1981 January 15

[A. LOIZOU, MALACHTOS AND SAVVIDES, JJ.]

ANNA LOIZOU KAZAMIA AND ANOTHER,
AS ADMINISTRATORS OF THE ESTATE OF
IOANNIS CHARALAMBOUS MILIKOUROU,
DECEASED,

Appellants-Plaintiffs,

v.

COSTAS GREGORIOU AND ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 5854).

Negligence—Road accident—Subsidence of the road and fall of lorry into a ravine—Road, though unasphalted, rather narrow, and without foundations, in frequent use by the general public—Possibility of subsidence not reasonably apparent—Driver of lorry not liable in negligence.

The deceased Ioannis Charalambous Milikouros ("the deceased") died as a result of an accident when the lorry in which he was travelling as a passenger fell into a ravine. In proceedings by the administrators of the deceased, for damages, both against the driver and the owner of the car ("the respondents") the trial Judge found that the accident occurred due to the subsidence of the road which was a forest road, without foundations, unasphalted and rather narrow; that at the place where the subsidence occurred the road was 12 ft. wide, the overall width of the car being 7' 6"; that on the left side of the road in relation to the lorry's direction, there was a ravine and on the right there was the mountain side; that a few feet before the subsidence there was a slight right hand bend which necessitated the keeping of a certain distance from the mountain side in order to be negotiated; and that the lorry, which was loaded, was being driven at the time in the middle of the road with 2 ft. on either side. On these findings the trial Court concluded that there was no liability on behalf of the respondents and dismissed the action.

Upon appeal by the administrators of the deceased:

Held, that earlier that morning respondent 1 had driven the

lorry, admittedly empty, along that forest road which was in frequent use by the general public; that, therefore, possibility of a subsidence was not reasonably apparent; that, consequently, the fact that respondent 1 did not prefer another road, a longer one, to the one in question, as suggested by learned counsel for the appellants, does not constitute negligence; that if a subsidence or any other occurrence is 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 and in the circumstances this was the position which inevitably compels this Court to dismiss this appeal, which must be dismissed accordingly.

Appeal dismissed.

Cases referred to:

Bourhill v. *Young* [1943] A.C. 92 at p. 107.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Orphanides, S.D.J.) dated the 8th May, 1978 (Action No. 1608/75) whereby their claim, as administrators of the estate of the deceased Ioannis Ch. Milikouros, for damages for his death caused in a traffic accident, was dismissed.

Ant. Lemis, for the appellants.

C. Adamides, for respondent 1.

K. Michaelides, for respondent 2.

A. Loizou J. gave the following judgment of the Court. The appellants who are the administrators of the estate of Ioannis Charalambous Milikouros, deceased, late of Kalopanayiotis, instituted these proceedings in the District Court of Nicosia, against the respondents for the benefit of the dependents and the estate of the deceased, claiming damages for his death, caused whilst travelling in motor-lorry under registration No. FA.565 driven by respondent 1 and owned by respondent 2.

They now appeal against the judgment of the trial Court by which their aforesaid claim was dismissed on the ground that they found no fault on the part of the driver in his driving and his positioning of the lorry in question at the material time.

The facts of the case are not in dispute. The deceased was

on the 8th February, 1974, a passenger in the said motor-lorry which was driven by respondent 1 and had been hired by him for the transportation of firewood. The lorry, loaded with firewood, was at the time driven along the forest road connecting Kykko Monastery with Yeratzies village. At a certain point the road subsided and it fell into a ravine as a result of which the deceased was killed and the driver of the lorry received personal injuries. It is a fact that the road in question was without foundation, unasphalted and rather narrow. At the place where this subsidence occurred, it was 12 ft. wide, which left about a couple of feet margin on either side of the lorry, the overall width was 7'6".

On the left side of the road in relation to the lorry's direction, there was a ravine and on the right there was the mountain side. A few feet before the subsidence, there was a slight righthand bend which necessitated the keeping of a certain distance from the mountain side in order to negotiate the bend. The lorry was being driven at the time in the middle of the road with 2 ft. on either side, at least at the time and the place where the subsidence occurred and this appears from the marks left on the road and noted on the plan which was prepared by a Police Investigating Officer who visited the scene of the accident and gave evidence of his findings to the Court at the trial.

On these facts, the trial Court concluded that there was no liability on behalf of the defendants as no negligence had been established, as the lorry was properly driven at the time and there was nothing to indicate that such subsidence would have occurred.

It has been argued before us and that was the line pursued before the trial Court, that respondent 1 was liable for the accident in that he drove a heavy loaded lorry too close to the edge of the precipice of a road without foundation, wet at the time and with some stones scattered on the road and that the road was dangerous due to the weather conditions prevailing at the time.

As stated by Lord Wright in *Bourhill* v. *Young* [1943] A.C. 92, at p. 107:

> "The general concept of reasonable foresight is the criterion of negligence and is fluid in its application; it has to be fitted to the facts of the particular case".

In the present case, respondent 1 drove that lorry, admittedly empty, earlier that morning along that forest road which was in frequent use by the general public. The possibility of a subsidence was not reasonably apparent. Consequently the fact that respondent 1 did not prefer another road, a longer one, to the one in question, as suggested by learned counsel for the appellants, does not constitute negligence. If a subsidence or any other occurrence is 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 and in the circumstances this was the position which inevitably compels us to dismiss this appeal, however regretful the performance of this duty is in view of the misfortune that has fallen on the deceased and his family.

In the result the appeal is dismissed with no order as to costs as none have been claimed.

Appeal dismissed. No order as to costs.