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

KYRIACOS ANTONIOU,

Appellant-Defendant,

v.

IORDANIS IORDANOUS AND ANOTHER,

Respondents-Plaintiffs.

(*Civil Appeal No.* 4908).

Negligence—Contributory negligence—What constitutes contributory negligence—Road accident—Collision between vehicles moving in opposite directions—Defendant suddenly swerving to the right whilst plaintiff was keeping his proper side (left) and driving at moderate speed—Plaintiff trying to pull his car outside asphalted road, applying his brakes and stopping but not managing to get entirely on to the berm—Fact that, in the agony of the moment in which he found himself, he did not reduce speed and did not fall in the berm entirely, does not make him guilty of contributory negligence.

Damages—General damages—Personal injuries—Appeal against award of general damages—Principles on which Court of Appeal will intervene—Painful crushing injuries—Widespread soft tissue bruising and indisputable deformity of right leg associated with an underlying displaced fracture of the right tibia and fibula—Indisputable deformity of left wrist region associated with an underlying fracture of the distal 1" of the left radius—In hospital for a month and both his hand and leg in plaster—Partial ankylosis and instability, swelling and post traumatic arthritis of the right ankle joint—Award of £800—Although Court of Appeal might have been prepared to award a higher amount no wrong principle of law applied by trial Judge in assessing the damages and the amount awarded not a wholly erroneous estimate of the damage.

Whilst the respondent-plaintiff was driving his motor car on his way from Myrtou to Nicosia at a speed of about 25 m.p.h. and at a time when it was dark and sleeting, he noticed a big stationary vehicle on the right half of the road with no lights on. He passed that vehicle and saw the lights of an oncoming vehicle. He pulled more to the left side of the road and whilst so proceeding, the oncoming vehicle, suddenly swerved to its

right. In order to avoid the accident the respondent tried to pull his car outside the asphalted part of the road, he applied brakes, turned to the left and stopped, but the accident was not avoided and the motor car of the defendant collided with his.

The trial Judge found that the defendant was wholly to blame for the accident and awarded an amount of £800 general damages to the plaintiff. Defendant appealed on the ground that the finding of the trial Court that he was wholly to blame was wrong having regard to the evidence adduced.

Plaintiff cross-appealed on the ground that the amount of £800 general damages was inordinately low, having regard to the injuries he received.

On admission to hospital plaintiff was found to suffer from widespread soft tissues bruising and indisputable deformity of the right leg associated with an underlying displaced fracture of the right tibia and fibula and complicated by partial impairment of the blood flow reaching the right foot. He also had diffused soft tissue swelling and indisputable deformity of the left wrist region associated with an underlying fracture of the distal 1" of the left radius. He was kept as an inpatient for a month where he was treated and both his hand and leg were placed in plaster. At the time of the trial he was suffering from partial ankylosis and instability, swelling and post traumatic arthritis of the right ankle joint. The condition of his said joint restricted substantially his activity and generally his efficiency in work.

Held, (I) *on the appeal:*

We fail to see how one could infer that in the agony of the moment in which the plaintiff found himself he could rightly be held to have contributed to the accident by not reducing the normal speed and by not falling on the berm entirely. Moreover, we do not see how the defendant driver can establish—once the burden lies on him—that had the plaintiff reduced his speed and gone entirely on the berm when he applied his brakes, the accident could have been avoided. We agree that the plaintiff was in no way to blame for the accident (see pp. 347–348 of the judgment post and *Asprou and Another* v. *Samaras and Another* (1975) 1 C.L.R. 223 at pp. 229–230).

Held, (II) with regard to the cross-appeal against the award of damages:

Although we might have been prepared to award a higher

amount of damages in favour of the plaintiff, we are not satisfied that the learned Judge, in assessing the damages applied a wrong principle of law and that the amount awarded is a wholly erroneous estimate of the damage.. We are, therefore, not prepared to interfere with the finding of damages which is generally a matter of assessment. (See *Asprou and Another* v. *Samaras and Another* (*supra*) at p. 231).

Appeal and cross-appeal dismissed.

Cases referred to:

Koudellaris v. *Christoforou & Others* (1975) 1 C.L.R. 366;

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

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

Asprou & Another v. *Samaras & Another* (1975) 1 C.L.R. 223, at pp. 229-230, and 231;

Karavallis v. *Economides* (1970) 1 C.L.R. 271.

Appeal and cross-appeal.

Appeal by defendant 1 and cross-appeal by plaintiff against the judgment of the District Court of Nicosia (A. Loizou, P.D.C. and Stylianides, D.J.) dated the 18th May, 1970, (Action No. 4918/68) whereby the plaintiff was awarded the sum of £1,430.- as damages in respect of injuries sustained by him in a traffic accident.

D. Papachrysostomou, for the appellant.

L. Demetriades with *D. Georghiades*, for respondent 1.

L. Loucaides, Deputy Attorney-General of the Republic, for respondent 2.

Cur. adv. vult.

STAVRINIDES, J.: The judgment of the Court will be delivered by:

HADJIANASTASSIOU, J.: On January 14, 1968, the plaintiff, Mr. Iordanis Iordanous, an Assistant Agricultural Officer in the Department of Agriculture was driving his motor car, a Morris Oxford, Registration No. BN 918, on his way from Myrtou to Nicosia, with his wife beside him and his sister Andromachi in the back seat. It was dark and sleeting. He had the headlights on in a dipped position. He was driving carefully at a normal speed, about 25 m.p.h. When he approached the ELDYK Military Camp he noticed a big stationary

vehicle on the right half of the road. That car had no lights on. He passed that big military vehicle and saw the lights of an oncoming vehicle. He pulled more to the left side of the road and whilst so proceeding, the oncoming vehicle suddenly swerved to its right. In order to avoid the accident, the plaintiff tried to pull his car outside the asphalted part of the road, but because he had no time to do much about it, he applied brakes, he turned to the left and stopped, but the accident was not avoided and the motor car of the defendant collided with his. As a result of that accident, both the drivers and the two passengers were injured and were removed to the Nicosia General Hospital. The plaintiff's car was also damaged.

In cross-examination he said that he could not make out before the said motor vehicle turned towards his side the distance at which it was from him, but he thought that it was safe for him to drive as he did. Then counsel questioned him in these terms:-

"*Q.* I put it to you that in view of the climatic conditions prevailing at the time and the fact that on your right there was a stationary unlit obstacle and as you did not know at which distance the oncoming vehicle was from you, you should not take more to the left and get on the berm.

A. I took to the berm when I was passing by the stationary vehicle, making some allowance for anything that might crop up from that stationary vehicle or behind it. After that I got on the left side of the asphalted part of the road and continued on my way, as it was safe to do so and not continue on the berm, in view of the climatic conditions, as the berm was wet and my car might slide.

The width of my car is 5 1/2' - 6'. I was driving on the extreme left of the asphalt but not in such a way as my left wheels to fall on the berm, as it was, as I said, dangerous to get on the berm in the condition it was.

The main point of impact was on the side of the front right mudguard."

There was corroborative evidence by Michalakis Mishaoulis, a young person who was doing his service with the National Guard, who told the Court that on the date of the accident he was a passenger in a Land Rover of the National Guard and they were proceeding from Nicosia towards Myrtou. Kyriakos

Antoniou, defendant No. 1, was the driver of that Land Rover and next to him there was another passenger and he was sitting behind the driver. It was dark, drizzling, and there was fog and a little snow. The vehicles had their headlights on at the time. The Land Rover was proceeding on the left hand side. They saw the headlights of a car coming from the opposite direction, it was keeping its proper side of the road and it was not coming at them. All of a sudden, the young officer, who was with them sitting next to the driver, called out "be careful, in front of us there is a car". Then the driver swerved to his right and immediately they collided with the oncoming vehicle. This witness further explained that when the officer called out, he was referring to a big truck belonging to ELDYK, a recovery vehicle with a crane. It had no lights on.

In cross-examination he said that when he first saw the stationary car it was about 25 meters ahead of them, and he saw it when the young officer called out. Defendant 1 did not apply brakes. Questioned further, he said it was not correct that defendant 1 applied brakes as soon as the young officer called out to him to be careful and their Land Rover swerved to the right. Pressed further in cross-examination, he said defendant 1 did not apply brakes, he turned the car to the right.

On the contrary, the defendant Kyriakos Antoniou, who was also in the National Guard, and who was the driver of the Land Rover involved in the accident, tried to throw the blame on the plaintiff. Before the accident he noticed a military vehicle belonging to ELDYK which had no rear lights on and he drove close to it before he noticed its presence. He admitted that when he was at a distance of about 20 meters the officer called out to him about that vehicle and he applied brakes, but as his speed was 20 m.p.h. he collided with the oncoming motor car of the plaintiff, because he did not see the motor vehicle, of the plaintiff coming from the opposite direction, nor did he use its lights. This witness tried to explain the reason why he did not see the lights and he said the road there is uphill and may be the oncoming vehicle was on the other side of the hill.

The learned trial Judge, having considered the testimony of the witnesses, accepted the evidence of the plaintiff and came to the conclusion that defendant 1 was wholly to blame for the accident. Then, dealing with the question of contributory

negligence, and having dealt with the submission of counsel that the plaintiff had contributed to the accident because he has failed to reduce speed when seeing the oncoming vehicle and take more to the berm, rejected it because, in the view of the trial Judge, the speed of the plaintiff was comparatively slow, considering that it was an open highway and he was keeping the left side of the road.

Finally, he concluded his judgment in these terms:-

> " There was nothing to suggest any danger and we do not expect prudent drivers to take to the berm whenever there is an oncoming vehicle driven on the proper side of the road, especially when the road has a width of 18' 6" and is divided in two lanes by a white line. He had not contributed to this accident, which would not have occurred but for the defendant's failure to have a proper look-out and drive in the weather conditions at the time with the proper care and attention which they warranted. His sudden swerving to the right being the cause of the accident as far as plaintiff is concerned. The plaintiff could not have taken any avoiding action as, though he thought of taking more to the left when the Land Rover swerved towards him he had no time to do so and tried to stop. In order that the plaintiff should have been found guilty of contributory negligence, it should have been shown as stated by Lord Dunedin in the case of *Fardon* v. *Harcourt-Rivington* [1932] All E.R. Reprint at page 83:-
>
> > 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur in the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions'."

Then, the learned Judge, having considered the medical evidence, came to the conclusion to award an amount of £1,325 in favour of Andromachi Iordanous; an amount of £1,450 in favour of the plaintiff driver, and an amount of £330 in favour of Anthoulla Iordanous.

The defendant appealed to this Court on the ground that the finding of the trial Court that he was wholly to blame for the accident was wrong having regard to the totality of the evidence adduced.

On the other hand, the plaintiff cross-appealed on the ground that the learned trial Judge wrongly awarded an amount of £800 general damages to him, as being inordinately low, having regard to the injuries received due to the accident.

Now, the main complaint of counsel for the defendant was that the trial Judge, in finding the defendant entirely to blame for the accident was wrong in view of the evidence that the plaintiff failed to reduce his speed and pull more on to the berm; and because he ought reasonably to have foreseen that if he did not behave as a reasonable prudent driver, he might hurt himself and has, therefore, contributed to the accident.

Having considered the contentions of both counsel, we think we should reiterate what we have said in a number of cases, *viz.*, that negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory 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 *Koudellaris* v. *Christoforou and Others* (1975) 1 C.L.R. 366. Before 1945 a plaintiff who was guilty of contributory negligence was disentitled from recovering anything if his own negligence was one of the subsisting 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 Company* (*Swansea*) *Ltd.*, [1949] 1 All E.R. 620. Our present law is contained in s. 57(1) of the Civil Wrongs Law Cap. 148, which says:-

> " 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: ....."

Subsection 7 reads as follows:-

> " ... 'Fault' means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Law, give rise to the defence of contributory negligence."

In the case in hand, the learned trial Judge found that the plaintiff was not guilty of contributory negligence, and in the particular facts and circumstances, we think that the plaintiff has acted as a reasonable prudent driver because all along he was driving at a moderate speed and was keeping his side of the road when suddenly he was confronted with the bad driving of the defendant. He applied his brakes and stopped, because, as he put it, he had no time to go entirely on the berm. We therefore fail to see how one could infer that in the agony of the moment in which that driver found himself he could rightly be held to have contributed to the accident by not reducing the normal speed at which he was driving and by not falling on the berm entirely. Moreover, we do not see how the defendant driver can establish—once the burden lies on him—that had the plaintiff reduced his speed and gone entirely on to the berm when he applied his brakes, the accident could have been avoided. We agree that the injured plaintiff was in no way to blame for the accident itself. He had the misfortune of having the defendant pulling suddenly by his bad driving on to the wrong side of the road and no doubt the accident was solely caused by the defendant's negligence and certainly the defendant is not entitled to say that the plaintiff could in those circumstances have done anything more in looking after his own safety: See *Asprou and Another* v. *Samaras and Another* (1975) 1 C.L.R. 223 at pp. 229–230.

We would, therefore, affirm the judgment of the learned Judge that the defendant was wholly to blame for the accident, and dismiss the appeal.

Now, as to the complaint in the cross-appeal that the award of general damages amounting to £800 in favour of the plaintiff were inordinately low having regard to the injuries suffered by him, we turn to consider the medical evidence.

The plaintiff, Iordanis Iordanous, was admitted to the hospital after the accident suffering from painful crushing injuries. Upon examination, he was found to suffer from widespreead soft tissue bruising and indisputable deformity of the right leg associated with an underlying displaced fracture of the right tibia and fibula, and complicated by partial impairment of the blood flow reaching the right foot. The treating doctor found also that he had diffused soft tissue swelling and indisputable deformity of the left wrist region associated with an underlying fracture of the distal 1" of the left radius (Colles fracture). He

was kept as an inpatient for a month where he was treated and both his hand and leg were placed in plaster. He was discharged from the hospital and resumed work on May 1, 1969, but he was still complaining that he was not feeling well.

His condition during the trial of the case, (he was examined by a medical board of three doctors) was that he had partial ankylosis and instability, swelling, and post traumatic arthritis of the right ankle joint. His present condition of the said joint restricted substantially his activity and generally his efficiency in work. The learned Judge, in the light of this final report, in awarding the amount of £800 to the plaintiff, took into consideration the pain and suffering, the discomfort and the resultant partial permanent incapacity that he had suffered.

We have considered the contentions of both counsel on the question of the adequacy of the damages awarded. The Court of Appeal will not interfere with the award of a Judge, although they might themselves have awarded a different amount, unless satisfied that the Judge in assessing the damages applied a wrong principle of law (as for instance by taking into account some irrelevant factor or leaving out some relevant one) or short of this, that the amount awarded was so extremely high or low as to make it a wholly erroneous estimate of the damage. This principle has been expounded in many judgments of our Supreme Court, and recently in *Karavallis* v. *Economides*, (1970) 1 C.L.R. 271 where the English authorities on the point, both of the House of Lords and of the Courts of Appeal in England, have been reviewed.

With this in mind, we have reached the conclusion that although we might have been prepared to award a higher amount of damage in favour of the plaintiff, nevertheless, we are not satisfied that the learned Judge, in assessing the damages applied a wrong principle of law and that the amount awarded is a wholly erroneous estimate of the damage. We are, therefore, not prepared to interfere with the finding of damages which, as stated earlier in another case, is generally a matter of assessment. (See *Asprou* v. *Samaras* (*supra*) at p. 231.).

We would, therefore, dismiss the cross-appeal also, but in the circumstances, we are not prepared to make an order for costs either in the appeal or the cross-appeal.

Appeal and cross-appeal dismissed. No order as to costs.