[VASSILIADES, P., JOSEPHIDES, HADJIANASTASSIOU, JJ.]

VARNAVAS G. VARNAKIDES,

Appellant-Plaintiff,

v.

CHRISTOS PAPAMICHAEL AND ANOTHER,

Respondents-Defendants.

(*Civil Appeal No.* 4879).

Road Traffic—Collision of two motor vehicles at cross-roads—Negligence—Contributory negligence—Apportionment of liability—Approach of the Court of Appeal—Principles restated—Duty of care imposed on every user of the road to take avoiding action for his own safety—And duty to guard against the possible negligence of others when experience shows such negligence to be common.

Contributory negligence—Principles applicable—Apportionment of liability made by trial Courts—Approach of the Court of Appeal to appeals against such apportionment—Principles applicable well settled—Cf. supra.

Road accident—See supra.

Motor Traffic—See supra.

Apportionment of liability made by trial Courts—Approach of the Court of Appeal—See supra.

Findings of fact made by trial Courts—Approach of the Court of Appeal to such findings as distinct from inferences to be drawn therefrom—Principles well settled.

Appeal—Apportionment of liability—Findings of fact—Approach of the Court of Appeal—See supra.

This case arose from a collision of two motor vehicles at a road crossing, driven by the plaintiff-appellant and the defendant-respondent, respectively. In the circumstances, the trial Court found that both parties were to blame and took the view that 75% of the blame should be placed on the defendant (respondent) and 25% on the plaintiff-appellant. On these percentages the trial Court proceeded to apportion the agreed damages, reaching the result that the plaintiff would in the end have to bear the whole of his own damages and pay in addition to the defendant £775 damages.

From this judgment the plaintiff appealed on two grounds : Firstly, that the finding of the trial Court that there was contributory negligence on his part was not justified and should be set aside ; and secondly, that if there was such contributory negligence, the apportionment of 25% of the liability on him was not warranted by the facts and should be reduced.

The Supreme Court, applying the well settled principles regarding its approach to appeals against apportionment of liability made by trial Courts, reached the conclusion that this was a case where it should interfere ; in the result, the Court allowed the appeal partly and apportioned the liability in 90% to the respondent-defendant and 10% only to the appellant-plaintiff with one half of appellant's costs in the appeal. The facts of the case sufficiently appear in the judgments delivered (see *post*).

Appeal partly allowed.
Order for costs as above.

Cases referred to :

Christodoulou v. *Menicou* (1966) 1 C.L.R. 17 ;

Despotis v. *Tseriotou* (1969) 1 C.L.R. 261 ;

Meletiou v. *Lemis* (1969) 1 C.L.R. 558 ;

Constantinou v. *Beaumont* (1969) 1 C.L.R. 241 ;

Panayiotou v. *Mavrou* (reported in this Part at p. 215 *ante*);

Patsalides v. *Yapani* (1969) 1 C.L.R. 84 at p. 100 ;

Kyriacou v. *Aristotelous* (reported in this Part at p. 172 *ante*, at pp. 177–178).

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Mavrommatis and Vakis, D.JJ.) dated the 31st January, 1970 (Action No. 2804/68) whereby it was adjudged that 75% of the blame for a traffic accident should be placed on the defendant and 25% on the plaintiff.

G. Pelagias with *D. Papachrysostomou*, for the appellant.

L. Demetriades, for the respondent.

The following judgments were delivered :

VASSILIADES, P. : This case arises from a collision of two motor vehicles at a road crossing within the area of the town of Nicosia, in a part, however, where buildings

stand apart and the visibility at the material part of the road, was clear for both drivers concerned. The collision was very violent due to the speed of defendant's car ; and the damage from the collision was considerable. The parties, through their advocates agreed regarding the damage. Their agreed figures as given in the first part of the judgment of the trial Court are : £200 for the damage to plaintiff's car ; £250 for other special damage of the plaintiff ; £750 general damages for the plaintiff, making the total of plaintiff's damages on a full liability basis, £1,200. The defendant's loss is put in two figures—£6,000 general damages for personal injuries, £700 damages to this car ; *i.e.* a total of £6,700.

The facts of the case are short and clear ; they can hardly be disputed at this stage, excepting for certain findings by inference, made by the trial Court upon which the Court decided and apportioned liability. These are still contested between the parties ; and constitute the subject matter of the appeal before us.

The appellant, to whom I shall refer as the plaintiff, was driving his Austin car. The defendant was driving his Jaguar a much more powerful car. The defendant was driving fast ; at a dangerous speed, in the circumstances. The plaintiff was driving carefully and slowly. He saw *the Jaguar coming from a distance of about 180–200 yards* from the crossing. He was then about 40 yards away from the crossing. Seeing that he was much nearer and that at the crossing there was a white line in the traffic-path of the Jaguar which should cause the Jaguar to slow down and give precedence to the plaintiff, he attempted to take the crossing before the Jaguar.

When, however, the plaintiff was almost at the crossing, he suddenly *realized—according to his own evidence—* that the driver of the Jaguar was not thinking on similar lines. He was coming at the same high speed, apparently intending to take the crossing before the other car, regardless of the white line on his path. The difference in the way in which the two drivers decided at the material time to take the crossing, resulted in a violent collision ; and extensive damage to both cars and their respective drivers. The defendant got the worse of it. Fortunately it was not as bad as it could have been.

It was never suggested that the collision was the result of an error of judgment on the part of one or both drivers. The case was pleaded and argued as one of damage from

the breach of statutory duty (the Road Traffic Law Regulations) and of negligence. The case for the plaintiff was that the collision was due exclusively to the reckless driving of the defendant. The case for the defendant on the other hand, was that the collision was due partly to the fact that the plaintiff failed to take avoiding action which, in the circumstances, he could have taken. Very rightly, I think, learned counsel for the defendant conceded without hesitation that his client was driving dangerously ; and stated that he is not here to justify the reckless driving of his client. In fact, he said, his client has suffered by far the greater consequence of this collision, probably because of his reckless driving.

The case for the defendant was that the plaintiff should have realized that the Jaguar was being driven in a dangerous manner and he should take action to protect himself—and other users of the road—by giving way to the Jaguar and thus avoid the collision. It is submitted on behalf of the defendant that going at the speed at which he was going—a very safe and prudent speed—and seeing the obviously dangerous speed of the other car, the plaintiff had ample opportunity to slow down slightly more, or even to stop, instead of driving on in order to take the crossing before the other car.

The trial Court dealt with this matter carefully in their judgment ; and came to the conclusion that the circumstances in which he was found, the plaintiff did have the opportunity to take avoiding action for his own protection, and safety. The Court say in their well considered judgment, why they reached that conclusion. And upon that finding, the Court found contributory negligence ; which they later took into consideration in apportioning liability. In making the apportionment, the trial Court took the view that, in the circumstances, 75% of the blame should be placed on the driver of the Jaguar, the defendant ; and 25% on the plaintiff. On these percentages, the trial Court proceeded to apportion the agreed damage, reaching the result that the plaintiff would in the end have to bear the whole of his own damage and pay in addition some £775 damages to the reckless driver of the Jaguar. As to costs, the trial Court took the view that in the circumstances, there should be no order for costs.

From this judgment, the plaintiff appealed on two main grounds : Firstly that the finding of the trial Court that there was contributory negligence on the part of the

plaintiff, was not justified and should be set aside ; and secondly, that if there was contributory negligence, the apportionment of 25% of the liability on the plaintiff, was not justified by the facts of the case. It is not reasonable, counsel for the appellant argued, to reach in the circumstances of this case, the final result reached by the trial Court.

Counsel for the defendant, on the other hand, submitted that however the result may appear in figures, to be rather strange in that the party who was least to blame, had to bear over and above his damage of £1,200, some £775 of the damage of the other side, the findings of the trial Court were open to the Court on the material before them, and should not be disturbed. As regards the apportionment, learned counsel argued that this Court should not substitute their own view for that of the trial Court ; and should not interfere with the apportionment made.

Both these matters have been considreed in several appeals of the same nature. I may refer to *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 ; *Despotis* v. *Tseriotou* (1969) 1 C.L.R. 261. The position resulting from these cases is shortly as follows : As far as facts are concerned, the Court of Appeal will not interfere with the findings of the trial Court unless the appellant can show sufficient reason for doing so. (See *Meletiou* v. *Lemis* (1969) 1 C.L.R. 558. As regards apportionment, the position is stated in *Constantinou* v. *Beaumont* (1969) 1 C.L.R. 241.

Following these cases, I can go directly to the result and say that we have not been persuaded in this appeal, that we should interfere with the findings of fact made by the trial Court ; excepting those (facts and inferences) directly connected with the question of liability. As regards this question and the apportionment made upon the conclusions of the trial Court, we reached the result, not without difficulty, that in the special circumstances of this case, this Court should interfere with the apportionment. Not only the striking result of the trial Court's apportionment makes it appear desirable that the matter should be reconsidered, but also the facts preceding the collision which have already been sufficiently described, make it necessary that the apportionment of the blame should be re-assessed

After discussing the matter between us, we take the view that the plaintiff approaching as he did, the crossing at a prudently slow speed, was held to have

contributed to this collision merely because, at most, he did not pay sufficient attention in order to assess and appreciate correctly the recklessness of the other driver. The cases in point, impose on every user of the road a duty of care to himself to take avoiding action for his own safety. Here the most one can say against the plaintiff is that he did not take sufficient care in following all along, the way in which the Jaguar was being driven, so as to appreciate correctly the recklessness of its driver ; and also, perhaps, that he did not take into account the possibility that, coming at that speed, the driver of the Jaguar might disregard the white line on the road which was put there to make him slow down and stop, if necessary, in order to give priority to the traffic crossing his path. In these circumstances, we cannot see how he can be charged with 25% of the blame. Giving the matter our best consideration, we reached the result that he cannot be blamed for more than 10% and that liability should be apportioned accordingly. We allow the appeal to that extent and apportion the liability in 90% to the defendant and 10% to the plaintiff. As regards costs, we think that we should not interfere with the order made for the costs in the District Court ; but in the appeal, we think that the appellant having partly succeeded, he should get one half of his costs.

Before leaving this case, I should like to deal shortly with the matter which apparently occupied much of the argument for the plaintiff at the trial Court ; and a matter with which the trial Court dealt rather extensively in their judgment : The effect of the criminal proceedings against the drivers, on their respective position in the civil action.

I need only say that in my opinion, the approach of the trial Court to this matter was correct. The criminal proceedings cannot affect the proceedings in pursuance of the civil claims arising from a collision, otherwise than in presenting to the civil Court the evidence relevant to the civil claim, as pleaded. For instance in questioning witnesses who gave evidence in the criminal proceedings, counsel may bear in mind and if necessary refer to the same witness's evidence in the criminal proceedings. I would only repeat here, what has already been said in other cases, that the trial of the civil claim is a different matter, for a different purpose, probably decided on different evidence. The result of the criminal proceedings

in the first instance or in the criminal appeal, did not have any effect upon the view which I have taken in dealing with the civil claim on the material on record in this appeal.

I would allow the appeal as already stated, apportioning liability accordingly ; with one half of appellant's costs in the appeal.

JOSEPHIDES, J. : It is well settled that if the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence ; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extra precautions. It must follow that a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common : *Panayiotou* v. *Mavrou* (reported in this Part at p. 215 *ante*)

In considering the present case, I rely on the following established facts : That the appellant's speed a few minutes before the impact was 20 m.p.h. and immediately before the impact was less than 20 m.p.h. ; that the respondent's speed was " definitely high " ; that the place where the accident occurred is in a developing area where there are scarcely any buildings, and the visibility is about 180–200 metres on either side ; that there was a halt sign in the form of a white line on the Alasia road along which the respondent was driving ; that before the collision the respondent's car was seen by the appellant when about 180 metres away ; that the respondent's car was 180 metres away from the cross-roads at a time when the appellant's car was 40 metres away from the same point ; and that from the moment when the appellant first saw the respondent's car up to the moment of the impact, the appellant's vision was not obstructed.

On these facts, respondent's counsel submitted that the appellant realized or that he ought to have realized the danger, and that he had the time to take avoiding action.

Appellant's counsel, on the other hand, submitted that when the appellant realized the danger he was almost at the cross-road and he had no time to take any precautions. He saw the respondent's Jaguar car going at a " terrific " speed, as he described it, some 180 metres away, but he (the appellant) did not realize that the respondent would not halt at the halt sign.

Considering all the circumstances of this case, including the respective positions and speeds of the cars, as well as the halt sign against the respondent, I would be inclined to the view that the possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable driver, that, consequently, the appellant was not negligent to any degree and that judgment should be given in his favour on a hundred per cent liability basis against the respondent. However, having discussed the matter with my learned brothers I have, with some difficulty, reached the decision not to dissent from their conclusion and to agree to the order proposed to be made by the President of this Court. I need hardly add that this is a decision on the particular facts of the present case and that it should not be taken as laying down any principle which may serve as a precedent in the future.

HADJIANASTASSIOU, J.: I also agree with the decision of the President, but I would like to add a few words of my own. The question which now falls to be determined in this appeal is whether on the facts of this case, the appellant was rightly found by the trial Court to be a contributory to the accident.

It is not in doubt, from the trend of the authorities, that the standard of care in contributory negligence is what is reasonable in the circumstances, and this in some cases corresponds to the standard of care required in negligence. See *Patsalides* v. *Yapani* (1969) 1 C.L.R. 84 at p. 100.

The trial Court, after addressing its mind properly to the question of law, and after dealing with the evidence, said that " it was with a lot of hesitation that they have not come to the conclusion that the plaintiff was not keeping a proper lookout whilst in Michalakopoullou Street, and that as a result he failed to see in time or at all the speeding defendant, a fact which would very well account for his failure to take any avoiding action at any stage". Moreover, the Court was of the view that the lookout of the plaintiff was not a proper one and this was borne out by his subsequent conduct in failing to take any avoiding action whatsoever, whereas the other driver, defendant No. 1, as the brake marks show, did take avoiding action by applying his brakes.

Going through the record, I am satisfied that it was reasonably open to the trial Court to reach the conclusion

that the appellant was contributory to the accident because he has failed to have a proper lookout and has failed to apply his brakes in order to avoid the accident. I would, therefore, affirm the judgment of the Court, because although contributory negligence does not depend on a duty of care, it does depend on foreseeability of harm to oneself. In my view, the appellant ought reasonably to have foreseen that because of the reckless driving of the respondent, that if he did not take any avoiding action he might be hurt himself.

Counsel for the appellant today complains in this appeal, that the apportionment of liability made by the trial Court was erroneous and/or unreasonable. Having given the matter my best consideration and having in mind that the question of the apportionment of blame is often one of impression and not susceptible to precise calculation, as well as the principles adopted in *Kyriakou* v. *Aristotelous*, (reported in this Part at p. 172 *ante* at pp. 177—178), I have decided with some reluctance to interfere with the apportionment of blame because, in my view, the trial Court's approach as to the reckless driving of the respondent was an error clearly discernible. I would, therefore, agree to the apportionment suggested by the President. Under the circumstances, I would partly allow the appeal.

VASSILIADES, P. : In the result this appeal is partly allowed and the judgment of the trial Court is varied so that the plaintiff will bear ten per cent (10%) of the total damage as agreed between the parties and recorded by the trial Court ; and the defendant shall bear ninety per cent (90%) of the said damage. With one half of his costs in the appeal for the appellant.

Appeal partly allowed. Order for costs as above.