[JOSEPHIDES, L. LOIZOU, HADJIANASTASSIOU, JJ.]

ANDREAS MILTIADOUS CHARALAMBOUS,
Appellant-Defendant,

v.

NEOPTOLEMOS CHARALAMBOUS AND ANOTHER,
Respondents-Third Parties.

(*Civil Appeal No.* 4894).

Negligence—Road traffic—Accident—Defendant's speed cause of the accident—Contributory negligence—Dismissal of defendant's claim against third party—Trial Court rightly reached conclusion that the third party was not guilty of contributory negligence having regard to the facts and circumstances of the case.

Practice—Adjournment of trial—Application to postpone trial to enable defendant to attend—Refused—Discretion of trial Court—The Civil Procedure Rules, Order 33, *rule* 6—*Cf. Old English Rules of the Supreme Court, Order* 36, *rule* 34—*Interference with such discretion by the Court of Appeal—Principles applicable—The Court of Appeal not satisfied that the trial Court's discretion has been exercised in such a way as to result in an injustice to the defendant—Appeal dismissed—Cf.* Maxwell *v.* Kenn [1928] 1 K.B. 645.

Adjournment of the trial—Court's discretion—Principles upon which the Court of Appeal will interfere with such discretion—See also supra.

Cases referred to :

Maxwell v. *Keun* [1928] 1 K.B. 645 ;

Walker v. *Walker* [1967] 1 All E.R. 412, at pp. 414C and 415C ;

M. (*J.*) v. *M.* (*K.*) [1968] 3 All E.R. 878, at p. 880D. and G. ;

Royal v. *Prescott-Clarke and Another* [1966] 2 All E.R. 366 ;

Sackville West v. *Attorney-General* [1910] 128 L.T. Journ. 265 ;

Rose v. *Humbles* (*Inspector of Taxes*) etc. [1970] 2 All E.R. 519 ;

Efstathios Kyriacou and Sons Ltd. v. *Mouzourides* [1963] 2 C.L.R. 1.

The facts of the case sufficiently appear in the judgment of the Court dismissing this appeal by the defendant in the action against only that part of the judgment of the trial Court which dismissed his claim against the third-parties (respondents).

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Mavrommatis and Vakis, D.JJ.) dated the 19th March, 1970, (Action No. 2643/68) whereby his claim against the third parties, in an action brought against him for personal injuries due to a traffic accident, was dismissed.

G. Cacoyiannis and *A. Dikigoropoulos*, for the appellant.

G. Raphael and *P. Michaelides*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

JOSEPHIDES, J. : The Full District Court of Nicosia awarded the plaintiff the sum of £3,115 damages against the defendant for personal injuries which the plaintiff sustained in a traffic accident in March, 1968, in Nicosia, but dismissed the defendant's claim against the third-parties without costs.

The defendant now appeals only against that part of the judgment which dismissed his claim against the third-parties (respondents). Consequently, we are not concerned in this appeal with the plaintiff's judgment against the defendant (appellant).

The present appeal was argued on behalf of the appellant on two main grounds—(*a*) that, on the facts as found by the trial Court, the respondents (third-parties) were guilty of contributory negligence and, failing that, (*b*) that the trial Court, in refusing to grant the adjournment sought on behalf of the appellant, did not exercise its discretion judicially and that such refusal amounted to a denial and/or a miscarriage of justice.

The undisputed facts in this case are briefly that at about 9 p.m. on the 20th March, 1968, the plaintiff was driving his motorcycle along Prodromos Street, in Nicosia. This

street is one of the busy roads leading from Nicosia to Strovolos with electric lighting of the old type. At the same time, the defendant was driving his motor car along the same road in the same direction as the plaintiff, that is, towards Strovolos. The defendant was doing at the material time over 50 miles per hour, which speed the trial Court described as " potentially a killer speed " in that part of the town at any time.

The defendant must have seen the plaintiff ahead of him from a distance of about 200 ft. the brakemarks left by the defendant's vehicle on the road were 117 ft. plus a thinking distance on the basis of a speed of 50 m.p.h. The defendant appears to have realised some danger ahead of him and he applied his brakes, but he did not manage to avoid knocking the plaintiff's motorcycle and thereby injuring the plaintiff seriously.

At the same time, there was another vehicle following that of the defendant, namely, a taxi driven by the first third-party, who was at the time doing so in order to help his father who was the owner of that vehicle. The taxi-driver (the first third-party) was doing at the time well over 50 m.p.h. as he was, " just before the defendant applied his brakes, in the process of overtaking the vehicle of the defendant ".

It appears that the first third-party must have been driving at the time on the offside of the road and, apparently, on realising the imminent collision, he reduced speed, applied his brakes and came to a standstill at a point shown on the plan produced. The plaintiff's motorcycle at the material time was not equipped with a rear light but had two rear reflectors and a strip of white paint which, if kept clean, reflects light turned on to it. The trial Court found as a fact that the lack of rear light on the plaintiff's motorcycle in no way contributed to the accident because, as the Court said in their judgment, the rear reflector, the white strip and the front light of the motorcycle made plaintiff's motorcycle clearly visible in the circumstances. A police vehicle examiner, called on behalf of the plaintiff, estimated the defendant's speed to have been about 54 m.p.h.

On these facts the trial Court found that the accident was caused solely by the speed of the defendant in respect of which there was evidence that it was 50 m.p.h. or over. The trial Court, after referring to their refusal to grant an adjournment to the defendant (with which we shall

have occasion to deal later in this judgment), state in their judgment : " In any event, we wonder how the defendant could explain his speed at the time of the accident, if indeed there can exist any explanation therefor, and speed was, to our mind, the cause of the accident ".

With regard to the first third-party, the trial Court found as a fact that he was actually doing well over 50 m.p.h. and that he was attempting to overtake the defendant either just before the defendant applied his brakes or just at the time the defendant was doing so ; and they went on to say, " Also there is no doubt that this speed that the third-party was doing was potentially dangerous. Again this is not by itself sufficient but we have to examine and decide whether the third-party's speed has any connection with or in any way contributed to the accident because speed by itself is not sufficient in the present case and circumstances ".

The defendant's brother, Marios Miltiadous, was called as a witness on behalf of the defendant, but he made " the worst possible impression " on the trial Court, who also stated in their judgment that the same applied with equal force to the evidence of the first third-party.

The defendant's brother said in evidence that he was sitting next to the defendant, who was driving at the material time. As they were going along Prodromos Street, they were followed by another car (the third-party's taxi) which was continuously flashing its lights to overtake them and that there was enough room for the taxi to do so. When the taxi was by their side and in the process of overtaking them this witness noticed for the first time the motorcyclist (the plaintiff), who was 10 to 15 feet away from the defendant's car. According to this witness, the defendant applied the brakes, his car skidded and knocked the motorcyclist. They could not, he said, turn either left or right. The taxi stopped next to them. The defendant's speed was, according to this witness, about 40 m.p.h. In cross-examination, when it was put to him that the defendant's speed was over 50 m.p.h., this witness replied that he did not look at the speedometer. This is the gist of the evidence of the defendant's brother.

The trial Court's comments on this witness's (defendant's brother) evidence were as follows :

> " Perhaps it would be sufficient to mention only the fact that this witness gives defendant's speed at only

40 m.p.h. and that he saw the plaintiff when plaintiff was only 15 ft. away from him (the distance between the witness-stand and the dock as he 'clarified') and after this the defendant applied brakes but this did not avert the collision. Surely this witness could not be said to have been asleep when his brother applied brakes 100 ft. earlier, as at 50 m.p.h. D.W. 1 (defendant's brother) must have almost been thrown on the windscreen and this would wake him up."

And the trial Court concluded as follows :

"The fact that the defendant did not give any evidence (as a matter of fact there is no evidence whatsoever to support the allegation that defendant wanted to take any other avoiding action by swerving to the right and he was prevented from doing so by the third party's presence) is sufficient to dismiss defendant's claim against the third-party.

Apart from the evidence of the speed of the third party there is no other evidence showing any nexus between the third party and plaintiff's accident.

This disposes of the claim by the defendant against the third-party but before concluding we wish to place on record again our very strong condemnation of the speed of third-party No. 1 at the material time (for which offence he got off very lightly indeed with a very small fine and he seemed to have been proud of it in this Court) and also of the fact that this witness was as untruthful as D.W.1 (the defendant's brother) ... ."

Before we go on to consider the grounds of appeal in this case we shall also state the facts with regard to the application made for an adjournment on behalf of the defendant in the course of the hearing, which adjournment was refused by the trial Court.

After the trial Court had heard seven witnesses on behalf of the plaintiff and the latter had closed his case, and after the defendant's brother had given evidence on defendant's behalf, counsel appearing for the defendant in the trial Court (Mr. Cacoyannis did not represent him in that Court), stated, "Your Honours, before I close my case I must ask for an adjournment to enable me to bring my own client here, that is to say, the defendant." The Court then said to counsel, "Can you give us any excuse whatsoever for the absence of the defendant from the Court

today ?" Counsel replied, " Well, the only excuse, I cannot say objectively, but what I know is that on the last occasion he had difficulty with the head of the Gymnasium at Polis in giving him leave to absent. Then I had to ring up Polis and get....." (It should be stated here that the defendant was at the time an instructor in physical training, stationed at Polis-tis-Chrysochous.)

The Court then said to counsel, " We are afraid that the defendant should be here and that there is no excuse for his non-appearance and we are afraid again that the Court cannot work at the convenience or for the convenience of any school of this island. Therefore, your request for an adjournment is refused and the case will go on and be completed today ". Counsel then said, " I have no other witness. In the circumstances, this is my case ".

The defendant having thus closed his case, the third-parties called one witness, namely, the first third-party, who gave evidence on their behalf and was cross-examined by counsel for the defendant ; and the third-parties then closed their case. The time was 12.30 p.m. and the case was adjourned to 2.45 p.m. on the same day for addresses. On the resumption of the case at 2.45 p.m., counsel for the third-parties addressed the Court. It was then the turn of counsel for the defendant to address the Court who, before doing so, made the following statement to the Court :

> " Your Honours, before addressing you I would like to correct a statement which partly arises out of my failure to look at my file. It seems that on the 5th February, 1970, I wrote to the defendant to obtain leave and come to Court from Polis, where he works, to-morrow. The reason was that I was under the impression that Mr. Papaphilippou's case would have taken more than one day. I do not know if that would make any difference but I thought I would mention it so that I would ease my conscience. If he did not appear, it may be that it is because of the letter."

Defendant's counsel then addressed the Court and he was followed by the plaintiff's counsel who, likewise, addressed the Court, and judgment was reserved and was delivered some time later.

It should, perhaps, be noted here that, although defendant's counsel made the above statement, he did not, at that late stage, apply again for an adjournment.

With regard to the application for adjournment by defendant's counsel and his statement to Court, quoted above, this is what the trial Court had to say in their judgment :

" Before proceeding we wish to put the following on record : On the last day of the hearing and after plaintiff completed his case, Mr. Dikigoropoulos, counsel for the defendant, asked for an adjournment because his client was not present. Thereupon the Court asked him to give the reasons for his client's absence. Mr. Dikigoropoulos at the time could offer no excuse whatsoever for the absence of the defendant but attempted to explain it by saying that the defendant probably had difficulty in obtaining leave from the headmaster. We told him that there was no excuse at all for the absence of the defendant and that permissions either from headmasters or even persons in higher authority cannot regulate the diaries and sittings of the Courts and it is the parties' duty to be on the day of the trial. It has been time and again stated by the Supreme Court that even counsel's convenience cannot afford a ground for an adjournment.

In the afternoon of the same day in the course of his final address to the Court Mr. Dikigoropoulos ' to ease his conscience ', as he put it, told us that he wrote to his client to come either on the day of the hearing or the next day because he thought that the case for the plaintiff might take more than one day. Why on earth he asked defendant to come on the next day, we cannot understand. He also alluded to the fact that when the case had to be adjourned because of the absence on sick leave of one of the Judges, he informed the other Judge, namely, Judge Vakis, of the difficulties of his client in securing permission to come to Court. Fortunately, we have on record the reply of Judge Vakis which was no different from the reply of this Court given to Mr. Dikigoropoullos in the morning, as aforesaid. We have placed all the above on record because there had been the occasion when different things were related at different Courts. We do not mean that Mr. Dikigoropoullos is a person who would do so but this shall prevent misunderstandings in case any of the parties decide to brief other counsel if this case comes before the Supreme Court.

In any event, we wonder how the defendant could expain his speed at the time of the accident, if indeed

there can exist any explanation therefor and speed was, to our mind, *the* cause for the accident."

This concludes the statement of facts and findings by the trial Court.

With regard to the *first ground* of appeal, that is, that of contributory negligence by the third-parties (respondents), both counsel on appeal accepted the findings of the primary facts made by the trial Court, which were open to the Court on the evidence before them. However, counsel for the defendant (appellant) argued that on these facts the trial Court ought to have found contributory negligence by the third-party, for the following reasons : The point of impact was 16 feet from the end of the brake-marks ; the brakes were applied for 101 feet before the impact ; and the Court found that the defendant saw the motorcyclist (plaintiff) some 200 ft. before the accident. The defendant, according to counsel, could not overtake the motorcyclist and he applied his brakes because the third-party was next to him and prevented him from taking any other avoiding action. Furthermore, the third-party was going at a greater speed and was in the process of overtaking the motorcyclist. The width of the road at that point is 17 feet tarmac plus 2 feet berm on either side of the road. The third-party said that he did not see the motorcyclist at all before the accident, but his version was rejected by the trial Court. It was counsel's submission that it was the duty of the third-party to make sure that it was safe for him to overtake the defendant. On the facts, defendant's (appellant's) counsel submitted that the third-party was negligent in overtaking at that particular point as he prevented the freedom of movement of the defendant and prevented him from taking avoiding action ; and the nexus was there, according to counsel, because the third-party was overtaking when the defendant was applying his brakes. Finally, defendant's (appellant's) counsel, referring to the trial Court's observation that the fact that the defendant did not give any evidence was sufficient to dismiss the defendant's claim against the third-party, submitted that, if defendant's evidence was considered necessary so that he should give his own explanation, then the defendant should succeed on his second ground of appeal. We shall refer to that point later in this judgment.

Having considered the findings of fact of the trial Court as well as the able argument on behalf of appellant's counsel, we are of the view that the trial Court rightly reached the

conclusion that the third-party was not guilty of contributory negligence for the following reasons. The third-party's lane was clear for him to overtake the defendant ; no signal or any other indication was given by the defendant that he was about to overtake the plaintiff motorcyclist who was driving ahead of him ; and it was not pleaded by the defendant that he signalled that he was going to overtake the plaintiff motorcyclist or that he intended to change his course in any way. This disposes of the first ground of appeal.

With regard to the *second ground* of appeal, counsel for the appellant (defendant) argued that the adjournment was sought until the following day to enable the defendant to give evidence, and that the Court's discretion in refusing such adjournment was exercised in such a way as to result in an injustice to the defendant. He conceded, however, that it was a mistake on behalf of counsel representing the defendant before the trial Court not to have his file with him to enable him to inform the Court at the time when he made the application for an adjournment that he (the defendant's advocate) had written a letter informing his client not to come until the following day. Moreover, there was no objection to the adjournment by the other side on record. In counsel's submission, the Court's refusal to grant the adjournment resulted in an injustice to the defendant because the Court itself observed in their judgment that the defendant did not give any evidence at the hearing (see trial Court's statement quoted earlier in this judgment).

Mr. Cacoyannis in addressing us for the appellant (defendant) on this point cited the following cases : *Maxwell* v. *Keun* [1928] 1 K.B. 645 (he read several extracts from the judgments delivered in that case, including an extract from page 659, to which reference is made to an error of judgment committed by the legal advisers of a party in applying late for the postponement of the trial) ; *Walker* v. *Walker* [1967] 1 All E.R. 412, at pages 414C and 415C ; and *M.* (*J.*) v. *M.* (*K.*) [1968] 3 All E.R. 878, at page 880D and G.

Mr. Raphael, counsel for the respondent (third-party), on the other hand, referred to three Cyprus cases which, we do not think are on the point, but he also referred to the English case of *Royal* v. *Prescott-Clarke* & *Another* [1966] 2 All E.R. 366, in which it was held that the Justices had wrongly exercised their discretion in refusing an adjournment to enable a party to produce further evidence

of a formal nature. Mr. Raphael further argued that defendant's counsel before the trial Court had earlier applied for an adjournment on the 3rd June, 1969, which was granted by the Court ; that on the 3rd February, 1970, defendant's counsel asked the trial Court to adjourn the case to a day during the school Easter vacation and that he was warned by one of the trial Judges that it was not possible to accede to such requests for adjournment ; and that, finally, on the day in question when the adjournment was refused (23rd February, 1970), defendant's counsel did not apply to the trial Court for an adjournment before opening his case or for a short break to enable him to get in touch with his client on the telephone ; that there was no evidence that the defendant was either ill or prevented from attending the Court at the time when defendant's counsel applied for an adjournment ; and that, consequently, the Court in the exercise of its discretion rightly refused the adjournment.

Order 33, rule 6, provides that " the Court may, if it thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms (if any), as it may think fit ". This rule reproduces substantially the provisions of the old English Rules of the Supreme Court, Order 36, rule 34. The leading case on this point is *Maxwell* v. *Keun*, which has been cited by appellant's counsel. It is unquestionable that whether or not to grant an adjournment is at the discretion of the trial Court. However, as observed by Sir Jocelyn Simon P. in *Walker* v. *Walker* [1967] 1 All E.R. 412 at p. 414 " we have authoritative guidance from the Court of Appeal in *Maxwell* v. *Keun* to a two-fold effect: First, where the refusal of an adjournment, would result in a serious injustice to the party requesting the adjournment, the adjournment should be refused only if that is the only way that justice can be done to the other party ; and, secondly, that although the granting or refusal of an adjournment is a matter of discretion, if an appellate Court is satisfied that the discretion has been exercised in such a way as would result in an injustice to one of the parties, the appellate Court has both the power and the duty to review the exercise of the discretion ".

In *Maxwell* v. *Keun & Others* [1928] 1 K.B. 645 (quoted earlier), it was held that " the Court of Appeal ought to be very slow to interfere with the discretion vested in a Judge by Order XXXVI, r. 34, with regard to such a matter as the adjournment of the trial of an action before him,

and very seldom does so ; but if it appears that the result of an order refusing such an adjournment will be to defeat the rights of the applicant altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, the Court has power to review the order, and it is its duty to do so .

Rule laid down in *Sackville West* v. *Attorney-General* [1910] 128 L.T. Journ. 265 applied ".

The same principles were applied in a recent case, that of *Rose* v. *Humbles* (*Inspector of Taxes*) *etc.* [1970] 2 All E.R. 519.

To sum up, although the adjournment of a hearing by a trial Court is a matter, *prima facie*, for the discretion of that Court and an exercise of that discretion will not be interfered with by an appellate Court in normal circumstances, if the discretion has been exercised in such a way as to cause what can properly be regarded as an injustice to any of the parties affected, then the proper course for an Appellate Court to take is to ensure that the matter is further heard.

On this point we also have the Cyprus case of *Efstathios Kyriacou & Sons Ltd.* v. *Stephanos Mouzourides* [1963] 2 C.L.R. 1. That was a case where the trial Judge refused to adjourn the hearing after the plaintiff closed his case at 2.15 p.m. on a Saturday and counsel for the defendant requested an adjournment on the ground that he was sick and could not carry on with the trial and that it was necessary for the defendant to adduce the evidence of certain witnesses whose presence could not have been secured at that late hour. The High Court of the Republic, on appeal, held that this was a matter for the discretion of the trial Judge and that he did use such discretion in a judicial manner, and the Appellate Court did not, therefore, interfere with the exercise of such discretion.

Considering the facts and circumstances of the present case as they appear on the record, we are of the view that the trial Court exercised their discretion judicially in the matter at the time when the application for adjournment was made, based on the grounds stated to them at the time. No valid reason was given by the defendant's advocate when he applied for that adjournment before the luncheon break. In the afternoon, after the third-parties had closed their case and their advocate addressed the Court, the defendant's advocate made a further statement to Court

so that, as he put it, he would " ease his conscience ". At that stage he did not apply for an adjournment. In any event, we are of the view that that was a very late stage to apply for an adjournment after counsel for the third-parties had addressed the Court.

We are further of the view that no injustice was caused to the defendant (appellant) by the refusal of the adjournment because, on the evidence of his own brother, who was called on his behalf, and who was a passenger in his (defendant's) car, it did not appear that the defendant signalled that he was going to overtake the motorcyclist ahead of him nor was this part of the defendant's case, as pleaded against the third-parties. Consequently, in the circumstances of this case, we are not satisfied that the trial Court's discretion has been exercised in such a way as to result in an injustice to the defendant (appellant).

For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.