1969
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STELIOS
STAVROU
v.
GEORGHIOS
PAPADOPOULOS

[TRIANTAFYLLIDES, LOIZOU & HADJIANASTASSIOU JJ.]

STELIOS STAVROU,

Appellant - Plaintiff,

v.

GEORGHIOS PAPADOPOULOS,

Respondent - Defendant.

(*Civil Appeal No.* 4627).

Civil Wrongs—Negligence—Contributory negligence—Apportionment of liability—Road traffic accident—Trial Court's apportionment of liability that both parties were equally to blame clearly erroneous and wrong in principle—Respondent (defendant) more to blame in that he negotiated a bend at excessive speed—See also herebelow.

Negligence—Contributory negligence—Apportionment of liability—Principles upon which the Court of Appeal will interfere—The Court of Appeal should not consider itself free to substitute its own apportionment for that made by a trial Court, save where there is an error in principle or the apportionment is clearly erroneous—Fault in, and causative potency of the acts complained of should both be considered.

Apportionment of liability—See above.

Contributory negligence—See above.

Road Traffic accident—See above.

In this road accident case the trial Court found that both parties were equally to blame. On appeal by the plaintiff the Court reversing the apportionment made by the trial Court,—

Held, (Loizou J., dissenting):

(1) It is well established that an appellate Court should not consider itself free to substitute its own apportionment for that made by a trial Court, except in cases where there is some error in principle, or when such apportionment is clearly erroneous (see *inter alia, Brown and Another* v. *Thompson* [1968] 2 All E.R. 708, where a number of leading cases on the point are referred to).

(2) In our view the trial Court erred in assessing both the fault in and the causative potency of, the acts of the two drivers, and that it so erred in favour of the defendant (now respondent). The said apportionment is clearly erroneous and wrong in principle.

(3) (a) We find ourselves in the same position—in disagreeing with the assessment of the relevant situation as made by the trial Court—as the Court of Appeal in England found itself very recently in *Clarke* v. *Winchurch and Others* [1969] 1 All E.R. 275.

(b) We think that the proper apportionment is to hold 80% liable for the accident the respondent (defendant) and 20% the appellant (plaintiff).

Appeal allowed in part.

Cases referred to:

London Passenger Transport Board v. *Upson* [1949] A.C. 155 at p. 173, per Lord Uthwatt;

Brown and Another v. *Thompson* [1968] 2 All E.R. 708;

Clarke v. *Winchurch and Others* [1969] 1 All E.R. 275;

Miraflores and George Livanos and Others [1967] 1 A.C. 826;

British Fame v. *Macgregor* [1943] 1 All E.R. 33;

Panther and the Ericbank [1957] 1 All E.R. 641.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Malachtos P.D.C. and Stavrinakis D.J.) dated the 14th April, 1967 (Action No. 564/1965) whereby he was adjudged to pay to the defendant the sum of £533 damages for injuries which he received and damage caused to his car due to a collision of his car with plaintiff's car.

P. Sivitanides, for the appellant.

N. Mavronicolas, for the respondent.

Cur. adv. vult.

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The following judgments were read:

TRIANTAFYLLIDES, J.: This is the judgment of Mr. Justice HadjiAnastassiou and myself; Mr. Justice Loizou will be delivering a separate judgment.

In this case the appellant-plaintiff appeals against the judgment delivered by the District Court of Paphos, in civil action No. 564/65, on the 14th April, 1967.

The appellant sued the respondent defendant claiming compensation for damage caused to his bus, TX419, on the 17th December, 1964, in Yeroskipos village, on the Limassol-Paphos main road, through a collision with car BV470 owned and driven by the defendant; the bus of the appellant was being driven, at that time, by a driver authorized by the appellant so to do.

The respondent counterclaimed in respect of injuries which he received and damage which was caused to his car due to the collision.

It was agreed between the parties that, subject to the issue of liability being decided by the Court, the damages to which the appellant was entitled were £134.– and the damages to which the respondent was entitled were £1,200.–, on a full liability basis.

The trial Court determined the issue of liability by holding that the appellant's driver and the respondent were equally to blame for the collision, and, as a result, judgment was given in favour of the respondent, and against the appellant, for £533.– damages, and costs accordingly.

The substantial ground on which this appeal has been argued by the appellant is that the trial Court was wrong in finding negligent, at all, the driver of the appellant; or, at any rate, that the trial Court erred in finding that both drivers were equally to blame for the collision, and it was submitted that it should have been found that by far the greater blame lay with the respondent.

It is necessary to state, at this stage, some of the essential facts of this case:

As already mentioned, the collision took place in Yeroskipos village; that is, in a speed-limit area where the maximum permissible speed is 30 miles per hour.

The bus of the appellant was proceeding towards Paphos and the defendant was proceeding, in the opposite direction, towards Limassol.

The time was about 8.30 to 9 a.m.

The width of the asphalted part of the road, at the scene of the collision, is 18 feet, with a 10 feet wide berm on the right-hand side of the road (as one proceeds towards Limassol) and with a 2 feet wide berm on the left-hand side of the road; beyond this 2 feet wide berm there is a ditch 2 feet wide, and next to it a wall about 10 feet in height.

The respondent, just before the collision, had negotiated a bend, while the driver of the bus of the appellant, which was proceeding on a straight road towards the bend, had just swerved to his right in order to overtake a stationary cart, which occupied part of the 10 feet wide berm on his left, plus 2 feet of the asphalted part of the road; this cart was 136 feet away from the beginning of the bend, and the visibility from the cart towards the direction of the bend was 215 feet.

The bus of the appellant and the car of the respondent collided at a point 50 feet away from the stationary cart.

Just before the collision the respondent was driving with all four wheels of his car on the asphalted part of the road—without using the berm to his left at all—because stones had collapsed on to such berm from the aforementioned 10 feet high wall next to the road.

In its judgment the trial Court had this to say on the issue of the negligence of the two drivers:

> "After careful consideration of the evidence adduced we came to the conclusion that at the time the bus was overpassing the stationary cart the defendant was negotiating the bend. The driver of the bus in overpassing the cart drove to his right hand side of the road thus blocking the side of the defendant, who was necessarily placed in a dilemma.
>
> In our view it was the duty of the driver of the bus before attempting to overpass the stationary cart, although the road was clear at the time, to sound his horn since he was about to change side, in view of the relatively short distance between the cart and the bend.

We must say that without any hesitation we have accepted the evidence of the defendant on this point which evidence is strongly supported by the direction of the skidmarks of both vehicles, though on the question of the speed of the two vehicles, at the time, we rejected it.

There is no doubt in our minds that the speed of the defendant at the time he was negotiating the bend was well over the limit of 30 miles per hour. This is in our view his main contribution to the accident. This fact is clear from the evidence of the plaintiff which we accept on this point and which evidence is supported by the length of the skidmarks of the two vehicles and their distance from the point of impact taking into consideration the fact that the bus is a much heavier vehicle than the mercedes"—the car of the respondent.

In view of the above and having in mind all the other facts and circumstances of this case we think that both drivers are equally to blame for this accident and we therefore apportion the liability to 50% on each one of them".

Thus, one of the main elements of negligent conduct which the trial Court has found against the appellant's driver was the fact that he did not sound his horn, when he was about to swerve to his right in order to overtake the cart, at a "relatively short distance" from the bend.

Yet, the non-sounding of the horn, by the driver of the appellant's bus, had not been pleaded by the respondent, in support of his contention that appellant's driver was negligent; nor was it, at any later stage, made part of the respondent's case against the appellant; and there does not appear from the record that appellant's driver was ever cross-examined on this point, or that any evidence at all was adduced regarding the issue of whether such driver did or did not sound his horn at the material time.

The trial Court did state in its judgment—as quoted above—that it accepted the evidence of the respondent "on this point"; but it could not have meant that it accepted evidence which, in fact, was never given before it; so, it must have only meant that it accepted the evidence of the respondent that he found his way blocked by the bus of the appellant while it was overtaking the cart.

Actually, counsel for the respondent has, himself, not attempted, during the hearing of the appeal, to support the judgment of the trial Court on the basis of the non-sounding of the horn by the appellant's driver; on the contrary, counsel has submitted that the non-sounding of the horn was not regarded by the trial Court as being an element of negligent conduct on the part of the appellant's driver, and has contended that what the trial Court had to say on this point was stated by way of a mere observation; and that the finding of negligence against the appellant's driver was based on the fact that the said driver, while overtaking the stationary cart, blocked the respondent's way and placed him, thus, in a dilemma.

The fact remains, nevertheless, that the trial Court did find that the appellant's driver, before attempting to overtake the cart, had a "duty" to sound his horn; and in our opinion, it is obvious that the breach of the said duty, as found by the trial Court, must have weighed a lot with it when making the apportionment of liability in the way in which it has made it.

As already pointed out, however, no such breach of duty to sound the horn was pleaded, alleged, or proved during the proceedings; moreover, the appellant's driver, for all one knows, may have sounded his horn at the material time; nobody appears to have asked him about it during the hearing of the case; and nobody said anything to the contrary; it seems that, somehow, the trial Court assumed that he had not done so.

Thus, in this material respect, the trial Court has proceeded to make a finding which it was not called upon to make by the pleadings, or any other proper procedural step taken by the parties; and it has made such finding without any evidence at all to warrant it, acting, apparently, under some kind of misapprehension.

Furthermore, we are not in a position to agree with the learned Judges of the trial Court that the non-sounding, as such, of the horn by the appellant's driver could be treated as amounting, in the particular circumstances of this case, to negligent conduct on his part; he was at some distance away, yet, from the bend, and there was no need, or reason, for him to sound his horn because he was about to overtake a cart; especially, since, as found by the trial Court, "the road was clear at the time", i.e. the respondent was not yet in sight negotiating the bend.

What could be held to amount to negligent conduct on his part was the fact that he seems to have swerved out too much to his right, in overtaking the cart, so that he blocked, as found by the trial Court, the respondent's side of the road.

Of course, it might be said in favour of the appellant's driver that he was driving, at the material time, along a straight stretch of the road, that he had adequate visibility towards the direction in which he was proceeding, that when he was about to overtake the cart the respondent's car was not yet in sight, and that there was sufficient distance, and space, between the cart and the bend to enable avoidance of a collision with anyone negotiating the bend, from the opposite direction, without exceeding the 30 miles per hour speed-limit.

But the appellant's driver could not take it for granted that another driver would not come round that bend at an excessive speed, as respondent has actually done.

As Lord Uthwatt has said in *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, at p. 173: "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take". And Lord du Parcq had this to say, in the same case, at p. 176: "A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do".

So it could be said that the bus had to overtake the cart in such a manner as to leave room for a vehicle coming round the bend, at speed, to pass—and he could have done so in the light of the relative measurements—and should not have swerved so far to his right as to block the road more than necessary in the circumstances.

In our view, therefore, the appellant's driver was at fault but not in exactly the manner, and to the extent, found by the trial Court; he was much less at fault than the trial Judges concluded that he was.

On the other hand the Court below appears to have seriously minimized in importance the extent to which the respondent was at fault:

In doing so it erred in principle, because it treated the re-

spondent as having been placed in a dilemma through the fault of the appellant's driver, whereas, in our view, the dilemma was primarily of respondent's own making, due to the excessive speed at which he went round the bend in a speed-limit area; disabling, himself, thus, also, from getting out of such dilemma.

Otherwise, instead of swerving to his right, to his wrong side of the road, in an effort to avoid the collision, he would have been able to avoid such collision by keeping to his left, and proper side, and passing between the wall and the bus of the appellant, which, on sight of respondent's car, swerved immediately to the left, in order to make way for respondent's car to pass; instead, due to the speed at which the respondent was negligently and unlawfully travelling, he was not able to avoid the collision by keeping to his proper side, and he proceeded towards his wrong side of the road in a desperate effort to avoid such collision; and, in doing so, he applied his brakes very belatedly, when all hope was gone of averting the calamity otherwise.

In the light of the foregoing, there remains to be resolved the question as to whether or not this Court, on appeal, should interfere with the apportionment of liability made by the trial Court.

It is well established that an Appellate Court should not consider itself free to substitute its own apportionment for that made by a trial Court, except in cases where there is some error in principle, or when such apportionment is clearly erroneous (see, *inter alia*, *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708; where a number of leading cases on the point are referred to).

With the above duly in mind we have reached the conclusion, in the light of all the material before us in this case, that the trial Court's apportionment should be interfered with, as being clearly erroneous and wrong in principle; for all the reasons which we have endeavoured to explain in this judgment we are of the view that the trial Court erred in assessing both the fault in, and the causative potency of, the acts of the two drivers, and that it so erred in favour of the respondent and against the appellant.

We find ourselves in the same position—in disagreeing with the assessment of the relevant situation as made by the trial

Court—as the Court of Appeal in England found itself very recently in *Clarke* v. *Winchurch and Others* [1969] 1 All E.R. 275.

We think that the proper apportionment is to hold 80% liable for the collision the respondent and 20% liable therefor the appellant; actually, as it may be apparent from what we have said already in this judgment, it is *ex abundanti cautela* that we have decided not to absolve completely of liability the appellant.

This appeal should be allowed so that the order of the Court below be set aside and another order be made in its place ordening the appellant to pay to the respondent only £132.800 (that is, pay to the respondent 20% of his damage of £1200, namely, £240, after deducting therefrom 80% of his own damage of £134, namely, £107.200); regarding costs there should be no order as to costs in respect of the costs in the Court below, and the respondent should pay to the appellant half of the costs of this appeal.

LOIZOU, J.: Unfortunately, I differ from my brother Judges, but, as they have by their judgment varied the judgment of the Court below, I do not see much point in dealing with the matter at any length in a dissenting judgment.

The only issue before the trial Court, and before this Court, was the apportionment of the liability between the two drivers as the parties had, in the course of the hearing, agreed on the quantum of damages on a full liability basis. Having heard the case and considered the evidence the trial Court found the two drivers equally to blame and consequently apportioned the liability between them on a 50 per cent basis.

The facts as found by the trial Court are set out in the majority judgment and I need not repeat them here in any detail; but I may be allowed to repeat the conclusions reached by the trial Court which are to be found at p. 53 of the record.

> "After careful consideration" they say "of the evidence adduced we came to the conclusion that at the time the bus was overpassing the stationary cart the defendant was negotiating the bend. The driver of the bus in overpassing the cart drove to his right hand side of the road thus blocking the side of the defendant, who was necessarily placed in a dilemma.

In our view it was the duty of the driver of the bus before attempting to overpass the stationary cart, although the road was clear at the time, to sound his horn since he was about to change side, in view of the relatively short distance between the cart and the bend.

We must say that without any hesitation we have accepted the evidence of the defendant on this point which evidence is strongly supported by the direction of the skidmarks of both vehicles, though on the question of the speed of the two vehicles, at the time, we rejected it.

There is no doubt in our minds that the speed of the defendant at the time he was negotiating the bend was well over the limit of 30 miles per hour. This is in our view his main contribution to the accident.....".

Now, with regard to the statement that it was the appellant's duty to sound his horn no evidence at all was adduced at the trial as to whether he did or did not sound his horn, or, to be more precise, no such evidence appears on the record; therefore, I have to assume that nothing was said about the sounding of the horn.

The question is whether in the light of the rest of the evidence and facts, as found by the trial Court, this unwarranted statement is sufficient reason to justify interference by this Court with the apportionment of liability. The fact remains that the appellant when overpassing the stationary cart drove so far to his right as to block the way of a vehicle coming from the opposite direction; that at the moment the appellant was doing this the respondent, travelling in the opposite direction, was negotiating the bend the beginning of which, on the side of the stationary cart, was 136 feet away from it. Even if we assume that the respondent was in a position to see the bus from a distance of a 136 feet, which does not seem to be the case because obviously the curve must have been obstructing respondent's view, in view of the position of the two vehicles at the time, and the same of course applies to the driver of the appellant's bus, such distance was not very much for two vehicles travelling from opposite directions; even if they were both going at a normal speed of 30 m.p.h. it would only take them approximately one and a half seconds to cover the distance.

Bearing in mind the size and weight of appellant's bus (which

would materially increase the distance required for it to pull up) and taking it for granted that its speed was 20 m.p.h. as the driver P.W. 3, Achilleas Djazas has stated in evidence (p. 24 of the record), on the one hand, and the fact that the respondent was travelling at a speed "well over the limit of 30 miles per hour" as found by the trial Court, on the other hand, it becomes at once apparent that the distance of 136 feet was not even sufficient thinking and braking distance. Therefore, respondent's first reaction to swerve to his right and accelerate in order to avoid a head-on collision and to apply his brakes only when he saw the bus turning to the same direction was not, in my view, unreasonable.

Coming back to the question of the sounding of the horn now, it is, to my mind, quite clear that the reference to appellant's duty to sound his horn was clearly in relation to his duty to any vehicle coming round the bend and not to the stationary cart with the animal yoked on it, which is the meaning that the appellant tried to attribute to this statement. But, be that as it may, I do not think that, in the light of the circumstances of this case and especially of the time that the two vehicles would take to cover the distance between them from the moment the driver of each vehicle was in a position to see the other vehicle, the sounding of the horn could be of much or any significance or consequence.

If we disregard completely this question of the sounding of the horn what remains is appellant's fault in blocking respondent's path and respondent's fault in going at a speed "well over the limit of 30 miles per hour" in a speed-limit area.

There is ample legal authority for the proposition that in apportioning liability regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness.

Lord Pearce in the course of his speech in the House of Lords in the *Miraflores and George Livanos and Others* [1967] 1 A.C. p. 826 after quoting a passage from the judgment of Willmer, J., in the *Panther and The Ericbank*, an Admiralty case reported in [1957] 1 All E.R. p. 641, on the question of causation, had this to say:

> ".....the investigation is concerned with 'fault' which includes blameworthiness as well as causation; and no

true apportionment can be reached unless both these factors are borne in mind".

On the question of review, on appeal, of the apportionment of blame found by the trial Court it was held in *British Fame* v. *Macgregor* [1943] 1 All E.R. p. 33, an Admiralty decision which went to the House of Lords, that the finding of the trial Judge as to the degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in very exceptional circumstances.

Viscount Simon, L.C., in the course of his speech said:

"The Court of Appeal has thought it right, while maintaining the view that both ships are to blame, to vary the distribution of the blame by putting two-thirds of it on the British Fame and relieving the Macgregor so that the Macgregor has to carry only the remaining one-third. It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge. I do not, of course, say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but on examination some of those reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden. If there were a case in which the judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be, I think—a reason for considering whether there should be a change made on appeal. But subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare".

Lord Wright in the same case had this to say:

"With the greatest respect to the Court of Appeal, and without in any way expressing any conclusion on the actual decision at which they there arrived, I venture to think that their statement of principle is not quite in accord with

the authorities, so far as laid down up to the present. *The Umtali*, which is a decision of this House, was not cited to the Court of Appeal, but there was cited *The Karamea*, in which LORD STERNDALE, M.R., a great authority on these matters dealing with this question of apprortionment says:

.....'I think it would need a very strong case indeed to induce this Court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it'.

WARRINGTON, L.J., is reported as saying:

'It may well be and probably is the case that if the Court arrives at the same conclusion both on the facts and in law it would not interfere merely because the learned judge in his discretion has given proportions which this Court thinks it would not have given'."

SCRUTTON, L.J., says:

" '.....if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships.....'.

It seems to me that these observations of three very eminent judges are quite in accord with what was said in *The Umtali*, and with what Viscount Simon, L.C., has just said. I do not say, any more than they did, that under proper conditions, such as those indicated by the three members of the Court of Appeal in *The Karamea*, the judge's apportionment might not be interfered with by an appellate Court; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it

involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the Courts have warned an appellate Court against interfering, save in very exceptional circumstances, with the judge's apportionment".

In the more recent case of *Brown and Another* v. *Thompson* [1968] 2 All E.R. p. 708, a Court of Appeal case, it was held that "in apportioning liability under the Law Reform (Contributory Negligence) Act, 1945, section 1(1) the emphasis is on fault and not solely on the causative potency of the acts of either party; where a trial judge has apportioned liability accordingly, his apportionment should not be interfered with on appeal, save in exceptional cases (as where there is some error in principle or the apportionment is clearly erroneous), and an appellate Court will not consider itself free to substitute its own discretion for that made by the trial Judge".

With the above considerations in mind let me now turn to the present case. The only ground on which the judgment of the trial Court can be criticized is the reference to the sounding of the horn—or rather to the non-sounding of the horn by the driver of the bus; and the question that has to be considered is whether, in the circumstances, this fact is so vital or could have such a bearing on the case as to warrant revision by this Court of the distribution of blame.

With the greatest respect I am clearly of opinion that the answer must be in the negative. At the risk of being tedious I feel that I must here repeat briefly certain relevant facts: The appellant's driver was at fault in that in passing by the stationary cart he swerved so much to his offside as to substantially block the passage for the respondent instead of leaving sufficient room for his vehicle to pass as he had a duty to do—and as he could safely have done in the light of the relative measurements. The respondent was also at fault in that he was overspeeding; the distance that separated the two vehicles from the moment that the two drivers could see each other could not have been more than 136 feet or in terms of time one and a half seconds at the maximum, which having regard to the speed and weight of the two vehicles was not even sufficient thinking and braking distance.

In the light of the above it seems to me that the non-sounding of the horn can neither be considered so vital nor that it

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could have had such, or any, bearing on the assessment of the share of each driver's fault, as to warrant interference with the trial Court's apportionment of liability.

In the circumstances of this case I am of the opinion that the conclusion that both drivers were equally to blame should stand and, for my part, I would not interfere with the apportionment of liability made by the trial Court.

I would, therefore, dismiss this appeal with costs.

TRIANTAFYLLIDES, J.: In the result this appeal is allowed on the terms set out in the majority judgment of this Court.

Appeal allowed in part; order for costs as aforesaid.