1980 June 11

[L. LOIZOU, HADJIANASTASSIOU AND SAVVIDES, JJ.]

ANDREAS PANAYIOTOU AND ANOTHER,
Appellants-Defendants,

v.

LEONTIOS XENOPHONTOS, AS ADMINISTRATOR OF THE ESTATE OF IACOVOS XENOPHONTOS,
Respondent-Plaintiff.

(*Civil Appeal No.* 5788).

Negligence—Road accident—Collision between lorry and land rover driven in opposite directions—Land rover driving on its wrong side of the road—Lorry-driver taking avoiding action by braking and stopping immediately—Sufficient space for land rover to pass—Finding of trial Court that lorry driver was, also, to blame for the accident erroneous.

This litigation arose out of a collision between a lorry driven by appellant-defendant Panayiotou and a land rover driven in the opposite direction by Iacovos Xenophontos who died as a result of the collision.

The accident occurred near a curve, in a forest road, and the version of the lorry driver was that he was keeping his proper side of the road, that he noticed the land rover coming out of a curve, at a distance of about 60 feet, not keeping its proper side of the road and that he (the lorry driver) immediately applied brakes and stopped.

The trial Court, after finding that immediately before the collision the land rover was keeping its wrong side of the road and in so doing touched the offside tip of the front mudguard of the lorry, came to the conclusion that the driver of the land rover was to blame for the accident.

The trial Court, further, came to the conclusion that the lorry driver was also to blame for the accident to an extent of

25% because "he was not keeping completely to his proper side of the road whilst entering the curve or else the back of the lorry would not be blocking a considerable part of the road"; and that "this fact coupled with the fact that the driver of the lorry saw the land rover keeping to its wrong side of the road from a distance of about 50 ft.," leads to the conclusion that despite of the action taken by him to avoid the accident, i.e. the braking and the stopping of the lorry, he is also to blame for the accident.

Upon appeal by the defendant–driver of the lorry:

Held, that the finding of the trial Court that the appellant was also guilty of negligence is obviously erroneous in the light of the evidence before the Court; that the appellant, having been faced with the imminent danger which the driver of the land rover has created by his negligent driving in blocking completely his path, the appellant had no alternative but to stop in order to avoid a head on collision, and in so doing he acted as a reasonable prudent man and has taken sufficient precautions to avoid the collision; that in these circumstances, and in the light of the evidence that there was sufficient space for the respondent to pass safely, and once the trial Court has accepted that the appellant has taken avoiding action by braking and stopping the lorry, the appellant was wrongly found to have contributed to the accident once the appellant in the present case has taken the best possible action in those circumstances; and that, accordingly, the appeal must be allowed.

Appeal allowed.

Cases referred to:

Pourikkos v. *Fevzi* (1963) 2 C.L.R. 24;

Theophanous v. *Markides and Another* (1975) 1 C.L.R. 199.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Nikitas, D.J.) dated the 7th December, 1977 (Action No. 4789/76) whereby they were found guilty of negligence and were ordered to pay to the plaintiff the sum of £598—as general damages.

G. Pelayias, for the appellants.

A. Magos, for the respondents.

Cur. adv. vult.

L. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: This is an appeal by the defendants from the judgment of the Full District Court of Nicosia dated 7th December, 1977, whereby the Court having found that the defendants were also to blame for the accident, awarded the sum of £598 as general damages to the estate of the deceased Iacovos Xenofontos involved in the fatal accident.

FACTS

The deceased, Iacovos Xenofontos, was involved in an accident in the morning of 22nd March, 1976, whilst he was driving his land rover which collided with the motor lorry of the defendants Andreas Panayiotou and another of Spilia. According to P.W. Lyssandros Liasides, who arrived at the scene at Sellai tou Skotomenou locality between Kykko Monastery and Stavros tis Psokas, accompanied by Sgt. Cleanthous, at the scene he met the driver of the lorry which was stationary on the road. He also saw the land rover which was in a precipice approximately 400 ft. deep. The road where the accident occurred was a forest road, and from the traffic signs or marks, he noticed that the land rover was travelling from the direction of Stavros towards Kambos, and the lorry was coming from the opposite direction.

Andreas Panayiotou, on the fatal date, left his village Spilia at about 5.00 a.m. carrying two passengers, Michael Papaioannou and Heracles Irodotou on their way to the forest near Yialia which had been destroyed by fire. As he was travelling on entering a curve, he noticed a land rover coming from the opposite direction, not keeping its proper side of the road. As his side was blocked completely by the land rover, he applied brakes and stopped immediately. The land rover continued travelling, and when the driver approached the lorry it suddenly swerved to its left. The side of the front offside mudguard of the land rover touched the tip of the front bumper of the lorry, and continued its way. Immediately he opened the door in order to see the registration number of the land rover. He then saw the land rover falling into the precipice. He explained that he was using that road continuously for a period of three years, and when the accident occurred he said he was keeping his proper side of the road. In cross-examination by

counsel, he told the trial Court that he kept to the extreme side of the road. When pressed further by counsel that the land rover was keeping its proper side of the road, his reply was "No, this is not correct, had the land rover kept its proper side of the road, it could safely pass me. In fact, lorries loaded with logs passed by safely after the accident".

There was further supporting evidence, and Heracles Irodotou, a co-passenger in the said lorry told the Court that on the date of the accident as they were proceeding, he noticed a land rover coming out of a curve. They were at a distance of about 60 feet from the curve, and were keeping their proper side of the road. The driver of the lorry, when he saw the land rover, immediately stopped, but the land rover continued its way in a straight line and was heading towards the front of their car. When the land rover was at a distance of about 10-15 feet away from them, he noticed the driver manoeuvring by swerving suddenly to the left. The side of the land rover touched the right tip of the front bumper of the lorry, and then continued its way. He alighted also and looked round, but he did not see the land rover. He then heard the noise that it made as it was falling into the precipice. He went to the edge of the precipice, looked down, and saw the land rover there, and together with the other passenger, Michael, went down to the precipice. They were joined by the driver of another land rover. He stayed at the scene of the accident till the police arrived.

Defence counsel, in challenging this witness, put clearly to him that when he first saw the land rover, it was at a greater distance than 60 ft. from him, and his answer was "No, this is not correct". To the second question that the land rover was keeping to its proper side of the road, the witness stated that that was not correct.

2. *FINDINGS OF THE TRIAL COURT*

The trial Court, having considered the whole evidence before them, and that there was sufficient space for the land rover to pass the lorry safely, as well as the real evidence, and in particular the brake marks of track ZB which corroborates the evidence of defence witnesses, viz., that the land rover, immediately before the collision was keeping its wrong side of the road, and in so doing touched the offside tip of the front

mudguard of the lorry. The trial Court reached the conclusion that the deceased driver was to blame for the accident. Then the trial Court proceeded to examine whether the driver of the lorry had contributed to the fatal accident, and had this to say:-

> "The position of the lorry as found by P.W. 1, and which we have earlier described in detail, proves that the driver of the lorry was not keeping completely to his proper side of the road whilst entering the curve, or else the back of the lorry would not be blocking a considerable part of the road—in fact it was beyond the crown of the road. This fact coupled with the fact that the driver of the lorry saw the land rover keeping to its wrong side of the road from a distance of about 50 ft., led us to the conclusion that despite the action taken by him to avoid the accident, i.e. the braking and the stopping of the lorry, he is also to blame for the accident and we estimate his liability at 25%".

3. *GROUNDS OF APPEAL*

Counsel in support of his grounds of law, very ably indeed argued (a) that the Court in finding that the appellant was to blame for the accident by 25%, erred in law and in fact; (b) that the said finding is unjustified and contrary to the evidence; (c) that the finding of the trial Court that the appellant was also liable for the accident was not duly reasoned.

On the contrary, counsel for the respondent, in a strong argument, invited this Court not to interfere with the finding of the trial Court that the appellants were also to blame for the accident. Counsel relies on *Yiannakis Kyriakou Pourikkos* v. *Mehmet Fevzi*, (1963) 2 C.L.R. 24, and *Georghios Theophanous* v. *Andreas Markides and Another*, (1975) 1 C.L.R. 199.

Having considered carefully the arguments of both counsel, the first question is whether the appellants were also to blame for the accident in the circumstances of this case.

In *Pourikkos* case (*supra*) Wilson, P., delivering the first judgment of the Court, had this to say at pp. 30-31:-

> "I find the conclusions of the trial Court difficult to accept. The Rule of the Road Law, Cap. 334, provides in section 2-
>
> 'every person driving any vehicle, which term in this

law includes a bicycle, tricycle or driving or riding or leading any animal—(a) when he meets another vehicle or any animal, shall keep his own vehicle or animal to the left side.'

The plaintiff must be taken to have known of this rule and he must likewise be held to have chosen to disregard it, because he chose to drive at a speed which prevented him from obeying it.

The main, if not the only cause of the collision was the excessive speed of the plaintiff which caused him to cross over to the defendant's side of the diversion. The defendant, seeing the plaintiff's vehicle travelling at an excessive speed, slowed down and drove his car partly off the pavement to the extent stated above. In these circumstances the action might well have been dismissed and the counter claim might well have succeeded completely.

However, a careful perusal of all the evidence leaves a doubt whether the trial Court was wrong in the result, applying the principle, as I do, stated in *Nance* v. *British Columbia Electric Railways Company Ltd.* [1951] A.C. 601 at p. 611: 'Generally speaking when two parties are so moving in relation to one another as to involve risk of collision, 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.'

The difficulty here is not whether the defendant took any precautions to avoid the collision, but whether he took sufficient precautions. This is a question of fact, upon which the trial Court has made a finding and it is not to be reversed when, as here, there is evidence to support it."

In *Theophanous'* case (*supra*), Triantafyllides, P., dealing with the question of contributory negligence, had this to say at pp. 205–206:–

"It is a well-founded principle that when two vehicles are so moving in relation to each other as to be involved in a risk of collision, each one of them owes to the other a duty to proceed with due care (see *Nance* v. *British Columbia*

Electric Railway Co. Ltd. [1951] 2 All E.R. 448). This principle has been applied by our Supreme Court on many occasions (see, *inter alia*, *Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24); it is, of course, always a question of fact whether each party has taken sufficient precautions to avoid the collision (see the judgment of Wilson P. in the *Pourikkos* case, *supra*, at p. 31).

We are of the view, having considered carefully all the relevant circumstances of this case, and bearing in mind the principles which govern the exercise of our powers to interfere with the decision of a trial Court in a case of this nature (see, *inter alia*, *Christodoulou* v. *Angeli* (1968) 1 C.L.R. 338, *Ioannou* v. *Mavridou* (1972) 1 C.L.R. 107, and *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172), that in the present case the finding as regards liability, made by the trial Court, is plainly erroneous and should be varied, so as to burden the motor-cyclist with 25% of the blame for the collision, and the appellant only to the extent of 75%. This apportionment of liability cannot, of course, affect the rights of the pillion-rider, because he was not responsible at all for the accident."

Having reviewed the authorities and in the light of the circumstances of this case, and fully aware of the principles governing our powers to interfere with the decisions of the trial Courts in cases of this nature, we have reached the conclusion that the finding of the trial Court that the appellants were also guilty of negligence is obviously erroneous in the light of the evidence before the Court, that the appellant driver, having been faced with the imminent danger which the respondent has created by his negligent driving in blocking completely his path, the latter had no alternative but to stop in order to avoid a head on collision, and in doing so he acted as a reasonable prudent man, and has taken sufficient precautions the avoid the collision.

In these circumstances, and in the light of the evidence that there was sufficient space for the respondent to pass safely, and once the trial Court has accepted that the appellant has taken avoiding action by braking and stopping the lorry, the appellants, in our view, were wrongly found to have contributed to the

accident, once the appellants in the present case have taken the best possible action in those circumstances.

We would, therefore, find ourselves in agreement with counsel for the appellants that the Court erred in law and in fact in holding that the appellant had contributed to the accident.

For the reasons we have given, we reverse the finding of the trial Court. Appeal allowed, but in the particular circumstances of this case, we are not making an order for costs.

Appeal allowed. No order as to costs.