

[TRIANTAFYLLIDES, LOIZOU AND HADJIANASTASSIOU, JJ.]

CHARALAMBOS MICHAEL,

Appellant-Defendant.

v.

PREZOU KYRIAKOU AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 4693).

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Negligence—Collision between motor-vehicles—Personal injuries—Fatal accident—Appeal by the second defendant in the actions on the issue of liability—Appeal allowed—Evidence as to negligence meagre, contradictory and in the nature of a conjecture—Inferences drawn therefrom by trial Court wrong—Respondents—plaintiffs failed to discharge the burden cast on them on the issue of negligence—Findings and judgment of the trial Court set aside—Appeal allowed—The Civil Wrongs Law Cap. 148 section 51; also section 51(2)(c) of said same Law.

Road Traffic Accident—Negligence—See above.

Appeal—Findings of fact made by trial Court—Not warranted by the evidence—Inferences drawn therefrom by trial Court wrong—Judgment appealed from (and findings of fact) set aside.

Practice—Appeal—Directions made by the Court of Appeal for service of notice of appeal on party who might be affected by outcome of appeal.

Evidence in civil cases—Inferences as distinct from conjecture.

Inference as distinct from conjecture—See immediately hereabove.

The facts sufficiently appear in the rulings and the judgment of the Court.

Cases referred to:

Jones v. Great Western Railway Co. (1930) 47 T.L.R. 39;

Lush v. T.F. Maltby, Ltd. (Honeywood, Third Party) (1959)
1 Lloyd's Rep. 46.

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Appeal.

Appeal against the judgment of the District Court of Nicosia (Mavrommatis & Stylianides D.JJ.) dated the 19th December 1967, (Consolidated Action Nos. 380/66, 832/67, 833/67, 404/66) whereby the appellant - defendant was adjudged to pay various sums to the plaintiffs in the aforesaid consolidated actions as damages for the injuries they received in a traffic accident.

G. Tornaritis, for the appellant.

Gl. Raphael, for respondents-plaintiffs in actions 380/66 and 404/66.

E. Vrahimi (Mrs.), for respondents-plaintiffs in actions 832/67 and 833/67.

G. Paschalis, for party affected.

Cur. adv. vult.

The following ruling was delivered on December 10, 1968 by:

TRIANTAFYLIDIS, J.: Having heard to-day counsel for the appellant — who was defendant 2 in the Court below in all these four consolidated actions — and having heard also counsel for respondents-plaintiffs in all the said actions — we had retired with a view to considering our decision regarding the outcome of this appeal.

But in the course of doing so we discovered, when going through the relevant files of the Nicosia District Court, that in two of these actions, namely 380/66 and 404/66, there were never filed either a memorandum of appearance by, or retainer for, Mr. Paschalis, the advocate who appeared later in the proceedings on behalf of defendant 1 in all four actions; nor were there filed statements of defence for defendant 1 in respect of actions 380/66 and 404/66.

From the record of the trial Court it appears that when the actions were consolidated the relevant application was made by counsel for appellant (defendant 2) and there were notified accordingly only counsel for plaintiffs; defendant 1 or his counsel were not so notified.

Then on the 7th December, 1967, when all four actions came up before the trial Court for hearing, Mr. Paschalis appeared

for defendant 1 in all such actions, even though he had no retainer and had entered no appearance or filed any defence in respect of two of them (380/66 and 404/66); and it does not appear from the record that his client was then present.

Yet on the said date Mr. Paschalis agreed on behalf of defendant 1 regarding the amounts of damages in all four actions.

Such actions were then adjourned to the 19th December, 1967, for a hearing as to liability.

On that date Mr. Paschalis again appeared for defendant 1, in all four actions – still without a retainer and still without having filed a memorandum of appearance or a defence in respect of two of such actions.

It is stated in the record before us that the “parties” were present, but we know now, from a statement made to this Court to-day by counsel for the appellant, that his client was in fact not present; and all counsel before us to-day cannot recollect whether defendant 1 was present, either.

The trial started, of all four actions together, and Mr. Paschalis took part in the proceedings as counsel for defendant 1; he cross-examined the main eyewitness but he did not address the Court; he stated instead that he admitted that his client was negligent, and the Court below, in giving one judgment in respect of all four actions, treated defendant 1 as having conceded liability regarding all such actions.

The foregoing tend to establish the existence of a, really, most unfortunate state of affairs; we have indeed considered whether it would be proper to order at this stage a new trial, on the ground of mistrial of the four consolidated actions. *On the other hand we do not want to hurry in adopting such a course, and create more costs, until we find which exactly is the position taken by defendant 1.*

It is, therefore, directed, at this stage, that counsel for appellant (defendant 2) should serve the Notice of appeal, together with the supplementary grounds filed on the 24th October, 1968 and 16th November, 1968, both on defendant 1, Eviplides Kyriacou Manoli, personally, and on his counsel, Mr. Paschalis; the Notice to be endorsed with a note to the effect that this appeal is fixed for hearing before us at 10.00 a.m. on the 17th January, 1969.

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Depending on whether or not defendant 1 does appear on that date — personally or through counsel — and in the light, *inter alia*, of what he has to say, we shall proceed to consider the outcome of this appeal, including the possibility of a new trial.

The question of costs for to-day to be decided later.

Order accordingly.

The following ruling was delivered on January 17, 1969 by:—

TRIANAFYLLIDES, J.: As the trial Court in its judgment did not proceed to apportion liability, between the appellant (defendant 2) and the other defendant (defendant 1), for the collision which has given rise to this appeal and as, thus, undoubtedly, defendant 1 will be affected by the outcome of this appeal if it is in favour of the appellant, we take the view that such defendant is, in the interests of justice, a necessary party to this appeal; and as such he ought to have been given notice of this appeal from the beginning.

Mr. Paschalis, who has appeared to-day for this defendant, has not objected to this appeal being heard further, even though its hearing has commenced in his absence, and he has not requested a hearing of this appeal *de novo*; he said that he is in a position to argue this appeal on behalf of his client. We, therefore, propose to hear him, even at this stage, on behalf of defendant 1, regarding the merits of the appeal.

The following judgments were read on July 28, 1969, by:

TRIANAFYLLIDES, J.: Mr. Justice Hadjianastassiou will deliver the first judgment of the Court.

HADJIANASTASSIOU, J.: In these four consolidated actions, the plaintiffs claimed damages for injuries sustained by them while they were passengers in the bus of the first defendant, which collided with a motor-van because of the negligent driving of both defendants. The special and general damages were agreed, and the Full District Court of Nicosia found that both drivers were equally to blame for this accident.

The sums awarded are as follows:

To the plaintiff Prezou Kyriakou in action No. 380/66—£1,300; to Marikou G. Pela in 404/66—£180; to Menelaos Kyriakou

and Menelaos Demosthenous, as administrators of the estate of the deceased Kyriacos Menelaou, in 832/67-£270; and to Menelaos Kyriakou and Menelaos Demosthenous as administrators of the estate of the deceased Soteroulla Demosthenous Menelaou in 833/67-£1.350.

Defendant 2 appealed against the judgment of the trial Court dated December 19, 1967.

The accident took place on January 19, 1966, at about 6.00 a.m., within the village of Orounda. The plaintiff, Prezou Kyriakou, was a married woman of 30 years of age and was a passenger for reward in the bus under registration No. TBD 146, owned and driven by defendant 1. The plaintiff was sitting in the third row of seats, and when the bus reached Orounda village, it collided with a motor-van under registration No. AM 668. As a result of the collision, the plaintiff suffered bodily injuries.

Although it is usual in traffic accidents to have two sharply conflicting versions, in this case, both Mr. Paschalis appearing for defendant 1, and Mr. Tornaritis for appellant-defendant 2, have chosen not to call any evidence before the trial Court on the issue of liability, after the case of the plaintiffs was closed.

It was the plaintiff's version (Marikou Pela), that while the first defendant was driving his bus speeding through the village of Orounda with the headlights on — as it was still dark — she noticed a van being driven backwards from a place off the left-hand side of the road on to the asphalted road in front of them, and it collided with that van; and as a result of that collision the bus overturned. In cross-examination, the witness said that she could not remember and could not say whether just before the accident occurred she was talking to anyone in the bus; she had noticed the van when they were very close to it, at a distance of 3 to 4 paces, and saw it moving before the collision.

Questioned further she said:—

“I saw it moving. It was obvious it was moving by the fact that it was in the road, it came and cut our path. I do not remember the exact position of the van, vis-a-vis the road, because, as I have already stated, I only saw it for a fraction of a second.”

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Then counsel for defendant 2 put this question to the witness:—

Q. "I put it to you that the van was stationary."

A. "No, it was coming driven backwards."

The evidence of the witness Hadjikyriakou Christodoulou, a very old lady, who apparently was called to support the statement of the witness for the plaintiff, is in these terms:—

"Early in the morning of 19th January, 1966, I was a passenger in the bus of my cousin, defendant 1. I was sitting in the row immediately behind the driver. Whilst driving through Orounda, our driver was driving very fast, and I passed a remark to him; 'Son, drive slowly'. It was still dark. Suddenly, whilst in the village, a car came out from our left (witness indicates to the left). That vehicle was being pushed by two persons whilst there was somebody in the driver's seat. A collision occurred between that vehicle and our bus, and as a result our bus overturned. That vehicle was moving, it was being pushed, it was not stationary. The vehicle that came from the left did not have any lights."

Cross-examined by Mr. Tornaritis she said:—

"The way it was being pushed, it was being pushed not backwards but forwards, when I first noticed the van it was very close to our bus; about 5 or 6 paces away."

Then counsel further put this question to the witness:—

Q. "I put it to you that you saw nothing."

A. "No, I told to the Court everything that I saw."

Pausing there for a moment, I would like to observe that in the light of the cross-examination by Mr. Tornaritis, and in view of the fact that criminal proceedings were instituted as a result of this accident, one would have expected to find a sketch plan showing the place where the accident occurred, the measurements of the road, whether there was a side street or a berm, as well as the position of the van just before the accident.

In my opinion, in view of the meagre evidence which has been placed before the trial Court, and in view of the absence of expert evidence with regard to the damage to the van, in

order to assist the Court to reach a correct conclusion as to whether both vehicles were moving at the time of the accident or one of them was stationary, I am in doubt whether the Court did not find itself at a great disadvantage in weighing properly the evidence before them.

As it appears from the record of the trial Court, at the close of the case for the plaintiff, counsel on behalf of the first defendant made this statement:—

“I admit that my client was negligent.”

The Court then proceeded hearing the submission of counsel for defendant 2 on the question of liability, and after weighing the evidence for the plaintiff, has delivered an extempore judgment. They had this to say:—

“We have observed the only two witnesses before us and without having merely to rely on preponderance of evidence, we can say that we can accept quite safely the evidence of the first witness called by the plaintiff, who impressed us as a truthful witness. As regards the second witness, a very old lady whose power of perception must be limited, the only thing we can take safely from her is that the van was coming, out of now-where almost, and the collision ensued.

We are satisfied that the facts of the case are as follows:—

The bus of defendant 1 was being driven at an excessive and very fast speed through the village of Orounda, when suddenly the van of defendant 2, being driven by defendant 2, emerged from an open space to the left, came slightly on the road and up to the asphalt, and as a result a collision ensued.

In the circumstances, it is obvious that both defendants are to blame. We do not propose to apportion liability, in view of the fact that the necessary procedure was not followed; all we can say is that both are to blame.”

Counsel for appellant-defendant 2 has mainly contended (a) that the findings of the trial Court that the appellant was also negligent were not warranted by the evidence when considered as a whole — being conflicting — and that the reasoning behind such findings was unsatisfactory; and (b) that the plaintiffs have failed to establish a case of negligence in accordance with the issues raised in the pleadings.

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Section 51 of our Civil Wrongs Law, Cap. 148, which reproduces the provisions of the common law on the point, provides that negligence consists of doing some act which, in the circumstances, a reasonable prudent person would not do, or failing to do some act which, in the circumstances, such a person would do, and thereby causing damage. But compensation for such damage is only recoverable by a person to whom the person guilty of negligence owed a duty in the circumstances not to be negligent. The owner of a vehicle owes such a duty not to be negligent to all persons who are carried for reward in his vehicle. See sec. 51 sub-sec. 2(c).

It is not in dispute that the burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by an act or omission for which the defendant is in law responsible.

It is alleged in para. 4 of the statement of claim in Action No. 380/66, that defendant 2 was the registered owner and driver of motor-van AM 668, who drove the said motor-van within the village of Orounda towards Pitsilia; para. 5 alleges that whilst the plaintiff was a passenger for reward in motor omnibus TBD 146, the defendants, negligently and in breach of their statutory duties, did drive and/or manage their said motor vehicles respectively within the village of Orounda, as a result of which the two vehicles collided and the plaintiff received bodily injuries, whereupon she has been put to loss and expense and has suffered damage.

Particulars of negligence were given that both defendants drove too fast within the village of Orounda. They drove in a careless manner; they failed to keep a proper lookout; they failed to reduce speed and/or to apply brakes at all or sufficiently or in time to do so, or to manoeuvre their respective vehicles so as to avoid collision; they failed to give any warning of their approach; generally, they drove without due care and attention.

The defence of the second defendant, which was delivered on June 28, 1967, puts the plaintiff to proof of the matters alleged in paras. 1, 2, 4, 5, 6, 7, 9, & 10 of the statement of claim.

Para. 5 reads:—

“Defendant No. 2 says that the accident, the subject matter

of the present proceedings, was the sole responsibility and was due to the negligence of defendant No. 1.”

I consider it constructive to deal with the allegations of negligence by the plaintiff in action 832/67. It is alleged in para. 4 of the statement of claim that the accident and the death of the minor Kyriakos Menelaou, were due to the negligence on the part of both defendants. Para. 2 reads *inter alia*:—

“The second defendant was at all material times the driver of the car under registration AM 668, and defendant 3 was the owner of that car.”

Particulars of negligence with regard to defendant 2 were given in para. 5. It reads:—

“Defendant 2 has parked his car at a place.....”

The defence of the second defendant, which was delivered on July 1, 1967, admits in effect that the defendant was the driver of the car AM 668 during the material time of the accident, as alleged in para. 2 of the statement of claim in Action 832/67, and goes on to allege in para. 3 that the sole responsibility for the accident rested on defendant 1.

I must confess, that although one object of the pleadings was to let the other side know what case he has to meet at the trial, this certainly could not be said about this defence of the second defendant, which tells no-one anything. It puts everything in issue except that there was an admission in Case No. 832/67 that the motor-car was at the scene of the accident, and no-one can tell from the defence of the case what defendant 2 would put forward at the trial or what the issues were. As I said earlier, even during the trial, on the question of liability, the only indication the trial Court could get in cross-examination was that perhaps the motor-van AM 668 was at the time of the accident stationary.

The defence of the first defendant, which was delivered on May 9, 1967, only in the cases Nos. 832/67 and 833/67, and which is identical in both cases, denied all and each one of the allegations of facts as regards negligence, and says that the accident resulting in the death of Kyriakos Menelaou, was due to the sole and exclusive negligence of the second defendant.

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Particulars of negligence with regard to the second defendant are given:—

- (a) drove backwards from a side-street into a main road without any guidance and/or without looking whether the main road was clear of traffic;
- (b) entered a main road driving backwards; and
- (c) failed to stop before entering a main road to make sure whether it was safe for him to do so.

The defence of the third defendant, which was delivered on May 26, 1968, in only these two cases, and which is identical in both cases, says in para. 2:—

“With the exception of the fact that he was the owner of the motor-van AM 668 which he admits, the defendant denies all other allegations contained in para. 2 of the statement of claim.”

Paragraph 4 reads:—

“Defendant ignores the facts set out in para. 4 in the statement of claim, and therefore denies same. Particularly, he denies that defendant 2 was in his service and was driving his motor-van for his account.”

It would be observed from the record of the trial Court, that on the day of the hearing — 19th December, 1967 — Mrs. Vrahimi, counsel for the plaintiffs in these two actions, made this statement to the Court:

“As there is no evidence against defendant 3 in actions 832/67 and 833/67, I withdraw the claim against defendant 3 with the Court’s leave.”

The record further reads:—

“*Court*: Leave granted, claim against defendant 3 dismissed without any order as to costs.”

On January 17, 1969, on the hearing of this appeal, counsel for the first defendant, in all four actions, was allowed in the interests of justice, to take part and argue the case of his client. Counsel then after supporting the judgment of the trial Court, contended that both drivers were negligent and were equally to blame.

The question which is posed before me, is whether there was negligence on the part of the driver of the vehicle which collided with that in which the plaintiff was riding, and did wholly or in part cause the accident.

I would like to state once again that proof may be by direct evidence or by inference, and that the fact to be proved must be made to appear more probable than not. It is clear that the evidence for the plaintiff does not tell us almost anything, except that the witness assumes that that must have happened and that the van was moving by the fact that it was on the road. It cannot be said, therefore, that that is a reasonable inference to be drawn, as there is no established fact that the second defendant was driving the van slowly on the asphalted road, and as a result the collision occurred. An inference is a deduction from an established fact and an assumption or guess is something quite different, but not necessarily related to any established fact. As it has been aptly said by Lord MacMillan in his speech in *Jones v. Great Western* (1930) 47 T.L.R. 39:

“The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.

In *Lush v. T. F. Maltby, Ltd. (Honeywood, Third Party)*, (1959) 1 *Lloyd's Rep.* 46, Devlin, J. had this to say:—

“The best way in which the case on this point can be put for the plaintiff is to say that it is a border-line case where it might be that there was negligence, and it might be that there was not, and no-one can begin to consider that fairly and draw the inference whether there was negligence or not, unless he is satisfied that he has got a complete detailed and truthful account from the witnesses of the exact

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circumstances in which the matter occurred. It is only with such a basis that it should be proper to begin to draw inferences and to pass what is sometimes called a value judgment on the nature of the act. That cannot be done unless the incidents which make up the act have been clearly and firmly established by evidence called on behalf of the plaintiff, who has to prove his case. That has not been done, and, for the reasons which I have given, therefore, the claim fails and must be dismissed.”

Although this Court is loath to interfere with an inference drawn by the trial judges who have seen and heard the witnesses, at the same time, if this Court is satisfied that the inference drawn is the wrong inference, then not only has it the power, but it is its duty, to substitute its own inference for that found by the learned trial judges.

Having fully considered the argument of counsel for the second appellant that the finding of the trial Court was not supported by the evidence that the second defendant was guilty of negligence, and that the evidence for the plaintiff was merely in the nature of a conjecture, and having read the whole evidence, I have reached the view that the inferences drawn by the trial Court were wrong.

For the reasons I have endeavoured to advance, and in view of the fact that the evidence called on behalf of the plaintiff-respondent was contradictory and in the nature of a conjecture, I have reached the conclusion to allow the appeal, but with no order as to costs here, or in the Court below (subject, of course, to the order for costs, made by this Court on the 25th October, 1968, remaining in force).

TRIANAFYLLIDES, J.: I agree with the outcome of this appeal, as stated in the judgment of my brother Mr. Justice Hadjianastassiou, which I have had the privilege of perusing in advance.

I have been satisfied by the appellant that the trial Court's verdict, regarding the negligence of the appellant, is an unsatisfactory one and should not be allowed to stand.

The evidence on which the learned judges of the trial Court have based such verdict has been set out in the judgment of Mr. Justice Hadjianastassiou and I need not repeat it.

In my opinion it could not properly be held, on the basis of such evidence, that the respondents had succeeded in discharging the burden cast upon them, of establishing the liability, through negligence, of the appellant; even though such burden was not a very heavy one in view of the civil nature of the proceedings.

The fact that one of their two witnesses was believed by the trial Court did not necessarily entitle the respondents to succeed against the appellant, because the quality of the relevant evidence was such that it could not be treated as amounting to sufficiently cogent evidence for the purpose.

As pointed out in the ruling* of this Court dated the 10th December, 1968, the proceedings before the District Court followed a rather unsatisfactory course, and, as a result, we have not lost sight of the possibility that a new trial might have been ordered; but once we did hear, in the appeal, counsel for the other defendant — who had not appealed — it was felt that any defects to be found in the first instance process should be treated as having been cured and that the interests of justice did not, therefore, require a new trial.

In the result I agree that this appeal should be allowed with no order as to costs, other than the one made on the 25th October, 1968.

LOIZOU, J.: I also agree that this appeal should be allowed. I consider it superfluous to go into any detail; it is sufficient to say that, in my view, the respondents have failed to prove a case of negligence against the appellant. I also agree that, in the circumstances, there should be no order for costs here or in the Court below (except the order already made on the 25th October, 1968).

TRIANTAFYLIDIS, J.: In the result this appeal is allowed and the order of the trial Court in so far as it affects the appellant is set aside; regarding costs there will be no order as to costs, either here or in the Court below (without prejudice, however, to the order for costs made by this Court on the 25th October, 1968).

Appeal allowed.

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* Vide p. 464 in this Part *ante*.