1988 June 22

(A. LOIZOU, P., SAVVIDES AND KOURRIS, JJ.)

ANDREAS AVRAAM,

Appellant-Defendant 1,

v.

1. PANTELIS ANDREOU,

Respondent-Plaintiff,

2. CHARALAMBOS SPANOUDIS,

Respondent-Defendant 2.

(Civil Appeal No. 7020).

Negligence — Contributory negligence — Road traffic collision — Avoiding action — Driver in a dilemma, taking, in the agony of the moment, the wrong avoiding action — Not guilty of negligence.

Negligence — Contributory negligence — Road traffic collision — Convoy of cars coming from opposite direction — In the absence of forewarning, appellant could not anticipate that somebody in the convoy would suddenly turn to the right in order to enter a side street.

Negligence — Contributory negligence — Road collision — Excessive speed — In the circumstances not a cause of the collision.

Evidence — Findings of fact — Road collision — Speed — Inference that from the way appellant's car hit the plaintiff's car, appellant's speed excessive — Trial Judge not entitled to draw such a conclusion.

The plaintiff was driving his car No. NL 99 along Anthoupolis-Nicosia road towards the direction of Anthoupolis, following car No. DM 007 driven by the respondent in this appeal. At the same time the appellant was driving his car No. KY 595 in the opposite direction.

At a point in the road respondent turned suddenly to the right, in order to enter a side street The appellant applied his brakes, but his car turned and hit plaintiff' s car

The trial Judge apportioned liability 30% to the appellant and 70% to the respondent The reason why he found appellant liable as aforesaid is that because he concluded, notwithstanding the absence of evidence, that he was driving at an excessive speed and that he did not take the proper avoiding action, because he failed to use an open space to his left, in order to avoid collision with respondent' s car.

Held, *allowing the appeal* (1) The trial Judge was not entitled to find that the speed was excessive from the way appellant' s car collided with plaintiff's car

(2) Even assuming that appellant' s speed was excessive, such speed was not sufficient per se in the circumstances to establish negligence

(3) The sudden action of the respondent put the appellant in a dilemma and, if the latter, in the agony of the moment, took the wrong action, he cannot be held guilty of negligence

(4) In the absence of a forewarning, the appellant could not anticipate that another car in the convoy from the opposite direction would suddenly turn to the right

Appeal allowed

Cases referred to:

Alexandrou v. Gamble (1974) 1 C L R 5,

Ioannou and Another v. Michaelides (1966) 1 C L R. 235,

Panayiotou v. Mavrou (1970) 1 C.L.R 215;

Karaolis and Another v. Charalambou (1976) 1 C L.R. 310.

Appeal.

Appeal by defendant 1 against the judgment of the District Court of Nicosia (Artemides, P.D.C.) dated the 19th June, 1985 (Action No. 5154/83) whereby the liability in respect of a traffic accident was apportioned at 30 per cent on him and 70 per cent on defendant 2.

A Dikigoropoullos, for the appellant.

St. Erotocritou (Mrs), for the respondent.

Cur adv. vult.

A. LOIZOU P.: The judgment of the Court will be delivered by Mr. Justice Kourris.

KOURRIS J.: This is an appeal from the judgment of a Judge of the District Court of Nicosia by which he determined the liability with regard to a collision involving the vehicles of defendant No. 1 appellant and the plaintiff on 5.9.1983, by holding that the appellant was to blame 30 per cent and the respondent 70 per cent for the said collision.

It was agreed between the parties that, subject to the issue of liability being decided by the Court, the damages to which the plaintiff was entitled were £300 special and general damages and £975 for damage sustained to his car on full liability basis.

The facts as found by the learned trial Judge shortly are these: On 5.9.1983, the plaintiff - who is not a party to this appeal - was driving his car No. NL 99 along Anthoupolis - Nicosia road towards the direction of Anthoupolis and was following car No. DM007 driven by defendant 2 who is the respondent in this appeal. Behind these two cars, there were other cars proceeding in the same direction. At the same time, defendant 1, who is the appellant in this appeal, was driving his car No. KY 595 in the opposite direction. When respondent approached the side road, Alexandros Panayoulis Street, which is on the right side of the road towards the direction of Anthoupolis, he turned suddenly to the right in a diagonal position to enter into the said side road thus blocking the way of the appellant, although he saw appellant's car coming from the opposite direction. Respondent testified that he estimated that he could turn into the side road before the approach of appellant' s car. The appellant faced with this situation, applied the brakes of his car which made a turn and hit plaintiffs car. The respondent's car had, in the meantime, entered the side road and drove away.

On these facts, the trial Judge found that both drivers are to blame for this accident and apportioned the liability by holding that the appellant is 30 per cent to blame for this accident and the respondent 70 per cent.

He also said that rightly counsel for the appellant conceded that his client contributed to the accident. Counsel for the appellant, however, complained before us that he had made no such

concession. We have perused the record before us and, indeed, there is no such admission by counsel for the appellant and we shall dismiss from our minds that such admission was ever made.

The trial Judge found that appellant was guilty of contributory negligence in that his speed was excessive, that appellant should have anticipated that some driver from the convoy of the cars coming from the opposite direction should turn into the side road, and that the appellant did not take sufficient avoiding action.

Appellant's counsel contends that the trial Court was wrong in finding that his client was guilty of contributory negligence by holding that he did not take sufficient avoiding action, this being against the evidence adduced. He, further, alleges that the evidence proves that he acted reasonably in the circumstances and that he took all the steps which a reasonable man could have taken in the circumstances. It is, further, contended that the finding of the trial Court that the appellants speed may have been one of the reasons of the collision is wrong and not warranted by the evidence. He also contended that the appellant could not anticipate, unless he has some fore-warning, that another user of the road would swerve to the right to enter into the side road.

With regard to the question of speed, the learned trial Judge, although he found that there was no evidence as to the speed of appellant's car, he went on to say that having regard to the circumstances of the collision, it is evident that appellant's speed was excessive but he gave no reasons, assuming that the speed of appellant's car was excessive, why the speed contributed to the accident.

The accident occurred on a road where the speed limit is 50 miles per hour and as there was no evidence as to the speed of appellant's car, we do not think that the trial Judge was entitled to find that the speed was excessive from the way appellant's car collided with plaintiff's car. But even if we were to proceed on the basis of the assumption that the appellant was, just before the collision driving at a high speed, we cannot, in any case, accept that doing so, was, inevitably sufficient per se and irrespective of the circumstances of the present case to establish negligence, (see *Alexandrou v. Gamble* (1974) 1 C.L.R. 5), and, in the circumstances of this case it cannot be said that the speed at which the appellant was driving was causative of the said collision.

The second question relates to the avoiding action on the part of the appellant. The difficulty here is not whether the appellant 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 if there is evidence to support it. The learned trial Judge found that the appellant did not take sufficient precautions to avoid the accident. He held that the appellant could drive his car on to an open space on the left of the road towards the direction of Nicosia.

In the case of *Christakis Ioannou and Another v. Fivos Michaelides* (1966) 1 C.L.R. 235, the Court had this to say at p. 238:

> «As regards the complaint that the respondent failed to take avoiding action, it has been held that where a 'wrong' step is taken by a driver in the agony of the collision it does not follow that that step was a negligent step if the other driver by his negligence placed the first driver in a position of danger; but the latter is to take a step which a reasonably careful man would fairly be expected to take in the circumstances *(Chaplin v. Hawes*, 3 C. & P. 554; *Swadling v. Cooper* [1931] A.C. 1, 9; and *Wallace v. Bergins* (1915) S.C. 205). This is a question of fact in each case».

There is no doubt that the respondent, by his negligent action in suddenly turning to the right, in a diagonal direction, to enter the side road, blocked the appellant's path in the main road and put the appellant in a dilemma, and even assuming that the latter did a wrong thing, we think that, having regard to the circumstances of this case, the appellant did not have the time or the opportunity to take effective avoiding action in the agony of the collision.

With regard to the point whether the appellant could anticipate that another user of the road coming from the opposite direction would suddenly turn to the right from a main road into a side road, we think that in the circumstances of this case the appellant could not anticipate such eventuality, unless he had some fore warning; and there was no such fore warning in the present case.

In the case of *Panayiotou v. Mavrou*, (1970) 1 C.L.R. 215, the Court adopted the English case of *Fardon v. Harcourt Rivington* and at p. 219 stated the following:-

> «It is well settled that negligence is the failure to take

reasonable care in the particular circumstances, and in each case the question whether a person has been negligent is a question of fact. We could usefully refer to the principle enunciated by Lord Dunedin in the House of Lords in *Fardon v. Harcourt-Rivington* [1932] All E.R. Rep. 81, at page 83, to the effect that 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 precautions. This statement is regarded as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others; and it must follow that a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common (see *Grant v. Sun Shipping Co. Ltd.* [1948] 2 All E.R. 238 at page 247 H.L)».

This principle was followed in the case of *Nicos Karaolis and Another v. Charalambous* (1976) 1 C.L.R. 310. We think that the Court erred in principle in expecting a driver who is travelling on his proper side of the road to anticipate that another driver coming from the opposite direction could suddenly swerve to his right to enter into the side road. This possibility of danger is only a mere possibility which would never occur to the mind of a reasonable man.

For all the above reasons, we are of the view that defendant 2 is solely to blame for this accident and we allow the appeal and the judgment is varied accordingly. In the result, there will be judgment against defendant 2 only for £1,275 with costs here and in the Court below.

Appeal allowed with costs here and in the Court below.