1982 September 15

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

MICHALAKIS EPIFANIOU, INFANT, THROUGH HIS NEAREST FRIEND AND RELATIVE HIS FATHER COSTAS EPIFANIOU,

Appellant–Plaintiff.

v.

ANDREAS HADJIGEORGHIOU,

Respondent–Defendant.

(*Civil Appeal No.* 6314).

Findings of fact—Appeal—Court of appeal will normally not interfere with findings of fact of the trial Court unless they are so erroneous or unwarranted by the evidence.

Whilst the respondent–defendant was driving his car along Kantara Avenue in the direction of Nicosia it knocked on the appellant–plaintiff, a five year old boy. The plaintiff has not given evidence at the trial apparently because of his tender age. The trial Court after considering the evidence accepted the evidence of the defendant and found that the accident occurred when the child dashed to cross the road. It further found that the defendant took sufficient precautions in the circumstances of the case and therefore he was not to blame at all for the accident. Such precautions were the sounding of the horn, the application of the brakes and the manoeuvring to the right to avoid the accident.

Upon appeal by the plaintiff.

Held, that this Court in determining an appeal, will normally not interfere with the findings of fact of the trial Court, unless such findings are so erroneous or unwarranted by the evidence as to make it proper or necessary for this Court to interfere; that having heard the argument of counsel for the appellant this Court has not been convinced that the findings of the trial Court were so erroneous or unwarranted by the evidence as

to make it proper or necessary for this Court to interfere; accordingly the appeal should fail.

Appeal dismissed.

Cases referred to:

Lang v. *London Transport Executive and Another* [1959] 3 All E.R. 609;

Ioannou and Another v. *Michaelides* (1966) 1 C.L.R. 235 at pp. 238, 239;

Kkafa v. *Kalorkotis* (1982) 1 C.L.R. 372.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stylianides, P.D.C. and Fr. Nicolaides, D.J.) dated the 21st August, 1981 (Action No. 1587/78) whereby plaintiff's action for damages for personal injuries alleged to have occurred as a result of the negligence and/or breach of statutory duty by defendant was dismissed.

P. Demetriou, for the appellant.

S. Erotocritou (Mrs.), for the respondent.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment of the Full District Court of Nicosia, whereby the action of the appellant-plaintiff for damages for personal injuries alleged to have occurred as a result of the negligence and/or breach of statutory duty by the respondent, was dismissed.

The grounds on which counsel for the appellant based this appeal, is, first, that the trial Court wrongly found that the respondent was not to blame for the accident which gave cause to the action, and, second, that the quantum of damages awarded by the trial Court was manifestly low.

The question of damages as assessed by the trial Court on the assumption of full liability, was £800.- agreed special damages and £1,750.- general damages.

The facts of the case are briefly as follows:-

The plaintiff, an infant, raised this action by his father and

next friend claiming special and general damages for injuries received in a road traffic accident due to the negligence and/or breach of statutory duty by the defendant.

The plaintiff was born in August, 1972. On 21.10.77 whilst crossing Kantara Avenue in Kaimakli Quarter of Nicosia, he came into collision with the front left door of motor car Reg. No. DB. 919 owned and driven by the defendant. The plaintiff was injured and was conveyed to the Nicosia General Hospital. The police on information arrived at the scene at 1.30 p.m. and P.C. 1683, Andreas Pettemerides (P.W.1), the police investigator found the motor car in its resultant position. In the presence of the defendant he took measurements and prepared a sketch (exh. 5).

Kantara Avenue is 40 ft. wide and is separated by a straight continuous white line into two moieties. Each half of the avenue can well accommodate two cars running in the same direction. At a distance of 60 - 70 meters from the point of impact marked 'X' on the sketch there is a round-about known as "Bata round-about". On the left of this avenue in the direction of Nicosia, there is a pavement 7 ft. wide. The plaintiff and another boy, Marios Gregou, one year his elder, were standing on that pavement. The defendant drove his car towards Bata round-about and he turned back driving along the same avenue towards town. Then this accident occurred, whilst the plaintiff and his companion were trying to cross the road. None of the two children was called to give evidence. The trial Court found that the only probable justification for their absence from the Court was their tender age.

The trial Court having considered the evidence before it, accepted the evidence of the respondent-defendant and came to the conclusion that the respondent had taken all reasonable steps to avoid the accident and he was not to blame in this case. The version of the defendant, as accepted by the trial Court, was as follows:

> "The defendant's version is that at about 1.00 p.m. he drove to Bata round-about and back towards Nicosia along Kantara Avenue. Whilst he was driving towards the round-about, he noticed on the right pavement two children who appeared talking. He was keeping the left

lane of the avenue. On his way back he was doing about 31 m.p.h. As he had in mind the presence of the children, he thought that they might intend to cross and so he drove on the inside lane, meaning on the part of the left moiety nearer to the centre of the avenue. The children on his way to the round-about did not exhibit any manifestation or any intention to cross the road. On his way back he saw that they were on the edge of the pavement. The elder child had his head turned to the left and the other child was not visible. He hooded the horn of his car to warn them and make them realise that there was danger. At that very moment the elder child pulled the other by the hand and they dashed to cross the road. He veered his vehicle to the right and applied brakes. The plaintiff knocked on the handle of the left front passenger's door. The defendant maintained the same speed all along until he applied brakes. He sounded the horn on approaching the children and without noticing any manifest act indicating that they would cross".

The trial Court made reference to the case of *Lang* v. *London Transport Executive and Another* [1959] 3 All E.R. 609, as to the principles governing the precautions which have to be taken in cases of traffic accidents and, in particular, to the following passage:

"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 to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precaution".

And, then, concluded as follows:

"From the evidence of the defendant it is plain that the possibility of the danger emerging was reasonably apparent. He stated that the children, who were standing on the pavement, though they did not do any act indicating that they would try to cross the road, the defendant realised that they might possibly cross the road.

The area where the accident happened is a speed limited area. There is no evidence before us that any other vehicles

or pedestrians were moving on the road at the time. The defendant was doing before he applied brakes 31 m.p.h. Driving, however, at a high speed or exceeding the prescribed speed-limit in a built-up area is not inevitably sufficient per se, irrespective of the circumstances of a case, to establish negligence. (Marios *Chr. Alexandrou* v. *Geoffrey Charles Gamble*, (1974) 1 C.L.R. 5; *Christos Demou* v. *Polykarpos Constantinou and Another*, (1979) 1 C.L.R. 21).

The vehicle of the defendant imprinted 19 ft. long brake-marks, which means that the accident would in any event have taken place even if the speed of the defendant was even lower.

In the light of the evidence we cannot attribute the accident to the speed of the defendant. The collision occurred soon after the application of the brakes of the defendant".

The trial Court went on to deal with the question as to whether, in the circumstances, the respondent acted negligently by failing to take all reasonable precautions in the circumstances and found that the respondent took sufficient precautions in the circumstances of the case and, therefore, he was not to blame at all for the accident. Such precautions were the sounding of the horn, the application of the brakes and the manoeuvring to the right to avoid the accident. The trial Court concluded as follows:

"The precautions required to be taken are those expected from an ordinary reasonably competent motorist. This accident was caused by the abrupt crossing by the plaintiff of the road in lateral direction right across the road. The unfortunate child is the sole author of his predicament. The defendant took sufficient precautions in the circumstances of the case and is not, therefore, to blame at all for the accident".

It is well settled that this Court in determing an appeal, will normally not interfere with the findings of fact of the trial Court, unless such findings are so erroneous or unwarranted by the evidence as to make it proper or necessary for this Court to

interfere. In *Christakis Ioannou and Another* v. *Fivos Michaelides* (1966) 1 C.L.R. 235, in which this Court was considering an appeal from the findings of the trial Court on the apportionment of negligence, one of the Judges had this to say at pp. 238, 239:

> "Though I do think that there is material on record on which the trial Court could possibly have found the respondent guilty of contributory negligence, sitting here on appeal I do not think that the view taken by the trial Court, to the effect that appellant was solely to blame, is so erroneous or unwarranted as to make it proper or necessary for this Court to interfere in the matter". (Per Triantafyllides, J., as he then was).

In a recent decision of this Court in *Kkafa* v. *Kalorkotis* (1982) 1 C.L.R. 372, the Court reiterated the principles as to the circumstances under which an appellate court will interfere with the findings of fact made by a trial Court. Hadjianastassiou, J., at p. 378, said:

> "As it has been said time and again, this Court, when hearing and determining an appeal is not bound by any determinations of questions of fact made by the trial Courts, and it has power to review the whole evidence in drawing its own inferences. But it will only do so, when a finding is not warranted by the evidence considered as a whole, and the reasoning behind a finding is unsatisfactory and/or is of the opinion that the trial Court was clearly wrong, and that the Court of Appeal should interfere to put right that which has gone wrong in the Court below, bearing always in mind that the making of such findings and the appreciation in general of the evidence at the trial is what the trial Judges are there for. (See *Ekrem* v. *McLean*, (1971) 1 C.L.R. 391; and *Christos Charalambides* v. *Polyvios Michaelides*, (1973) 1 C.L.R. 66)".

We have heard the argument of counsel for the appellant but we have not been convinced that the findings of the trial Court were so erroneous or unwarranted by the evidence, as to make it proper or necessary for this Court to interfere.

As this appeal fails on the question of liability, we find it

unnecessary to deal with the second ground of appeal concerning the question of damages.

For these reasons this appeal stands dismissed but in view of the fact that counsel for the respondent has claimed no costs, we make no order as to costs in this appeal.

Appeal dismissed. No order as to costs.