CHRISTAKIS IOANNOU AND ANOTHER,
Appellants-Defendants,

v.

FIVOS MICHAELIDES,
Respondent-Plaintiff.

(Civil Appeal No. 4579).

Civil Wrongs—Negligence—Road Traffic—Road Accident—Collision of two motor vehicles—Negligence—Contributory negligence Finding of the trial Court that appellant-defendant driver was solely to blame for the accident upheld on appeal—"Agony of the collision" Failure to take avoiding action in the agony of the collision— " Wrong " step taken by a driver on the agony of collision is not necessarily a " negligent step "—Therefore, even assuming that the respondent driver did the wrong thing, still he cannot be held to have contributed to the accident by his negligence—Since he did not have the time or opportunity to take effective avoiding action in the agony of the collision.

Negligence—Contributory Negligence—"Agony of the collision"—Wrong step taken in the agony of the collision—See under Civil Wrongs above.

In this appeal the appellant admits that the accident was caused by his negligence, but he alleges that he was only partly to blame and that the respondent (plaintiff) contributed to the said accident. The Trial Court found that the appellant-defendant driver was fully to blame and that the respondent did not contributed at all to the accident. The facts sufficiently appear in the judgment of Josephides, J. The Supreme Court in upholding (Vassiliades J., dissenting) the judgment of the trial Court and in dismissing by majority the appeal :

Held, (1) as regards the complaint that the respondent (plaintiff) 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 the step was a negligent step if the other driver by his negligence placed the first driver in a position of danger. (see *Chaplin* v. *Hawes* **3** *C. &*

P. 554 ; *Swadling* v. *Cooper* [1931] A.C. 1, at p. 9 ; and *Wallace* v. *Bergins* (1915) S.C. 205).

(2) There is no doubt in this case that the appellant-defendant driver by his negligent action in emerging from an open space in the respondent's-plaintiff's path on the main road put the respondent in a dilemma and, even assuming that the latter did the wrong thing, we think that, having regard to the circumstances of this case, including the short space of time........, the respondent (plaintiff) did not have the time or the opportunity to take effective avoiding action in the agony of the collision.

Appeal dismissed. No order as to costs in the appeal.

Cases referred to :

Chaplin v. *Hawes*, 3 C. & P. 554;

Swadling v. *Cooper* [1931] A.C. 1, at p. 9;

Wallace v. *Bergins* (1915) S.C. 205.

Appeal.

Appeal against the judgment of the District Court of Limassol, (Loizou. P.D.C. & Malachtos D.J.) dated the 31st March, 1966, (Action No. 1055/64) whereby the defendants were adjudged to pay to the plaintiff the sum of £334 by way of damages for bodily injuries he received at a road collision.

X. Clerides with *N. Pelides*, for the appellant.

I. Maounis with *E. Michaelides*, for the respondent.

VASSILIADES, J. : Mr. Justice Josephides will deliver the the first judgment.

JOSEPHIDES, J. : In this appeal the appellant admits that the accident was caused by his negligence but he alleges that he was only partly to blame and that the respondent contributed to the accident. The trial Court found that the appellant was fully to blame and that the respondent did not contribute at all to the accident.

The accident occurred between the 46th and 47th milestones on the Nicosia-Limassol road. As the respondent was driving to Limassol in an Austin A50 car, the appellant, who was driving a Pontiac Parisienne, emerged from an open spa-

ce on the left hand side of the respondent, he cut across the path of the respondent and he had gone for a distance of 58 ft diagonally when the two cars collided The admitted point of impact is within an inch from the centre of the asphalt road on the appellant's side

The evidence of the plaintiff, as summarised in the judgment of the trial Court, is to the effect that, while he was driving his car at about 45 m p h on his proper side of the road, he saw the defendant's car suddendy emerging from the open space on his (plaintiff's) nearside and proceeding in the direction of Nicosia holding its offside of the road Plaintiff first tried to go further to his right but then he saw the defendant also turning to the same side and he again turned to his left He tried to apply his brakes, he said, but before he could apply them hard enough the accident occurred

The defendant's version, on the other hand, is that he was driving his car out of an open space into the highway Before doing so he looked to his left and right to see whether the road was clear He did not see any vehicle and he entered the asphalt road and proceeded in the direction of Nicosia After he proceeded on the asphalt road for some distance he saw the plaintiff's car from a great distance coming toward him He then proceeded to get to his nearside of the road and when he saw that the plaintiff was going on the wrong side brought his car to a stand-still and sounded his horn but the plaintiff drove on and the two vehicles collided with their front offsides As a result of the impact the plaintiff's respondent's car came to a stand-still 6 ft from the point of impact whilst that of the defendant-appellant was pushed back about 8 ft

The trial Court found the facts in accordance with the plaintiff's version and they went on to say that it was quite evident that the defendant came on to the road without first ascertaining whether the road was clear and at a time when it was not in fact clear and, on the contrary, was very dangerous for him to have done so Having done so he proceeded on his offside of the road and thus placed the oncoming plaintiff in a difficult predicament and in such a position that he could not reasonably be expected to avoid the accident In those circumstances the trial Court found for the plaintiff-respondent and concluded that the defendant's-appellant's negligence was the sole cause of the accident

It was argued before us today that the respondent did not take proper avoiding action which a reasonable man could have taken under the circumstances. There were no brake-marks on the road and it was submitted on behalf of the appellant that the track marks of his Pontiac car of 58 ft. on the main road were straight dust tyre marks and that there was no zig-zagging, which is inconsistent with the plaintiff's-respondent's version. It should be borne in mind, however, that as against that the respondent was driving along an open main road, which was *not* in a built-up area, that there was no speed limit and no " slow " sign, that he was driving on his proper side of the road, that his speed was 45 miles per hour on a straight stretch of the road, and that even if his speed was higher he could not be held to be negligent in these circumstances.

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 appellant by his negligent action in emerging from an open space in the respondent's path in the main road put the respondent in a dilemma and, even assuming that the latter did the wrong thing, I think that, having regard to the circumstances of this case, including the short space of time taken by the appellant's car to cover the distance of 19½ yards up to the point of impact, the respondent did not have the time or the opportunity to take effective avoiding action in the agony of the collision. I am of the view that on the evidence before the trial Court it was open to them to find as they did, that the appellant was solely to blame for the accident, and I would, therefore, dismiss the appeal.

VASSILIADES, J. : Mr. Justice Triantafyllides will deliver the second judgment.

TRIANTAFYLLIDES, J. : I would like to say only that I agree with the conclusion reached by Mr. Justice Josephides in this case, but my approach is slightly different. 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. I, therefore, would dismiss the appeal, too.

VASSILIADES, J.: After exhaustive discussion I still find myself unable to agree that there are no circumstances justifying the intervention of this Court in the findings of the trial Court.

It is common ground that the collision was the result of negligence; and that it resulted in damage amounting to a considerable sum, nearly a thousand pounds. The trial Court reached the conclusion that no blame could be attributed to the driver of the smaller car involved in this collision; (the plaintiff in the action; and respondent in this appeal) They have reached this conclusion on the evidence before them, consisting of the sworn versions of the two drivers and also of the real evidence in the case, regarding which, there is no dispute.

The sworn evidence of the driver of the smaller car, is to the effect that at the material time he was driving at 45 m.p.h. Nevertheless, when he came into collision with the other car, a much bigger and heavier vehicle, moving on the opposite direction, or having just come to a stand-still, the resultant positions were that the bigger car was pushed backwards some eight ft. towards the other side of the road, while the smaller car went further on for 6 ft. to the other side of the road. This, to my mind, is real evidence inconsistent with the estimate of his speed by the driver of the smaller car; and consistent with the version of the driver of the bigger car, that the smaller car was travelling at a great speed.

There is another material point where the real evidence contradicts, in my opinion, the version of the driver of the smaller car, which was accepted by the trial Court; and supports the version of the driver of the bigger car, which was rejected. This is the dust tyre-marks found on the asphalted road, as shown in the plan. This real evidence shows that the bigger car covered a distance of about 20 yards in a somewhat oblique direction, from the entrance of the parking place (which was on the smaller car's proper side of the road) towards the bigger car's proper side, but running in about

the middle of the road. This evidence is also inconsistent with the version of the driver of the smaller car, that the other car was moving in his path ; and that in so doing, it put the driver of the smaller car in a predicament. This seems to me, reading the judgment of the trial Court, to have been the main factor which led the trial Court to their conclusion that the blame for the collision must be placed entirely on the driver of the bigger car.

It seems to me that this conclusion ignores the undoubted fact that the smaller car must have been travelling at a speed considerably bigger than that stated by its driver. It also, I think, ignores the fact that the driver of the smaller car failed to take the proper avoiding action by taking more to his proper side, which it was his legal duty to do, in the circumstances. Had the driver of the smaller car taken the proper avoiding action, that is to say, had he kept to his proper side of the road, and had he reduced his speed, he would, I think, have avoided the collision, which, according to the police-plan, occurred about an inch further from the middle of the road, towards the proper side of the big car, and on the wrong side of the smaller car.

According to this plan there is no doubt, that from the point of impact, the smaller car had at its disposal nearly 10 ft. of asphalted road, plus 3 ft. of berm. I cannot see how the driver of the smaller car can be said to be entirely free of all blame, for this collision, when he failed, in the circumstances, to make use of these 13 ft. of road, on his proper side, for avoiding action.

It is in these circumstances that I find myself not only unable to agree with the conclusion that the blame and liability for this collision must be placed exclusively on the driver of the bigger car ; but I also find myself unable to agree that, in the circumstances, this Court should not intervene in the findings of the trial Court. It may well be that a bigger share of blame rests on the driver of the bigger car. It may also be that the liability of the driver of the smaller car must be found at a correspondingly smaller percentage than that of the driver of the bigger car ; but I cannot see how the driver of the smaller car can be held entirely unconnected with the negligence which caused the collision.

In view of the result of the majority judgment in the present appeal, I do not think that it is any use my going further

into the question of how the blame for the collision and the corresponding liability of the two drivers should, be apportioned. I, therefore, leave the matter at that.

In the result the appeal will be dismissed as decided by the judgments of the majority of the Court. As regards costs, we all agree that in the circumstances, there should be no order as to costs in the appeal

Appeal dismissed. No order as to costs in the appeal.