[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

DEMOS CHARALAMBOUS,

Appellant-Defendant,

v.

COSTAKIS PILLAKOURIS,

Respondent-Plaintiff.

(Civil Appeal No. 5235).

Findings of fact—Appeal turning on findings of fact based on credibility of witnesses—Approach of Court of Appeal—Road accident—Collision at cross-roads—Two conflicting versions—Plaintiff's version preferred by trial Court—Reasons behind trial Judges findings on issue of liability such that could not be sustained on the evidence—Moreover such findings inconsistent with the real evidence and to that extent unsatisfactory—Reversed. 5

The appellant (defendant) in this appeal complained against the judgment of the Court below whereby he was held entirely to blame for a traffic accident that occurred at a cross-road. 10 The trial Court believed the version of the respondent (plaintiff) as to how the accident occurred and the appeal, therefore, turned on the findings of fact based on the credibility of witnesses which were attacked as being unreasonable, against the weight of evidence and unsafe to be acted upon. 15

Allowing the appeal by majority (Hadjianastassiou, J. dissenting) the Court of Appeal:

Held, (I) Per A. Loizou, J.:

(1) This Court will very reluctantly and in cases where it is only a matter of justice and judicial obligation so to do, interfere 20 with findings of fact made by trial Courts (see, *inter alia, Varnakides* v. *Papamichael and Another* (1970) 1 C.L.R. 367). Furthermore, the burden is on the appellant to show sufficient reasons for interfering and which this Court will do if it is persuaded that the reasoning behind the trial Judge's findings is wrong. 25

(2) Having considered the two versions and the lay-out of the scene of the accident as well as the findings of the trial Judges

(vide p. 216 *post*) I could not help holding that as a matter of common sense the accident could not have happened as claimed by the respondent-plaintiff. I have no difficulty in coming to the conclusion that the reasons behind the trial Judge's findings on the issue of liability are such that could not be sustained on the evidence. They are defeated by the objective fact of the lay-out of the road, the statement of the respondent himself as to where his motor-cycle was when the impact occurred, which if true, renders impossible the occurrence of the accident, as well as the resultant position of the motor-cycle and the damage on the two vehicles. (p. 218 *post*).

Held, (II) per Malachtos, J.:

(1) The burden is on the appellant to satisfy this Court that the trial Court is in error in that its findings are unsatisfactory or that they are not warranted by the evidence considered as a whole. If he is successful then this Court should proceed on the evidence to decide the case without feeling bound by determinations on questions of fact made by the trial Court. (See *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134 and *Economides* v. *Zodhiatis*, 1961 C.L.R. 306).

(2) In the present case the decision as to who is to blame for the accident is not to be reached solely on the basis of the findings depending on which one of the two conflicting versions is to be believed, but a great lot depends on inferences to be drawn from primary facts and, particularly, from the real evidence. The findings of the trial Judge are inconsistent with the real evidence and so to that extent are unsatisfactory. Having gone through the record I have not come across any material contradictions in the evidence of the appellant so that to render it unacceptable as found by the trial Judge. (See pp. 221–224 *post*).

Appeal allowed.

Cases referred to:

Onassis v. *Vergottis* [1968] 2 Lloyd's Rep. 403;

Steamship Hontestroom (Owners) v. *Steamship Sagaporack (Owners)* [1927] A.C. 37 at p. 47;

Powell and Wife v. *Streatham Manor Nursing Home* [1935] A.C. 243 at pp. 267–268;

Andrews v. *Freeborough* [1966] 3 W.L.R. 342 at pp. 346-47;

Skrekas v. *Nicolaou* (1973) 1 C.L.R. 123, at p. 126;

Nearchou v. *The Police* (1965) 2 C.L.R. 34 at p. 41;

Poullou v. *Constantinou* (1973) 1 C.L.R. 177;

Mavrovouniotis v. *Estate of Chrystalleni Ch. Nicolaidou*, 14 C.L.R. 272;

Mamas v. *The Firm "Arma" Tyres* (1966) 1 C.L.R. 158 at p. 160;

Watt or Thomas v. *Thomas* [1947] A.C. 484; 5

Varnakides v. *Papamichael and Another* (1970) 1 C.L.R. 367 at p. 371;

Nearchou v. *PapaEfstathiou* (1970) 1 C.L.R. 109 at p. 114;

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134 at p. 146;

Economides v. *Zodhiatis*, 1961 C.L.R. 306; 10

Waghorn v. *George Wimpey & Co. Ltd.* [1969] 1 W.L.R. 1764;

Yuill v. *Yuill* [1945] P. 15.

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Loris, P.D.C.) dated the 23rd August, 1973, 15 (Action No. 3668/72) whereby he was adjudged to pay to the plaintiff the sum of £422.350 mils, as damages for personal injuries suffered by the plaintiff and as damage to his motor-cycle as a result of a road accident.

A. Neocleous, for the appellant. 20

B. Vassiliades, for the respondent.

Cur. adv. vult.

The following judgments were read:

HADJIANASTASSIOU, J.: On September 17, 1972, at 2.00 a.m., the plaintiff was riding his motor cycle under Registration No. 25 CA 416 along Ethnikis Antistaseos Street on his way to the east keeping his left-hand side of the road. On approaching Thessalonikis Street, which is a cross-road, he halted at the halt sign; he looked right and left and then right again and saw a motor car driven from the direction of south going north along 30 Thessalonikis Street, which is a major road. Whilst he was still at the halt sign, he was struck and injured by the car driven by the defendant, under registration No. BF587. He was taken to the hospital, and remained there for a few days, and after he was discharged, he sued the defendant claiming damages. 35

The Court of Limassol, after hearing evidence, found that the defendant was solely to blame for the accident, and awarded to the plaintiff the sum of £250 general damages, and the sum of £188.260 mils special damages. The defendant appealed

against the findings of fact as being unreasonable, wrong in law, and against the weight of evidence; and also against the finding of the learned trial Judge as to the apportionment of blame.

5 The facts are these:-

As usual, in these accidents, there were two conflicting versions before the trial Court, both by the plaintiff and the defendant, because nobody else witnessed the accident.

It was the version of the plaintiff that on the date of the 10 accident, whilst he was riding his motor cycle, keeping his lights on, going from west to east, and keeping his left-hand side of the road, which is a minor road, on approaching Thessalonikis Street, he halted at the halt sign, and after looking right and left and then right again, he noticed a car driven by the defen- 15 dant from the south to north along that street, which is a major street. Whilst he was still standing at the halt sign, his front wheel protruding into the major road by 1 foot only, he was knocked down by the oncoming car which was driven too close to his side, and was dragged with the rear part of the motor 20 car and was thrown on to the road.

The plaintiff was cross-examined at great length and was pressed in order to show that he, the plaintiff, did not stop at the halt sign, in these terms:-

"*Q.* When did you see the lights for the first time?

25 *A.* I saw the lights coming, the headlights.

Q. And instead of going straight on, this car came, turned left and knocked on you.

A. No, it did not turn to the left, it was going straight on and it knocked me.

30 *Q.* How far in front of you was this car passing, have you noticed?

A. It passed very close to me, otherwise it would not have knocked me.

Q. What happened then, did the car go onto the pave- 35 ment?

A. I do not know; I know that I fell to the ground and I remained there.

Q. Which part of the car hit you?

A. The front left bumper of the car.

Q. When the car knocked you down, did you realize what the car did?

A. It did not stop, it continued going straight.

Q. Did you notice it going straight on?

A. Yes, because had it stopped it would not have dragged me with the rear part. I did not see the car stop, it went straight on. 5

Q. Did you realize it turned left and hit you?

A. No it did not turn left; it was going straight on.

Q. It did not go left or right. 10

A. I did not see it; at the speed it was going it dragged me with the rear part and I was thrown onto the road.

....

Q. I put it to you that you were going along Ethnikis Antistasseos St. at a high speed and you did not stop at the halt sign. 15

A. I was going at a low speed and I stopped at the halt sign.

Q. I put it to you that you were going at a high speed.

A. No.

Q. And you failed to stop at the halt line. 20

A. It is not correct.

....

Q. I put it to you that you did not look left or right to see if there was any other vehicle coming.

A. I looked.

Q. I put it to you that your m/cycle hit the left side of the car of the defendant and it was not the front of the car that hit your m/cycle. 25

A. No it is not so.

Q. I put it to you that you had no light on that night.

A. I had a light on and my m/cycle was in very good condition. 30

Q. After the accident do you remember having seen the defendant?

A. No I did not see him at all.

Q. I put it to you that the defendant was keeping his 35

correct side of the road and he was about 2 meters from his left side.

A. No, had it been so, he would not have knocked on me.

Q. If he was one meter from the extreme left edge of the road?

A. Even then he would not have knocked on me.

Q. I put it to you that the defendant was travelling at a normal speed, less than 30 m.p.h.

A. No, he was going at a high speed."

Before the plaintiff was removed to the hospital, witness Kokos Ioannou who was a passenger in a car driven by his friend, saw the plaintiff lying on the ground and shouting for help. They both alighted and he realized that somebody (the defendant) was standing near him. Then the witness inquired from the defendant why he did not take the injured person to the hospital, but the latter remained silent. Finally, the injured person was put in another car which was passing from there, and the friend of that witness remained there apparently to prevent the defendant from leaving the scene.

The police arrived at the scene of the accident which happened at 2.00 a.m. at a commendable speed, at 2.25 a.m. and from a sketch prepared by them, not on scale, it appears that the width of the minor road is 19′ wide and that of the major road is 24′ wide. The point of impact was shown to the police by the defendant and was marked on the sketch as letter "G". The police traced no skid marks or brake marks or anything to indicate with accuracy where the point of impact was, but the point shown by the defendant indicated that the accident occurred at a point which is 6′ away from the halt line within Thessalonikis Street. There are pavements on both sides of the two streets. Point 'H' was indicated by the plaintiff as the point of impact. The car was moved away from the scene by the defendant, and I propose returning to the evidence of the police witness at a later stage.

On the contrary, the defendant threw the blame for the accident on the plaintiff and told the Court that on that morning he was leaving from the Wine Festival—being on duty, because he is employed by the Limassol Chamber of Commerce and Industry—and he was driving at a speed of 30 m.p.h. along Thessalonikis Street from south to north. When he approached

the cross-roads, he saw the motor cycle of the plaintiff when he was 5' away from it emerging from Ethnikis Antistasseos Street into the major road without halting at all. There was no other traffic on the road, and the street lights were on. He swerved to the right trying to avoid the accident, but the cyclist hit his car on the left side by the headlamp. Then the witness went on that the cyclist hit also the rear left part of his car. He alighted and when he asked the plaintiff why he did not halt, his reply was that he did not see him. When people arrived at the scene of the accident, he told them that an accident had occurred and that he had knocked him down. The defendant further alleged in his statement that a little while later, a car was passing, he stopped it, and together with one of the two persons who had come before, took the plaintiff to the hospital. He reported the accident to the police.

This witness was cross-examined by counsel on behalf of the plaintiff at length in order to show that the defendant was careless, because he was going very fast, once he had information that in the vicinity of his house, which is adjacent to the Turkish Quarter, there was trouble between the Greeks and Turks. The defendant was further cross-examined that he was lying when he said that having knocked down the motor cyclist he stopped a passing car in order to take the plaintiff to the hospital.

Having read the questions and answers put to the defendant, I have no difficulty to endorse the view taken by the learned Judge that he was evasive in his answers, and this was done apparently because he did not want to give the impression that—having been involved in the accident, he had no intention of not wanting to help and remove the man to the hospital, but the fact remains that when he was asked by that witness why he did not take the injured person to hospital, he had no explanation. Furthermore, I must point out that if the version of the defendant which he put before the trial Judge, *viz.*, that after the accident the defendant asked the motor cyclist why he did not halt, and the reply of the latter was that he did not see him, why did he not say so when he was asked by witness Ioannou and why did not put that version to him. I think no comment is required because obviously that was an afterthought.

Then the defendant was questioned in these terms:–

"*Q.* You said that after you knocked him down you swerved to the right and stopped, and then you proceeded and stopped on the left side.

A. Yes.

Q. So the motor cycle at the point it was after you swerved to the right?

A. I do not remember, I had swerved to the right to avoid it. I swerved to the right and then I went on to the left side again and stopped. When I realized the motor cycle was coming, I swerved to the right. The motor cycle knocked on my left side by the head-lamp.

Q. Which part of the motor cycle hit on your car?

A. The steering bar.

Q. At what height from the ground was the point on your car that was damaged?

A. My car is a mini (indicates a height of about a yard). It was under the headlamp.

Q. Is it the height of the steering bar?

A. I do not know."

Then the defendant was questioned by the Court:-

"*Q.* Did you hear the noise of the impact or did you see him getting out of the halt line?

A. I saw him coming out of the halt line and knocking on my car."

Although the defendant in his examination in chief did not say that in order to avoid the accident he did apply his brakes, nevertheless in re-examination he said that he applied brakes and stopped after he had swerved, at a distance of about 6'. Then his counsel put this question:-

"*Q.* When you saw him did you apply the brakes hard?

A. Yes, after I swerved to the right to avoid him I applied brakes and I stopped at a distance of about 6'-7.'"

The learned trial Judge, having considered the evidence before him, made his findings of fact that at the time of the accident the plaintiff's motor cycle was stationary at the halt line and that the defendant was driving without having a proper lookout, and by driving to his extreme left hand side when there was no other traffic in the road, he failed to see the motor cyclist despite the fact that the scene of the accident was properly illuminated and that the said motor cycle had its lights on at the time of the accident. On these findings of fact the

learned trial Judge was satisfied that the defendant was entirely to blame for the accident because the plaintiff impressed him as a truthful witness and he accepted his version. On the contrary, the defendant impressed him unfavourably, because he kept throughout his testimony switching from one version to another, and so one could not say with precision what his version was on many material points. Then he went on to add:-

"His enumerable contradictions coupled with his continuous perspiration, and a unique hesitation in answering questions directly rendered profound his effort to exonerate himself from liability."

In view of these findings of fact depending on credibility of the witnesses, the question is whether the Court is entitled to disturb those findings. There is no doubt that the learned trial Judge in making his findings of fact, took also into consideration the real evidence as well as everything that was said, but in spite of the fact that the defendant had alleged that he had tried to avoid the accident by applying his brakes, no traces at all of brake marks were found on the road. We think, therefore, that the answer to this question can be found in the decision of the House of Lords in *Onassis* v. *Vergottis* [1968] 2 Lloyd's Rep. 403, which affords a recent striking illustration of how difficult it is for an Appellate Court to disturb findings dependent on the credibility of witnesses.

In *Steamship Hontestroom (Owners)* v. *Steamship Sagaporack (Owners)* [1927] A.C. 37, at p. 47, Lord Sumner said:-

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial Judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses .... It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of

the witnesses and of their own view of the probabilities of the case .... If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone."

In view of the behaviour of the defendant in the case in hand and in view of his evasive manner in answering questions and having regard to his whole conduct before the trial Court, I think the case of *Powell and Wife* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, provides the correct answer as to the approach by the Court of Appeal in a case which is based on findings of fact by the trial Judge. Lord Wright, dealing with this problem, had this to say at pp. 267–268:–

"The problem in truth only arises in cases where the Judge has found crucial facts on his impression of the witnesses: Many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: In all such cases the appellate Court is in as good a position to decide as the trial Judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any Judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: As the evidence proceeds through examination, cross–examination and re–examination the Judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse. He will not necessarily distrust a witness simply because he finds him inaccurate in some details: He can give such inaccuracy its proper place, particularly if he sees that the witness is tired, or antagonized, or confused, or perhaps impatient, and especially if the matter of the inaccuracy is of minor or collateral importance. But such inaccuracies may appear in a very different light when pointed to as isolated passages in the shorthand notes and abstracted from the human atmosphere of the trial and from the totality of the evidence. The Judge will form his impression from the whole personality of the witness: He can allow for the nervous witness, standing up in a crowded Court or worried by the strain of cross–examination. The Judge may be deceived by an adroit and plausible knave or by apparent innocence: For

no man is infallible; but in the main a careful and conscientious Judge with his experience of Courts is as likely to be correct in his impressions as any tribunal, unless perhaps, as some would say, a jury of twelve members is preferable. Yet even where the Judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness; such cases have occurred in the experience of most Judges and are covered by the third question propounded by Lord Sumner.

When I seek to apply these principles to the present case I find myself unable to accept as sufficient the reasoning which has led the Lords Justices to reverse the decision of the trial Judge. I trust that in the brief summary which alone is possible here, I shall do no injustice to their elaborate and careful judgments. I have only extracted from these judgments enough to explain why I find it impossible to agree with their reasoning."

In *Andrews* v. *Freeborough*, [1966] 3 W.L.R. 342, Willmer L.J., dealing with the finding of the learned trial Judge who declined to find that the child had stepped off the kerb and found that in some way, whilst standing on the kerb she was caught up or swept up by defendant's car as it passed, said at pp. 346-347:-

" It is indeed tempting to accept the invitation put forward by the defendant, since the accident could easily be explained on the basis that the child stepped off the kerb into the road. I confess that I find it quite difficult to appreciate just how the accident happened if the child remained throughout standing on the kerb. But the Judge was fully alive to the difficulties of the plaintiff's case. He had the advantage, denied to us, of seeing and hearing the witnesses, particularly the defendant herself. He came to the conclusion that the plaintiff's case with all its difficulties, should be accepted. His finding that the child did not step off the kerb was a finding of primary fact, based

largely on his view of the quality of the evidence which he heard. In my judgment it is not a finding with which this Court could properly interfere."

The reasoning of this case was adopted and followed by our
5 Court of Appeal in *Skrekas* v. *Nicolaou* (1973) 1 C.L.R. 123, where Triantafyllides, P. said at p. 126:

" The principles which should guide an appellate tribunal in deciding whether or not to interfere with the decision of a trial Court as regards the issue of contributory negli-
10 gence have been referred to by this Court in, *inter alia*, *Ekrem* v. *McLean*, (1971) 1 C.L.R. 391, and *Ioannou* v. *Mavridou*, (1972) 1 C.L.R. 107.

In the light of these principles I am not, as in the *Andrews* case, prepared—(irrespective of what we might or might
15 not have decided had we been dealing with the present case as a trial Court)—to interfere with the judgment of the trial Court as regards the issue of liability for the accident in which the respondent was injured;.........."

In *Nicolaos Nearchou* v. *The Piolice*, (1965) 2 C.L.R. 34,
20 Josephides, J., dealing with the question whether the evidence supported the finding of negligence, said at p. 41:-

" It is true that the evidence shows that the appellant was driving his lorry very slowly, at about 10 miles per hour, and that he did not hit the cyclist with the front part of
25 the vehicle; but, all the same, the fact remains that this was a comparatively wide road of 18 1/2 feet, that there was no other vehicle on the road at the time and that the appellant drove so closely to the cyclist as to knock him down. On the whole we are satisfied that there was suffi-
30 cient evidence on which the trial Judge could make the finding which he did."

This case was adopted and followed in *Poullou* v. *Constantinou*, (1973) 1 C.L.R. 177.

In *Miltiades Mavrovouniotis* v. *Estate of Chrystalleni Ch.*
35 *Nicolaidou* (1934) 14 Cyprus Law Reports, p. 272, it was held that –

" Where a Judge's findings of fact depend upon the credibility of witnesses an appellate Court has power to set such findings aside where the trial Judge has failed to take

account of circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself, or with indisputable fact."

This statement of the law was referred to in the case of *Philippos Charalambous* v. *Sotiris Demetriou*, 1961 C.L.R. 14 at page 16. 5

In *Sofoclis Mamas* v. *The Firm "Arma" Tyres* (1966) 1 C.L.R. 158 at p. 160, Vassiliades, J. (as he then was) said:-

"The findings of the trial Court will not be disturbed on appeal, unless the appellant can satisfy this Court that the 10 reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole. There is no dispute in the present case, about the legal position."

In *Yuill* v. *Yuill* [1945] P. 15 the Court of Appeal held:- 15

"Where a Judge has accepted the evidence of a witness or witnesses on one side of a case on a careful observation of his or their demeanour, and has given judgment accordingly, an appellate Court can reverse the decision, but only in the rarest cases, and when it is convinced by the plainest 20 considerations that it is justified in holding that the Judge has formed a wrong opinion."

In *Watt* or *Thomas* v. *Thomas* [1947] A.C. 484, the House of Lords held that:-

"When a question of fact has been tried by a Judge without 25 a jury and it is not suggested that he has misdirected himself in law, an appellate Court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The 30 appellate Court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and 35 heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

Lord Thankerton in his speech stated the principles as follows at p. 487:-

"I. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusions; II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court."

Having reviewed the authorities at length as to the powers of the Court of Appeal to review the findings made by the trial Judge, the first question is whether the Judge who decided on conflicting evidence, his finding is falsified by some objective fact. The main complaint of counsel on behalf of the appellant was that the findings of the trial Judge were wrong so far as the point of impact and the mode of occurrence of the accident are concerned and invited this Court to interfere with the said finding.

There is no doubt, and we have said on a number of occasions that in collision cases the oral evidence should be tested by the Court with the real evidence. I agree, therefore, that the precise nature of the damage sustained by the colliding bicycle and the motor car and their relative or final positions may be determinant and indisputable facts. But from the evidence of the policeman in this case, we have it that he checked both vehicles and the damage on the motor cycle was that the front wheel was dented towards the wing, the steering bars were dented to the left with an inclination towards the left and that the forks were dented inwards. As to the damage of the car, the evidence was that the side of the left front wing was dented inwards, and the side of the left rear bumper was dented outwards. Then, this witness was cross-examined by counsel on behalf of the defendant in these terms:-

"*Q.* Anything to indicate where the point of impact was?

A. No.

Q. Did you ask why the defendant had moved his car?

A. Yes, he told me that he went to the police to report the accident after having sent the plaintiff to the hospital in another car." 5

In view of the rest of the evidence, it appears that the defendant was definitely lying when he said that he had sent the plaintiff to the hospital and that his purpose was to conceal the exact resulting position of his car after the collision.

In re-examination, counsel on behalf of the plaintiff questioned 10 the witness in these terms:-

"*Q.* You said that the rear wing was dented outwards, how do you explain that?

A. After the impact and due to the fact that the car was proceeding, it pulled part of the wing protector wheel 15 and dragged it.

Q. The resultant position of the motor cycle was after it was dragged?

A. Yes.

TO COURT: 20

Q. The point of impact the defendant showed you is 6 ft. away from the halt line within Thessaloniki Street.

A. 6 ft. from the imaginary line or 7 ft. from the halt line. The halt line is about one foot away from the imaginary line of Ethnikis Antistasseos Street. 25

Q. Point C is the resultant position of the m/cycle.

A. Yes.

Q. The m/cycle was no more facing in the direction of arrow B, but it was facing north-west.

A. Yes. 30

Q. From what is the left hand side of the steering bar away?

A. From the imaginary line.

Q. And the rear wheel?

A. It is 12 ft. from the imaginary line. 35

Q. From what you have seen on the spot and from your inquiries on the spot, you cannot say where the point of impact is.

A. No.

Q. Was the collision violent or a mild one?

A. It was not violent."

Now the fact remains that the plan was not on scale, and no photographs were produced, and once the evidence was that the front wheel of the motor cycle was protruding into the major road by 1 foot, one should allow a margin of error, and no doubt this must have been in the mind of the learned Judge who found that the defendant was driving in the early hours of the morning too close to the side of the motor cyclist.

With respect to the view that the accident could not have happened in the way it was described by the plaintiff, I think once these are primary facts and have been accepted by the trial Judge, one should bear in mind the warning given by Willmer, L.J., in the *Andrews* case (*supra*) that although he found it quite difficult to appreciate just how the accident happened if the child remained throughout standing on the kerb and had not stepped into the road, nevertheless, his Lordship came to the conclusion that the Court of Appeal should not have interferred and that the plaintiff's case with all its difficulties ought to have been accepted.

In the case in hand, as it appears from the whole evidence, the trial Judge was fully alive of the difficulties of the case, but he had the advantage denied to us of seeing and hearing the witnesses, particularly the defendant himself. His finding that the plaintiff did stop at the halt sign, as I said earlier, was a finding of primary fact, based largely on his view on the quality of the evidence which he heard, and which he properly weighed, having regard to the whole personality of the defendant particularly. The observations, therefore, made that the learned trial Judge erred because he gave importance to the fact that the defendant was sweating when giving evidence in June—a hot month—to say the least, one should not forget that the defendant when questioned at length on the question of credibility he must have been aware that he was caught lying as to what had happened at the scene, and particularly when he said that after he sent the plaintiff to the hospital in another car he went and reported the accident to the police. This had been proved to be a lie and I think with respect to any criticism this is definitely not justified if one reads the whole of the defendant's evidence, and particularly where he gave a different

version that he stopped the passing car and together with one of the two persons took the plaintiff to the hospital.

With this in mind, I would go further and state that the appellant has failed to show that the Judge had failed to use or has palpably misused his advantage of seeing the witnesses, 5 and the Court of Appeal ought not to have taken the responsibility of reversing the conclusions arrived at merely on the result of their own comparisons and criticism of the witnesses— the nature of the damage being unexplained—and of their own view of the probabilities of the case without expert evidence. 10

Applying the principles to which I have referred earlier in this judgment, and in the absence, I repeat, of any expert evidence explaining from the precise nature of the damage how the accident occurred, and because the defendant by moving his car deprived the Court from knowing what was its resultant 15 position, I have reached the conclusion that the damage cannot be considered as being determinant and undisputable fact which constitutes positive evidence refuting the oral evidence of the witnesses. I would, therefore, find myself unable to accept as sufficient the reasoning which has led my two brothers to 20 reverse the decision of the trial Judge, and for the reasons I have given I would affirm the judgment that the defendant was wholly to blame for the accident and dismiss the appeal with costs.

A. LOIZOU, J.: This is an appeal from the judgment of the 25 District Court of Limassol by which the appellant-defendant in the Court below—was found solely to blame for a road accident and was adjudged to pay to the plaintiff-respondent in this appeal—the sum of £422.350 mils, as damages for the personal injuries suffered by the plaintiff and the damage to 30 his motor-cycle, and further, ordered to pay the costs of the action.

The only issue before us is whether the findings of fact based on the credibility of witnesses which the trial Judge saw and heard, were unreasonable, against the weight of evidence and 35 unsafe to be acted upon.

The road accident in question, occurred in the early hours of the 17th September, 1972, at the cross-road of Thessalonikis Street, which is a main road and Ethnikis Antistaseos Street, which is a side road controlled by a halt line. It involved motor- 40

car Reg. No. BF 587 driven by the appellant and motor-cycle Reg. No. CA 416 driven by the respondent.

The appellant, an employee of the Limassol Chamber of Commerce and Industry, left the Limassol Wine Festival where 5 he had been on duty, and was proceeding at a speed of about 30 mils per hour on the said road. When he approached the cross-road in question, he saw the motor-cycle of the respondent, when he was about 5 ft. away from it, coming out of the side road without halting. He swerved to the right, but a 10 collision was not avoided. The motor-cycle hit on the side of the appellant's car by its left head lamp and then hit the rear left part of the car again, apparently, on account of the motion of the car at the time.

The respondent on the other hand, claimed that on approa- 15 ching Thessalonikis Street he stopped at a halt line which was one foot inside Ethnikis Antistaseos Street from the imaginary line where it meets Thessalonikis Street, he looked right and left and then again right and saw the car of the appellant proceeding northwards. He first saw lights far away, but could 20 not make out whether it was a car or any other vehicle. He only realised that it was a car when it was at a distance of about 10-15 ft. from him. He could not see far, as there were houses on the right and cars stationary on the left side of the road, as one proceeds along Thessalonikis Street, northwards. Whilst 25 his motor-cycle was still stationary and at that protruding about a foot from the halt line, the car of the appellant knocked the right side of his motor-cycle with its left bumper and then it dragged him with the rear part and threw him on to the road.

30 On the issue of liability, apart from the evidence of the two parties, Police Constable Nicos Gavriel (P.W.1) who visited the scene of the accident shortly after it occurred, gave evidence. He stated that he found at the scene the motor-cycle of the respondent who, in the meantime, had been removed to the 35 hospital, and the appellant in whose presence he took measurements and prepared a plan (*exhibit* 1). According to this witness, both streets are asphalted with properly constructed pavements on either side. He could not trace anything on the spot indicating where the actual point of impact was, indepen- 40 dently of the evidence of the litigants. He checked both vehicles and he found that the front wheel of the motor-cycle was dented towards the wing, its right wing protector was dented

inwards and its steering bars were dented to the left with the forks dented inwards. On the car there was damage on the left front wing dented inwards and the side of the left rear bumper was also dented. Two points of impact were indicated to him. The one at the time, by the appellant which he marked on *exhibit* 1 and which was in Thessalonikis Street, 7 ft. from the halt line at its side in the middle of Ethnikis Antistaseos Street. The other point was indicated to him by the respondent after he was discharged from hospital which was on the halt line. He also marked on this plan the resultant position of the motor-cycle which was sideways in Thessalonikis Street, its front part being at a distance of 7 ft. and its rear part 12 ft. from the imaginary line of Ethnikis Antistaseos Street.

On this evidence, the learned trial Judge accepted that the following facts had been established:

"(a) The plaintiff's motor cycle was stationary on the halt line when same was hit by the motor car driven by the defendant.

(b) The defendant was driving at the material time his said car without having a proper look out; he even failed to heed the presence of the motor cycle as he himself admitted, despite the fact that the scene of the accident was properly illuminated and the motor cycle ridden by the plaintiff had its lights on at the material time.

(c) The defendant was driving generally without due care and attention; it was quite unnecessary for him to drive on his extreme left hand side of the road, when there was no other traffic on Thessalonikis Street, at the time, thus colliding with the motor cycle of the plaintiff which was stationary at the time on the halt line, with its engine on, waiting for the main road to clear up before proceeding."

He then concluded that for the aforesaid reasons he was satisfied that the appellant was entirely to blame for the accident. Having watched the demeanour of both witnesses in the witness box he preferred the evidence of the plaintiff to that of the defendant. Plaintiff impressed him as a truthful witness, unlike the defendant who kept throughout his testimony switching from one version to another, and one could not say with precision what his version was on many material points. His in-

numerable contradictions coupled with his continuous perspiration and a unique hesitation in answering questions directly, rendered profound his effort to exonerate himself from liability.

The question posed for me is whether this is a case to interfere with these findings of fact which this Court, as it has been repeatedly stated (see *Varnakides* v. *Christos PapaMichael and Another* (1970) 1 C.L.R. 367 at p. 371 and the authorities therein cited, and also *Nearchou* v. *PapaEfstathiou* (1970) 1 C.L.R. 109 at p. 114), will do very reluctantly and in cases where it is only a matter of justice and judicial obligation so to do, as stated in the *Steamship Hontestroom (Owners)* v. *Steamship Sagaporack (Owners)* [1927] A.C. 37 at p. 47. Furthermore, the burden is on the appellant to show sufficient reasons for interfering and which this Court will do if it is persuaded that the reasoning behind the trial Judge's findings is wrong.

Having considered the two versions and the lay–out of the scene of the accident as described by the police witness Gavriel (P.W. 1) and set out in the plan (*exhibit* 1) as well as the findings of the learned trial Judge's hereinabove set out, I could not help holding that as a matter of common sense the accident could not have happened as claimed by the respondent. It was found as a matter of fact that the plaintiff's motor–cycle was stationary on the halt line when hit by the motor–car driven by the defendant. According to the respondent, and his testimony has been accepted by the trial Judge, the front wheel of his motor–cycle protruded only by one foot from the halt line which places it just touching the imaginary line where Ethnikis Antistaseos Street meets with Thessalonikis Street. Furthermore, the respondent was positive when specifically questioned, that the car of the appellant proceeded straight on and did not turn to the left when it hit him. But such a collision could not have occurred even if the appellant's car was being driven on the extreme left of the road, as found by the trial Court, unless it went over the imaginary line, a fact that presupposed either mounting the pavements or sharply deviating from its straight course, a fact that the respondent himself would have noticed, had it happened and would have certainly mentioned to the Court. Also, a perusal of the record, does not reveal such contradictions as to render the most natural of the two versions improbable and untrue so as to be dismissed by a trial Court, merely on the ground of the witness's demeanour in the witness box.

With due respect to the learned trial Judge, I have no difficulty or hesitation in coming to the conclusion that the reasons behind the trial Judge's findings on the issue of liability are such that could not be sustained on the evidence. They are defeated by the objective fact of the lay-out of the road, the statement of the respondent himself as to where his motor-cycle was when the impact occurred, which, if true, renders impossible the occurrence of the accident, as well as the resultant position of the motor-cycle and the damage on the two vehicles. The collision could not have occurred unless the motor-cyclist negligently dashed out of the side road.

In relation to this, I have also considered the question whether there could be contributory negligence on the part of the appellant, but I have not been able to find any contribution on his part. There was nothing which made it reasonably apparent that there was a possibility of danger emerging from that side road and the appellant took no precautions. Consequently, the respondent-plaintiff was solely to blame for this accident.

In view of the conclusions reached on the liability of the parties, the present appeal is allowed with costs here and in the Court below. The judgment of the trial Court is set aside. As the damage on the vehicle of the appellant has already been assessed at £20.- there should be judgment on the counterclaim for £20.- for the appellant against the respondent, with no order as to costs, as the costs awarded in allowing the appeal cover the costs of the counterclaim as well.

MALACHTOS, J.: This is an appeal by the defendant from the judgment of the District Court of Limassol in Action No. 3668/72 whereby he was held entirely to blame for a traffic accident that occurred on the cross-road of Thessalonikis and Ethnikis Antistaseos Streets in Limassol town at 2 a.m. on the 17th September, 1972, when motor car under Registration No. BF 587, which he was driving at the time, came into collision with motor cycle under Registration No. CA 416 on which the plaintiff was riding. As a result of the collision the plaintiff sustained bodily injuries and his motor cycle, as well as the car of the defendant, were damaged.

The trial Judge having found that the defendant was entiiely to blame for the accident, gave judgment in favour of the plaintiff in the sum of £422.350 mils with costs. The damage caused to the car of the defendant, for which there was a counterclaim, was assessed at £20.-

We are not concerned in this appeal with the findings of the trial Judge on the question of damages but only with his findings as regards liability, which, according to the grounds of appeal, are unsatisfactory and not warranted by the evidence adduced.

5 As to how this accident occurred the litigants in giving evidence before the trial Court related their own version. The two versions are conflicting.

It is the version of the plaintiff that at about 2 a.m. on the 17th September, 1972, he was riding his motor cycle in Ethnikis 10 Antistaseos Street going home from work and directed from west to east. When he arrived at the cross-road with Thessalonikis Street he stopped at the halt line, looked to the right and left and then to the right again and saw the lights of an oncoming vehicle in Thessalonikis Street coming from his right and directed 15 towards the north. The first time he had seen this vehicle it was at a distance of about 100 to 150 ft. away. He could not see it earlier because of the existence of houses and motor cars stationary on the right hand side of the road in Thessalonikis Street as one faces south. When this vehicle came at a distance of 20 about 10 to 15 ft. away from him he realised that it was a car. This car proceeded straight on and with its front nearside bumper knocked on the right hand side of the motor cycle, then the rear part of the car hit him and with the speed it was going dragged him and the motor cycle and as a result he was 25 thrown on to the road. At the time he was knocked down his motor cycle was stationary with the lights on but in a dipped position. Its front wheel was protruding about 1 foot from the halt line to the direction of Thessalonikis Street. At the time of the accident no other traffic was on the road. Soon after 30 the accident he was placed in a passing car and was taken to the hospital.

On the other hand, the version of the defendant is that he was at the time driving his motor car at a speed of about 30 m.p.h. along Thessalonikis Street from south to north and 35 when he approached the aforesaid cross-road he saw the motor cycle of the plaintiff when only 5 ft. away from it, coming straight from Ethnikis Antistaseos Street to Thessalonikis Street, without halting. He then swerved to his right but the collision could not be avoided. The motor cycle as it was 40 coming hit on the left hand side of his car. He was at the time driving on the left hand side of the road and at a distance of about two metres from the pavement. After the collision he

stopped his car at a distance of about 25 ft. away from the point of impact into the north side of Thessalonikis Street. As a result of the accident the plaintiff was injured and was taken to the hospital by a passing car. He, himself, went to the Police Station and reported the accident and returned to the scene. At 2.25 a.m. the Police arrived and P.C.505 Nicos Gavriel (P.W.1), took various measurements in the presence of the defendant and prepared a sketch which he produced in giving evidence before the trial Court as *exhibit* 1.

The cross-road where this accident occurred is formed by Thessalonikis and Ethnikis Antistaseos Streets and is controlled by halt signs. Thessalonikis Street is the main road and is 24 ft. wide and Ethnikis Antistaseos Street is 19 ft. wide. Both streets are asphalted and they have pavements on both sides. The white halt line in Ethnikis Antistaseos Street is 1 foot away from the imaginary line which joins the northern with the southern pavement in Thessalonikis Street on the left hand side of the road as one faces north. The point of impact indicated by the defendant is situated on the cross-road at a distance of 7 ft. from the halt line and 6 ft. from this imaginary line. The point of impact indicated by the plaintiff, after his discharge from the hospital, is on the halt line. The front part of the motor cycle, which was found at its resultant position opposite the halt line on the cross-road is at a distance of 7 feet from the imaginary line and its rear part 12 feet. There were no signs on the road as a result of the accident. Due to the collision the right wing protector of the motor cycle was dented. The steering bars were dented with an inclination towards the left. The front wheel and its fork were dented inwards. The damage on the car was on the side of the front nearside mudguard, which was indented. The side of the left near bumper was dented outwards.

The trial Judge, after considering the evidence adduced, had this to say at page 40 of the record:

> "As I have mentioned earlier, the only evidence supporting the two versions is the evidence of the plaintiff on the one hand and that of the defendant on the other. There is no other evidence; nobody else was present at the material time, and the evidence of the Police Constable (P.W.1) is substantially neutral; the constable could not trace anything on the spot indicating where the actual point of impact was, independently of the evidence of the litigants.

I have listened to the sworn testimony of both litigants and I carefully watched their demeanour in the witness box and I must say that I prefer the evidence of the plaintiff to that of the defendant. The plaintiff impressed me as a truthful witness and I accept his version. The defendant on the contrary impressed me unfavourably; he kept throughout his testimony switching from one version to another, so one cannot say with precision what his version was on many material points. His innumerable contradictions coupled with his continuous perspiration and a unique hesitation in answering questions directly, rendered profound his effort to exonerate himself from liability.

From the evidence as I have accepted it, the following facts have been established:-

(a) The plaintiff's motor cycle was stationary on the halt line when same was hit by the motor car driven by the defendant.

(b) The defendant was driving at the material time his said car without having a proper look out; he even failed to heed the presence of the motor cycle as he himself admitted, despite the fact that the scene of the accident was properly illuminated and the motor cycle ridden by the plaintiff had its lights on at the material time.

(c) The defendant was driving generally without due care and attention; it was quite unnecessary for him to drive on his extreme left hand side of the road, when there was no other traffic on Thessaloniki Street at the time, thus colliding with the motor cycle of the plaintiff which was stationary at the time on the halt line, with its engine on, waiting for the main road to clear up before proceeding.

For all the above reasons I am satisfied that the defendant is entirely to blame for this accident."

As it has been stated earlier on in this judgment the appellant complains against the findings of the trial Court as to how this accident occurred.

The approach of this Court on this matter is well settled. The burden is on the appellant to satisfy this Court that the trial Court is in error in that its findings are unsatisfactory or

that they are not warranted by the evidence considered as a whole. If he is successful then this Court should proceed on the evidence to decide the case without feeling bound by determinations on questions of fact made by the trial Court. Useful reference may be made in this respect to the case of *Ioannis Patsalides* v. *Karabet Afsharian* (1965) 1 C.L.R. 134 at page 146 where the following passage is cited from the case of *Economides* v. *Zodhiatis*, 1961 C.L.R. 306:

> " Undoubtedly a Court of Appeal has the power to set aside the findings of fact of a trial Court where the trial Judge has failed to take into account circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself, or with indisputable fact. And since the enactment of the Courts of Justice Law, 1960, under section 25(3) this Court is not bound by any determinations on questions of fact made by the trial Court and has power to re-hear any witness already heard by the trial Court, if the circumstances of the case justify such a course. But this provision has to be applied in the light of the general principle that a Court of Appeal ought not to take the responsibility of reversing the findings of fact by the trial Court merely on the result of their own comparisons and criticism of the witnesses, and of their own view of the probabilities of the case.
>
> A distinction should, however, be made between the findings of primary facts and the conclusions drawn from those facts by the trial Court. The Court of Appeal is prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts."

In the present case, with all due respect to the trial Judge, the decision as to who is to blame for the accident is not to be reached solely on the basis of the findings depending on which one of the two conflicting versions is to be believed, but a great lot depends on inferences to be drawn from primary facts and, particularly, from the real evidence, as presented in the police sketch by P.W.1, whose evidence is not substantially neutral as found by the trial Judge. The resultant position of the motor cycle, which was found just opposite the halt line on to the cross-road, the non existence of any signs on the asphalt, which would be an indication that the motor cycle was dragged there, disprove the version of the plaintiff and support the version of

the appellant that the point of impact was where he had indicated to the police shortly after the accident. Had the accident occurred in the way the plaintiff described, then the motor cycle could not have resulted where it did on the cross-road but 5 further up in the northern part of Thessalonikis Streets and in an oblique direction in relation to the halt line. Furthermore, the damage on the front mudguard of the car, which was indented, as well as the damage to the front wheel and the fork of the motor cycle which were also indented, indicate that the 10 motor cycle was in motion at the time of the accident and collided head on on to the side of the car. Another reason is that it could not have been possible for the car to knock on the motor cycle at the point of impact indicated by the plaintiff without first mounting the southern pavement on the left hand 15 side of Thessalonikis Street, since the respondent categorically stated in giving evidence that the appellant did not turn left but went straight on as he was coming and hit him.

In the present case, I have no hesitation in taking the view that the findings of the trial Judge are inconsistent with the 20 real evidence and so to that extent are unsatisfactory. In view of the above I think that the trial Judge was not justified in rejecting the evidence of appellant. Indeed, having gone through the record of proceedings, I have not come across any material contradictions in the evidence of the appellant so that 25 to render it unacceptable as found by the trial Judge. The cause of this accident was the sudden emerging of the respondent from the side road on to the main road without halting at a time when the appellant was so close to the cross-road that he could not avoid the accident. There is nothing to incidate 30 that the appellant saw a possibility of a danger emerging from the side road. The respondent, therefore, is entirely to blame for this accident.

Before concluding this judgment I must say that there was another reason for which, although not argued before him, the 35 trial Judge should not have accepted the version of the plaintiff, in that his evidence as to what constituted the negligence of the appellant differs materially from the particulars of negligence enumerated in his statement of claim.

Needless to say that where the version of facts found by the 40 trial Judge was not just variation, modification or development, but was something new, separate and distinct and not merely a technicality, there had been so radical a departure from the

pleaded case as to disentitle the plaintiff to succeed. (*Waghorn* v. *George Wimpey & Co. Ltd.*, [1969] 1 W.L.R. 1764). The material particulars of negligence referred to in the statement of claim read as follows:

"(g) Turning or attempting to turn into Ethnikis Antistaseos Street without first ascertaining or ensuring whether it was safe so to do and when it was dangerous and/or unsafe so to do. 5

(i) Suddenly turning to the left into Ethnikis Antistaseos Street and without giving any indication of his intention so to do. 10

(k) Failing to keep as close as possible to the left hand side of the road when negotiating a turning.

(m) Swerving to the right whilst negotiating a left hand turn and/or driving on the wrong side of the road." 15

It is clear from the above that the original version of the respondent was that the appellant, upon reaching the cross road, swerved suddenly to the left in order to proceed westwards. At the trial he changed this version. That is the reason why in giving evidence, removed the point of impact from inside 20 Ethnikis Antistaseos Street to a distance of about 1 foot after the halt line into Thessalonikis Street.

For the reasons stated above I would allow the appeal, set aside the judgment of the trial Court and enter judgment in favour of the appellant on his counterclaim in the sum of £20.- 25 with costs both here and in the Court below.

HADJIANASTASSIOU, J.: In the result, the present appeal is allowed by majority with costs here and in the Court below.

The judgment of the Court below is set aside and there will be judgment for the appellant-defendant on the counterclaim 30 against the respondent-plaintiff in the sum of £20 with no order as to costs on the counterclaim.

Appeal allowed.