[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

HARBIYE EKREM, SUING THROUGH HER NEXT FRIEND HER FATHER EKREM NASIF,
Appellant-Plaintiff,

v.

IAN DOUGLAS McLEAN,
Respondent-Defendant.

(*Civil Appeal No.* 4911).

Negligence—Contributory negligence—Appeal—Apportionment of liability—Principles upon which the Appellate Court will interfere with such apportionments made by trial Courts—The Appellate Court will not interfere unless the apportionment is wrong in principle or clearly erroneous or unwarranted—And this is so even where one or more members of the Supreme Court may be inclined to think that as trial Judges they might make a different apportionment—Girl of four years of age struck by motor-car while suddenly and without warning darting to cross the road—Held to be wholly to blame by the trial Court—Finding of trial Court held on appeal not to be so erroneous or unwarranted as to justify interference by this Court.

Road accident—Negligence—Contributory negligence—Apportionment of liability—Girl aged 4 held to be wholly to blame for the accident—Her action for damages rightly dismissed—See supra.

Apportionment of liability—Appeal—Approach of Court of Appeal to appeals against apportionment of liability made by trial Courts—See supra.

This is an appeal by the defendant—a girl of four years of age—against the judgment of the District Court of Nicosia, dismissing her action whereby she was claiming damages for personal injuries sustained in consequence of her being struck on February 3, 1968 by a motor-car driven by the defendant (now respondent).

The findings on which the dismissal appealed from was based are briefly as follows :

". . . . .Inside Kokkina village the defendant (respondent) was driving at the very reasonable speed of 20–25 miles per hour when he saw ahead of him a group of women

taking water from the public fountain to his left and off the road. The defendant (respondent) did not and could not see the girl (plaintiff-appellant) as she was probably amongst the women. Also, there was nothing whatsoever to indicate to him that any one of the persons at the fountain to whom he was clearly visible, would try to cross the road across his path. Therefore, he gave them a berth of about 1 ½ feet, which in the circumstances, taking into consideration that it is a very narrow road, can be taken to have been quite reasonable. When the defendant (respondent) was level with the women, suddenly and without any prior warning whatsoever, the girl darted to cross the road and in her effort she was hit by the front nearside part of the motor-car . . . . . As a result she was injured. In all these circumstances, we cannot find any blame whatsoever on the defendant and it seems that it was the infant plaintiff who is absolutely to blame for the present accident. Despite the suddenness of the girl darting, the defendant did take evasive action by applying his brakes and stopping within a few feet from the point of impact. The defendant could do absolutely nothing else and, as stated, he cannot be held to blame at all."

It was argued by counsel for the appellant girl that the respondent driver was also to blame even to a small degree, because in the particular circumstances of this case he did not act as a prudent driver : (A) For not sounding his horn when he saw the women standing on the berm ; (B) for failing to reduce his speed and (C) for driving too close to the berm instead of taking more to the right.

Dismissing the appeal, the Court :—

Held, (1). When it is necessary for a Court to ascribe liability in proportions to more than one person, it is well established that regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness. In the *Miraflores and the Abadesa* [1967] 1 All E.R. 672, at pp. 677–678 Lord Pearce said :

". . . . .the investigation is concerned with 'fault' which includes blameworthiness as well as causation ; and no true apportionment can be reached unless both factors are borne in mind."

(2) The principles which govern the Appellate Court in determining whether to vary the apportionment in cases of

this nature are well settled, and have been laid down in a number of decisions. The Appellate Court will not interfere with such apportionment unless it is satisfied that the apportionment made by the trial Court is so erroneous or unwarranted, or wrong in principle as to make it proper or necessary for this Court to interfere in the matter ; and this is so even if one or more members of this Court may be inclined to think that as trial Judges they might make a different apportionment (*see Alexandrou* v. *Komodromou and Others* (1970) 1 C.L.R. 69 at p. 73 ; *Ioannou and Another* v. *Michaelides* (1966) 1 C.L.R. 235, at p. 238 ; *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708, at pp. 710 and 712 ; *British Fame (Owners)* v. *MacGregor (Owners)* [1943] 1 All E.R. 33 ; *Baker* v. *Willoughby* [1969] 3 All E.R. (H.L.) 1528, at p. 1530). Regarding the case *Andrews* v. *Freeborough* [1966] 3 W.L.R. 342, relied upon by counsel for the appellant, it is to be observed that the facts in that case are distinguishable from those in the present case.

(3) On the evidence on record and directing ourselves by the authoritative pronouncements which bear the principle in various different sets of circumstances, we do not think that the view taken by the trial Court that the girl (plaintiff-appellant) was solely to blame is so erroneous or unwarranted as to justify this Court for interfering with the apportionment made.

Appeal dismissed. No order as to costs.

Cases referred to :

Miraflores and the Abadesa [1967] 1 *All* E.R. 672, at pp. 677-678 ;

Alexandrou v. *Komodromou and Others* (1970) 1 C.L.R. 69, at p. 73 ;

Brown and Another v. *Thompson* [1968] 2 All E.R. 708, at pp. 710 and 712 ;

British Fame (Owners) v. *MacGregor (Owners)* [1943] 1 All E.R. 33 ;

Kerry v. *Carter* [1969] 3 All E.R. 723 ;

Quintas v. *National Smelting Co. Ltd.* [1961] 1 All E.R. 630 ;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172 ;

Ioannou and Another v. *Michaelides* (1966) 1 C.L.R. 235, at pp. 238-239 ;

Baker v. *Willoughby* [1969] 3 *All* E.R. 1528, at pp. 1530-31 H.L. ;

Andrews v. *Freeborough* [1966] 3 W.L.R. 342, at p. 346.

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HARBIYE EKREM, SUING THROUGH HER FATHER EKREM NASIF
v.
IAN DOUGLAS MCLEAN

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Mavrommatis and Stylianides, D.JJ.) dated the 30th May, 1970, (Action No. 3017/68) whereby her action claiming damages for personal injuries sustained in consequence of her being struck by defendant's car was dismissed.

A. Dana, for the appellant.

A. Myrianthis, for the respondent.

The judgment of the Court was delivered by :—

HADJIANASTASSIOU, J. : On May 30, 1970, the Full District Court of Nicosia dismissed the action of the plaintiff claiming damages for personal injuries which were sustained in consequence of her being struck by the defendant's motor-car on February 3, 1968. The plaintiff now appeals against the judgment of the trial Court and the notice of appeal raises two points :

(1) That the trial Court by accepting the evidence of the defendant ought to have found at least some degree of negligence on the part of the driver ; and

(2) That the Court wrongly weighed the evidence adduced by the defendant.

However, today counsel stated before us that he was not challenging the findings of the Court and we take it that the latter point was abandoned.

The plaintiff Harbiye Ekrem was four years of age at the time of the accident, and on February 3, 1968, was taken by her mother to the tap of the village of Kokkina in order to take water. Whilst they were so waiting for their turn, as there were other women taking water, the defendant who was driving his motor-car under registration No. DJ. 707, carrying among other passengers his wife, who was sitting in the front seat next to him, was passing through the village of Kokkina on his way to Polis, and found himself involved in a traffic accident. As a result of the accident the child sustained serious injuries and was taken to Pentayia Hospital for treatment.

The trial Court, after finding that the plaintiff sustained serious injuries, summarized them under three headings :—

(*a*) Dislocation and fractures (including teeth) ;

(*b*) Post-concussional syndrome including the very serious sub-head of the possibility of epilepsy ;

(c) Disfigurement, by which we mean mainly the ugly surgical scar on the outer aspect of the thigh which we ourselves inspected and we found to be prominent and ugly."

Harbiye was discharged from the hospital on February 15, 1968, but continued attending the said hospital as an out-patient. Pausing here for a moment we feel that we must express our sorrow for the accident of this young girl, which in our view, could have been avoided, had it not been for lack of proper attention and care by her mother.

As is usual in these traffic accidents there were two conflicting versions. It was the version for the plaintiff that on the date of the accident —

" The plaintiff at about 3 p.m. of the 3rd February, 1968, walked with her mother to the public fountain of Kokkina village just off the main Nicosia-Polis road. As there was only one tap in the village and there were other women filling their pots, plaintiff's mother stood on the berm at a distance of 1-1½ feet from the edge of the asphalted part of the road, waiting for her turn with her back turned towards the fountain and the plaintiff stood in front of her facing her mother. Whilst there, motor car registration No. DJ. 707 driven by the defendant at a high speed coming from the direction of Nicosia, struck the plaintiff and threw her at a distance of about 30 feet. In order to do so the car left the asphalt, got on the berm and then hit the infant plaintiff. None the less, the car stopped at a short distance after the impact."

Although there was no sketch before the trial Court indicating the point of impact in this traffic accident, nevertheless, it appears from the evidence before the trial Court that the width of the road was 7–8 feet with 2–3 feet berm on either side, and the skid marks left by the car were about 18–20 feet. The width of the vehicle was 4½–5 feet. The road was dry, and at the time of the accident there was no other traffic on the road.

It was the version of the defendant that on the date of the accident —

" whilst he was driving through Kokkina village at 20 miles per hour on a straight stretch of road, all of a sudden he saw on his left a group of women standing on the berm collecting water. When he was almost level with this lot of women the child suddenly dashed

out in front of him, he immediately applied brakes, but the collision was not averted and the front nearside corner of the car by the head lights struck the child. The defendant drove his car all the way on the asphalted part of the road and his car came to a standstill within a few feet. The defendant stressed the fact that the child dashed suddenly and unexpectedly and that he simultaneously applied brakes. There was no other vehicle on the road at the time ; he saw the group of women from a distance of about 30 yards but the child was not visible. He first noticed the top of the head and the hand of the child when the child actually dashed out."

The version of this witness was corroborated by the evidence of his wife who was sitting at the side from which the child emerged from the group of women and, who was in our view, in a better position to see and observe the movements of the child dashing into the road. She stated that the child was not standing by the side of the road on the berm but she came out from behind the women running for not more than a few feet. She did not see the child at all before, but only saw her suddenly dashing into the road, taking a couple of steps and then bumping on the front nearside of the car.

The trial Court after properly weighing and evaluating the whole evidence, and after giving their weighty reasons, accepted the version of the defendant and his wife, and made their findings of fact, which I propose reading :

> " At the material time the defendant with his wife and certain other persons as passengers, was driving on the Nicosia-Polis road through Kokkina village. When inside Kokkina village he was driving at the very reasonable speed of 20–25 miles per hour when he saw ahead of him a group of women taking water from the public fountain to his left and off the road. The defendant did not and could not see the child as she was probably amongst the women. Also, there was nothing whatsoever to indicate to him that any one of the persons at the fountain to whom he was clearly visible, would try to cross the road across his path. Therefore, he gave them a berth of about 1½ feet, which in the circumstances, taking into consideration the fact that it is a very narrow road, can be taken to have been quite reasonable. When the defendant was level with the women, suddenly and without any prior warning whatsoever, the child darted

to cross the road and in her effort she was hit by the front nearside part of the motor-car, that is to say the front nearside headlamp. As a result she was injured.

In all these circumstances, we cannot find any blame whatsoever on the defendant and it seems that it was the infant plaintiff who is absolutely to blame for the present accident. Despite the suddenness of the child darting, the defendant did take evasive action by applying the brakes and stopping within a few feet from the point of impact.

The defendant could do absolutely nothing else and, as stated, he cannot be held to blame at all."

When it is necessary for a Court to ascribe liability in proportions to more than one person, it is well-established that regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness. In the *Miraflores* and *The Abadesa* [1967] 1 All E.R. 672 at pp. 677-678 Lord Pearce said :

" ..... the investigation is concerned with 'fault' which includes blameworthiness as well as causation ; and no true apportionment can be reached unless both those factors are borne in mind."

As we have said earlier the findings of fact of the trial Court are not challenged but counsel in the course of hearing this appeal has attacked the findings of the Court that the plaintiff was wholly to blame for the accident and forcibly argued that the defendant driver was also to blame even to a small degree, because in the particular circumstances of this case he did not act as a prudent driver : (*A*) For not sounding his horn when he saw the women standing on the berm ; (*b*) for failing to reduce his speed and (*c*) for driving too close to the berm instead of taking more to the right of the road. It was equally strenuously argued by counsel for the defendant that the only cause of the accident was the plaintiff's own negligence.

The principles which govern the appellate Court in determining whether to vary the apportionment in cases of this nature are well settled, and have been laid down in a number of decisions. In *Alexandrou* v. *Komodromou and Others* (1970) 1 C.L.R. 69, Vassilliades, P. at p. 73 had this to say :—

" The issue of negligence in a case of this nature is decided on the findings regarding the facts relevant to negligence ; and the apportionment of liability

depending on such findings, is also practically a finding of fact. Thus the primary responsibility for finding and apportioning negligence rests with the trial Court ; and its decision should not be disturbed unless this Court is persuaded that there are sufficient reasons justifying intervention ; and this is so even where one or more members of this Court may be inclined to think that as trial Judges they might make a different apportionment."

In *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708 Winn, L.J., after stating the facts and reviewing the evidence and the findings of the trial Judge, said at p. 710 :

> " It is said by counsel for the appellant that, whereas it may be difficult and not in accordance with the practice of this Court to change a complete acquittal by a Judge of one party of any negligence at all into a finding against that party of some degree, however minor, of negligence, on the other hand, where there has been as here, a condemnation, albeit a mild condemnation, of the appellant, Mr. Thompson, as being partly responsible for this collision, counsel submits that the Court is entirely unfettered and should fell itself free to substitute its own opinion for that of the trial Judge on the question of the attribution of blame. If there is any widespread belief to that effect at the Bar, it should be entirely discarded. It can lead only to much wasteful use of an appellate Court's time. It is quite contrary to the well established practice of this Court. Perhaps at the risk of being tedious in giving this reminder, the *locus classicus* of course, is *British Fame* (*Owners*) v. *MacGregor* (*Owners*)*. It was an Admiralty decision, which went to the House of Lords, and the speech to which I desire to direct attention, so that it may be borne in mind, is that of Lord Wright."

Pausing here for a moment, we would state that in our view, the speech of Lord Wright emphasises that there would have to be a very strong case to justify any review of apportionment if an appellate Court accepted the same view of the law and the facts as that taken by the learned Judge.

Later on Winn, L.J. had this to say at p. 712 in the same case :

> " Directing myself by those very authoritative pronouncements, and having taken note of other cases

* [1943] 1 All E.R. 33.

which are usefully noted in Bingham's Digest of Motor Claims Cases (5th edn.) which entirely bears out the principle in various different sets of circumstances, I feel quite satisfied that I do not find any cause in the instant case for altering the apportionments made by the trial Judge. I deliberately do not say that, had I been trying this case myself, my apportionment would have been twenty per cent. I am not concerned with that. I find no reason which moves my mind at all to consider that the trial Judge's apportionment was wholly erroneous. Even if I had thought there was reason to disagree with his apportionment, I would have thought it impossible, for the reasons indicated in the judgments to which I have referred, to interfere with the Judge's apportionment."

Willmer, L.J., who also agreed that the appeal should be dismissed said at p. 713 :

" the only thing that I desire to add for myself is an expression of my concurrence with the observations which have fallen from Winn, L.J., with regard to the reluctance of this Court to interfere on a mere matter of apportionment where no error of principle is alleged and no misapprehension of the facts on the part of the trial Judge is suggested."

This case was explained in *Kerry* v. *Carter* [1969] 3 All E.R. 723. The matter has received further consideration in *Quintas* v. *National Smelting Co., Ltd.* [1961] 1 All E.R. 630. This decision was adopted and followed in the case of *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172.

In *Christakis Ioannou and Another* v. *Fivos Michaelides* (1966) 1 C.L.R. 235, a case in which the trial Court found that the appellant defendant driver was fully to blame and that the respondent did not contribute at all to the accident, Josephides, J. after stating the facts and reviewing the evidence and the findings of the trial Judges said at p. 238 :

" As regards the complaint that the respondent failed to take avoiding action, it has been held that where a ' wrong ' step is taken by a driver in the agony of the collision it does not follow that that step was a negligent step if the other driver by his negligence placed the first driver in a position of danger ; but the latter is to take a step which a reasonably careful man would fairly be expected to take in the circumstances (*Chaplin* v. *Hawes*, 3 C & P 554 ; *Swadling*

v. *Cooper* [1931] A.C. 1, 9 ; and *Wallace* v. *Bergins* [1915] S.C. 205). This is a question of fact in each case.

There is no doubt that the appellant by his negligent action in emerging from an open space in the respondent's path in the main road, put the respondent in a dilemma and, even assuming that the latter did the wrong thing, I think that, having regard to the circumstances of this case, including the short space of time taken by the appellant's car to cover the distance of 19 $\frac{1}{3}$ yards up to the point of impact, the respondent did not have the time or the opportunity to take effective avoiding action in the agony of the collision. I am of the view that on the evidence before the trial Court it was open to them to find as they did, that the appellant was solely to blame for the accident, and I would, therefore, dismiss the appeal."

Triantafyllides, J. as he then was, after concurring that the appeal should be dismissed had this to say in the same case at pp. 238–239 :

" I would like to say only that I agree with the conclusion reached by Mr. Justice Josephides in this case, but my approach is slightly different. Though I do think that there is material on record on which the trial Court could possibly have found the respondent guilty of contributory negligence, sitting here on appeal I do not think that the view taken by the trial Court, to the effect that appellant was solely to blame, is so erroneous or unwarranted as to make it proper or necessary for this Court to interfere in the matter."

In *Baker* v. *Willoughby* [1969] 3 All E.R. (H.L.) 1528, Lord Reid in reversing the decision of the Court of Appeal said at pp. 1530–31 :

" The Court of Appeal recognised that the trial Judge's assessment ought not to be varied unless 'some error in the Judge's approach is clearly discernible'. But they appear to have thought it impossible to differentiate when both parties had a clear view of each other for 200 yards prior to impact and neither did anything about it. I am unable to agree. There are two elements in an assessment of liability, causation and blameworthiness. I need not consider whether in such circumstances the causative factors must necessarily be equal, because in my view there is not even a presumption to that effect as regards blameworthiness.

A pedestrian has to look to both sides as well as forwards. He is going at perhaps 3 m.p.h. and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways although he may have to observe over a wide angle ahead ; and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous. And it sometimes happens, although I do not say in this case, that he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian. And in the present case I can see no reason to disagree with the trial Judge's assessment. I would therefore restore the trial Judge on this issue."

Reverting now to the complaint of counsel, and after perusing carefully the record of the trial Court, we think that having regard to the particular circumstances of this case, the defendant driver acted as a reasonably prudent driver, because once the child was not visible—being among the group of women—he did not have either to sound his horn, since his presence was known to the women, nor to slow down because there was no indication that any one from the women were trying to cross the road. Regarding the further complaint that the defendant drove too close to the berm, one should bear in mind that the defendant driver was passing through a quiet narrow village road at about 3 o'clock, in the afternoon, and that he was keeping the middle of the road without any indication or notice that a child was among those women. Under these circumstances, we do not think that the driver was at fault for doing so and, because he was suddenly confronted with this unfortunate child who emerged suddenly from among the group of women in his path in the main road, and who did his best in taking evasive action immediately by applying his brakes.

Regarding the case of *Andrews* v. *Freeborough* reported in [1966] 3 W.L.R. 342 relied upon by counsel, the facts and the conclusions of the trial Court are summarised by Willmer, L. J. as follows at p. 346 :—

" The defendant said in evidence that she saw the children standing on the curb when she was at a distance of about 40 yards. She said that she thought that they were waiting to cross but that she never saw them look in her direction. Yet she did not think

it necessary to sound her horn or to reduce her speed. She insisted in evidence that she saw the deceased child step off the curb into the side of her car. The Judge accepted that she was an honest witness doing her best to tell the truth. But he concluded that this part of her evidence was unacceptable and expressed the view that she was unconsciously reconstructing what she thought must have happened. This conclusion was largely based on the fact that the defendant had said nothing about the child stepping off the curb either when giving her original statement to the police on the day of the accident or when giving evidence at the Coroner's inquest a year later."

Later on Willmer, L.J. had this to say :

" In the circumstances Lloyd-Jones J. declined to find that the child had stepped off the curb. He found that in some way, while standing on the curb, she was caught up, or swept up, by the defendant's car as it passed. This necessarily involved that the defendant's car must have been driven too close to the curb. As I read his judgment, the Judge thought that the defendant was to blame, (*a*) for not sounding her horn, (*b*) for failing to reduce her speed and if necessary to stop on seeing the children, and (*c*) for driving too close to the curb. He declined to find any contributory negligence on the part of the deceased child, even on the assumption that she was old enough to be capable of negligence.

On this appeal, as I have already said, it has not been contended that the defendant was entirely free from blame. But we have been invited to say that the deceased child was guilty of contributory negligence so that the plaintiff should recover only a proportion of the damages. It has been submitted that we ought to set aside the finding of Lloyd-Jones J. as to how the accident happened, and substitute a finding that the deceased child did step off the curb as the defendant alleged. It has been admitted that, even if that were so, the defendant would have to be found partly to blame for the accident for not sounding her horn. It is indeed tempting to accept the invitation put forward by the defendant, since the accident could easily be explained on the basis that the child stepped off the curb into the road. I confess that I find it quite difficult to appreciate just how the accident happened if the child remained throughout standing on the

curb. But the Judge was fully alive to the difficulties of the plaintiff's case. He had the advantage, denied to us, of seeing and hearing the witnesses, particularly the defendant herself. He came to the conclusion that the plaintiff's case, with all its difficulties, should be accepted. His finding that the child did not step off the curb was a finding of primary fact, based largely on his view of the quality of the evidence which he heard. In my judgment it is not a finding with which this Court could properly interfere. That being so, I find myself unable to say that any case of contributory negligence on the part of the deceased child has been made out. The defendant was in my view rightly held liable for the whole of the damages sustained by the child, whatever they may be."

It thus appears that in *Andrews* case the facts can be distinguished from the present case, because the defendant admitted seeing the children waiting to cross and took the chance once they were not looking her way, that she could safely pass them.

For the reasons we have tried to explain, and directing ourselves by the authoritative pronouncements which bear out the principle in various different sets of circumstances, we do not think that the view taken by the trial Court that the appellant was solely to blame is so erroneous or unwarranted and, as we do not find any cause in the instant case for interfering with the apportionment of blame, we would dismiss this appeal. In view of the fact that counsel for the respondent claimed no costs, we do not propose making an order for costs.

Appeal dismissed.
No order as to costs.