1979 November 26

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

ANDREAS PARASCHOU KIKA,
Appellant-Defendant,

v.

KYRIACOS LAZAROU,
Respondent-Plaintiff,

v.

THE ATTORNEY-GENERAL OF THE REPUBLIC,
Respondent-Third Party.

(*Civil Appeal No.* 5886).

Credibility of witnesses—Findings of trial Court as to credibility—Appeal—Approach of Court of Appeal.

Negligence—Contributory negligence—And apportionment of liability—Findings of trial Court as to—Approach of Appellate Court—Road accident—Unlighted traffic check-point—Respondent knocked down by motor-vehicle at night time whilst standing almost in the middle of the road and manning the check-point—Guilty of contributory negligence in that he hastened, without due care in the circumstances, to step across, or dangerously near to, the path of an approaching vehicle at night, which, though it had slowed down, had not yet come to a stop.

Highway—Obstruction—Government of the Republic placing check-point at night-time—No light or other means to indicate its existence and no appliances to national guardsmen manning it to make their presence known to road users—Check-point an obstruction entailing liability for the Government of the Republic—Injury to national guardsman by motor vehicle—Omission to ensure that obstruction properly lit and to provide said appliances contributed to the chain of events which had resulted in the injury—Government of the Republic has to indemnify person responsible for the accident.

The respondent-plaintiff ("the respondent") was knocked

down by a car driven by the appellant-defendant ("the appellant") whilst serving, together with a colleague of his, in the course of their duties as national guardsmen, at a traffic check-point on Ayia Varvara-Pera Chorio road, which was set up as a result of the Turkish invasion. At the time of the accident it was dark and neither the respondent nor his companion had at their disposal any means by which to make their presence known from a distance to an approaching person or vehicle; they were not wearing special attire, they did not have torch lights or reflecting triangles and they did not have wire fences in order to block the road; they were both dressed in military uniforms which were not easily visible at night-time.

The trial Court believed the version of the respondent, which was supported by the testimony of his companion, that he was standing almost in the middle of the road and was signalling to approaching cars to stop; that when he saw the appellant's car approaching he signalled to him to stop by raising his arms in the manner used by traffic policemen; and that the appellant's car slowed down and when the plaintiff moved towards it, it accelerated and knocked him down.

The version of the appellant, which was rejected by the trial Court, was that when he was about 35 metres from the place of the accident he was dazzled by the lights of a car coming from the opposite direction with the result that he did not see the respondent at all.

The trial Court concluded that the appellant was solely to blame for the accident and it exonerated the third-party, the Government of the Republic, from any responsibility because it could not be said that its failure to furnish the respondent with the means necessary for giving warning of his presence on the road at the check-point at night could be treated at having, in any way, contributed to the occurrence of the accident.

Upon appeal by the defendant:

Held, (1) (*with regard to the findings of the trial Court relating to the credibility of the parties*) that the question of credibility is a matter primarily for the trial Court to decide and this Court has not been persuaded by Counsel for the appellant that the trial Court was wrong in this respect, or that there are other sufficient grounds for disturbing the trial Court's relevant

findings; and that on the material before this Court it was reasonably open to the trial Court to make the findings as to credibility which it made (see, *inter alia*, *Manoli* v. *Evripidou* (1968) 1 *C.L.R.* 80 *at p.* 100).

(2) (*On the question whether the conclusion of the trial Court that the appellant was solely to blame for the accident was a correct one*) that having paid due regard to the principle that an appellate Court should be slow to interfere with the finding of a trial Court regarding the existence or not of contributory negligence, and with the apportionment of liability in case contributory negligence has been found to exist by a trial Court (see, *inter alia*, *Dieti* v. *Loizides* (1978) 1 C.L.R. 233, 242), this Court has reached the conclusion that in this case it cannot uphold, on appeal, the finding of the trial Court that the appellant was solely to blame in relation to the accident in which the plaintiff was injured; that the plaintiff is, also, responsible for its occurrence and is, therefore, guilty of contributory negligence in that he hastened, without due care in the circumstances, to step across, or dangerously near to, the path of an approaching vehicle at night, which, though it had slowed down, had not yet come to a stop; and that, accordingly, the contributory negligence of the plaintiff is assessed to be in the region of 15% (see on the question of contributory negligence the leading case of *Davies* v. *Swan Motor Co.* [1949] 1 All E.R. 620 at p. 632).

(3) (*On the question whether or not any indemnity is payable by the Government of the Republic, as a third party*) that the placing of a check-point at night-time at the place in question, in a public road, without any light or other means to indicate its existence and the posting there of national guardsmen who were not furnished with any appliances to make their presence known to road users, constituted an obstruction entailing liability for the Government of the Republic (see the principles expounded in, *inter alia*, the case of *Fisher* v. *Ruislip-Northwood Urban District Council and County Council of Middlesex* [1945] 2 All E.R. 458); that without overlooking at all the difficulties with which the Government of the Republic was being faced at the time, and which prevented it from establishing properly lit check-points, and from furnishing all necessary appliances to those manning them, this Court is of the opinion that the complete omission to provide the plaintiff with any means whatsoever which would indicate that he was manning lawfully a

military check-point at that particular place, has contributed to the chain of events which has resulted in the plaintiff being injured by the vehicle driven by the appellant and, consequently, the Government of the Republic has, as a third party to the proceedings, to indemnify to an appropriate degree the appellant for the damages which he has to pay to the plaintiff; and that, accordingly, the degree of blame of the Government of the Republic, as a third party, is assessed at 25% (pp. 678-9 *post*).

Appeal allowed.

Cases referred to:

Manoli v. *Evripidou* (1968) 1 C.L.R. 90 at p. 100;

Davies v. *Swan Motor Co. (Swansea), Ltd.* [1949] 1 All E.R. 620 at p. 632;

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

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

McMath v. *Rimmer Bros. (Liverpool) Ltd.*, [1961] 3 All E.R. 1154;

Karikatou v. *Soteriou, Soteriou* v. *Apseros* (1979) 1 C.L.R. 150;

Dieti v. *Loizides* (1978) 1 C.L.R. 233 at p. 242;

Fisher v. *Ruislip-Northwood Urban District Council and County Council of Middlesex* [1945] 2 All E.R. 458;

Morris v. *Mayor, Aldermen and Burgesses of the Borough of Luton* [1946] 1 All E.R. 1;

Whiting v. *Middlesex County Council and Another* [1947] 2 All E.R. 758;

Darling v. *Attorney-General and Another* [1950] 2 All E.R. 793.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Stylianides, P.D.C. and Laoutas, D.J.) dated the 31st August, 1978 (Action No. 21/75) whereby he was ordered to pay to plaintiff the sum of C£5,850.—by way of damages, for injuries suffered by him due to the defendant's negligence.

X. Syllouris, for the appellant-defendant.

Ant. Lemis with *D. Savvides* (*Mrs.*) for the respondent-plaintiff.

A. Frangos, *Senior* Counsel of the Republic, with *Gl. HadjiPetrou*, for the respondent—third party.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant, who was the defendant in action No. 21/75 in the District Court of Nicosia, has appealed against a judgment of the said Court ordering him to pay to the respondent, the plaintiff in the action, C£5,850, by way of damages, for injuries caused to him due to the negligence of the appellant.

The said amount of damages, comprising special and general damages, had been agreed at the trial by the parties, and, so, what was in issue was only the question of liability.

The Government of the Republic, through the Attorney-General, was made by the appellant a third party, against whom the appellant claimed indemnity or contribution, but his claim was dismissed in view of the fact that the trial Court held that the appellant was solely to blame for the accident in the course of which the plaintiff was injured.

The salient facts of this case, as found by the trial Court, are as follows:-

The plaintiff was, at the time, serving in the National Guard as a reservist, having been called up as a result of the Turkish invasion of Cyprus which commenced on July 20, 1974.

On August 18, 1974, the plaintiff was posted at a camp near Ayia Varvara village, and in the morning of that day the plaintiff, together with another national guardsman, a certain Loutsios, were ordered to check the traffic proceeding from Ayia Varvara village towards Pera Chorio village. Two other national guardsmen were checking the traffic coming along the same road from the opposite direction, and the two check-points were at a short distance from each other.

The appellant was at the time a special constable stationed at the nearby village of Potamia.

As the Turkish military forces were advancing towards that area orders were given for the evacuation of the civilian population; consequently, in the afternoon of August 18, 1974, the appellant transported his family from Potamia to Lythrodontas village, and at about 7.30 p.m. he was driving from Lythrodontas to Pera Chorio police station where he was to carry out duties as special constable. He was driving his private car, No

CS898, and in order to reach the said police station he had to drive along the road leading from Ayia Varvara to Pera Chorio.

On his way he knocked down the plaintiff at the check-point where he was posted as aforesaid, with the result that the plaintiff suffered serious injuries.

It is common ground that at the time of the accident it was dark, and that neither the plaintiff nor his companion Loutsios had at their disposal any means by which to make their presence known from a distance to an approaching person or vehicle; they were not wearing special attire, they did not have torch lights, they did not have any reflecting triangles and they did not have wire fences in order to block the road; they were both dressed in military uniforms which were not easily visible at night-time.

It is common ground, too, that both the plaintiff and Loutsios were at the time acting in the course of their duties as national guardsmen, in the employment of the Government of the Republic, and they could not refuse to carry out the relevant military orders given to them in relation to serving at the particular check-point.

According to the plaintiff's version, which was supported by the testimony of Loutsios, the plaintiff was standing almost in the middle of the road and he was signalling to approaching cars to stop; when they did so he was checking them, while Loutsios was standing armed at the side of the road.

When the plaintiff saw the appellant's car approaching he signalled to him to stop by raising his arms in the manner used by traffic policemen for such a purpose. The appellant's car slowed down and the plaintiff moved towards it, whereupon it accelerated and knocked him down.

According to the version of the appellant, when he was about 35 metres from the place where the accident occurred he was dazzled by the lights of a car coming from the opposite direction, with the result that he did not see the plaintiff at all. He slowed down his car as a precautionary measure, because he had been dazzled, and then he heard a knock on the front side of his car; he stopped, he alighted from his car, but in the darkness he could not see anything; as he heard insults and threats he, at

once, got back into his car and drove to Pera Chorio police station where an officer of the National Guard arrived and informed him that he had hit with his car the plaintiff.

The plaintiff and Loutsios denied categorically that there was any other car on that road at the material time, and the trial Court discarded, as a sheer afterthought, the version of the appellant about a car coming from the opposite direction, which dazzled him with its lights.

As has already been mentioned in this judgment, the appellant was found to be solely to blame for the accident; as a result the plaintiff was not found to be guilty of any contributory negligence, and the third party, the Government of the Republic, was exonerated from any responsibility.

The appellant has, by means of the present appeal, challenged all the above findings.

In reaching its said conclusions the trial Court found that the appellant, on seeing the plaintiff signalling him to stop, reduced his speed, and, then, accelerated suddenly and without warning, at a time when the plaintiff was very near to him, and as a result the plaintiff was hit and injured; and that this conduct of the appellant constituted negligent driving. The trial Court went on to hold that as the appellant had seen the plaintiff it could not be said that the failure of the Government of the Republic to furnish the plaintiff with the means necessary for giving warning of his presence on the road at the check-point at night could be treated as having, in any way, contributed to the occurrence of the accident.

We are not prepared to disturb the findings of the trial Court regarding the credibility of the parties to this appeal and of the other witnesses.

We are of the opinion, in accordance with the approach adopted in, *inter alia*, *Manoli* v. *Evripidou*, (1968) 1 C.L.R. 90, 100, that the question of credibility is a matter primarily for the trial Court to decide and we have not been persuaded by counsel for the appellant that the trial Court was wrong in this respect, or that there are other sufficient grounds for disturbing the trial Court's relevant findings. On the material before us, it was, in our view, reasonably open to the trial Court to make the findings as to credibility which it made.

We have, next, to examine whether the conclusion of the trial Court that the appellant was solely to blame for the accident is a correct one:

It has been submitted by counsel for the appellant that the plaintiff ought to have been found by the trial Court to be guilty of contributory negligence.

In connection with the question of contributory negligence we have been referred to, in the course of the arguments before us, to *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (*Swansea Corporation and James, Third Parties*), [1949] 1 All E.R. 620, where Denning L.J., as he then was, said (at p. 632):-

> "While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the Court to be 'just and equitable,' having regard to the claimant's 'share in the responsibility' for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."

The *Davies* case, *supra*, is a leading case on the topic of contributory negligence, which has been referred to, *inter alia*, in *Nance* v. *British Columbia Electric Railway Co., Ltd.*, [1951] 2 All E.R. 448, *Jones* v. *Livox Quarries LD.*, [1952] 2 Q.B. 608 and *McMath* v. *Rimmer Bros.* (*Liverpool*), *Ltd.*, [1961] 3 All E.R. 1224, as well as, recently, by our Supreme Court in *Karikatou* v. *Soteriou, Soteriou* v. *Apseros*, (1979) 1 C.L.R. 150.

Having paid due regard to the principle that an appellate Court should be slow to interfere with the finding of a trial Court regarding the existence or not of contributory negligence, and with the apportionment of liability in case contributory negligence has been found to exist by a trial Court (see, *inter alia*, *Dieti* v. *Loizides*, (1978) 1 C.L.R. 233, 242), we have reached the conclusion that in this case we cannot uphold, on appeal, the finding of the trial Court that the appellant was solely to blame in relation to the accident in which the plaintiff was injured. We have decided that the plaintiff is, also, responsible for its occurrence and is, therefore, guilty of contributory

negligence in that he hastened, without due care in the circumstances, to step a cross, or dangerously near to, the path of an approaching vehicle at night, which, though it had slowed down, had not yet come to a stop.

We assess the contributory negligence of the plaintiff to be in the region of 15%, with the result that the damages payable by the appellant to the plaintiff are reduced to the round figure of C£4,970.

There remains to examine, now, whether or not any indemnity is payable by the Government of the Republic, as a third party, to the appellant in respect of the said amount of C£4,970 which he has been ordered to pay to the plaintiff.

The placing of a check-point at night-time at the place in question, in a public road, without any light or other means to indicate its existence and the posting there of national guardsmen who were not furnished with any appliances to make their presence known to road users, constituted an obstruction entailing liability for the Government of the Republic, on the basis of the principles expounded in the case of *Fisher* v. *Ruislip-Northwood Urban District Council and County Council of Middlesex*, [1945] 2 All E.R. 458 (which has been referred to in its judgment by the trial Court) and, also, in the cases of *Morris* v. *Mayor, Aldermen and Burgesses of the Borough of Luton*, [1946] 1 All E.R. 1, *Whiting* v. *Middlesex County Council and another*, [1947] 2 All E.R. 758 and *Darling* v. *Attorney-General and another*, [1950] 2 All E.R. 793, in all of which the *Fisher* case, *supra*, was referred to.

We do not agree with the trial Court that since the appellant apparently saw the plaintiff and slowed down, the obstruction caused by the check-point and the omission of the Government of the Republic to ensure that such obstruction was properly lit and that the plaintiff was furnished with the necessary appliances, cannot be treated as having any causative connection with the accident in which the plaintiff was injured. In our view, it should not be lost sight of, and ought to be judicially noticed, that, due to the situation then prevailing in Cyprus, road users were being stopped at night not only by duly authorized police and military personnel for security purposes but, also, by other persons in uniform who were acting unlawfully and for sinister

reasons. We, therefore, find quite some merit in the argument put forward by counsel for the appellant that it was not unnatural for his client to have slowed down initially at the check-point and then to accelerate in order to get away from there as he was not sure about the lawfulness of the intentions of the armed persons whom, as has been found by the trial Court, he must have seen there.

In the light of the foregoing, and without overlooking at all the difficulties with which the Government of the Republic was being faced at the time, and which prevented it from establishing properly lit check-points, and from furnishing all necessary appliances to those manning them, we are of the opinion that the complete omission to provide the plaintiff with any means whatsoever which would indicate that he was manning lawfully a military check-point at that particular place, has contributed to the chain of events which has resulted in the plaintiff being injured by the vehicle driven by the appellant and, consequently, the Government of the Republic has, as a third party to the proceedings, to indemnify to an appropriate degree the appellant for the damages which he has to pay to the plaintiff.

We assess the degree of blame of the Government of the Republic, as a third party, at 25% and we, therefore, order that a round figure of C£1,245 should be paid to the appellant by such third party by way of contribution and indemnity in respect of the amount of C£4,970 which the appellant has to pay to the plaintiff.

In the result this appeal is allowed and the judgment of the trial Court is varied so that the amount of damages payable by the appellant to the plaintiff is reduced from C£5,850 to C£4,970. We, also, give judgment in favour of the appellant and against the Government of the Republic, as a third party, for the aforesaid amount of C£1,245.

As regards costs, the appellant should pay to the plaintiff the costs of the trial on the scale of C£3,000 to C£5,000, and the third party should indemnify the appellant to the extent of 25% of such costs, and should, also, pay to him the costs of the institution of third party proceedings at the trial only, because, in view of the peculiar circumstances of this case, we are not prepared to make any other order as to costs as between the appellant and the third party in relation to the costs of the trial.

As regards the costs of the appeal, we order that the plaintiff should pay to the appellant the costs of this appeal on the scale of C£500 to C£1,000; and we have decided to make no other order as to any costs of this appeal.

Appeal allowed. Order for costs as above.