[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

GEORGHIOS THEOPHANOUS,

*Appellant-Defendant,*

*v.*

ANDREAS MARKIDES AND ANOTHER,

*Respondents-Plaintiffs.*

*(Civil Appeal No. 5357).*

1975
Sept. 22

GEORGHIOS THEOPHANOUS
v.
ANDREAS MARKIDES AND ANOTHER

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*Negligence—Contributory negligence—Road accident—Collision between motor-cycle and car moving in opposite directions—Duty of vehicles so moving in relation to each other as to be involved in a risk of collision—Always a question of fact whether each party has taken sufficient precautions to avoid the collission—Apportionment of liability—Principles on which Court of Appeal interferes with apportionment made by trial Court—Finding as regards liability plainly erroneous—Varied.*

*Damages—Special damages—Loss of earnings—Mitigation of damages—Delay in fitting artificial leg due to plaintiff's impecuniosity—No reason for reducing special damages as regards loss of earnings.*

*Damages—General damages—Nasty crushing compound injury to right thigh leading to extensive soft tissue destruction of lower third of right thigh and shattering of right femur, with traumatic ischaemia of right knee and leg—Mid thigh amputation—In hospital for 70 days—Out patient for 3 months—Plaintiff an athlete, footballer and football trainer—His future earning capacity considerably reduced—Devaluation of money—Award of C£11,000—So very high as to necessitate intervention—Reduced to C£9,000.*

*Contribution—Joint civil wrong-doers—Damages to pillion-rider for injuries he received through collision of motor-cycle and car—Order of contribution against drivers to the extent of their liability—Section 64(1) of the Civil Wrongs Law, Cap. 148.*

Whilst the respondent Markides was riding his motor-cycle and was proceeding from Dhali to Lymbia, carry-

ing as a pillion-rider respondent Toumazou his motor-cycle collided with a car which was being driven in the opposite direction by the appellant.

The trial Court found that the appellant was solely to blame for the collision, due to negligence on his part, and gave judgment in favour of Markides for the sum of C£4,700 and in favour of Toumazou for the sum of C£13,599.

The appellant in this appeal complains against the finding of the trial Court as regards the issue of liability; and though he does not deny that the collision took place as a result, also, of his own negligence, he contends that the motor-cyclist contributed too, through negligence, to the collision.

The appellant, further, complains against the amount of the special and general damages awarded to the pillion-rider (respondent Toumazou).

It was not disputed by the respondent motor-cyclist that when he saw the oncoming car of the appellant, for the first time, it was still 100 metres or more away; the car had its headlights full on; the motor-cyclist estimated that there was sufficient room, on the asphalted part of the road, for the car and his motor-cycle to drive past each other and he started signalling with his lights in order to indicate to the driver of the car, the appellant, that he was being dazzled by the headlights of the car. According to the motor-cyclist's own testimony his visibility was diminished, as a result of him being dazzled, so that he could see clearly ahead of him only up to a distance of 1 - 2 metres; and he reduced his speed from approximately 25 - 30 m.p.h. to about 20 m.p.h. When the two vehicles had approached each other, and as the headlights of the car had not been dipped, he took the extreme left side of the asphalted part, but he refrained from going on to the berm, because, as he said, he knew that it was not on the same level as the asphalted part; eventually, the two vehicles collided.

The factual position regarding the injuries sustained by respondent Toumazou was as follows: He suffered a nasty crushing compound injury to his right thigh

leading to extensive soft tissue destruction of the lower third of the right thigh and shattering (segmental fragmentation) of the right femur, with traumatic ischaemia of the knee and leg, that is interruption of the blood supply from the lower right thigh downwards; also, he suffered a 10 c.m. linear lacerated wound on the ulnar side of the lower third of his forearm. He was hospitalized and despite all efforts to save his leg, there developed extensive soft tissue necrosis (gangrene) and septicaemina, which started to threaten his life, and, as a result, a midthigh amputation had to be carried out as a life saving measure. He stayed in hospital for approximately 70 days. Subsequently he was followed up and treated as an out-patient for three months.

At the time when the medical report was prepared (about two years after the collision) efforts were being made to fit the respondent with an artificial leg which had already been ordered from abroad.

The fitting of the artificial leg would help materially to render the said respondent independent and enable him to be trained in a semi-sedentary form of work at the Social Insurance Rehabilitation Centre; thus, the tormenting effects which the loss of his leg has caused to him there would be minimised; but, he will never be able to work as a mason, as before.

The trial Court awarded the amount of C£11,000 as general damages and C£2,599 special damages. This latter item included an amount of C£1,649 loss of earnings from the date of the collision up to the date of the filing of the statement of claim which is challenged by the appellant as excessive. Appellant's counsel argued, in this respect, that had this respondent taken steps to have an artificial leg fitted earlier, he could have started earning his living, even if only to a certain limited extent, before the filing of the statement of claim, and, consequently, would not have been deprived in toto of his earnings for the full period which intervened between the accident and the filing of the statement of claim. He further submitted that the delay in having an artificial leg fitted was due, to a certain extent, to the fact that, though the respondent owned some immovable property, he was trying to have the artificial leg fitted

abroad free of charge, through efforts made by his trade Union; and he referred, in this respect, to *Wheeler* v. *British India Steam Navigation Co. Ltd.* [1966] 2 Lloyd's Rep. 335, where the special damages as regards loss of earnings were reduced to those which would have occurred had the plaintiff, in that case, taken timely steps to begin his earning capacity.

*Held, (I) With regard to the issue of liability:*

1. It is a well-founded principle that when two vehicles are so moving in relation to each other as to be involved in a risk of collision, each one of them owes to the other a duty to proceed with due care (See *Nance* v. *British Columbia Electric Raiway Co. Ltd.* [1951] 2 All E.R. 448). This principle has been applied by our Supreme Court on many occasions (see, *inter alia, Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24); it is, of course, always a question of fact whether each party has taken sufficient precautions to avoid the collision (see *Pourikkos* case, *supra,* at p. 31).

2. Bearing in mind the principles which govern the exercise of our powers to interfere with the decision of a trial Court in a case of this nature (see, *inter alia, Christodoulou* v. *Angeli* (1968) 1 C.L.R. 338, *Ioannou* v. *Mavridou* (1972) 1 C.L.R. 107 and *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172) we are of the view that in the present case the finding as regards liability, made by the trial Court, is plainly erroneous and should be varied, so as to burden the motor-cyclist with 25% of the blame for the collision, and the appellant only to the extent of 75%.

*Held, (II) With regard to the special damages (item of loss of earnings).*

Though this respondent was not a man of straw he could definitely not be regarded as being so well off as to enable this Court to hold that it was unreasonable for him to try to have the artificial leg fitted free of charge, or at minimum cost, through efforts made for the purpose by his trade union; so any delay which may have occurred, in this connection, due to relative impecuniosity of the respondent cannot be treated as a factor in favour of the appellant. (See McGregor on

Damages, 13th ed. p. 166, paragraph 235 and *Clippens Oil Co. Ltd.* v. *Edinburgh and District Water Trustees* [1907] A.C. 291 at p. 303). The case of *Wheeler* v. *British India Steam Navigation Co. Ltd.* [1966] 2 Lloyd's Rep. 335, referred to by counsel for the appellant, is distinguishable from this case on its facts.

*Held, (III) With regard to the general damages:*

It appears that the only relevant decision of this Court, in a case of this nature, is that of *Christodoulou* v. *Angeli* (1968) 1 C.L.R. 338, where the award was C£6,000. In the present case we have duly taken into account all relevant considerations, including the devaluation of money since the *Christodoulou* case, the fact that this respondent was at the time of the accident an athlete, a footballer and a football trainer, as well as that his future earning capacity has been very considerably reduced, but we still find that the amount of C£11,000 is so very high as to necessitate our intervention; in our opinion it should be reduced to C£9,000.

*Held, (IV) With regard to contribution under s. 64(1) of the Civil Wrongs Law, Cap. 148:*

As there has been made no submission to the contrary, we have decided that, in the circumstances of this case, we should order that the respondent motorcyclist should indemnify the appellant to the extent of his own liablility, namely 25%, in relation to the damages payable to the respondent pillion-rider.

*Appeal partly allowed.*

Cases referred to:

*Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448;

*Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24 at p. 31;

*Christodoulou* v. *Angeli* (1968) 1 C.L.R. 338;

*Ioannou* v. *Mavridou* (1972) 1 C.L.R. 107;

*Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172;

*Wheeler* v. *British India Steam Navigation Co. Ltd.* [1966] 2 Lloyd's Rep. 335;

*Clippens Oil Co. Ltd.* v. *Edinburgh and District Water Trustees* [1907] A.C. 291 at p. 303;

*Zeytountsian* v. *The Attorney-General of the Republic* (1973) 1 C.L.R. 52.

**Appeal.**

Appeal by defendant against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Evangelides, Ag. D.J.) dated the 28th September, 1974 (Consolidated Actions Nos. 6310/71 and 6628/71) whereby the defendant was ordered to pay to plaintiff in action No. 6310/71 the sum of £4,700.- and to plaintiff in action No. 6628/71 the sum of £13,599.- as general and special damages suffered by them in a traffic accident due to the negligent driving of the defendant.

*R. Michaelides,* for the appellant.

*D. Papachrysostomou.* for the respondent Markides (plaintiff in action No. 6310/71).

*M. Christofides,* for the respondent Toumazou (plaintiff in action No. 6628/71).

*Cur. adv. vult.*

The facts sufficiently appear in the judgment of the Court delivered by:

TRIANTAFYLLIDES, P.: The appellant, who was the defendant in the Court below, appeals against the judgment given by the District Court of Nicosia in two consolidated actions, No. 6310/71 and No. 6628/71, instituted, respectively, by the two respondents, as plaintiffs.

What gave rise to the proceedings was a traffic collision which occurred on July 23, 1971, in the evening, on the Lymbia - Dhali road, under the following circumstances: Respondent Markides was riding his motor-cycle, No. EF469, and was proceeding from Dhali to Lymbia, carrying as a pillion-rider respondent Toumazou; the motor-cycle collided with a car, No. FH477, which was being driven in the opposite direction by the appellant.

The trial Court found that the appellant was solely to blame for the collision, due to negligence on his part, and gave judgment in favour of Markides for the sum

of C£4,700 and in favour of Toumazou for the sum of C£13,599.

The appellant attacks by this appeal the finding of the trial Court as regards the matter of liability; though he does not deny that the collision took place as a result, also, of his own negligence, he contends that the motor-cyclist, respondent Markides, contributed, too, through negligence, to the collision.

The appellant has appealed, also, as regards the amount of the special and general damages awarded to the pillion-rider, respondent Toumazou.

It is to be noted that the appellant has claimed, in case he is successful on the issue of liability, that a contribution order, concerning the damages payable to the pillion-rider, should be made against the motor-cyclist; he sought such an order at the trial, but it was not made, because it was held that the appellant was solely to blame for the accident.

In dealing with the issue of liability it should be borne in mind that it is not disputed by the respondent motor-cyclist that when he saw the oncoming car of he appellent, for the first time, it was still 100 metres or more away; the car had its headlights full on; the motor-cyclist estimated that there was sufficient room, on the asphalted part of the road, for the car and his motor-cycle to drive past each other and he started signalling with his lights in order to indicate to the driver of the car, the appellant, that he was being dazzled by the headlights of the car. According to the motor-cyclist's own testimony his visibility was diminished, as a result of him being dazzled, so that he could see clearly ahead of him only up to a distance of 1 - 2 metres; he said that he, therefore, reduced his speed from approximately 25 - 30 m.p.h. to about 20 m.p.h.; then, when the two vehicles had approached each other, and as the headlights of the car had not been dipped, he took to the extreme left side of the asphalted part, but he refrained from going on to the berm, because, as he said, he knew that it was not on the same level as the asphalted part: eventually, the two vehicles collided.

It is a well-founded principle that when two vehicles

are so moving in relation to each other as to be involved in a risk of collision, each one of them owes to the other a duty to proceed with due care (see *Nance* v. *British Columbia Electric Railway Co., Ltd.* [1951] 2 All E.R. 448). This principle has been applied by our Supreme Court on many occasions (see, *inter alia, Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24); it is, of course, always a question of fact whether each party has taken sufficient precautions to avoid the collision (see the judgment of Wilson P. in the *Pourikkos* case, *supra*, at p. 31).

We are of the view, having considered carefully all the relevant circumstances of this case, and bearing in mind the principles which govern the exercise of our powers to interfere with the decision of a trial Court in a case of this nature (see, *inter alia, Christodoulou* v. *Angeli* (1968) 1 C.L.R. 338, *Ioannou* v. *Mavridou* (1972) 1 C.L.R. 107 and *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172), that in the present case the finding as regards liability, made by the trial Court, is plainly erroneous and should be varied, so as to burden the motorcyclist with 25% of the blame for the collision, and the appellant only to the extent of 75%. This apportionment of liability cannot, of course, affect the rights of the pillion-rider, because he was not responsible at all for the accident.

We come, next, to the question of the amount of damages which were awarded to the pillion-rider: It has been contended, first, that the special damages, concerning his loss of earnings, which were assessed at C£1,649, from the date of the collision up to the date of the filing of the statement of claim, are excessive.

This respondent has suffered extensive injuries, which are described in a medical report, by Dr. Pelides, which was produced before the trial Court; the report may be summarized as follows:

The respondent suffered a nasty crushing compound injury to his right thigh leading to extensive soft tissue destruction of the lower third of the right thigh and shattering (segmental fragmentation) of the right femur, with traumatic ischaemia of the right knee and leg, that is interruption of the blood supply from the lower right

thigh downwards; also, he suffered a 10 cm linear lacerated wound on the ulnar side of the lower third of his forearm.

He was hospitalized. Despite all efforts to save his leg, there developed extensive soft tissue necrosis (gangrene) and septicaemina, which started to threaten his life, and, as a result, a midthigh amputation had to be carried out as a life saving measure.

The post operative period was difficult, but he gradually responded to treatment; and later on refashioning of the thigh stump was performed.

He stayed in the hospital for approximately 70 days. Subsequently he was followed up and treated as an outpatient for three months.

The midthigh stump healed soundly and the motion of his right hip is within normal limits.

At the time when the medical report was prepared (about two years after the collision) efforts were being made to fit the respondent with an artificial right leg which had already been ordered from abroad.

His mood, behaviour and responsiveness, which were on the low side initially, improved with psychotherapy and the passage of time.

The fitting of his right thigh stump with an artificial leg, and re-education in its use, would help materially to render him independent and enable him to be trained in a semi-sedentary form of work at the Social Insurance Rehabilitation Centre in Nicosia; thus, there would be minimized the tormenting effects which the loss of his leg has caused to him; but, he will never be able to work as a mason, as before.

It has been argued by counsel for the appellant that this respondent, had he taken steps to have an artificial leg fitted earlier, could have started earning his living, even if only to a certain limited extent, before the filing of the statement of claim, and, consequently, would not have been deprived in toto of his earnings for the full period which intervened between the accident and the filing of the statement of claim; and, in this connection, it was submitted that it was reasonable to expect that

the respondent, had he made the necessary efforts, could have had the artificial leg from abroad—(it being common ground that this could not be had in Cyprus)—fitted within about eight months after the accident, and this would have minimized his loss of earnings. It was submitted, further, by counsel for the appellant, that the delay in having fitted an artificial leg was due, to a certain extent, to the fact that, though the respondent owned some immovable property, he was trying to have the artificial leg fitted abroad free of charge, through efforts made for this purpose by his trade union; and we have been referred to, in this respect, to *Wheeler* v. *British India Steam Navigation Co., Ltd.* [1966] 2 Lloyd's Rep. 335, where the special damages as regards loss of earnings were reduced to those which would have occurred had the plaintiff, in that case, taken timely steps to regain his earning capacity. In our view that case, where there existed clear medical evidence to the effect that the plaintiff could have regained his earning capacity earlier, is clearly distinguishable from the present one, where we only have a medical report (as summarized above) from which it cannot be derived definitely that the artificial leg could have been fitted, and that the respondent could have been re-trained to do a new kind of job, before the filing of the statement of claim; as it appears from such report, two years after the accident efforts were still being made to provide the respondent with an artificial leg which had been ordered from abroad.

From the material on record it is quite clear that though this respondent was not a man of straw he could definitely not be regarded as being so well off as to enable us to hold that it was unreasonable for him to try to have the artificial leg fitted free of charge, or at minimum cost, through efforts made for this purpose by his trade union; so any delay which may have occurred, in this connection, due to relative impecuniosity of the respondent cannot be treated as a factor in favour of the appellant. As it is stated in McGregor on Damages, 13th ed., p. 166, paragraph 235, "a plaintiff will not be prejudiced by his financial inability to take steps in mitigation"; and there is referred to there the following dictum of Lord Collins in *Clippens Oil Co.*

*Ltd.* v. *Edinburgh and District Water Trustees* [1907] A.C. 291 (at p. 303): "The wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act". (The *Clippens* case has been relied on by our Supreme Court in *Zeytountsian* v. *The Attorney-General of the Republic*, C.A. No. 5150 * not reported yet).

In the light of the foregoing, we see, therefore, no reason for reducing the special damages as regards loss of earnings.

In relation to the appeal against the amount of general damages, C£11,000, awarded to the respondent pillion-rider, it may be pointed out that it appears that the only relevant decision of this Court, in a case of this nature, is that of C£6,000 in the *Christodoulou* case, *supra*. In the present case we have duly taken into account all relevant considerations, including the devaluation of money since the *Christodoulou* case, the fact that this respondent was at the time of the accident an athlete, a footballer and a football trainer, as well as that his future earning capacity has been very considerably reduced, but we still find that the amount of C£11,000 is so very high as to necessitate our intervention; in our opinion it should be reduced to C£9,000.

The last matter with which we have to deal with in this appeal is the making of an order of contribution under section 64(1) of the Civil Wrongs Law, Cap. 148. As there has been made no submission to the contrary, we have decided that, in the circumstances of this case, we should order that the respondent motor-cyclist should indemnify the appellant to the extent of his own liability, namely 25%, in relation to the damages payable to the respondent pillion-rider.

In the result, the appeal is allowed in part: The amount of damages awarded to the respondent motor-cyclist is reduced by 25%, that is by the degree of his own

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* Now reported in (1973) 1 C.L.R. 52.

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liability, for the collision; the total amount of damages awarded to the respondent pillion-rider is reduced by C£2,000, due to the reduction of the amount of general damages as aforesaid; and an order of contribution is made as stated above.

We shall not disturb the order for costs made by the Court below, but we order that the respondents should pay to the appellant the costs of this appeal.

*Appeal allowed in part.*
*Order for costs as above.*