1969
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ODYSSEAS PATSALIDES
v.
KIKI YIAPANI AND ANOTHER

[TRIANTAFYLLIDES, LOIZOU & HADJIANASTASSIOU JJ.]

ODYSSEAS PATSALIDES,

Appellant—Defendant,

v.

KIKI YIAPANI AND ANOTHER,

Respondents—Plaintiffs.

(*Civil Appeal No.* 4632).

Civil Wrongs—Road Traffic—Collision of motor vehicles at a cross-road controlled by traffic lights—Negligence—Breach of statutory duty—Contributory negligence—Duty owed by driver crossing a cross-road with lights in his favour, to traffic crossing in disobedience to such lights—Damages—Injury to property (in this case a motor car) not owned by the driver-plaintiff—Such damages not recoverable in the absence of a contract of bailment, express or implied, between said driver-plaintiff and the owner of the car, properly pleaded and proved—The fact that the said driver was the wife of the owner raises no presumption that such contract of bailment existed—The Contract Law, Cap. 149 *sections* 106(1)(*b*) *and* 140.

Contract—Bailment—Section 106(1)(*b*) *of the Contract Law, Cap.* 149*—Bailee—Injury to goods bailed caused by third persons—Bailee entitled to use such remedies as the owner might have used in the like case if no bailment had been made—Section* 140 *of Cap.* 149 supra*—Finding of bailment in the present case set aside as such bailment was not pleaded or proved.*

Negligence—Breach of statutory duty—Contributory negligence—See above under Civil Wrongs.

Road Traffic—Crossing cross-road controlled by traffic-lights—Collision of motor cars at such cross-road—Respective duties owed—See above under Civil Wrongs.

Damages—Damage to property not owned by the plaintiff—Remedies—Bailment—Bailee—See above under Civil Wrongs; also see above under Contract.

Bailment—Bailee—Injury to goods bailed—Remedies available to bailee—See above under Contract.

Practice—Pleadings—Statement of Claim—Amendment—Departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or; at all events, accompanied by the relevant amendment—Amendment—Discretion of the Court—Issue not pleaded—Continuous failure to apply for an amendment—Pleadings should be amended and not merely be treated as amended—Court of Appeal declined, in the circumstances of the instant case, to order amendment of the statement of claim—Although it had powers to order such amendment—See, also, immediately herebelow.

Practice—Appeal—Pleadings—Amendment—Power of the Court of Appeal to direct amendment of pleadings even at the stage of delivery of judgment on appeal—Discretionary powers—Considerations applicable—See, also, above, under Practice.

Pleadings—Amendment—See above under Practice.

Civil Procedure—Appeal—Findings of fact made by trial Courts—Principles upon which the Appellate Court will interfere.

Findings of fact—See above under Civil Procedure.

This is an appeal by the defendant against a judgment of the District Court of Nicosia, whereby he was adjudged to pay to the two plaintiffs (now respondents) £445 and £400, respectively, by way of damages in relation to a road-traffic collision which occurred in Nicosia on the 16th October, 1965, through the negligence, as found by the trial Court, of the appellant, defendant in the action. At the material time respondent 1 (plaintiff 1) was driving her husband's car along Evagoras Avenue with respondent 2 (plaintiff 2) sitting next to her, and the appellant (defendant) was driving his car along Diagoras and Passiades Streets towards Evagoras Avenue. The collision of the two cars occurred at the cross-road of Evagoras Avenue with Diagoras and Passiades Streets, a cross-road controlled by traffic lights. The appellant was found by the trial Court solely to blame for this collision in that he proceeded across the said cross-road while the traffic lights were against him. Out of the sum of £445 awarded to respondent 1 (*supra*) an amount of £110 represented compensation for the damage caused to her husband's car, driven at the time by her as aforesaid. In the statement of claim this car was described as "her car"; and it was only at the trial that it cropped up that it belonged to her husband. No "bailment" of this car was ever pleaded and such evidence as was allowed to be given to that effect was indeed very vague and scanty.

Counsel for the appellant submitted that:

(A) The finding of the trial Court that the appellant was negligent in that he proceeded across the aforesaid cross-road when the traffic lights were against him was not warranted by the evidence; or the Court erred in believing the witnesses who said so.

(B) Even if the appellant did cross with the traffic lights against him, respondent 1 should, nevertheless, have been found to have contributed to the collision through her own negligence in that she failed to keep a proper look-out and/or to take avoiding action in order to prevent collision.

(C) Regarding the sum of £110 damages awarded to respondent 1 in respect of the damage caused to the car she was driving at the time (*supra*), the trial Court erred in awarding such damages for the following reason: In view of the undisputed fact that the car in question was the property of respondent's husband, the wife (respondent 1) could not pursue any such claim otherwise than as "bailee" of the car, and this in accordance with the provisions of section 140 of the Contract Law, Cap. 149 (*infra*); but there was no evidence that respondent 1 was at the time "bailee" of the car under a contract of bailment either express or implied; in any case such contract of bailment under section 106(1)(b) of Cap. 149 (*supra*) was never pleaded.

Section 140 of the Contract Law, Cap. 149, reads as follows:

> "140. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or *does* them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring legal proceedings against a third person for deprivation or injury."

The Court, rejecting submissions (A) and (B) (*supra*) but accepting submission (C) (*supra*):—

Held, I. As to submission(*A*) supra *regarding the finding of negligence.*

(1) Per Triantafyllides J. (Loizou J. concurring):

I have not been satisfied that the finding of the Court below to the effect that the appellant was negligent in that he pro-

ceeded across the cross-road while the traffic-lights were against him, was not warranted, or that the trial Court erred in accepting as true evidence which has led it to the said finding.

(3) Per HadjiAnastassiou J.:

The principles on which this Court decides appeals on the credibility of witnesses are well settled and I need not enter into them in detail. It must be shown that the trial Judge was wrong and the onus is on the appellant to persuade this Court. Matters of credibility are within the province of the trial Judge and if, on the evidence before him it was reasonably open to him to make the finding which he did, then this Court will not interfere. In this case I have not been persuaded that on the evidence before the trial Court it was not open to them to make the findings which they did.

Held, II. As to submission (B) supra *regarding contributory negligence:*

(1) Per Triantafyllides J. (Loizou J. concurring):

In the light of the authorities and on the material on record, I am of the opinion that the appellant has failed, by far to discharge the burden of establishing that the trial Court ought to have found respondent 1 guilty of contributory negligence; especially as the space of time from the moment when respondent could have noticed the appellant's car coming towards her until the collision itself was an extremely short one, and as there was scarcely any time, or room, for her to manoeuvre away from the appellant's car—crossing with the traffic lights against its driver, the appellant—so as to avoid the collision (See *Joseph Eva Ltd.* v. *Reeves* [1938] 2 All E.R. 115, at pp. 118 and 124 per Sir Wilfrid Greene M.R. and Scott L.J., respectively; *Rowlands* v. *Fisher* [1959] C.A. (reported in Bingham's Modern Cases on Negligence, 2nd ed. at p. 185); *Davis* v. *Hassan* C.A. (Reported in the "Times" newspaper of January 13, 1967; and in The New Law Journal, 1967, at p. 72).

(2) Per Hadjianastassiou J.:

(a) The standard of care in contributory negligence is what is reasonable in the particular circumstances of each case; and this in most cases corresponds to the standard of care in negligence "although contributory negligence does not depend on a duty of care, it does depend on forseeability. Just as an actionable negligence requires the forseeability of harm to

others, so contributory negligence requires the forseeability of harm to oneself". (*See Jones* v. *Livox Quarries Ltd. Same* v. *Same* [1952] 2 Q.B. 608, at p. 615, per Denning L.J. (as he then was).

(b) It is possible, however, that in certain cases the position is different. Where the defendant is charged — as in this case — with the breach of a statutory duty, the standard by which the plaintiff's contributory negligence is judged appears to be less exacting than that used for measuring ordinary negligence (See *Eva* case, *supra*; *Rowlands* case, *supra*; and *Davis* case, *supra*).

(c) The onus is on the appellant to establish contributory negligence. Going through the record I am satisfied that the appellant failed to discharge the onus cast on him. From the evidence I have reached the conclusion that the inference drawn by the trial Court was the right one i.e. that the appellant was solely to blame for the accident; because the respondent 1 had seen the appellant's car crossing with the traffic lights against him (the appellant) from a distance of 4 yards only and because there was hardly any time or room — in view of the pavement and the electric pole — for the respondent to try and avoid the accident.

Held, III. As to submission (C) supra *regarding the issue of* damages (£110) in respect of the damage to the *Motor-car driven at the time by respondent* 1 *and belonging to her husband:*

(1) Per Triantafyllides J. (Loizou J. concurring):

(A) As matters actually are in these proceedings, I am of the view that the award of £110 damages in question cannot be sustained for the following reasons:

(a) In the statement of claim it was stated that at the material time respondent 1 was driving her car.

(b) It was only in her evidence that respondent 1 stated that the car was registered in her husband's name, but, then, she did not explain how it came to be in her possession (whether with or without the knowledge or consent of her husband).

(c) Until the conclusion of the trial no application or order was made for the statement of claim to be amended so as to conform, in this respect, with the reality of the matter.

(d) The trial Court found that the plaintiff 1 (respondent 1) was entitled to pursue her claim under the item in question (*viz.* damages to her husband's car) because at the time she was a "bailee of her husband and she was under an obligation to return it to him"; she was, therefore, entitled to rely on section 140 of the Contract Law, Cap. 149. But the trial Court gave no indication about the material on which it based its finding of the existence of a contract of bailment between respondent 1 and her husband; nor did it direct any amendment of the statement of claim so as to bring it into conformity with the situation established by its judgment.

(e) By his notice of appeal, the appellant raised the issue in question; yet until the time when we reserved judgment in this appeal no application for amendment of the statement of claim, in this connection, was made by respondent 1.

(f) On the authorities, if the award in question in favour of respondent 1 were to be allowed to stand then the statement of claim would have to be amended accordingly (See: *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332, at p. 347 per Lord Russell of Killowen; *Lagioudi* v. *Georghiou*, 23 C.L.R. 199, at p. 202; *Kemal* v. *Kasti*, 1962 C.L.R. 317, at p. 323; *Stylianou* v. *Photiades*, 21 C.L.R. 60, at p. 80; Cf. *Iordanou* v. *Anyftos*, 24 C.L.R. 97, at p. 106.

(g) I do bear in mind that this Court can in a proper case direct an amendment of pleadings even at the stage of delivering judgment on appeal (See, *inter alia*, *Kemal* v. *Kasti supra*). But in the circumstances of this case I would not be disposed to exercise my discretion in favour of respondent 1.

(B) This appeal should, therefore, be allowed in part and the amount of damages in favour of respondent 1 should be reduced by £110 i.e. by the amount awarded in respect of the damages to the car of her husband.

(2) Per Hadjianastassiou J.

(a) The finding of the trial Court that at the material time respondent 1 was the bailee of her husband's car is not supported by any evidence.

(b) One cannot presume that a contract of bailment is created simply because the wife was found driving her husband's car.

(c) I would therefore allow the appeal in part and set aside the order of the trial court to the extent of £110 as regards respondent 1.

Appeal allowed in part. No order for costs in the appeal. Order for costs made by the Court below to remain intact.

Cases referred to:

Portocallis v. *Hji Theodossi*, 1962 C.L.R. 1 *distinguished;*

Joseph Eva Ltd. v. *Reeves* [1938] 2 All E.R. 115, at pp. 118 and 124, per Sir Wilfrid Greene M.R. and Scott L.J. respectively;

Rowlands v. *Fisher* [1959] C.A. (reported in Bingham's Modern Cases on Negligence, 2nd ed. at p. 185);

London Passenger Transport Board v. *Moscrop* [1942] A.C. 332, at p. 347 per Lord Russell of Killowen;

Laghoudi v. *Georghiou*, 23 C.L.R. 199 at p. 202;

Kemal v. *Kasti*, 1962 C.L.R. 317 at p. 323;

Stylianou v. *Photiades*, 21 C.L.R. 60 at p. 80;

Iordanou v. *Anyftos*, 24 C.L.R. 97, at p. 106;

Jones v. *Livox Quarries Ltd. Same* v. *Same* [1952] 2 Q.B. 608, at p. 615, per Denning L.J. as he then was;

Davis v. *Hassan*, C.A. (reported in the "Times" newspaper of January 13, 1967; and, also, in the New Law Journal, 1967 p. 72).

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Evangelides Ag. D.J. & Demetriades D.J.) dated the 25th April, 1967 (Action No. 349/66) whereby he

was ordered to pay to the two plaintiffs £445 and £400, respectively, by way of damages in relation to a traffic collision.

L. Papaphilippou, for the appellant.

A. Paikkos, for the respondents.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES, J.: In this case the appellant-defendant appeals against the judgment given, on the 25th April, 1967, by the District Court of Nicosia, in civil action 349/66; by virtue of such judgment the appellant was ordered to pay to the respondents £445 and £400, respectively, by way of damages in relation to a traffic collision which occurred on the 16th October, 1965, through the negligence, as found by the trial Court, of the appellant.

It is common ground that in the afternoon of that day respondent 1 was driving car X651 along Evagoras Avenue, in Nicosia, with respondent 2 sitting next to her. At the same time the appellant was driving car CB849 along Diagoras Street, towards Evagoras Avenue, with the intention of crossing it and proceeding beyond it, along Passiades Street, which is a continuation, in practically a straight line, of Diagoras Street.

At the cross-road of Evagoras Avenue with Diagoras and Passiades Streets (which is a cross-road controlled by traffic-lights) the cars driven by the appellant and respondent 1 collided; as a result both respondents suffered personal injuries and the car driven by respondent 1 was damaged.

The main issue before the trial Court was the issue of the liability for the collision; and by the judgment under appeal such issue was decided against the appellant, who was found solely to blame for the collision, in that he proceeded across the cross-road when the traffic-lights were against him and in favour of respondent 1.

Having examined all the evidence before the Court, in the light of the submissions of learned counsel for the appellant, I have not been satisfied that the finding of the Court below, to the effect that the appellant was negligent, in that he proceeded across the cross-road while the traffic-lights were against

him, was not warranted, or that such Court erred in accepting as true evidence which has led it to the said finding.

Counsel for the appellant has, next, argued that even if the appellant did cross with the traffic-lights against him, respondent 1 should, nevertheless, have been found to have contributed to the collision through her own negligence, in that she failed to keep a proper look-out and, thus, did not see the appellant in time; and in that she failed, also, to take avoiding action in order to prevent the collision.

In this respect this Court has been referred by counsel for the appellant to the cases of *Portocallis* v. *Hji Theodossi* 1962 C.L.R. 1, *Joseph Eva, Ltd.* v. *Reeves* [1938] 2 All E.R. 115 and *Rowlands* v. *Fisher* [1959] C.A. (reported in Bingham's Modern Cases on Negligence, 2nd ed., at p. 185).

Though the duty of keeping a proper look-out is dealt with in the judgments in the *Portocallis* case, the facts there were quite different from the facts of the present case and I have not found anything therein which would be treated as being of real assistance to me in determining this appeal.

The *Eva* case was a case of a collision at a cross-road controlled by traffic-lights, as is the present case; it was there laid down that a driver crossing a cross-road with the lights in his favour owes no duty to traffic crossing in disobedience to the lights, beyond a duty, if he in fact sees such traffic, to take all reasonable steps to avoid a collision.

In his judgment Sir Wilfrid Greene, M.R., said (at p. 118): "In my opinion, Reeves was entitled to assume that traffic approaching the crossing from the west would act in obedience to the statutory regulations, and he was not bound to assume, or provide for, the case of an east-bound vehicle entering the crossing in disobedience to the red light. This does not, of course, mean that, if he had noticed the appellants' van in time, it was not his duty to take all reasonably possible steps to avoid coming into collision with it, notwithstanding that the appellants' van was acting in breach of the regulations. In fact, however, he did not see it, and I do not see how it can be said that he was under any obligation to assume the possibility of its presence".

And Scott, L.J., had this to say in his judgment (at p.124): ".....if a car, with the green just opened in its favour, sum-

moning it forward, had to keep a look-out for traffic from the red direction, it would prevent that automatic resumption of forward movement by the vehicles temporarily held up which is vital to the free circulation of traffic. To hold that such a car owes a duty to a law-breaker crossing from the red direction would be to undermine the whole system of light-regulation, and to defeat an important part of its purpose".

In commenting on the *Eva* case, in the *Rowlands* case (which was again a case where a driver crossing with the traffic-lights in his favour was absolved of liability for a collision with a driver crossing with the lights against him) Hodson, L.J., remarked that the *Eva* case does not absolve drivers crossing with the lights in their favour from keeping a look-out, but "it does not cast a heavy burden on them of anticipating such danger as might arise from the action of someone who is unlawfully on the crossing".

It is, also, useful to refer to the case of *Davis* v. *Hassan*, decided in England by the Court of Appeal on the 12th January, 1967, (and reported in The Times of January 13, 1967; see, also, The New Law Journal, 1967, p. 72).

That was yet another case of a collision at an intersection controlled by traffic-lights and the plaintiff was hit by defendant's car while she was crossing with the traffic-lights in her favour; the defendant's allegation being that the lights turned in his favour before the plaintiff's car was out of the intersection.

The following passages are from the report in the New Law Journal (*supra*):

"The Judge held that he was bound as a matter of law to decide wholly in the plaintiff's favour (*Eva* v. *Reeves* [1938] 2 All E.R. 115) though had that not been the position, he would have found the plaintiff one-third to blame."

"It was held" on appeal "that every case of negligence had to be decided on its own particular facts and the Judge, if he had not erroneously held himself bound in law to find only in favour of the plaintiff would have found both drivers to blame, though he had given no reasons for holding the plaintiff to be blameworthy. On the Judge's findings it could not be said that the plaintiff was not entitled to proceed past a traffic light which was in her favour; the only ground for

imputing negligence to her would be that she ought to have seen the defendant's car approaching. Although the fact that the traffic light was in her favour entitled her to be judged leniently, that fact did not entitle her to drive on even in the face of evident danger. The intersection was a large one and since the plaintiff's attention had to be focused on the traffic lights, she could not be accused of negligence for not seeing the defendant's car approaching until the last moment. The defendant was wholly to blame and the appeal would be dismissed on the facts of the case, and not on the question of law on which it had erroneously been decided in the Court below".

With the foregoing in mind, I am of the opinion, on the material before me, that the appellant has failed, by far, to discharge the burden of establishing that the trial Court ought to have found respondent 1 guilty of contributory negligence; especially as the space of time from the moment when respondent 1 could have noticed the appellant's car coming towards her until the collision itself was an extremely short one, and as there was scarcely any time, or room, for her to manoeuvre away from the appellant's car, so as to avoid the collision.

The remaining two issues, in this appeal, relate to the question of damages:

The first one relates to an amount of £60 which was awarded as damages in favour of respondent 1, because of her loss of earnings for two months, as a cook and almoner, at the clinic of Dr. Kollitsis, who is her brother. It has been submitted by counsel for the appellant that respondent 1 was not, in fact, employed, on remuneration, by her brother, at the time of the collision. But the trial Court had the benefit of hearing and seeing Dr. Kollitsis, himself, giving evidence on this point, and once it accepted the existence of a master and servant relationship between Dr. Kollitsis and respondent 1, at a salary of £30 per month, I see no adequate reason for which to interfere with the relevant finding of the trial Court.

The second issue relates to an amount of £110 awarded to respondent 1 as damages in respect of the damage caused, by the collision, to the car which she was driving.

It is common ground that this vehicle was not registered

in her name at the time, but in the name of her husband who was away from Cyprus; and that it was his property.

I hasten to say that, in a situation such as the present one, it does not, necessarily, follow that a plainttiff would, always, be precluded from claiming, and recovering, damages for damage to the car of another person which he happened to be driving at the time of a traffic collision.

But, as matters actually are in these proceedings, I am not of the view that the award in question can be sustained; and this for the following reasons:—

In the statement of claim it was stated (see paragraph 4) that at the material time respondent 1 was driving *her* car.

When respondent 1 gave evidence (preparatory to the hearing, under Order 36, rule 5 of the Civil Procedure Rules) she said: "I was driving my small Fiat car X651....." and then she described how the collision occurred. Then she stated, in cross-examination, that: "the car is registered in my husband's name", but she did not explain how it came to be in her possession (whether with or without the knowledge or consent of her husband).

When counsel for respondents called evidence at the trial regarding the damage to the car in question, counsel for the appellant objected to it, on the ground, *inter alia*, that respondent 1 was not the owner of the vehicle. Counsel for respondents conceded that in fact the car belonged to the husband of respondent 1. The trial Court admitted the evidence and stated in its relevant ruling: "We find that the third ground" — that of the ownership of the vehicle — "is not a question of admissibility of evidence, but it will be a question to be decided at the end of the trial whether she is entitled to recover or not in view of the fact that she is not the registered owner of the car".

Until the conclusion of the trial no application, or Order, was made for the statement of the claim to be amended so as to conform, in this respect, with the reality of the matter.

Then, in its judgment, the Court below had this to say:

> "We find that the plaintiff" — respondent 1 — is entitled to pursue the claim under this item because at the time she

was driving the car she was a bailee of her husband and she was under an obligation to return it to him. S. 140 of Cap. 149, provides that if a third person does injury to goods bailed, then the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring legal proceedings against a third person for such injury".

But the trial Court gave no indication about the material on which it based its finding of the existence of a contract of bailment between respondent 1 and her husband; nor did it direct any amendment of the statement of claim so as to bring it into conformity with the situation established, as above, by its judgment.

By the Notice of appeal (ground (c)) the appellant raised the issue that, in the circumstances, respondent 1 was not entitled to recover in respect of the damage caused to the car of her husband; yet until the time when we reserved judgment in this appeal no application for amendment of the statement of claim, in this connection, was made by respondent's 1 side.

In *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332, Lord Russell of Killowen said (at p. 347):—

> "Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended'. They should be amended in fact".

This dictum was adopted in Cyprus in, inter alia, *Laghoudi* v. *Georghiou*, 23 C.L.R. 199, at p. 202, *Kemal* v. *Kasti*, 1962 C.L.R. 317, at p. 323, as well as in *Stylianou* v. *Photiades* XXI C.L.R. 60, at p. 80 (where, apparently, through an oversight, it was erroneously attributed to Lord Russel of Killowen in "*Brackenborough* v. *Spalding Urban District Council* [1942] A.C. 310, at p. 347" instead of to his Lordship in the *Moscrop* case, *supra*).

Furthermore, in the judgment in *Iordanou* v. *Anyftos*, (24 C.L.R. 97, at p. 106) the following has been stated: "A Court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at trial other issues which the evidence of a particular witness might suggest".

Thus, if the award in question in favour of respondent 1 were to be allowed to stand then the statement of claim would have to be amended accordingly.

I do bear in mind that this Court can in a proper case direct an amendment of pleadings even at the stage of delivering judgment on appeal (see, inter alia, *Kemal* v. *Kasti*, *supra*); but, of course, such power is discretionary and has to be exercised when it is right so to do in the circumstances of the particular case.

One consideration that would apply is the avoidance, in a proper case, of multiplicity of proceedings; and I have paid due regard to such consideration in the present case. Nevertheless I find myself unable to order, in the exercise of the relevant powers, an amendment of the statement of claim, sustaining at the same time the finding of the trial Court that respondent 1 can recover damages for the damage to the car of her husband, as a bailee thereof.

In the first place, I do not agree, with respect, with the learned Judges of the trial Court that, on the basis of the scanty material before the Court, respondent 1 discharged the onus of proving that there existed a bailment of the vehicle in question, between herself and her husband, in the sense of section 106(1)(b) of our Contract Law, (Cap. 149). No express statement to that effect has ever been made by respondent 1 or any other witness; the mere fact that she was driving the said vehicle does not lead, safely, even on the balance of probabilities, to the conclusion that she was doing so as a bailee; she may well have doing so without her husband's consent (and it was never stated in evidence that she had his consent), or even against his express prohibition; there were still material facts to be established before the trial Court could have found as it did on this point.

Be that as it may, I would not be, in any case, disposed, in the present instance, to exercise my discretionary powers, in

favour of respondent 1, and to order, at this stage, an amendment of the statement of claim so as to give judgment in her favour on this issue; and I take this view because of the repeated and continuous failure on her part to react to the obvious need for an amendment accordingly, of the statement of claim; her laches in the matter are such as to render it inequitable on the part of this Court to come to her rescue at this belated stage.

Moreover, if an appropriate amendment were now to be ordered such a course would deprive the appellant of an opportunity of pleading to the amended statement of claim, and this would be contrary to what has been laid down in *Stylianou* v. *Photiades* and *Laghoudi* v. *Georghiou* (*supra*); and it must be borne in mind, in this respect, that the appellant has been objecting all along in this case to the right of respondent 1 to recover damages in respect of the damage to the car of her husband, and, thus, an amendment ordered by us now would not be merely such as to bring the pleadings into conformity with evidence adduced without objection, as was the position in *Kemal* v. *Kasti* (*supra*).

This appeal should, therefore, be allowed in part and the amount of damages in favour of respondent 1 should be reduced by £110, i.e. by the amount awarded in respect of the damage to the car of her husband; otherwise this appeal should fail and is dismissed.

Regarding costs, and bearing in mind that both respondents were represented, here and in the Court below, by one and the same counsel, I would leave intact the order for costs in the Court below and make no order as to costs in the appeal.

LOIZOU, J.: I am in entire agreement with the judgment just delivered by my brother Triantafyllides, J., and there is nothing that I wish to add.

HADJIANASTASSIOU, J.: I agree with my learned brother Mr. Justice Triantafyllides, but I would like to elaborate on the arguments and considerations which have led me to this result.

The facts are simple. The plaintiff No. 1 was driving a motor car Reg. No. X651, on October 16, 1965, along Evagoras Ave., in Nicosia, on the way from Metaxas Sq., towards the Stadium. Plaintiff No. 2 was sitting next to her. At the cross

roads, which are controlled by traffic lights, of Evagoras Ave., Diagoras and Passiades Streets, the car driven by plaintiff 1 collided with a car driven negligently by defendant 1, who was crossing against the traffic lights from Diagoras Street towards Passiades. As a result of this accident both plaintiffs suffered injuries and the car No. X651 was also damaged.

Counsel for the appellant-defendant has contended in this appeal that the finding of the trial Court that the defendant was solely to blame for the accident, was contrary to the evidence and unreasonable. Now the principles on which this Court decides appeals on the credibility of witnesses are well settled and I need not enter into them in detail. It must be shown that the trial Judge was wrong and the onus is on the appellant to persuade this Court. Matters of credibility are within the province of the trial Judge and if, on the evidence before him it was reasonably open to him to make the finding which he did, then this Court will not interfere with the judgment of the trial Court.

The learned trial Judges, who had seen and observed the demeanour of the witnesses, and who had to weigh the two versions, and reach a conclusion, had this to say in their judgment:

> "On this question of the cause of the accident we have believed the plaintiffs and their witness and disbelieved the defendant and his witnesses Skarlatos and Pantazis. We do not accept the version of the defendant and his two witnesses because their evidence cannot bear close examination. The defendant stated that he had proceeded about two metres and stopped and then started again and before he advanced more than 1/2 a metre the collision occurred. But on the other hand the distance which he covered from his place at the traffic lights in Diagoras street to the place of impact must have been much greater than that. The Court asked P.C. Demos Kourtellas to measure the distance from the traffic lights in Diagoras street to the alleged point of impact and it was found to be 82 feet. It is clear to us that the defendant had travelled a much greater distance from the moment he passed the traffic lights up to the point of impact than the 2 1/2 metres that he says that he did. We make some allowance for the fact that the car of the defendant when passing by the traffic lights in Diagoras street would be a few feet

nearer to Passiadou street than the pole of the traffic lights on the pavement and also because the real point of impact must have been a few feet nearer to the lights than the alleged point of impact but with these deductions it is clear to us that the defendant must have travelled over 60 feet from the moment he passed the traffic lights up to the moment the collision occurred".

I have no doubt, that this being a matter of credibility the trial Court has decided to accept the plaintiffs' version, and after hearing the argument of counsel, I have not been persuaded that on the evidence before the Court it was not open to them to make the findings which they did make in this case. For these reasons, I would dismiss the submission of counsel on this point.

Counsel relying mainly on the authority of *Rowlands* v. *George Fisher* [1959] C.A. (reported in Bingham's Modern cases on Negligence, 2nd ed. at p. 185) has further contended that even if appellant was crossing against the traffic lights nevertheless he argued that plaintiff No. 1, should have been found by the trial Court to have been a contributory to the accident, because, by failing to keep a proper look out she did not see the appellant in time; and that she was negligent in not taking all reasonably possible steps to avoid the collision.

The question is whether respondent-plaintiff 1 was guilty of contributory negligence such as to reduce the damages amounting to £445 awarded to her in the judgment appealed from.

Now the standard of care in contributory negligence is what is reasonable in the circumstances and this in most cases corresponds to the standard of care in negligence. Denning L.J. had this to say in the case of *Jones* v. *Livox Quarries Ltd. Same* v. *Same* [1952] 2 Q.B. p. 608 at p. 615:

> "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

"Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them?"

It is possible, however, that there are certain special cases in which the position is different. Where the defendant is charged with the breach of a statutory duty, the standard by which the plaintiff's contributory negligence is judged appears to be less exacting than that used for ordinary negligence.

In *Rowlands* v. *Fisher* (*supra*), a case of breach of statutory traffic regulation, the facts appear in the Report in Bingham's Modern Cases on Negligence at p. 185: "Defendant crossed stop line when lights are green – as he got onto junction he saw lights go to amber – he went on – plaintiff (who was crossing from defendant's nearside) moved off on red and amber – the mutual views were obscured by a large van on plaintiff's right, which also started on red and amber but stopped in time – collision between plaintiff and defendant–*Held*, defendant not liable. *Eva* v. *Reeves* [1938] 2 All E.R. 115; 2 K.B. 393, C.A. Per Hodson L.J. (8C), does not absolve drivers crossing with lights in their favour from keeping a lookout, but (7D) 'it (i.e. the decision) does not cast a heavy burden on them of anticipating such danger as might arise from the action of someone who is unlawfully on the crossing' ".

In *Davis* v. *Hassan*, reported in 1967, in the New Law Journal the facts are as follows: –

"Plaintiff's car struck by that of the defendant at a cross-road where traffic crossing straight over the intersection was able to proceed on a green filter light, while traffic turning half right was halted by a red light. The plaintiff's case was that as she approached the cross-roads the filter light was green in her favour, allowing her to proceed straight ahead. Half-way across, the defendant's car struck hers. The defendant's case was that the lights had turned green in his favour before the plaintiff's car was out of the intersection. The judge held that he was bound as a matter of law to decide wholly in the plaintiff's favour (*Eva* v. *Reeves* [1938] 2 All E.R. 115) though had that not been

the position, he would have found the plaintiff one-third to blame.....

"It was held on appeal, 'that every case of negligence had to be decided on its own particular facts and the judge, if he had not erroneously held himself bound in law to find only in favour of the plaintiff would have found both drivers to blame, though he had given no reasons for holding the plaintiff to be blameworthy. On the judge's findings it could not be said that the plaintiff was not entitled to proceed past a traffic light which was in her favour; the only ground for imputing negligence to her would be that she ought to have seen the defendant's car approaching. Although the fact that the traffic light was in her favour entitled her to be judged leniently, that fact did not entitle her to drive on even in the face of evident danger. The intersection was a large one and since the plaintiff's attention had to be focused on the traffic lights, she could not be accused of negligence for not seeing the defendant's car approaching until the last moment. The defendant was wholly to blame and the appeal would be dismissed on the facts of the case, and not on the question of law on which it had erroneously been decided in the court below' ".

The evidence of plaintiff 1 on this issue, is in these terms:—

"On reaching the junction of Evagoras Avenue with Diagoras Street on the right and Passiadou Street on the left, I saw that the traffic lights were all right for me to proceed, the light being green. I saw the green light from a distance of some 20 yards. I kept going. As I was about to pass the crossing my car was hit by a car which came from Diagoras Street. As far as I can say the driver had been trying to cross in a straight direction, i.e. to enter Passiadou Street".

In cross-examination she said:—

"I first saw defendant's car when it was about 4 yards from me. For a moment I thought of swerving to the left, but there was the pavement in that direction. Accordingly I did nothing".

Later on counsel put this question to the witness:

"I put it to you that as you approached the crossing there were people – school children and others – crossing Evagoras Avenue at the far end of the crossing and also crossing the junction of Passiadou Street on your left and Diagoras Street on your right.

A. No. I deny also that I was careless and I paid no attention to the traffic".

Now once the appellant's negligence was established as causing the accident, the onus is on him to establish that the respondent's contributory negligence was a substantial or co-operating cause. Going through the record in this issue, I am satisfied that the appellant has failed to discharge the onus cast upon him to prove that the respondent-plaintiff was crossing without keeping a lookout and that she was contributory to the accident. On the contrary from the evidence, I have reached the conclusion that the inference drawn by the trial Court was the right inference that the appellant was solely to blame for the accident; because the respondent had seen the car crossing with the lights against him from a distance of 4 yards only and, because in the circumstances she found herself there was hardly any time or room – in view of the pavement and the electric pole – to try and avoid the collision.

The next question is the amount of £110 awarded by the trial Court to respondent 1 because of the damage to the car.

The point in controversy, on which the decision of this point turns, was what was the true nature of the relation between the driver and her husband who was away abroad at the time of the accident to his car. Was it that of bailee and bailor of the car of which she was the driver?

Now in sub–s. 1(b) of section 106 of our Contract Law, Cap. 149, the definition of "bailment" is in these terms:

"(b) a 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them."

Whether there is a bailment or not, is a question which must depend upon the particular circumstances of each case.

In the present case the only material before the trial Court as to the question of ownership of car X651 appears in the statement of claim at para. 4 to the effect that "plaintiff 1 was driving her car" and also a passage from her evidence which reads: "I was driving my small Fiat car X651." But in cross-examination she said: "The car is registered in my husband's name". Then some months afterwards when the hearing of the case was resumed and, after an objection taken by counsel for appellant on the question of admissibility of evidence with regard to the amount of damage to the car X651, counsel appearing for both respondents made this statement:

> "Regarding the ownership of the car, we concede that the car belongs to the husband of plaintiff 1. However, the husband of plaintiff 1 was abroad at the time of the accident and the wife may be considered as the trustee of the property of the husband. It was a property of the common house, therefore, any damage which was suffered does not have to be claimed by the husband of plaintiff 1."

It would be observed, that counsel for the respondents was inviting the Court to take the view, that the wife was the bailee of the car of her husband. But nothing more was done by counsel, either by an application for leave to amend the statement of claim to the effect that respondent 1 was driving the car of her husband as a bailee at the material time and/or to apply for leave to recall the witness to give evidence on the question of bailment.

However, the trial Court in delivering its reserved judgment on April 25, 1967, had this to say on this question:—

> "Mr. Papaphilippou in his address however alleged that this plaintiff cannot recover this amount for the simple reason that the car was registered in the name of her husband. We find that the plaintiff is entitled to pursue the claim under this item because at the time she was driving the car she was a bailee of her husband and she was under an obligation to return it to him".

Section 140 of our Contract Law, provides machinery for legal proceedings by a bailor or bailee against wrong-doers. It is in these terms:—

> "If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had

been made; and either the bailor or the bailee may bring legal proceedings against a third person for such deprivation or injury".

It would be observed from the wording of this section that no proposition can be more clear than that either a bailor or the bailee of a chattel may maintain an action in respect of it against a wrong-doer. The latter by virtue of his possession, and the former by reason of his property. There is authority that an action by one, however, is a bar by an action by the other.

With due respect to the finding of the learned trial Judges, whether a bailee is entrusted by the owner with property to hold on his behalf it is a question depending upon the particular circumstances of the case. In the absence of an express contract of bailment the onus remains on the plaintiff to prove to the trial Court facts of such a nature justifying the inference that an implied contract was in effect in existence. In the absence, therefore, of evidence of bailment I am of the opinion that in this case, I can interfere with the finding of the learned trial Judges. It seems to me that they did misdirect themselves, in law, and that the findings of fact on this issue are certainly not justified by the absence of evidence and therefore their conclusions were wrong. For these reasons, I would accept the submission of counsel on this question.

I would, however, like to express the view, that as at present advised, in the absence of *prima facie* evidence one cannot presume that a contract of bailment is created simply because the wife was found in possession, driving her husband's car a view apparently shared by the learned trial Judges.

For the reasons I have endeavoured to explain I have reached the conclusion that I would also allow the appeal in part and set aside the order of the Court for the amount of £110. Otherwise the appeal is dismissed with no order as to costs here on this appeal.

TRIANTAFYLLIDES, J.: In the result this appeal is allowed, as against respondent 1, to the extent of reducing the damages awarded in her favour to £335, instead of £445; and it is otherwise dismissed both as against her and as against respondent 2.

The order for costs made by the Court below remains intact and there shall be no order for costs in the appeal.

Appeal partly allowed; order for costs as aforesaid.