1975
Dec. 8

IOANNIS KOUDELLARIS

v.

CHRISTOFOROS I. CHRISTOFOROU AND OTHERS

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

IOANNIS KOUDELLARIS,

Appellant-Defendant,

v.

CHRISTOFOROS I. CHRISTOFOROU AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 5273)

Negligence—Contributory negligence—Collision between vehicles moving in the same direction—Sudden turn to the right by defendant's vehicle whilst plaintiffs' vehicle was about to overtake him—Duty of defendant to keep proper lookout whilst so turning and to satisfy himself that he could execute that manoeuvre in safety—Having regard to the evidence before it, trial Court drew the correct inference that the accident was solely caused by negligent driving of the defendant.

Court of Appeal—Inferences drawn from primary facts—Appeal turning on such inferences—Principles on which Court of Appeal acts—Section 25(3) of the Courts of Justice Law, 1960 (Law 14 of 1960).

Inferences—Drawn from primary facts—See, also, under "Court of Appeal".

The appellant in this appeal complains against the finding of the Court below that he was wholly to blame for the accident.

It was the version of the respondent that whilst he was driving his car from Nicosia to Xeros he met a lorry proceeding in the same direction. When he realised that the road in front of him was clear up to a great distance, and as he wanted to overtake the lorry, he sounded his horn and upon noticing that the lorry was moving towards the left hand side of the road, in order to allow him more space, he accelerated and increased his speed to 60 m.p.h. When he found himself 40 ft. from the lorry, he realized that the lorry was suddenly turning to the right without any warning, either by the trafficator or by hand. In order to avoid

the accident, he applied his brakes, sounded his horn, and in the agony of the moment, he pulled slightly to the left because there was a deep ditch on the right hand side of the road, but the accident occurred.

The version of the appellant was that when he approached Akaki village he turned to the right in order to proceed into the side road. He signalled with his hand, having no trafficator, and having looked into the mirror to see that no car was following him he turned to the right. When he was blocking the road, he heard the screeching of brakes, he attempted to accelerate in order to avoid the collision, but as his lorry was loaded and was turning slightly to the right, the accident occurred.

The trial Court, having considered the versions of both drivers, and having observed that it was the duty of the lorry driver (appellant) to have kept a proper lookout whilst turning to his right, and that he failed to satisfy himself that he could execute that manoeuvre in safety, came to the conclusion that he was negligent and that he was entirely to blame for the accident. The trial Court further said that they have some doubts as to whether appellant did actually signal with his hand, but even if he did so, he admitted himself that there was no car coming from behind him. It was clear, therefore, that no driver coming from behind had seen the signal. The trial Court went on to say that it was the duty of the appellant to make a signal and see in his mirror and make sure that either no car was coming behind him or that if there was a car behind him, he would have proper warning, and concluded by adding that they were satisfied that appellant failed to do so.

In considering whether the respondent contributed to the accident the trial Court stated that they could not see what blame could be attributed to the respondent.

Counsel appearing for the appellant conceded that his client was equally to blame for the accident, but he argued that the trial Court, having regard to the evidence adduced drew the wrong inference in accepting that the respondent did not contribute to the accident; and invited the Court of Appeal to reverse the decision of the trial Court because in all such cases an appellate

Court is in as good a position as the trial judge.

The Court of Appeal after citing the principles on which it acts on hearing appeals turning on inferences, and after referring to the relevant case-law and to s. 25(3) of the Courts of Justice Law, 1960 (vide pp. 372(14)—374(41) of the judgment *post*),

Held, (1) Once the sole question in this case is whether the proper inference from the facts is that the appellant was wholly to blame for the accident, we have no difficulty to say that we, as an appellate Court, should form an independent opinion, though we will attach importance to the judgment of the trial Court.

(2) Although appellant looked momentarily in his mirror and saw no vehicle following him, it is clear in our view that when he turned and cut across the road, he did not make sure that he could execute that manoeuvre in safety; one cannot but draw the inference that had he looked once again to see in his mirror before actually turning, he would have been in a position to see the respondent driver, who sounded his horn in order to overtake him.

(3) Having regard to the evidence before it, the trial Court drew the correct inference that the accident was solely caused by the negligent driving of the defendant, and we are not, therefore, prepared to interfere with that finding of the trial Court.

(4) Regarding the issue of contributory negligence, we think that in the particular facts and circumstances of this case, respondent acted as a reasonable prudent man. The appellant failed to establish, (once the burden rested on him), that the accident could have been avoided had the respondent pulled to the right instead of to the left when, in the agony of the moment, he applied his brakes. We are not prepared to say that a reasonable prudent driver who took all necessary precautions for his own safety before starting to overtake the lorry ahead of him would in those circumstances have done anything more to avoid the accident.

Appeal dismissed.

Cases referred to.

Simpson v *Peat* [1952] 1 All E.R. 447;

Watt or Thomas v *Thomas* [1947] A.C 484 at pp 486 and 488;

Powell v *Streatham Manor Nursing Home* [1935] A C 243 at p 267;

Benmax v *Austin Motor Co Ltd*, [1955] 1 All E.R. 326;

Constantinou v *Katsouris & Another* (reported in this Part at p 188, *ante*, at p 192),

Charalambides v *Michaelides* (1973) 1 C L R. 66,

Jones v *Livox Quarries Ltd* [1952] 2 Q B 608;

Swadling v. *Cooper* [1931] A C 1;

Davies v *Swan Motor Co (Swansea) Ltd.* [1949] 1 All E.R 620.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Ioannides, P.D C and Evangelides, Ag. D.J.) dated the 20th December, 1973 (Consolidated Actions Nos. 3735/71 and 3019/71) whereby the plaintiffs were awarded the sum of £540.- as damages for injuries they suffered in a traffic accident due to the negligence of the defendant

Ph Clerides, for the appellant.

A Georghiades, for the respondents

Cur adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:

HADJIANASTASSIOU, J.: The plaintiffs were injured in a road traffic accident which occurred on September 17, 1970, between a Rover motor car driven by Ioannis Christoforou, and a lorry driven by Ioannis Koudellaris, the defendant. On December 20, 1973, the Full District Court of Nicosia held the defendant wholly to blame for the road accident in the two consolidated actions, and awarded to the two minors the sum of £170 and £120

damages respectively, and to Iroulla Christoforou the sum of £250. The defendant appealed against the finding of the Court that he was wholly to blame for the accident, and the appeal was argued on the ground that the finding of the Court based on the inference that he was wholly to blame, was wrong in law because the other driver had contributed to the accident.

The accident occurred on September 17, 1970, when the plaintiffs' father, the headmaster of the Technical School of Xeros, was driving from Nicosia to Xeros with his wife and his two minor children as passengers, and just before reaching Akaki village, shortly after the 13th milestone of Nicosia - Morphou road, he met a lorry proceeding in the same direction. When the driver of the Rover realized that the road in front of him was clear up to a great distance, and because he wanted to overtake him apparently because the lorry was driven very slowly, being loaded, he sounded his horn, and when he noticed that the lorry was moving towards the left hand side of the road in order to allow him more space, he accelerated and increased his speed to 60 m.p.h. to overtake the lorry. Unfortunately, when the driver found himself 40 ft. from the lorry, he realized that the lorry was suddenly turning to the right without any warning, either by trafficator or by hand. In order to avoid the accident, he applied his brakes, sounded his horn to warn the lorry driver, and in the agony of the moment, he pulled slightly to the left because there was a deep ditch on the right hand side of the road, but the accident occurred.

The version of the defendant was that when he approached Akaki village he turned to the right in order to proceed into the side road, intending to buy bread from a nearby bakery. He signalled with his hand, having no trafficator, and having looked into the mirror to see that no car was following him, he turned right. When he was blocking the road, he heard the screeching of the brakes of a motor car, he attempted to accelerate in order to avoid the collision, but because the lorry, being loaded, was turning slightly to the right, the accident occurred, and the driver of the other car collided with the rear wheel of the lorry. Questioned further as to whether he heard the horn of the car in question, he

said that because of the diesel engine of the lorry which is very noisy, he did not hear it. The defendant gave also a statement to the police shortly after the accident, but when he was asked to indicate the point on the road where the collision took place, according to the evidence of the policeman, he was not in a position to do so.

The trial Court, having considered the versions of both drivers, and having observed that it was the duty of the lorry driver to have kept a proper lookout whilst turning to his right, and that he failed to satisfy himself that he could execute that manoeuvre in safety, (*Simpson* v. *Peat* [1952] 1 All E.R. 447) came to the conclusion that he was negligent and that he was entirely to blame for the accident and put the matter in this way :-

> "The defendant told us that before he had attempted to cut across the road, he had put out his hand and looked in his mirror and he saw no car behind him. We have some doubts as to whether he did actually put his hand out, but even if he did so, he admitted himself that there was no car coming behind him. It is clear, therefore, that no driver coming from behind had seen his signal. The lorry of the defendant did not have a trafficator. It was, therefore, the duty of the defendant when he came very close to the bakery to drive very very slowly, to make again a signal that he was to turn to the right and see in his mirror and make sure that either no car was coming behind him or that if there was a car behind him, he would have proper warning. We are satisfied that he failed to do so."

Then the Court, having accepted that the driver of the Rover car had sounded his horn before attempting to overtake the lorry, in considering also whether the other driver contributed to the accident, said :-

> "... we cannot see what blame can be attributed to the driver of the car. He saw the lorry in front of him, he wanted to overtake, he pulled to the right, he saw that the road was clear, he sounded his horn and when he started on his way to overtake the lorry, he saw the lorry turning to the right. Defendant's counsel submitted that the driver of the

car was to be blamed because he did not pay attention to the defendant's signal that he was about to turn to the right, but as the defendant himself has stated, when he made that signal there was no car behind him. So, we cannot see what warning the driver of the car had that the lorry was about to turn to the right."

Counsel on behalf of the appellant, in arguing the appeal, although he conceded that his client was equally to blame for the accident, nevertheless, he argued that the trial Court, having regard to the evidence adduced, drew the wrong inference in accepting that the driver of the Rover did not contribute to the accident in question, and invited the Court to reverse its decision because in all such cases an appellate Court is in as good a position to decide as the trial judge.

The principles on which the Court of Appeal acts on hearing appeals turning on inferences, have been expounded in a number of cases, both in England and by this Court, and we think it convenient to state that an appellate Court "has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution". Per Viscount Simon in *Watt or Thomas* v. *Thomas* [1947] A.C. 484 at p. 486.

The Court should be "satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion" (Per Lord Thankerton in *Watt* v. *Thomas* (*supra*) at p. 488) before it disturbs its findings of fact. On the other hand, where as often happens the facts are not in dispute, but the case rests on the inference to be drawn from them, an appellate Court is in as good a position as the trial judge to decide the case. (Per Lord Wright in *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243 at p. 267).

In *Benmax* v. *Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326, Viscount Simons, dealing with Order 58 Rules 1 & 4 of the Rules of the Supreme Court, said at pp. 327 - 328 :-

"But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence. A jury finds that the defendant has been negligent and that is an end of the matter unless its verdict can be upset according to well-established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate Court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.

In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question

is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate Court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge."

In a most recent case, *Constantinou* v. *Katsouris and Another* (reported in this Part at p. 188, *ante),* Triantafyllides, P., delivering the judgment of the Supreme Court in its appellate jurisdiction, reiterated and approved of the said principle and said at p. 192 :-

> "In the present case the decision concerning the responsibility for the collision is not to be reached solely on the basis of findings of primary facts, that is to say, depending on which of the two conflicting versions of the drivers involved therein is to be believed (as was, for example, the position in *Nicolaou* v. *Zayer,* (1974) 1 C.L.R. 156, where this Court refused to interfere on appeal with the trial Court's decision as to liability), but a great lot, indeed, depends, also, on inferences to be drawn from primary facts; and as it was held in, *inter alia, Patsalides* v. *Afsharian,* (1965) 1 C.L.R. 134, this Court is in as good a position as a trial Court to draw such inferences."

Having reviewed the authorities and having regard to the provisions of s. 25(3) of the Courts of Justice Law, 1960 (Law 14/60) and that "the High Court on hearing and determining any appeal .... shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, draw its own inferences .... and may give any judgment of make any order which the circumstances of the case may justify", we would adopt and follow the principles formulated in the cases already quoted, because once the sole question in this case is whether the proper inference from these facts is that the defendant was wholly to blame for the accident, we have no difficulty to say that we, as an appellate Court, should form an independent opinion, though we will attach importance to the judgment of the trial Court.

With this in mind, we think that we are inclined to

reiterate what we said in *Charalambides* v. *Michaelides* (1973) 1 C.L.R. 66 that negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in looking after his own safety. He 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. See *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608. We would also add that before 1945 a plaintiff who was guilty of contributory negligence was disentitled from recovering anything if his own negligence was one of the substantial causes of the injury. (See *Swadling* v. *Cooper*, [1931] A.C. 1). Since 1945 he is no longer defeated altogether, he gets reduced damages. (See *Davies* v. *Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620). In this latter case, the Court also looked to the cause of the damage (p. 632).

In the case in hand, the trial Court, as we said earlier, found that the cause of the accident was the negligent driving of the defendant because although he looked momentarily in his mirror, and saw no vehicle following him, it is clear in our view that when he turned and cut across the road, he did not make sure that he could execute that manoeuvre in safety, and one cannot but draw the inference that had he looked once again to see in his mirror before actually turning, he would have been in a position to see the plaintiff driver, who sounded his horn in order to overtake him. (See *Constantinou* v. *Katsouris (supra)* at p. 192).

The next question is whether the plaintiff driver was guilty of contributory negligence for being careless in looking after his own safety. Having considered the contentions of both counsel, we think that in the particular facts and circumstances of this case, the plaintiff acted as a reasonable prudent man, because before embarking to overtake the defendant driver, he sounded his horn, and when he saw the defendant driver ahead of him proceeding more to the left—in order to allow him more space to pass, as he thought—he accelerated, once the road was clear up to a great distance ahead of him, and we, therefore, fail to see how one could infer that the plaintiff could rightly be held to have contributed to this accident. Moreover, we do not see that the defendant

driver established, once the burden rests on him, that the driver of the Rover, had he pulled to the right instead of to the left, in the agony of the moment, when he applied his brakes, the accident could have been avoided. Certainly, we are not prepared to say that a reasonable prudent driver who took all necessary precautions for his own safety before starting to overtake the lorry ahead of him would in those circumstances have done anything more to avoid the accident.

For the reasons we have endeavoured to explain, and because the case of *Constantinou* (*supra*) relied upon by counsel for the defendant driver, is distinguishable from the facts of this case, we do not hesitate to say that the trial Court, having regard to the evidence before it, drew the correct inference that the accident was solely caused by the negligent driving of the defendant, and we are not, therefore, prepared to interfere with that finding of the trial Court. We would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.