintiff denied the allegation of the defendant that at the material time her left arm was protruding from the near side of the bus But the trial Court found that the plaintiff's arm was so protruding outside the bus immediately before the accident and rejected her version that her arm was pushed outside the window of the bus because of the condition of the street and the sudden swerving of the bus With regard to the driver (second defendant) the trial Court found that had he (the driver) who was not at all acquainted with the road at that place and who swerved suddenly into Phryne Street proceeded more cautiously and reduced speed instead of increasing it he would have been in a position to appreciate better the danger of approaching too near the wall and since there was no other traffic, he would have driven farther away from the wall, as there was ample space even not allowing the usage of the width of the irrigation ditch On this finding the trial Court came to the conclusion that the driver was negligent in not realizing that the wall constituted an obstruction of such a nature that a prudent driver should have seen it and ought to have realised the fact that he would or might hit a passenger on the bus and ought to have given it a wider berth

On the above findings of fact to the effect that the plaintiff (appellant) suffered damage as the result partly of her own fault and partly of the fault of the driver, the trial Court went to apportion the liability as to 60 per cent to the plaintiff and 40 per cent to the driver, awarding the plaintiff on that basis £2,000 damages (*supra*)

The plaintiff appealed against that judgment and the defendants cross-appealed.

The appeal was argued on behalf of the appellant-plaintiff on three grounds –

(a) that the finding of the trial Court as to the plaintiff's contributory negligence was not supported by the evidence;

(b) that, in any event, the Court could not in law find contributory negligence against the plaintiff as this has not been specially pleaded in the defence, and

(c) that the amount of general damages assessed by the trial Court was unreasonably low.

On behalf of the defendants-respondents it was argued that the finding of the trial Court that the driver (second defendant) contributed to the accident was wrong.

The Supreme Court, in dismissing the cross-appeal and allowing partly the appeal by directing that liability should be apportioned equally instead of 60 per cent to the plaintiff and 40 per cent to the driver:-

*Held*, (1) *with regard to the cross-appeal and the first ground of appeal* (supra):-

(1) No doubt this Court is competent to reverse findings of fact of the lower Courts where there is no adequate evidence to support such findings; and to reverse conclusions based on an error in law. Therefore, the question which falls for our determination is: Did the trial Court on the findings they made, if such findings were supported by the evidence, apply the law correctly?

(2) Now, what is the law on this point?

(a) Section 51 of the Civil Wrongs Law, Cap. 148, which reproduces the provisions of the common law on this point provides that negligence consists of doing some act which in the circumstances a reasonable prudent person would not do or failing to do some act which, in the circumstances, such person would do, and thereby causing damage. But compensation for such damage is only recoverable by a person to whom the person guilty of negligence owed a duty in the circumstances not to be negligent. The owner of a vehicle owes such duty not to be negligent to all persons who are carried for reward in his vehicle (section 51 (2) (c) of Cap. 148, *supra*).

(b) The general principle appears to be that those driving or having control of vehicles owe a duty of care to their passengers, and that if the plaintiff can show he was lawfully in the defendant's vehicle and suffered an accident of a type which would not normally have occurred if that vehicle had been properly driven, then the onus will be on the defendant to show he was not negligent. Such case of this kind must depend on its own facts.

(c) The standard of negligence is in all cases not as absolute one but is dependent upon the attendant circumstances, and in the case of contributory negligence consisting

of neglect of one's own personal safety the Court must have regard to the distractions, strains and fatigue of the plaintiff or deceased at the time of the accident.

Principles laid down in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1939] 3 All E.R. 722, at pp. 730-731 per Lord Atkin, and at p. 737 per Lord Wright, *applied.*

(d) As regards contributory negligence section 57 of Cap. 148 (*supra*) reproduces the provisions of the English Law Reform (Contributory Negligence) Act, 1945. To constitute contributory negligence it is not necessary to show that the conduct of the passenger amounted to the breach of any duty which he owed to the defendant, but it is sufficient to show a lack of reasonable care by the passenger for his own safety.

*Davies* v. *Swan Motor Co.(Swansea) Ltd.* [1949] 1 All E.R. 620 and *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448, *followed.*

(e) In assessing degrees of liability and in apportioning blame the rule of common sense approach has to be adopted: see *Davies* case, *supra*, at p. 627 per Evershed L. J. as he then was; and "*The George Livanos*" (1965), "The Times" Newspaper, December 14.

(3) We are of opinion that in the present case there was adequate evidence to support the findings made by the trial Court that the driver was guilty of negligence in driving his bus and that the plaintiff-appellant passenger was likewise guilty of contributory negligence having regard to the following circumstances, that is to say:—

Phryne Street was a very narrow street at the material place (9 feet 9 inches with berm); there was a projecting wall and the bus was 7 feet 2 inches wide; the road was bumpy and had potholes. Therefore, the wall was a potential source of danger and it was the duty of the driver to reduce speed and leave a reasonable safety margin between his bus and the wall, on the footing that owing to the condition of the road and the sudden swerve it was reasonable to foresee that the passenger in the bus might be knocked against the wall. Instead of doing that the driver increased speed and drove too close to the wall causing, thus, the plaintiff's arm to be crushed between the bus and the wall.

The finding of the trial Court that the plaintiff, although acquainted with the road, did not use reasonable care for her own safety in leaving her arm protruding out of the bus, is adequately supported by the evidence.

(4) It is true that if the plaintiff had not been in that position (viz. leaving her left arm protruding out of the bus) she would not have been injured, but adopting the common sense approach as laid down in the *Davies* case (*supra*), we are of the view that the plaintiff, in the circumstances of this case, was not to blame more than the driver, so that, although we agree with all the other conclusions in the careful and well reasoned judgment of the trial Court, we do not feel that we can uphold their apportionment of liability as to 60 per cent to the plaintiff-passenger and 40 per cent to the driver, second defendant. We are of the view that, in the circumstances, this liability should be apportioned equally, that is to say 50 per cent to the plaintiff and 50 per cent to the driver. On that basis the appellant-plaintiff must be awarded £2,500 damages instead of £2,000.

*Held*, (*II*) *with regard to the second ground of appeal i.e. that the trial Court was precluded from finding contributory negligence on the part of the plaintiff-appellant as it had not been specially pleaded*:

(1) Order 19, rule 13 of the Civil Procedure Rules (corresponding to the English Order 19, rule 15, prior to the recent Revision of the English Rules of the Supreme Court) provides, *inter alia*, that the party must raise by his pleading all such grounds of defence or reply, as the case may be, which if not raised "would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings as, for instance, fraud, prescription or limitation of time, release, payment, performance, or facts showing illegality of any kind, or reducing the claim or counterclaim unenforceable" That it is the duty of the defendant to raise in his defence all such grounds which if not raised would be likely to take the plaintiff by surprise or would raise issues of fact not arising out of the preceding pleading.

(2) (a) In the present case the defendants did not use the conventional words whereby contributory negligence is usually pleaded (viz: "The accident was caused or contributed to by the negligence of the plaintiff"), but, after

denying any negligence on their part, went on to allege that "*any injury and/or loss to the plaintiff was the result of her* own negligence"; and then they gave full particulars of the plaintiff's alleged negligence. In substance they pleaded *contributory negligence to the full extent.*

(b) Although we consider that contributory negligence should be specially pleaded and particulars thereof given in the defence, we do not think that in the way that the defence was drafted in the present case the plaintiff was, in any way, taken by surprise because full particulars of the defendants' defence were actually given in their pleading. The case was fought throughout on that basis and no objection was taken on plaintiff's behalf to the leading of evidence by the defendants to prove contributory negligence. It seems that this point was taken for the first time in the final address of plaintiff's counsel to the trial Court.

*Held,* (*III*) *with regard to the third ground of appeal viz. that the sum of* £4,000 *assessed as general damages by the trial Court was unreasonably low*:

(1) The trial Court awarded a global sum as general damages without apportioning it under the various heads of damage. They were entitled to do so.

(2) Having given the matter our best consideration we are not convinced either that the trial Court acted upon some wrong principle of law or that the amount awarded was so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled (*see*: *Flint* v. *Lovell, infra. Cacoyianni* v. *Papadopoullos, infra. Kemsley Newspapers* v. *Cyprus Wines and Spirits Co. Ltd. K.E.O., infra.*)

(3) For these reasons we would not be justified in disturbing the finding of the trial Court as to the amount of damages. In any event, we do not think that, taking all the circumstances into consideration, the amount of £4,000 assessed as general damages on the basis of full liability is on the low side.

*Held,* (*IV*) in the result the appeal is allowed and the judgment of the District Court varied to the extent that judgment for the plaintiff is entered in the sum of £2,500 agaist both defendants with costs for one advocate here and in the Court below.

1965
Nov 25 26
1966
Jan 27

TESSI CHRISTODOULOU
v
NICOS SAVVA MENICOU AND OTHERS

The cross-appeal is dismissed

*Appeal allowed Judgment of the District Court varied accordingly Order for costs as aforesaid Cross-appeal dismissed*

*Cases referred to*

*O Hara* v *Central S M T Co Ltd* (1941) S C 363

*Dooman* v *Scottish Motor Traction Ltd* (1950) S C 136,

*Parkinson* v *Liverpool Corporation* [1950] 1 All E R 367,

*Caswell* v *Powell Duffryn Associated Collieries Ltd* [1939] 3 All E R 722, at pp 730-731 per Lord Atkin and p 737 per Lord Wright

*Davies* v *Swan Motor Co (Swansea) Ltd*, [1949] 1 All E R 620,

*Nance* v *British Columbia Electric Railway Co Ltd* [1951] 2 All E R 448,

*The George Livanos* "The Times" Newspaper December 14, 1965

*The Owners of s s 'Pleiades* v *Page* [1891] A C 259,

*Jay and Sons* v *Veevers Ltd* [1946] 1 All E R 646,

*Hunt* v *Lovell* [1935] 1 K B 354 at p 360,

*Cacoyiannis* v *Papadopoullos* 18 C L R 205,

*Kemsley Newspapers Ltd* v *Cyprus Wines and Spirits Co Ltd* (1958) 23 C L R 1, at p 15

**Appeal.**

Appeal against the judgment of the District Court of Kyrenia (Hji Anastassiou, P D C, & Savvides, D J) dated the 19th May, 1965 (Action No 115/63) whereby the defendants were adjudged to pay to the plaintiff the sum of £2,000 by way of damages for injury sustained by her while a passenger in the bus of the second defendants driven by the first defendant

*St Pavlides* with *Ph Clerides*, for the appellant

*X Clerides*, for the respondent

*Cur adv vult*

The facts sufficiently appear in the judgment of the Court.

ZEKIA, P. . The judgment of the Court will be delivered by Mr. Justice Josephides.

JOSEPHIDES, J. : In this case the plaintiff claimed damages for injury sustained by her while a passenger in the bus of the second defendants by the negligent driving of the first defendant. The special damages were agreed at £1,000 and the Full District Court of Kyrenia assessed the general damages at £4,000 but found that the plaintiff was 60 per cent to blame for the accident, reduced the damages accordingly, and awarded her the sum of £2,000.

The plaintiff appealed against that judgment and the defendants cross-appealed.

The appeal was argued on behalf of the plaintiff on three grounds--

(a) that the finding of the trial Court as to the plaintiff's contributory negligence was not supported by the evidence;

(b) that, in any event, the Court could not in law find contributory negligence against the plaintiff as this had not been specially pleaded in the defence; and

(c) that the amount of general damages assessed by the Court was unreasonably low.

On behalf of the defendants it was argued that the finding of the trial Court that the first defendant contributed to the accident was wrong. The second ground in the defendants cross-appeal was that the award of general damages was excessive, but this was abandoned in the course of the hearing of the appeal.

The accident took place on the 5th December, 1962, at about 6 p.m. in Phryne Street, Lapithos. At the time the plaintiff, who was 17 years old, was attending the American Academy in Nicosia and was a passenger for reward in the bus of the second defendants which was being driven by the first defendant. The plaintiff was sitting in the third row of seats on the left hand side of the bus, close to the window, reading a magazine, which she was holding in both hands and in such a way as to have her lower left arm resting on the frame of the window. When the bus reached Lapithos,

and whilst it was proceeding in Makarios II Street, someone in the bus called out to the driver "Take Tessie home in Phryne Street". Tessie is the plaintiff's name. The driver (first defendant) swerved and drove into Phryne Street, and he had proceeded for a distance of about 33 ft. when the accident happened. This was at a point marked "B" on a sketch plan produced at the trial. When the bus had reached point "B" the driver heard someone calling out to him to stop. He did so and when he alighted he saw that the plaintiff's left arm had been injured and he then drove her to her house in that street.

As is usual in these accidents, there were two sharply conflicting versions but we shall revert to this presently.

Shortly after the accident, the plaintiff was taken to the clinic of Dr. Thalis Michaelides in Nicosia, where she was admitted at about 8.30 p.m. in the same evening. She was found to be suffering from a severe compound fracture of the left upper arm, an extensive wound on the lower arm with crushing of the skin, and severance and crushing of all muscles and the radial nerve. She was operated upon twice and both operations were very painful. Her treatment lasted from December, 1962, to August, 1963, but the bone did not unite and a bone grafting operation will be needed. That kind of operation is not always successful and more operations may have to be performed in order to put the arm right. With regard to her general condition, according to the medical evidence, she would be unable to do work of a type requiring fine movements and, although she could hold something, she could not exert pressure with her fingers. Her gripping power in the left hand had diminished and she would be handicapped in carrying out her housework. Ugly and repulsive scars would permanently disfigure her arm and she would need expensive plastic operations abroad (costing between £500 and £1,000) for skin grafting in order to reduce the scars.

Phryne Street in Lapithos, where the accident occurred, is a narrow street, its width at the junction with Makarios II Street being 13 feet and 6 inches, but it narrows down as one proceeds further into that street. On the left hand side there is a nine-foot wall beginning from the junction and extending beyond point "B" which is 33 feet and 10 inches from the junction. The wall protrudes slightly into the street forming an angle at that point. A piece of flesh was found at point

" B " by the police sergeant who investigated the case and it is common ground that the plaintiff's arm was crushed on the wall at that point. The width of the street there (point " B ") is 8 feet paved surface and 1 foot 9 inches berm made of big river stones (chakiles) and earth, with grass in between, and a water channel made of concrete next to the berm. The road at point " B " was bumpy and had potholes. The width of the bus was 7 feet 2 inches and its length 23 feet.

The driver was not acquainted with Phryne street and this was the first time that he was driving along it. The plaintiff's house is situated in that street and she was, therefore, well aware that it was a very narrow street at point " B ".

It was the plaintiff's version that while the first defendant was driving the bus in Makarios II street he swerved abruptly, and without stopping, first to the right into Phryne street, and then to the left, and in doing so he increased his speed to 15 miles per hour in reaching the narrow part of Phryne street at point " B ". In consequence of the sudden swerving there was a jerk in the bus and the plaintiff felt a sudden pain in her left arm which she saw dropping in her lap. The bus did not stop there but proceeded for another 15 yards and it then stopped after someone had called out to the driver to stop. It then proceeded on and stopped in front of plaintiff's house. When her mother came out she rushed at the driver shouting at him and threatening to kill him, whereupon the plaintiff, in order to calm her down, told her to stop making a scene as nobody was to blame and that she was going to explain to her later on. The plaintiff was emphatic that her arm was not protruding outside the bus.

On the other hand, the defendant's (driver's) version was that the plaintiff's arm was protruding and that he had to drive very close to the wall as the road was so narrow as to leave hardly any room for the bus to go through.

The trial Court after weighing the two versions found as a fact that there was no impact between the bus and the wall and that the appellant's left arm was protruding from the near side of the bus. They further found that, had the driver who was not at all acquainted with the road and who had swerved suddenly into Phryne street, proceeded more cautiously and reduced speed instead of increasing it, he would have been in a position to appreciate more the danger of approaching too near the wall and, since there was no other

traffic, he could have driven farther away from the wall as there was ample space even not allowing the usage of the width of the irrigation ditch. On this finding of fact the trial Court came to the conclusion that the driver was negligent in not realizing that the wall constituted an obstruction of such a nature that a prudent driver should have seen it and ought to have realized the fact that he would or might hit a passenger on the bus and ought to have given it a wider berth.

With regard to the plaintiff the trial Court found that the plaintiff's arm was protruding outside the bus immediately before the accident and they rejected her version that her arm was pushed outside the window of the bus because of the condition of the road and the sudden swerving of the bus. They were further satisfied that the spontaneous statement made by the plaintiff to her mother immediately after the accident that no one was to blame for it can only be interpreted to mean that the plaintiff must have known all along that she was negligent in opening the window of the bus and allowing her arm to project outside it.

Pausing there for a moment, we do not think that, in the circumstances of this case, it would be safe to draw any conclusions from the plaintiff's statement. At the time she was a girl of 17 and it is well known that girls of that age react differently from the ordinary, cool and reasonable man. It may well be that being in terrible pain herself from the crushing of her arm she wanted to spare her mother and appease her in order to avoid scenes. A girl of the plaintiff's age is normally very shy and sensitive and would not unnaturally try to avoid scenes.

On the above findings of fact, to the effect that the plaintiff suffered damage as the result partly of her own fault and partly of the fault of the driver, the trial Court went on to apportion the liability having regard to the plaintiff's share in the responsibility for the damage, and they came to the conclusion that on the facts of the case the proper apportionment of liability would be 60 per cent to the plaintiff and 40 per cent to the driver.

It is now convenient to deal with the plaintiff's final ground of appeal, to the effect that the finding of the trial Court that she was guilty of contributory negligence was not supported by the evidence, and with the cross-appeal of the defendants,

to the effect that the finding of the trial Court that the driver was guilty of contributory negligence was likewise not supported by the evidence.

In considering this matter it should be borne in mind that the conclusions reached by the trial Court were conclusions of fact. There is no doubt that this Court is competent to reverse findings of fact of the Courts below where there is no adequate evidence to support such findings; and to reverse conclusions based on an error in law. The question which falls for our determination is: Did the trial Court on the findings they made, if such findings were supported by the evidence, apply the law correctly?

Now, what is the law on this point? Section 51 of our Civil Wrongs Law, Cap. 148, which reproduces the provisions of the common law on the point, provides that negligence consists of doing some act which in the circumstances a reasonable prudent person would not do or failing to do some act which, in the circumstances, such person would do, and thereby causing damage. But compensation for such damage is only recoverable by a person to whom the person guilty of negligence owed a duty in the circumstances not to be negligent. The owner of a vehicle owes such a duty not to be negligent to all persons who are carried for reward in his vehicle (section 51 (2) (c)).

In two Scottish cases it was held that a sudden swerve which causes injury to a passenger is evidence of negligence: In *O'Hara* v. *Central S.M.T. Co. Ltd.*,1941 S.C. 363, a passenger was thrown from the platform of an omnibus when it swerved to avoid a pedestrian. The Court of Session held that the onus was on the defenders to displace the *prima facie* presumption of negligence arising from the swerve, and that they had discharged this onus. In *Doonan* v. *Scottish Motor Traction Ltd.*, 1950 S.C. 136, a passenger was injured when a bus swerved and hit a fence to avoid a child. The Court of Session held that the onus was on the defenders and that the admission by the pursuer of the presence of the child on the road did not affect this onus. In an English case *Parkinson* v. *Liverpool Corporation* [1950] 1 All E.R. 367, a standing passenger was injured when an omnibus suddenly stopped to avoid running over a dog. The Court of Appeal held that the driver had given an explanation showing that he was not negligent. It should be observed that these cases do not lay down any principles of law but they simply show

the particular application of the law of negligence to the facts of those cases.

The general principle would appear to be that those driving or having control of vehicles owe a duty of care to their passengers, and that if the plaintiff can show he was lawfully in the defendant's vehicle and suffered an accident of a type which would not normally have occurred if that vehicle had been properly driven, then the onus will be on the defendant to show he was not negligent. Each case of this kind must depend on its own facts, and the simple test to be applied is "did the driver in the circumstances act reasonably or unreasonably by doing something which a reasonable person would not do and leaving undone something a reasonable person would do?"

As regards contributory negligence, section 57 of our Civil Wrongs Law, reproduces the provisions of the English Law Reform (Contributory Negligence) Act, 1945, on the point. One of the leading cases on contributory negligence in England is the House of Lords case of *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1939] 3 All E.R. 722, although it was decided prior to the 1945 Act when contributory negligence was a complete defence. As Lord Atkin said (at page 730):

> "The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence".

And at page 731:

> "I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances. But, having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree

of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine".

And Lord Wright had this to say (at page 737) :

"Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury, or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus, a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre ; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins".

The effect of the *Caswell* decision is that the standard of negligence is in all cases not an absolute standard but is dependant upon the attendant circumstances, and in the case of contributory negligence consisting of neglect of one's own personal safety the Court must have regard to the distractions of the plaintiff or deceased at the time of the accident and to the strain and fatigue of the work which may make a workman give less thought to his personal safety than persons with less trying surroundings and preoccupations. Thus, though their is only one standard of negligence that standard is subject to qualification in all cases. The *Caswell* case was considered and applied in *Davies* v. *Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620, where it was held that, in any event, to constitute contributory negligence it was not necessary to show that the conduct of the passenger amounted to the breach of any duty which he owed to the defendant, but it was sufficient to show a lack of reasonable care by the passenger for his own safety. This principle was subsequently

1965
Nov. 25, 26
1966
Jan. 27
—
TESSI
CHRISTODOULOU
v.
NICOS SAVVA
MENICOU AND
OTHERS

applied in the Privy Council case of *Nance* v. *British Columbia Electric Railway Co. Ltd* [1951] 2 All E.R. 448.

In assessing degrees of liability the common sense approach had to be adopted. Evershed L.J., as he then was, in considering questions of apportionment of blame under the English Law Reform (Contributory Negligence) Act, 1945, in the *Davies* case (*supra*), at page 627 said : " In arriving at the conclusion at which I do arrive, I conceive it to be my duty to look at the whole facts of the case as they emerged at the trial both of the action and of the third party proceedings, and then, using common-sense, to try fairly to apportion the blame between the various participants in the catastrophe for the damage which the deceased suffered ". See also page 629 in the same Report.

The *Davies* case, which showed that the common sense approach had to be adopted, was referred to with approval in a recent case by the Court of Appeal in England : See " *The George Livanos* " (1965), " The Times " Newspaper, December 14.

Reverting now to the present case, learned counsel for the appellant invited our attention to a number of extracts from the evidence in support of his submission that the finding of the trial Court that the plaintiff was guilty of contributory negligence was not supported by the evidence. Likewise learned counsel for the respondent drew our attention to a number of extracts from the evidence in support of his submission that the driver was not guilty of negligence.

Having fully considered these submissions and having read the whole record of the evidence, we are of the view that in the present case there was adequate evidence to support the findings made by the trial Court that the driver was guilty of negligence in driving his bus and that the plaintiff was likewise guilty of contributory negligence. Having regard to the following circumstances, that is to say, that Phryne street was a very narrow street (9 feet 9 inches with the berm), that there was a projecting wall, that the bus was 7 feet 2 inches wide and that the road had potholes and was bumpy, we are of the view that the wall was a potential source of danger and that it was the duty of the driver to reduce speed and leave a reasonable safety margin between his bus and the wall, on the footing that owing to the condition of the road and the sudden swerve it was reasonable to foresee that the pas-

sengers in the bus might be knocked against the wall Instead of doing that, the driver increased speed and drove too close to the wall causing the plaintiff's arm to be crushed between the bus and the wall

The finding of the trial Court that the plaintiff although acquainted with the road did not use reasonable care for her own safety in leaving her arm protruding out of the bus, is adequately supported by the evidence It is true that if the plaintiff had not been in that position she would not have been injured, but adopting the common-sense approach, as laid down in the *Davies* case we are of the view that the plaintiff, in the circumstances of this case, was not to blame more than the driver, so that although we agree with all the other conclusions in the careful and well reasoned judgment of the trial Court, we do not feel that we can uphold their apportionment of liability as to 60 per cent to the plaintiff and 40 per cent to the driver We are of the view that, in the circumstances of this case, this liability should be apportioned equally, that is to say, 50 per cent to the plaintiff and 50 per cent to the driver

The *second* ground of appeal was that the trial Court was precluded from finding contributory negligence on the part of the plaintiff as it had not been specially pleaded In support of that ground learned counsel for the appellant referred to Order 19, rule 13, of our Civil Procedure Rules, which corresponds to the English Order 19, rule 15 (prior to the recent Revision of the English Rules of the Supreme Court), and to *Atkin*'s Court Forms and Precedents, volume 12, page 27 He also referred to the note under the heading Negligence' to the English Order 19 rule 15, in the Annual Practice 1961, at page 467, which states "Contributory negligence should be specially pleaded" It should be noted however, that this statement is based on the English case of *The Owners of S S "Pleiades" v Page* [1891] A C 259, which was decided prior to the enactment of the English Law Reform (Contributory Negligence) Act 1945 , but in *Atkin*'s *Court Forms* (*ubi supra*), at page 27, it is stated ' Contributory negligence must still be specially pleaded", although no case is quoted in support of that statement No case on-all-fours was cited by plaintiff's counsel and we have been unable to trace any ourselves In a case, however, tried by Lynskey J (*Jan & Sons v Peevers Ltd* [1946] 1 All E R 646), the claim and counterclaim arose out of a collision and *Jan & Sons* claimed damages from *Peevers Ltd* and the defen-

1965
Nov. 25, 26
1966
Jan. 27
—
Iosif
Christodoulou
v.
Nicos Savva
Mesiou and
Others

dants counterclaimed against the plaintiffs for damage to their motor lorry. It was found on the facts that the drivers of both vehicles were guilty of negligence, that the negligence of each contributed to the accident but that the driver of the plaintiffs lorry had the greater share of blame. Although contributory negligence was not expressly pleaded the Court held that under the Law Reform (Contributory Negligence) Act, 1945, both parties were able to succeed on their claim for damages notwithstanding their contributory negligence, with the result that the plaintiffs were only to recover one-third and the defendants two-thirds of the respective sums claimed by them.

Our rule 13 of Order 19, *inter alia*, provides that a party must raise by his pleading all such grounds of defence or reply, as the case may be, which if not raised "would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings as, for instance, fraud, prescription or limitation of time, release, payment, performance, or facts showing illegality of any kind, or rendering the claim or counterclaim unenforceable". It will thus be seen that it is the duty of the defendant to raise in his defence all such grounds which if not raised would be likely to take the plaintiff by surprise or would raise issues of fact not arising out of the preceding pleadings.

A defence pleading contributory negligence is usually drafted in the following way: "The accident was caused or contributed to by the negligence of the plaintiff," and then particulars of the plaintiff's negligence are given. See Bullen and Leake's Precedents of Pleadings, 11th edition, page 1081 No. 1026, and Atkin's Court Forms (*supra*), page 27, Form No. 20.

In the present case the defendants in the first paragraph of their defence denied generally that they were guilty of negligence and they went on to allege in the second paragraph that "any injury and/or loss to the plaintiff is the result of her own negligence"; and then they gave full particulars of the plaintiff's negligence in two paragraphs to the effect that, although the bus at the time was passing along a very narrow street, with buildings on either side, leaving only a few inches between the bus and wall, the plaintiff had her arm outside the bus and failed to put it inside and/or in such a position as to avoid the danger which was in any way obvious.

It will thus be seen that the defendants did not use the conventional words "or contributed to" by the negligence of the plaintiff, but they expressly denied any negligence and they expressly pleaded that the injury was the result of her own negligence as set out in detail in the particulars. That is to say, in substance they pleaded contributory negligence to the full extent. Although we consider that contributory negligence should be specially pleaded and particulars of the alleged negligence given in the defence, we do not think that in the way that the defence was drafted in the present case the plaintiff was, in any way, taken by surprise because full particulars of the defendants defence were actually given in their pleading. The case was fought throughout on that basis, and the record of the proceedings does not show that any objection was taken on plaintiff's behalf to the leading of evidence by the defendants to prove contributory negligence. It seems that this point was taken for the first time in the final address of plaintiff's counsel to the trial Court.

The *third* and *final ground* of appeal was that the sum of £4,000 assessed as general damages by the trial Court was unreasonably low. The trial Court awarded a global sum as general damages without apportioning it under the various heads of damage, which they were entitled to do.

The Court stated in their judgment that in assessing the damages they took into consideration the following: that at the time of the accident the plaintiff was a girl of 17 years of age and had been studying shorhand and typing, and that as a result of the accident she was prevented from completing her studies and working as a shorthand typist, and that her earning capacity was diminished as well as her choice of employment, the pain and suffering of two operations and the probable necessity of further operations of bone grafting with the consequential pain and suffering and the considerable expense, the ugly and repulsive scars that would permanently disfigure her arm and that she would need expensive plastic operation abroad for skin grafting in order to reduce the scars, the loss of amenities, such as sports and her being handicapped in the carrying out of her duties as a housewife and in doing other work requiring fine movements of the fingers, and, finally, the injury to her health arising out of the non-union of the fracture of the bone which has remained for a long period in inter-metallary nail and restriction of the movements of the fingers due to paralysis to the nerves.

1966
Nov. 25, 26
1966
Jan. 27
—
TESSI
CHRISTODOULOU
v.
NICOS SAVVA
MENELAOU AND
OTHERS

Appellant's counsel submitted that the trial Court did not take into sufficient consideration the evidence of Dr. T. Evdokas, a psychiatrist, whose evidence it was stated went much further than the irritability of the plaintiff as an after-effect of her injuries. This doctor stated that, in his opinion, irrespective of the plastic operations, the plaintiff would be handicapped psychologically and liable to develop inferiority complex and that, besides the emotional aspect of the scars, her prospects of marriage were prejudiced; but he added that a successful plastic operation would improve her psychological condition.

Having given the matter our best consideration we are not convinced either that the Court acted upon some wrong principle of law or that the amount awarded was so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled (*Flint* v. *Lovell* [1935] 1 K. B. 354 at page 360, C.A.; *Cacoyianni* v. *Papadopoullos*, 18 C. L. R. 205; and *Kemsley Newspapers Ltd.* v. *Cyprus Wines and Spirits Co. Ltd. K. E. O.* (1958) 23 C.L.R. 1 at page 15). For these reasons we would not be justified in disturbing the finding of the trial Court as to the amount of damages. In any event, we do not think that, taking all the circumstances into consideration, the amount of £4,000 assessed as general damages on the basis of full liability is on the low side.

In the result the appeal is allowed and the judgment of the District Court varied to the extent that judgment for the plaintiff is entered in the sum of £2,500 against both defendants with costs for one advocate here and in the Court below.

The cross-appeal is dismissed.

*Appeal allowed. Judgment of the District Court varied accordingly. Order for costs as aforesaid. Cross appeal dismissed.*