1979 April 5

[TRIANTAFYLLIDES, P., STAVRINIDES AND HADJIANASTASSIOU, JJ.]

NICOLAOS ANTONIOU,

Appellant-Defendant,

v.

LAMBROS SERGIS,

Respondent-Plaintiff.

(*Civil Appeal No.* 5350).

Negligence—Road accident—Apportionment of liability—Principles on which Court of Appeal interferes with apportionment of liability made by a trial Court—Collision between vehicles moving in opposite directions—Impossibility of distinguishing between negligence of drivers—Both equally to blame—Failure to keep any adequate look-out and to take avoiding action.

Whilst the parties to this appeal were driving their vehicles, during daytime, in opposite directions on a road within the area of the Geological Department, they collided near a bend, 12 feet wide, at a time when another car was parked near it. The trial Judge rejected their conflicting versions as to how the accident occurred and, in the absence of sufficient material before him to reach a different view, held that they were both equally to blame.

The trial Judge stated that they both failed to keep any adequate look-out; that the defendant did not see the oncoming car until it was almost upon him (he saw plaintiff from a distance of two meters); that the parties were approaching a narrow bend; that there was an obstruction on the road and it was their duty, therefore, to proceed with due caution; that both parties failed to take avoiding action; that plaintiff did not make any attempt to stop his car given his low speed and the defendant did not swerve in any way.

On appeal by the defendant:

Held, (1) that having regard to all the surrounding circumstances the trial Judge was right in taking the view that both

drivers were not keeping a proper look-out; that, therefore, the distribution of the blame should not be varied; and that in the absence of any guide which would lead this Court to any other conclusion, it agrees with the trial Judge that the blame should be apportioned equally to both drivers (see *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472 at pp. 1476-1477 and 1479).

(2) That, moreover, when the Court of Appeal accepts the findings of fact of the trial Judge it can, in the absence of error of law, only revise the distribution of blame in exceptional cases, as where, for instance, the Judge in distributing blame is shown to have misapprehended a vital fact bearing on the matter; that this Court has not been convinced that in distributing blame the trial Judge has misapprehended a vital fact bearing on this matter; and that, accordingly, his decision must be affirmed.

Appeal dismissed.

Cases referred to:

Baker v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472 at pp. 1476-1477 and 1479;

Woods v. *Duncan* [1946] A.C. 401 at p. 421 (H.L.);

Karikatou v. *Soteriou and Apseros* (reported in this Part at p. 150 *ante*);

British Fame (*Owners*) v. *McGregor* (*Owners*) [1943] A.C. 197;

Koningin Juliana [1975] 2 Lloyd's Law Reports, 111.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Nikitas, D.J.) dated the 11th September, 1974, (Action No. 4028/70) whereby he was held to be equally to blame with the plaintiff for a traffic accident.

St. Erotokritou, for the appellant.

K. Chrysostomides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Hadjianastassiou, J.

HADJIANASTASSIOU J.: The main question raised in this appeal is whether the appellant-defendant was not to blame for the accident which took place on May 1, 1970 when the

two cars of the parties were involved in a collision. The accident occurred on a road within the area of the Government Geological Department. The damages sustained by the plaintiff's car amounted to £170 and the damages to the defendant's car to £70.

The plaintiff, in throwing the blame for the accident on the defendant, alleged in his statement of claim that on the said date, the defendant was driving at a speed which was, in the circumstances, excessive. He failed to keep the left-hand side of the road, and did not use the brakes in time to avoid the collision.

On the contrary, the defendant repudiated the allegations of the plaintiff that he was guilty of negligence, and alleged in the statement of defence that it was the plaintiff who was driving at an excessive speed having regard to the circumstances of this case, and has failed to see in time or at all the oncoming vehicle, and has failed to use the brakes in time or at all, and because of his negligence and of his failure to take steps to avoid the other car, the collision took place.

The facts as found by the trial Judge are these:- The accident happened at a bend 12 feet wide. It is a rather sharp bend which both drivers knew well because they are both employees of the Geological Department. The road there has earthen berms on either side, which are in a usable condition. The left berm in relation to the direction the defendant was driving, is between 3-3 $^1/_2$ feet wide, and is bounded by a row of trees which are planted at intervals. The width of the other berm is 10 feet, and ends by the outer wall of the building of the Geological Department. There are also there, trees 3 feet away from the asphalt.

The plaintiff has stated that he was driving his Rover saloon car at a speed of 10-15 m.p.h. along this road which forms a left-hand bend in relation to the direction he was following, when he noticed a land-Rover parked on the inside of the bend, on his near-side berm, obstructing his view. As soon as he negotiated the bend, and whilst he was passing the stationary vehicle, he collided with the defendant's oncoming car. As a result of that accident, the front right parts of both cars were damaged.

In cross-examination, the plaintiff said that the land-Rover

was positioned with its left wheels either half a foot on the asphalted part of the road or half a foot from the edge thereof. It was parked in a position parallel to the wall of the building, but he could not specify at what distance from the corner of the building. When he first saw the defendant's car it was at a distance of 5–10 meters away from his own and he was in the process of negotiating the bend.

There is no doubt that in this type of accident, it is the usual practice for one party to blame the other, and according to the defendant, he was driving on the correct side of the road at a speed of 10 m.p.h. when he saw the plaintiff's car at a distance of 2–3 meters in front of him coming round the bend from the opposite direction and on the wrong side of the road. Although he braked, the collision could not be avoided, and the parts of the vehicle which collided were the front offside headlamp and the front offside part of the Mazda saloon (defendant's car) with the front right side of the other car.

The defendant further explained that although at the time of the impact his car was partly on his nearside berm occupying 2 ft., it was not because he was taking any avoiding action, but because he was going off the road in order to park his car under a tree in the area to his left. He was heading towards that direction and denied the suggestion that he had to travel round the bend for that purpose.

In cross-examination, the defendant said that when the cars collided, the plaintiff's car was 6 feet from the plaintiff's nearside edge of the road.

The learned trial Judge, having considered the arguments of counsel on both sides, and having examined the evidence before him, observed that the case presented some difficulty because there was complete lack of real evidence such as marks on the road, indicating the courses in which the vehicles had been travelling before the collision, and because there was no evidence at all as to the resultant positions of the two cars.

Having rejected the version of both sides as to how the accident occurred, the learned Judge thought that the proper inference to draw in the circumstances of this case was that both drivers were guilty of negligent driving. Dealing further with the evidence before him, the learned Judge said:-

" As indicated earlier, the plaintiff was unable to speak as

to his position on the road, nor was he able to say where the other vehicle was, save only that it was on the asphalt. On the other hand, the defendant's main allegation that his car was 2 feet within the left berm, is in direct conflict with his statement in cross-examination to the effect that plaintiff was about 6 ft. from his nearside edge of the road and I would stress that defendant was always positive when referring to distances. Considering the width of the road and that of defendant's car which is, according to his testimony, about 4 feet, his assertion cannot stand. Even if I were to assume that the width of this bend is only about 10 feet, again, in the light of all relevant evidence, the defendant's main allegation would not have been correct. I would also venture to say that the damage to the cars... does not lend support to the defendant's contention. It will be remembered that at the time of the impact, the defendant asserted that his car was partly in the berm proceeding towards the yard. Accordingly, I conclude that I cannot rely on defendant's evidence as well...

It appears to me that the proper inference to draw in the circumstances of this case is that both drivers have been guilty of negligent acts. In the first place they have failed to keep any adequate look-out. Defendant did not see the oncoming car until it was almost upon him (he saw plaintiff from a distance of two meters) and it must not be forgotten that the parties were approaching a narrow bend, there was an obstruction on the road and it was their duty, therefore, to proceed with due caution. Secondly, both parties failed to take avoiding action. Plaintiff did not make any attempt to stop his car given his low speed. On the other hand, defendant did not swerve in any way."

Then the learned Judge, having addressed his mind to the case of *Baker* v. *Market Harborough Ind. Co-op. Society Ltd.* [1953] 1 W.L.R. 1472, concluded as follows:-

"In the case in hand each driver was guilty, more or less, of the same negligent acts as shown above. Once both drivers are to blame and there are no means of distinguishing between them, I apportion blame equally."

As it appears from the judgment we have just quoted, the learned Judge was of the opinion that both drivers were equally

to blame for the accident in the absence of sufficient material before him to reach a different view. We certainly acknowledge his difficulty; counsel on behalf of the appellant argued that the learned Judge erred both in law and in fact in finding that the appellant was also to blame for the accident for failing to keep a proper lookout and that he failed to take avoiding action by swerving, in view of the fact that there were trees to his left side.

As it has been said in a number of cases, negligence is a specific tort and, in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done, or in doing something which ought to be done either in a different manner or not at all. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the accompanying circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The material considerations are the absence of the care which is on the part of the defendant due to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two. (See *Woods* v. *Duncan*, [1946] A.C. 401 H.L. at p. 421 per Viscount Simon; see also the recent case of *Karikatou v. Soteriou and Christakis Apseros* (reported in this Part at p. 150 *ante*) on the question of negligence).

In *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.*, [1953] 1 W.L.R. 1472, where the evidence established that a collision between two motor-vehicles proceeding in opposite directions occurred in the centre of a straight road during the hours of darkness, when both drivers were killed, the inference, in the absence of any other evidence enabling the Court to draw a distinction between them, was that each driver was committing almost the same acts of negligence—failing to keep a proper look-out and to drive his vehicle on the correct side of the road—and accordingly, both were equally to blame. Lord Denning L.J. (as he then was) delivering the second judgment, said at pp. 1476-1477:-

" Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitatingly hold that both were to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the Court to draw a distinction between them, they must be held both to blame, and equally to blame...But when both may be to blame, the Judge is under no such compulsion and can cast the blame equally on each.

So much seems so clear on principle that it is unnecessary to go further; but I would like to say that the evidence to my mind makes it much more likely that both were to blame than that one only was to blame. It shows that each driver kept his course, with his off-side wheels on or over the centre line of the road. There was room for each of them to pull in to his near-side of the road, but neither did so. There was not the slightest trace of any avoiding action taken by either—no brake marks; no swerve; no hooter; nothing. Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each."

Romer, L.J., delivering his own judgment, said at p. 1479:-

" How, precisely, this unfortunate accident came about can never be known for certainty. I think, myself, that there is much to be said for the theory suggested by Mr. Beney, namely, that each driver was concentrating on his near-side and assumed, wrongly as it turned out, that his off-side was within the central cats' eyes, without looking also to the other approaching vehicle. If so, the absence of skid marks or other signs of emergency action is understandable. Whether, however, that be the true explanation or not, the fact is that at the moment of impact the off-side of each of these vehicles was in simultaneous occupation of

a strip two feet to three feet wide in or about the centre of a straight road; and it seems to me that this overlapping of position is irreconcilable with the view that either driver was performing his obvious duty of keeping a proper look-out for the other. It follows that both of the drivers were to blame for the resulting accident, and I agree that in the absence of any guide (and there is none) which would lead to some other conclusion the blame should be apportioned equally."

In the present case, there was not the slightest trace of any avoiding action taken by the drivers, no brake marks, no swerve and no hooter to warn each other. The accident has taken place during daylight, and it seems to us, having regard to all the surrounding circumstances, that the learned trial Judge was right in taking the view in his careful judgment that both drivers were not keeping a proper look-out.

We think, therefore, having heard the argument of counsel for the appellant, that we should not vary the distribution of the blame, and that in the absence of any guide which would lead us to any other conclusion, we agree with the Judge that the blame should be apportioned equally to both drivers.

The House of Lords in *British Fame* (*Owners*) v. *McGregor* (*Owners*), [1943] A.C. 197, held that "When an appellate tribunal accepts the findings of fact of the Court below and its conclusion that two vessels in collision were both to blame, it should, in the absence of error in law, only revise the distribution of blame in very exceptional cases, as where, for instance, a number of different reasons have been given why one ship is to blame, but the appellate Court, on examination, find some of those reasons not to be valid, or where the Judge in distributing blame is shown to have misapprehended a vital fact bearing on the matter." (See also *Koningin Juliana*, [1975] 2 Lloyd's Law Reports, 111, where the principle formulated in The McGregor case has been accepted as being an authoritative statement of the law.)

Once, therefore, we have not been convinced that in distributing blame, the learned Judge has misapprehended a vital fact bearing on this matter, we affirm the decision of the trial Judge that the blame should be cast equally on each driver, and dismiss the appeal with costs in favour of the respondent.

Appeal dismissed with costs.