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

SAVVAS CHRISTOFI AND ANOTHER,
Appellants-Defendants,

v.

KYPROS NICOLAOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 5041).

Contributory negligence—Causation—When is a person guilty of contributory negligence—Causative potency—Blameworthiness—Apportionment—Plaintiff's arm injured by vehicle coming from opposite direction, while extended outside his stationary car at night time, in order to give a hand signal—Plaintiff held on appeal guilty of contributory negligence—Section 57(1) *of the Civil Wrongs Law, Cap.* 148.

Road Traffic—Accident—Apportionment of blame—See supra.

Highway—Users of—Duty owed by users of the highway towards each other.

Negligence—Contributory negligence—Apportionment of liability—Road accident—See supra.

The facts sufficiently appear in the judgment of the Court, allowing this appeal by the defendants in this road accident case ; and holding that on the evidence the plaintiff was guilty of contributory negligence.

Cases referred to :

Charalambides v. *Michaelides* (reported in this Part at p. 66 *ante*) ;

Nance v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448, at p. 450 ;

Jones v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, at p. 615 ;

Tessi Christodoulou v. *Nicos Menicou and Others* (1966) 1 C.L.R. 17, at p. 33.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Stavrinakis, Ag. P.D.C. and Evangelides, Ag. D.J.) dated the 30th December, 1971, (Action No. 6076/70) whereby they were adjudged to pay to the plaintiff the sum of £1,400 as damages for injuries which he sustained due to the negligent driving of defendant No. 1.

C. Myrianthis, for the appellant.

J. Mavronicolas with *A. Danos*, for the respondent.

Cur. adv. vult.

The judgment of the Court will be delivered by :—

HADJIANASTASSIOU, J.: On June 8, 1970, in the early hours of the morning, the plaintiff was driving his land rover, Registration No. AT 299 along Afxentiou Avenue in Nicosia, and stopped at the junction of Marcos Dracos Avenue. He put out his hand in order to signal his intention to turn to his right, and his right arm was injured by a lorry driven by defendant No. 1 and owned by defendant No. 2. He was taken to the hospital and remained there as an in patient for 37 days, and in the end this resulted in permanent partial incapacity, for which he sued the defendants claiming damages. After hearing evidence, the Full District Court of Nicosia found that defendant No. 1 was solely to blame for the accident and awarded to the plaintiff the sum of £1,200 general damages and an agreed sum of £200 special damages against both defendants. The defendants appealed both against the findings of fact as being unreasonable, wrong in law and against the weight of evidence, and also against the finding of the trial Court as to the apportionment of blame.

The relevant facts can be shortly stated : The plaintiff, whilst driving his land rover along Gregoriou Afxentiou Avenue proceeding towards Nicosia, when he approached the junction, stopped on the left side of the road because he intended to turn right. He consulted his mirror and because there was a car following him, he put out his hand—as his car was not fitted with electric trafficators—to give a signal of his intention to turn right and to give priority to the cars coming from the opposite direction. Whilst he was looking in the mirror and before he had time to retract his hand, defendant No. 1, who was driving his lorry from the opposite direction behind a small car at

30 m.p.h., with dipped lights, struck and injured the right arm of the plaintiff which was protruding outside the window of his car, because the said lorry was driven very close to the plaintiff's car.

It is significant that the defendant did not allege that he had to drive very close to the car because there was no room on the other side of the road. He denied that there was a car in front of him, and said that he proceeded driving keeping his proper side of the road, without realizing when he approached the car coming from the opposite direction that an accident had occurred. It was later on that he was informed that he had hit the hand of the plaintiff. Then the defendant was questioned in these terms :—

"*Q.* Did you notice the hand of the plaintiff extended at the side of the car ?

A. I did not see his hand outside the land rover and there was nothing to show that he intended to turn to the right. The lights of the plaintiff's car were on. It is impossible for one to see at night a hand signal of a driver of a car coming from the opposite direction with its lights on. I cannot say if a hand signal can be seen where the street is illuminated by street lights. The street lighting at that particular spot was not such as to permit a car driver to see a hand signal."

The asphalted part of the road at the scene of the accident is 18′ and there are berms on either side of the road which are usable, but at the scene of the accident they are about 3″–4″ lower than the surface of the asphalted part of the road. The width of the lorry was found to be 5′ and its length 12′. The lights of the lorry were in good working order and they were at a higher level than the lights of the car driven by the plaintiff. The road is straight, and where the accident took place is illuminated by strong mercury lights.

The resultant injuries of the plaintiff on the date of hearing of the action as found by Mr. Pelides, were as follows :—

"The right forearm fractures feel soundly united in acceptable axial fragmental alignment ; only mild 5–10 varus (Lateral bowing) angulation deformity of right forearm persists ; A 6″ long scar is evident of the posterior surface of right elbow. Moderate subjacent soft tissue thickening persists around the

right elbow. The joint's range of active motion is 2/3rds of normal. Right forearms rotation active range is just over one half of normal. Effective gripping of right hand fairly strong but exhibits deficit as regards sustained light gripping from an obtuse angle."

With regard to the accident, the trial Court, after testing the evidence of the plaintiff—that his forearm only was protruding outside the car—with the real evidence, *i.e.* with the finding of Mr. Pelides (the surgeon) that the patient was found to have compound fracture of the right oleocranum process with traumatic division of the triceps tendon and comminuted double fractures of the radius and ulna, expressed the view that such evidence was corroborated by the injuries found by Mr. Pelides.

Then the Court proceeded to give its reasons for reaching their conclusions and had this to say :—

"As no injuries were found on the upper part of the arm and the injuries are confined below the elbow, we find that his hand was not extending outside the car above the elbow. We may also safely say that the 4" lacerated wound which was lying over the fractured oleocranum process was caused by the pushing of the arm backwards and finding resistance in all probability against the window frame of the motor-car. Judging also from the fractures of the ulna and radius, we may infer that the lorry hit directly that part of plaintiff's forearm and this is of importance in ascertaining the distance at which the lorry passed by the plaintiff's vehicle. Normally the length of a forearm together with the hand in an extended position is about 1–1½ feet. If we take out from the length of the forearm the hand, then the length below the elbow must be by about 6 inches less. With the above data in mind we can say that the space between defendant's and plaintiff's cars when side by side could not have been more than 9"–12"; had it been more, one would expect the injuries to be confined to the hand and not extend to the forearm and the elbow. By this calculation and bearing in mind (*a*) the fixed position of the plaintiff's car, (*b*) its width (5'), and (*c*) its distance from the nearside edge of the asphalt (3½'), (*d*) that the lorry passed the plaintiff's car at a distance of not more than 1' and (*e*) the width of the lorry (7' 6"), we arrive at the conclusion that there must have been a distance of about 1' from the lorry's left side to its nearside edge of the asphalt."

Finally, on the evidence before it, the trial Court arrived at the finding that the defendant was wholly to blame for the accident because the defendant, in passing the plaintiff's stationary car should have kept such a distance from it as to make allowance for a hand signal, irrespective of whether he saw it. It was something foreseeable, and he took a chance by passing it at such a close distance.

Counsel for the appellant contended with regard to the question of apportionment, that the respondent was wholly to blame for the accident in view of his negligent conduct in driving towards the side of the appellant, and particularly so, in view of his negligence in stretching his hand outside the window during the night when traffic was coming from the opposite direction. Counsel further argued that respondent was also guilty of contributory negligence in law because a person driving along a highway must always have in mind the possibility of an accident in stretching out his hand to signal and failing to take reasonable precautions for his own safety in relation to the kind of danger which was likely to occur by not pulling his hand inside the car when realizing that the lorry coming from the opposite direction was about to overtake him.

There is no doubt that the basis of assessment as to the apportionment of blame is that the proper apportionment is determined by the facts of each case ; and that it is well judicially established that the two elements of causative potency and blameworthiness are the relative factors regarding the apportionment of liability. See *Charalambides* v. *Michaelides* (reported in this Part at p. 66 *ante*).

Regarding the use of a highway, we would like to state that when two parties on the highway are so moving in relation to one another as to involve risk of an accident, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles or both proceeding on foot or whether one is on foot and the other controlling a moving vehicle. In *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448, Viscount Simon said at p. 450 :—

> " The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, undubitably correct."

With the above considerations in mind both as to the facts and as to the law, initially the most important consideration in this case is to look at the defendant's conduct,

and in doing so, in our view, the defendant was driving without due care and attention and was approaching the other car in such a way as to involve the risk of an accident. Because the defendant was travelling during the night very close to the stationary car, we repeat that he ought reasonably to have foreseen the possibility of his being involved in an accident, and has failed to exercise that care which the circumstances of this case demanded. We would, therefore, affirm the judgment of the trial Court that the defendant owed a duty to the plaintiff to proceed with due care, and was to be blamed for the accident, and we are not prepared on the facts of this case to say otherwise.

The next question which is posed is whether the plaintiff is to be found guilty of contributory negligence and, what was his share of the responsibility for the ultimate damage suffered by him.

Our Civil Wrongs Law, Cap. 148 s. 2 of which defines " damage " as including " loss of comfort and bodily welfare ", provides by s. 57 (1) that :—

> " Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The first question, accordingly, is whether this plaintiff was guilty of contributory negligence. In *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, Denning, L.J. said at p. 615 :—

> " 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."

Respectfully adopting this test it seems clear that the plaintiff, travelling at night and stopping at the junction more to the side of the defendant, ought reasonably to have foreseen the possibility of his being involved in an accident,

even though his car was stationary at the time of the accident and had to extend his arm outside the window in order to give a hand signal to the car which was following him. Unfortunately, however, he showed no foreseeability that he might hurt himself and although fully realizing that traffic was coming from the opposite side, he did not act as a reasonable prudent man—once his attention was directed only to the car following him—and in his reckonings he failed reasonably to realize or take into account the possibility of the driver of the lorry being careless in order to pull his arm inside the car. We would repeat that in the circumstances of this case the attention of the plaintiff ought to have been directed also to the traffic approaching him and in his own interest he ought to have pulled his hand inside the car.

In the light of the facts and circumstances of this case, we find ourselves in agreement with counsel for the appellant that the respondent did not use reasonable care for his own safety in having his arm protruding out of the car, and has suffered damage partly of his own fault and partly of the fault of the appellant. With this in mind, we have reached the view that the finding of the trial Court that the appellant was wholly to blame for the accident, cannot be supported by evidence, and we, therefore, find that the respondent was guilty of contributory negligence. Cf. *Tessi Christodoulou* v. *Nicos Savva Menicou and Others* (1966) 1 C.L.R. 17 at p. 33.

The only remaining question is : In what proportion should the damage suffered by the respondent be borne. We think that the trial Court arrived at a wrong apportionment having regard to the two elements of causative potency and blameworthiness referred to earlier in this judgment, but on the other hand we think that the appellant was more to blame in the circumstances of this case. Giving the best consideration that we can to the whole matter, we assess the responsibility of the respondent in terms of 40 per cent of the whole, and allow the appeal to the extent of reducing the damages to that extent.

Appeal, therefore, allowed with half of the costs in this Court. Order below varied by reducing the figures by 40 per cent.

Appeal allowed. Order for costs as above.