

DEMETRIOS EMMANUEL AND ANOTHER,

Appellants-Defendants,

v.

ANDRONICOS NICOLAOU AND ANOTHER,

Respondents-Plaintiffs.

DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

(Civil Appeal No. 5342).

5 *Negligence—Contributory negligence—Apportionment of liability*
—Appeal—Principles on which Court of Appeal will intervene
—Road accident—Collision during overtaking—Lorry over-
taken by a pick-up—Driver of small car not sounding his horn
before starting the overtaking and passing too close the lorry
in overtaking it—Swerving to the left and in front of the lorry
after overtaking procedure was completed—Lorry driver saw
the approaching car from behind—Not keeping the extreme
left side of the road—No error of law can be detected in trial
10 *Court's apportionment (2/3 pick-up, 1/3 lorry)—Sustained.*

15 *Damages—Damage to vehicle—Award for “unforeseen damages”*
—Not based on the expert evidence which was believed in
toto—In the absence of any evidence before him trial judge
not entitled to increase the amount suggested by the expert—
In so doing he has acted contrary to the principle that damages
are of a compensatory nature.

20 *Damages—Special damages—It is for the plaintiff to prove his*
claim for special damages—Damage to motor vehicle—Claim
for loss of use and loss of profit—Principles applicable—In the
absence of evidence substantiating such claims trial judge not
entitled to determine the quantum of damages by taking into
consideration the amount of capital represented by the vehicle.

25 *Damages—General damages—Personal injuries—Severe contusion,*
bruising and haematoma on right thigh and buttock—Bruising
on shoulder and movements painful—Abrasions on right el-
bow—In the clinic for 5 days—Continues to have pain over
the right great trochanter and right shoulder and expected to
experience some pain during weather changes—Award of
30 *£250—Sustained.*

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

These proceedings arose out of a collision between a lorry driven by the respondent-plaintiff 2 and a pick-up driven by appellant-defendant No. 1. The accident occurred whilst the pick-up was in the process of overtaking the lorry. The trial judge found that the conduct of the driver of the pick-up, who was an inexperienced driver, was the predominant cause of the collision and he found three faults on the part of this driver, namely: That he swerved to the left and in front of the lorry after the overtaking procedure was completed; that he did not sound his horn before starting the overtaking procedure at a time when the lorry driver did not give a 'ready to be overtaken' signal or any other signal whatsoever; and that he passed too close to the lorry in overtaking it.

The trial Judge, also, found one fault on the part of the lorry driver namely that at the time the wheels of the lorry locked after the application of brakes, the lorry was on the extreme right of the left side lane of the road as divided by the broken line and bearing in mind the direction of the two vehicles, it could be safely inferred that the off-side of the lorry was over the dividing line before the application of brakes.

After finding as above the trial Court held that the driver of the pick-up (the appellant-defendant 1) was liable to the extent of two thirds for the accident and the lorry driver (the respondent-plaintiff No. 2) to the extent of one third.

Regarding the damage to the lorry the trial judge having accepted the evidence of the expert awarded the mount of £685 but he increased from £50 to £150 the amount which this expert allowed for unforeseen damage. The trial Judge, also, awarded an amount of £400 for loss of use of the lorry after holding that this vehicle remained idle for about 100 working days, and that it represented a "certain capital, income producing outlay which is assessed at £4.- per day".

The trial Judge, finally, awarded to the driver of the lorry (respondent-plaintiff 2) an amount of £250 general damages for the injuries he suffered in the collision. This driver sustained a severe contusion, bruising and haematoma on his right thigh and right buttock, bruising on his shoulder, abrasions on the right elbow and his movements were painful. He was kept in the clinic for 5 days and he continued to have pain over the right great trochanter and right shoulder and expected to experience some pain during weather changes.

The appellants-defendants appealed against the apportionment of liability and against the aforesaid awards for unforeseen damages, loss of use, and general damages.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 The respondents-plaintiffs cross-appealed against the apportionment of liability only.

10 *Held*, (1) that in the absence of an error of law, where an appellate tribunal accepts the findings of fact of the Court below, it should only revise the apportionment in very exceptional cases (see, inter alia, *British Fame (Owners) v. MacGregor (Owners)* [1943] A.C. 197 (pp. 24-31 *post*); that having regard to this principle and to section 57(1) of the Civil Wrongs Law, in the present case no error in law can be detected on the part of the trial judge and his findings of fact are accepted; that this alone would be a sufficient reason for not interfering with his apportionment; that the overriding consideration was the fact that the driver of the pick-up, an inexperienced driver, started overtaking the lorry without any warning at all and when he was doing so he drove too close to the lorry in spite of the fact that he himself thought there was ample space to pass; that both as a matter of blameworthiness and as a matter of causation the pick-up driver was far more to be blamed than the driver of the lorry; that, accordingly, the trial judge in arriving at his apportionment of fault came to a proper conclusion and this Court ought not to disturb it; and that, therefore, both the appeal and the cross-appeal will be dismissed (pp. 31 - 32 *post*). (*Observations on Christodoulou v. Menicou and Others* (1966) 1 C.L.R. 17).

30 (2) That once the trial judge accepted the evidence of the expert of the defendants in toto he was not entitled, in the absence of any evidence before him, to increase the amount of £50.- for any other unforeseen damage because he acted contrary to the principle that damages are of a compensatory nature (p. 38 *post*).

35 (3) That it was for the plaintiffs to prove their claim for special damages; that in the absence of any evidence to that effect the learned Judge was not entitled to determine the quantum of damages and introduce the method suggested by him *i.e.* to take into consideration an amount of capital without taking into consideration that there was evidence that during that season the vehicle was not in demand; that the trial Judge misdirected himself because what he ought to have done

1977

Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

was to consider only the estimated loss of profits for the period of 100 days irrespective of whether the amount of money spent for the purchase of the lorry was (a) or (b) figure. (See *Dixons (Scholar Green) Ltd. v. J.L. Cooper Ltd.*, [1970] R.T.R. 222); that in the absence of evidence as to the loss of profit the calculations made by the trial Judge were wrong in law and that, accordingly, the appeal on the issue of quantum of damages for loss of profit will be allowed (pp. 32-42 *post*). 5

(4) That this Court will not interfere with the award of a Judge although they might themselves have awarded a different amount unless satisfied that the Judge in assessing the damages applied a wrong principle of law (as for instance by taking into account some irrelevant factor or leaving out some relevant one) or, short of this, that the amount awarded was so extremely high or low as to make it a wholly erroneous estimate of the damage. (See *Antoniou v. Iordanous* (1976) 1 C.L.R. 341); that the award of the trial Judge is not out of line with some of the figures of other awards which this Court has in mind; and that, accordingly, the appeal on this issue will be dismissed. 10
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Appeal partly allowed.
Cross-appeal dismissed.

Cases referred to:

- Zarpeteas v. Touloupou and Others* (1975) 1 C.L.R. 454;
- British Fame (Owners) v. MacGregor (Owners)* [1943] A.C. 197 at p. 201; 25
- The British Aviator* [1965] 1 Lloyd's Rep. p. 271 at p. 278, 279-280;
- Christodoulou v. Menicou and Others* (1966) 1 C.L.R. 17;
- Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 1 All E.R. 620 at p. 627; 30
- Koningin Juliana* [1974] 2 Lloyd's Rep. 353 and on appeal [1975] 2 Lloyd's Rep. 111;
- The "Miraflores" and the "Abadesa"* [1966] 1 Lloyd's Rep. 97; 35
- Kyriacou v. Aristotelous* (1970) 1 C.L.R. 172;
- Gregoriou v. Mehmet and Another*, 24 C.L.R. 112;

Admiralty Commissioners v. S.S. Susquehanna [1926] A.C. 655;

Greta Holme [1897] A.C. 596;

The Mediana [1900] A.C. 113;

5 *The Marpessa* [1907] A.C. 241;

Stroms Bruks Aktie Bolag v. John & Peter Hutchison [1905] A.C. 515 at pp. 525-526;

British Transport Commission v. Gourley [1956] A.C. 185 at p. 206;

10 *Hartley v. Sandholme* [1974] 3 All E.R. 475;

Parry v. Cleaver [1969] 1 All E.R. 555;

Daish v. Wauton [1972] 1 All E.R. 25;

Perestrello Ltd. v. United Paint Co. Ltd. [1969] 1 W.L.R. 570 at p. 579;

15 *The Bernina* [1886] 55 L.T. 781;

J. & E. Hall Ltd., v. Barclay [1937] 3 All E.R. 620;

The Argentino [1883] 13 P.D. 191 C.A. at p. 201; affirmed on appeal [1889] 14 App. Cas. 519;

20 *Carslogie S.S. Co. Ltd. v. Royal Norwegian Government* [1952] A.C. 292;

Owners of Strathfillan v. Owners of Ikala [1929] A.C. 196 at pp. 200, 205;

Sunley (B.) & Co. Ltd. v. Cunard White Star, Ltd. [1940] 1 K.B. 740 at p. 748;

25 *Re Trent and Humber Co. Ex parte Cambrian Steam Packet Co.* [1868] 4 Ch. App. 112;

The Gazelle [1844] 2 Wm. Rob. 279;

Dixons (Scholar Green) Ltd. v. J. L. Cooper Ltd. [1970] R.T.R. 222;

30 *Antoniou v. Iordanous* (1976) 1 C.L.R. 341.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C.) dated the 13th September, 1974, (Actions Nos. 2339 and 2342/72) whereby it was held that the plaintiff was liable to the extent of one third and the defendants to the extent of two thirds in respect of a collision between a car driven by plaintiff and a car driven by defendant 1. 5

L. Papaphilippou, for the appellants.

G. Ladas with *A. Paikkos*, for the respondents. 10

Cur. adv. vult.

The judgment of the Court was delivered by:—

HADJIANASTASSIOU, J.: This is an appeal by the defendants from the decision of a Judge of the District Court of Nicosia dated September 13, 1974, holding that the plaintiffs in their action for damages against the defendants—the owners of the pick-up vehicle—in respect of a collision between the two vehicles on March 28, 1972, were one-third to blame, and the defendants two-thirds. The plaintiffs cross-appealed and gave notice of their intention that the decision of the Judge that they were one-third to blame should be varied. 15 20

The facts are stated in the judgment of the learned Judge and are these:- Mr. Andronicos Nicolaou is the plaintiff in action No. 2339/72 and the owner of the lorry under Registration DA 588, and its driver was Mr. Kypros Constantinou, plaintiff in Action 2342/72. Defendant 1 was Mr. Demetrios Emmanuel, the driver of the pick-up vehicle, under Registration No. ET 310. Defendant 2 was the Unitex Trading Co. Ltd., the owner of the said pick-up, and both are defendants in both actions which have been consolidated by order of the trial Judge on January 11, 1973. 25 30

The lorry driver, in explaining how the accident occurred, said that whilst he was driving on that date at a speed of 25 m.p.h., he noticed the presence of the pick-up through his driving mirror at a point where the road was still straight, and before reaching the curve. He did not expect that car to overtake him because of the curve. The 35

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 driver did not give him any warning, nor did he sound his
horn to indicate that he was about to overtake him, and
he did not give any signal that it was alright to be over-
taken. As he was negotiating a left hand curve and before
10 reaching the place where the accident occurred, he kept
on the left hand side of the road where he was overtaken
by the car. It cut suddenly in front of him by turning to
the left. He immediately applied brakes, turned slightly to
the left in order to avoid the collision, but as that car was
15 so close, he did not manage to avoid it. He turned further
to the left, and as a result his lorry overturned into a near-
by ditch. He further explained that the front right mud-
guard of the lorry hit the left side of that pick-up. Just
after the collision the pick-up veered to the left into the
20 fields. Then he added that shortly after the accident he
saw the driver of the pick-up whom he knew before, and
asked how it all happened. His reply was "Ta echasa ego,
mou arpaxe ke o allos to timoni ke se emplexamen ke ese-
na". Later on both drivers were taken by someone who
was passing by to the General Hospital for treatment.

On the other hand, the driver of the pick-up in explain-
ing how the accident occurred, said that on his way from
Kyrenia to Nicosia via Yerolakkos, he was following a
25 lorry proceeding in the same direction as he was. He fol-
lowed it for a distance as there was a continuous white di-
viding line and when the line started becoming dotted, he
moved to the right side of the road and started overtaking
the lorry. In overtaking the lorry he accelerated his speed
30 to about 30 - 40 m.p.h., and when he had almost complet-
ed the overtaking procedure he felt something pulling his
car to the right, he did not hear anything, and as there
were some road markers on the right hand side of the
road, he tried to bring the car back to the road because he
35 was too near the road markers. As he was doing so the
car started travelling in a zig zag manner and then he
found himself on the left hand side ditch. He did not re-
member anything else. At the time, he felt this force pull-
ing to the right, he was on the right side of the road.

40 In cross-examination he said that he was the holder of
a learner's licence, and Anastassios Petrou (a holder of a
driving licence) was with him in the pick-up truck. He was
following the plaintiff's lorry for about a mile, even more,
and was keeping a distance of about 40 metres from it. He

1977

Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

could not say whether he was keeping this distance away from the lorry constantly or whether he was reducing it or increasing it. When he started overtaking the lorry, the road was straight, but at the place where the accident happened the road starts taking a slight turning to the left. He had completed the overtaking before reaching the turning. The accident happened after he had completed overtaking. He said he did not notice whether at the place where the collision occurred the road was divided by a continuous or a broken white line. He did not try to overtake at a place where the road was divided by a continuous white line. He only made his attempt when the line started being broken. He also said that at the particular moment when he was trying to bring the car back on to the road, his co-driver got hold of the steering wheel, but as he was holding it tight, he did not permit him to take control of it. He denied, however, that the place at which he tried to overtake was slightly dangerous.

After the accident, he was approached by Kypros Constantinou (the driver of the lorry) whom he knew before, and as he was worried about the accident—it was the second day he was working for his employers—Kypros, in order to calm him down and give him courage, told him that “this matter would be settled by our employers”. He did not remember what was exchanged between the two of them.

The learned Judge, having considered the evidence before him as to the cause of the accident, said that he had no doubt that the collision between the two vehicles occurred when the pick-up was alongside and leading the lorry with the left side of its cargo case opposite the right front corner of the lorry. He then added that the finding could be inferred also conclusively from the place where paint and tyre marks were found on the left side of the pick-up which in its turn corroborates the already more probable version of the pick-up driver.

Then, in order to substantiate the position he has taken, he says that it is most unlikely, in fact impossible, that the collision occurred when the pick-up swerved in front of the lorry as under such circumstances the pick-up would have been literally run over by the heavier vehicle. It is obvious that the damage to the small car was nothing

more than a glancing blow which, however, with the impetus of the heavier vehicles was strong enough to send the pick-up off course and out of control.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 Then, in dealing with the point of impact, he was of the view that it could not have been the one indicated by the lorry driver, and what is more, it was inconsistent with his version as to the starting point of the brake marks. The point shown by the driver of the pick-up, he said, is compatible with his version and with the damage found on the side of his vehicle. This point is 7' 6" from the right side of the road and it comes to corroborate the theory of the lorry being at the crucial moment over the dividing line, and as the asphalted width of the road is 18' 8", that shows that the lorry crossed over the dividing broken white line by nearly two feet.

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20 Finally, the trial Judge dealing with the question as to who was responsible for the accident made his findings of fact based on inferences that both drivers were at fault and in dealing with the apportionment of blame, he reached the conclusion that the liability of the pick-up driver was greater than that of the driver of the lorry and the apportionment of blame was made as follows: pick-up driver—two-thirds; and lorry-driver—one-third.

25 We do not propose to undertake a more detailed examination of the events which led to the collision, but the dispute now is as to the faults committed by each driver. There is no doubt that the trial Judge found that the conduct of the driver of the pick-up was the predominant cause of the collision and he found three faults on the part of the driver of the pick-up; (1) that the pick-up swerved to the left and in front of the lorry after the overtaking procedure was completed; (2) that the pick-up driver did not sound his horn before starting the overtaking procedure and that the lorry driver did not give a 'ready to be overtaken' signal or any other signal whatsoever; (3) that he passed too close to the lorry in overtaking it; and one fault on the part of the driver of the lorry: that the lorry at the time its wheels locked after the application of brakes, was on the extreme right of the left side lane of the road as divided by the broken line and bearing in mind their direction, it is safely inferred that the off-side of the

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

lorry was over the dividing line before the application of brakes.

Such being the faults of each side, as found by the Judge, it becomes in my view a matter of appreciation to decide how they should weigh in order to arrive at a just apportionment, and the question remains, in view of the contentions of counsel in this appeal and cross-appeal, whether we could or should interfere with the apportionment of the trial Judge. We agree, of course, that the predominant cause of the collision was the conduct of the driver of the pick-up vehicle, and we approach the question of apportionment on the basis that both drivers were at fault. As it was stated in *Zarpeteas v. Touloupou & Others*, (1975) 1 C.L.R. 454, apportionment of fault is not an easy task for any Judge, but it must be said that the trial Judge, who has the benefit of hearing the evidence at first hand and sensing the atmosphere of the case, enjoys an enormous advantage over an appellate tribunal. It has been established by a long series of decisions, — and we propose dealing with some of these cases culminating in a case of the House of Lords, in *British Fame (Owners) v. MacGregor (Owners)* [1943] A.C. 197 — that in the absence of an error of law, where an appellate tribunal accepts the findings of fact of the Court below, it should only revise the apportionment in very exceptional cases. In that case, Lord Wright, speaking in the House of Lords, said at p. 201:-

“Apportionment is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge’s apportionment”.

The next case is *The British Aviator*, [1965] 1 Lloyd’s Rep. 271. In that case, the trial Judge’s apportionment,

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

(two-fifths—three-fifths) was altered by the Court of Appeal to equal apportionment. No fresh findings of fact were made by the Court of Appeal nor were the findings of the Judge disagreed with. The revision was made on the basis that the Judge had taken “a wrong view of the facts”; and that he did not appreciate the seriousness of the fault of the ship *Crystal Jewel*. Lord Justice Willmer, clearly thought the case to be on the border line and said at p. 278:-

10 “It has been argued on behalf of the respondents,
with considerable force, that all that the Court is
being asked to do here is to attach greater weight to
the helm action of one of the vessels than was attached
15 by the learned Judge below. It is said that, even if
we were to think that the *Crystal Jewel*’s helm action
was more blameworthy than the learned Judge seemed
to think, that would be only a matter of individual
opinion, with which, having regard to what was said
20 by Lord Wright in the passage I have just cited, an
appellate Court is not entitled to interfere. As I have
said, this was a very forceful and very attractive
argument; and I am bound to confess that I was very
nearly persuaded by it. But in the end I have come
25 to the conclusion that this is a case in which the
learned Judge’s apportionment of blame is properly
open to review.

I reach that conclusion because I do not think that
the learned Judge ever really did appreciate the seriousness
30 of the fault of the *Crystal Jewel* in altering
her course to starboard when she did and in the manner
she did. This, I think, did amount to taking a
wrong view of the facts and was not a mere expression
of individual opinion”.

Finally, he said at pp. 279-280:-

35 “This means that in my judgment the *Crystal Jewel*’s
fault in starboarding in the way in which she did has
much, much greater significance than was attributed
to it by the learned Judge. By that I mean that not
only was it more blameworthy than he appears to
40 have thought it, but also that as a matter of causation
it had more effect in bringing about this collision

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

than any other single factor. On a true view of the facts, therefore, I find myself unable to agree with the learned Judge's view that this fault on the part of the Crystal Jewel was a lesser fault than the British Aviator's turn to port in the last two minutes before the collision. That being so, I do not think that the learned Judge did have any good ground for differentiating between these two vessels. In my judgment the liability ought to have been apportioned equally between them; and to that extent, therefore, I would allow the appeal". 5 10

Turning now to our case law, in *Tessi Christodoulou v. Nicos Savva Menicou and Others*, (1966) 1 C.L.R. 17, the trial Judges' apportionment (60% to the plaintiff and 40% to the defendant) was altered by the Supreme Court of Cyprus to fifty-fifty. No fresh findings of fact were made by the Court, nor were the findings of the judges disagreed with. The revision was made on the basis of *Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 1 All E.R. 620, following the rule of common sense approach adopted by Evershed L.J. at p. 627. Josephides, J., dealing with the submissions of counsel that the finding of the trial Court that the plaintiff was guilty of contributory negligence was not supported by the evidence, said at pp. 32, 33:- 15 20 25

"...we are of the view that in the present case there was adequate evidence to support the findings made by the trial Court that the driver was guilty of negligence in driving his bus and that the plaintiff was likewise guilty of contributory negligence. Having regard to the following circumstances, that is to say, that Phryne street was a very narrow street (9 feet 9 inches with the berm), that there was a projecting wall, that the bus was 7 feet 2 inches wide and that the road had potholes and was bumpy, we are of the view that the wall was a potential source of danger and that it was the duty of the driver to reduce speed and leave a reasonable safety margin between his bus and the wall, on the footing that owing to the condition of the road and the sudden swerve it was reasonable to foresee that the passengers in the bus might be knocked against the wall. Instead of doing that, the driver increased speed and drove too close to the 30 35 40

wall causing the plaintiff's arm to be crushed between the bus and the wall.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 The finding of the trial Court that the plaintiff, although acquainted with the road, did not use reasonable care for her own safety in leaving her arm protruding out of the bus, is adequately supported by the evidence. It is true that if the plaintiff had not been in that position she would not have been injured, but adopting the commonsense approach, as
10 laid down in the *Davies* case, we are of the view that the plaintiff, in the circumstances of this case, was not to blame more than the driver, so that, although we agree with all the other conclusions in the careful and well reasoned judgment of the trial Court, we do
15 not feel that we can uphold their apportionment of liability as to 60 per cent to the plaintiff and 40 per cent to the driver. We are of the view that, in the circumstances of this case, this liability should be apportioned equally, that is to say, 50 per cent to
20 the plaintiff and 50 per cent to the driver”.

We think the only observation we can make in this case is that the Supreme Court has given emphasis to the age of the plaintiff (she was 17 at the time) and in making their own apportionment did not consider the effect of the
25 decision of the House of Lords in the *MacGregor* case (*supra*) that an appellate court should only revise the apportionment in very exceptional cases.

In *Koningin Juliana*, [1974] 2 Lloyd's Rep. 353, the trial Judge's, Mr. Justice Brandon's, apportionment of
30 blame was two-thirds—one-third and was altered by the Court of Appeal by majority to fifty-fifty. On appeal by the owners of the *Koningin Juliana*, in [1975] 2 Lloyd's Reports, 111, it was “held by H.L. (Lord Wilberforce, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Ed-
35 mund-Davies and Lord Fraser of Tullybelton), that, on the issues involved, the case was one where an appellate Court ought not to disturb the trial Judge's apportionment: It had not been shown that the Judge had failed to give proper weight to the elements forming the composite
40 fault of the *Koningin Juliana* (see p. 113, cols. 1 and 2; p. 115, col. 2; p. 116, cols. 1 and 2);—*The MacGregor* [1943] A.C. 197; [1942] 74 Ll. L. Rep. 82, applied—*The*

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

British Aviator [1965] 1 Lloyd's Rep. 271, doubted—*The Almizar*, [1971] 2 Lloyd's Rep. 290 explained".

Lord Simon of Glaisdale, speaking in the House of Lords, adopted the view of Sir Gordon Willmer, supporting the apportionment of Justice Brandon, and said at p. 115:- 5

"But I also agree that this is not in any event a case where an appellate tribunal is entitled to substitute its own view of relative responsibility for that of the trial Judge. Where an appellate Court finds no error of law and accepts the findings of fact of the trial Judge, it is only in quite exceptional circumstances that it should revise the apportionment of the trial Judge". 10

Then, Lord Simon proceeded and made these observations as to why the apportionment of the trial Judge should not be revised by an appellate tribunal, at pp. 115, 116:- 15

"Thirdly, therefore, any other rule would encourage a proliferation of appeals, in the hope of finding an appellate tribunal which might attach different weights to the various considerations. It is an undoubted advantage of our own system of judicature that so few of the cases which come to trial are taken to appeal. This brings me to a fourth reason for the rule, though it is one which I feel some diffidence in expressing. No Judge, instance or appellate, is properly equipped without both intuition and a capacity for logical analysis. But the latter quality is the more called-for in an appellate tribunal; while intuition, as Roscoe Pound was wont to emphasize, is the prime and essential quality required in a trial Judge. The balancing of a number of conflicting considerations of fact (such as is called for in matters like apportionment of fault or quantifying damages or exercising discretion as to the custody of a child) is generally more a matter of intuition than of logical analysis. Finally, the trial Judge deals with such matters day in day out; and his judgment is thereby reinforced by constant experience". 20
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Finally, in dealing with the decision of the majority of the Court of Appeal, his Lordship said:-

5 “The majority of the Court of Appeal thought that
Mr. Justice Brandon, in arriving at his apportion-
ment of blame, might have ‘totted up’ the number of
faults on each side (taking the Koningin Juliana’s as
one only) and translated the resultant ratio into ap-
portionment of liability. With all respect I do not
10 think that the passage from the judgment of the
learned trial Judge which I have just quoted justifies
such an inference, and I can find no reflection of any
such obvious error in approach to apportionment
elsewhere in the judgment. As Sir Gordon Willmer
said (p. 364): ‘With all his experience the learned
15 Judge must be taken to know as well as anybody
that apportionment of blame in the Admiralty Court
is not to be arrived at by ‘totting up’ and comparing
the number of faults in the navigation of each vessel’.
Although, perhaps, the phrase ‘single composite
20 fault’ could lend itself to misunderstanding, all the
errors in the navigation of the Koningin Juliana did
result from her pilot’s faulty look-out (or the defec-
tive communication between him and the captain)
resulting in the incorrect appreciation that the Thu-
roklint was stopped; whereas the Thuroklint’s various
25 errors were entirely separate, indicating in totality
an extraordinary failure to navigate with due care.
In my view, therefore, the apportionment of liability
made by the learned trial Judge should not be dis-
turbed; and I would allow the appeal”.

30 Lord Wilberforce, in delivering the first judgment, said
inter alia at pp. 112, 113:-

“All of these faults being found, it became a matter
of appreciation to decide how they should be weighed
so as to arrive at a just apportionment of blame.

35 My Lords, this summary of the issue is, I believe,
sufficient to make it clear that the case is one where,
the trial Judge having made an apportionment,
taking all factors into account, a Court of Appeal,
including this House, ought not to disturb it. The
modern authority which reflects this principle is the
40 decision of this House in the *MacGregor, British
Fame (Owners) v. MacGregor (Owners)*, [1943]
A.C. 197; [1942] 74 Ll. L. Rep. 82, where the rea-

1977

Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

sons for the rule are clearly and authoritatively stated. I shall not repeat them: they are as valid and as generally applicable today. Of subsequent cases relied on as to some degree diminishing the force of the *MacGregor* I need only refer to two. In *The Al- 5*
mizar, [1971] 2 Lloyd's Rep. 290, the apportionment of the trial Judge was reversed after his crucial finding, on advice, had, on different advice, been re- 10
jected by the Court of Appeal. On further advice in this House, the apportionment was further varied. I think that it is clear that in both appeal Courts the new apportionment was based upon the advice those Courts had received, so that the factual elements upon which the apportionment has to be based were not the same. Variation of the apportionment in these 15
circumstances is clearly authorized by *The MacGregor* (sup).

In *The British Aviator*, [1965] 1 Lloyd's Rep. 271, the trial Judge's apportionment (two-fifths—three-fifths) was altered by the Court of Appeal to equal 20
apportionment. No fresh findings of fact were made by the Court of Appeal nor were the findings of the Judge disagreed with. The revision was made on the basis that the Judge had taken 'a wrong view of the facts': he did not 'appreciate the seriousness of the 25
fault' of the *Crystal Jewel*. My Lords, I must say that I doubt the validity of this decision and I note that Lord Justice Willmer, whose authority lends its weight, himself clearly thought the case to be on the borderline (see p. 278). I deprecate the use of this 30
case as a basis for weakening of the *MacGregor* rule. Attempts were made by learned Counsel for Thuro-klint to discover errors, or errors of appreciation, in the judgment of the trial Judge, but in my opinion these were not made good. The only criticism which 35
appeared possibly to have any substance was that he had grouped three faults of the *Koningin Juliana* into one 'composite fault'. But it does not follow from this that he failed to give proper weight to the elements forming the composite fault, or that he would have 40
given more weight to them if he had regarded them as separate faults. I certainly find it impossible to believe that he was led, by his description, into the

5 crude mathematical sum suggested by the learned
Master of the Rolls. The efforts of Counsel were still
less successful when applied to the judgment of Lord
Justice Willmer. This, in my respectful opinion, is
clear, correct and unanswerable and I would be con-
10 tent to accept the whole of it. The majority of the
Court was unable to establish the necessary founda-
tion for departing from the Judge's apportionment.
I would allow the appeal and restore the judgment of
Mr. Justice Brandon".

15 See also *The "Miraflores"* and the "*Abadesa*", [1966]
1 Lloyd's Rep. 97, where Lord Justice Willmer explained
his stand in the *British Aviator* (*supra*) and upheld the
apportionment of blame in that case at p. 111. See also
the majority judgment of Winn and Danckwerts L.JJ. at
pp. 111 - 113, where they expressed a different view and
interfered with the apportionment made by the trial Judge.

20 Having reviewed the authorities and having regard to
s.57(1) of our Civil Wrongs Law Cap. 148, we think we
can state that in the present case we can detect no error
in law on the part of the learned Judge, and we accept his
findings of fact stated by him in his careful judgment. This
alone would in our view, be a sufficient reason for not in-
25 terfering with his apportionment of fault, but on the facts
of this case, we, for our part, might entertain some doubt
as to whether the lorry was 2 feet over the dividing line,
and had we been trying the case at first instance, we think
we would feel fairly confident, having regard to the evi-
30 dence, that we should in all probability have arrived at the
same result. In our judgment, the overriding consideration
was the fact that the driver of the pick-up who started
overtaking the preceding vehicle without any warning at
all, when he was doing so, being an inexperienced driver,
drove too close to the lorry—in spite of the fact that he
35 himself thought that there was ample space to pass—ne-
vertheless, he collided with the lorry. Because of that col-
lision, he lost control of the pick-up, and to make things
worse, his co-driver who was an experienced driver, in
trying to help him to keep the pick-up in control, which
40 started zig-zagging across the road, he was prevented by
the defendant and inevitably the pick-up continued being
out of control and finally it crashed in front of the lorry
and overturned into the fields. It was this fact that above

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

all gave rise to the position of difficulty and danger which ultimately, as we said, resulted in the collision between the lorry and the pick-up. It is true that the learned Judge found that the lorry at the time of the accident was 2 feet over the dividing line. But at the same time when the driver saw the pick-up going zig-zag he applied brakes with a view to avoiding the accident, and because the pick-up which continued travelling out of control, and found itself in front of and too close to the lorry, the accident could not have been avoided. With this in mind, the very persuasive argument which we heard on behalf of the appellants entirely failed, in my view, to overcome this overriding consideration. Both as a matter of blameworthiness and as a matter of causation we think that the pick-up driver is far more to be blamed than the driver of the lorry.

Directing ourselves with those weighty judicial pronouncements, we are of the opinion that the learned Judge in arriving at his apportionment of fault came to a proper conclusion and, this Court ought not to disturb it. We would, therefore, dismiss both the contentions of counsel on the appeal and cross-appeal. (*Kyriacou v. Aristotelous* (1970) 1 C.L.R. 172).

The next question is whether the amount of £400 awarded to the owner of the lorry for loss of use and loss of profits is recoverable having regard to the evidence. The plaintiff in Case No. 2339/72 has been a contractor for road constructions for the last 25 years and had a number of contracts in hand. He owned three lorries to carry out his business including the one which had been involved in the accident. He alleged that because of the loss of the use of the lorry he was deprived of a profit of £5 - £8 per day and in order to repair it he spent an amount of general damages for the repairs of the said extra amount of £50 for painting the said lorry. In his statement of claim, the plaintiff, apart from claiming an amount of general damages for the repairs of the said lorry, claimed also the amount of £500 for loss of use and profits due to the immobilization of the lorry, but without putting forward figures or any other calculations to represent his loss.

On the contrary, the defendants in their turn, although

in their defence have challenged the right of the plaintiff to claim special damages, nevertheless, they had never asked for particulars—to which no doubt they were entitled—*Maritsa Gregoriou v. Emir Hussein Mehmed and Another*, 24 C.L.R. 112—and they have never called evidence to rebut the allegation of the plaintiff. Furthermore, it was added that the damages sought were too high and remote, but it is equally true to say that when the plaintiff was pressed in cross-examination to give some figures as to his income, or indeed to produce some calculations as to how he reached that figure of making the profit, he was more evasive and his answer was that he could not say how much he earned from the whole of his business. We think that in a case of this nature, we would have expected the plaintiff, once he was claiming an amount for special damages, to have tried at least to call his accountant, in whose hands his accounts were, or, to call some other evidence and not simply to state that he was earning from each lorry an amount of £5 or £8 per day.

We think it would serve a useful purpose to refer to the case of *Admiralty Commissioners v. S.S. Susquehanna* [1926] A.C. 655 where Viscount Dunedin, after referring to the cases of *Greta Holme* [1897] A.C. 596, *The Mediana* [1900] A.C. 113; and *The Marpessa* [1907] A.C. 241, concluded as follows at p. 662:-

“This is not a case where special damage has been attempted to be proved. If it could have been shown that the disabled oil tanker had, by contract, been let to some party at a stipulated rate for the period during it was disabled, or that owing to its disablement it had missed a contract, then the terms of the contract it had secured or would have secured would have served rightly as the basis of the sum to be allowed as damages”.

And in *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515, Lord Macnaghten, after stating that the division into general and special damages was more appropriate to tort than contract, said at pp. 525 - 526:-

“ ‘General damages’, as I understand the term, are such as the law will presume to be the direct natural

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

or probable consequence of the act complained of. 'Special damages', on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly".

5

Then he concludes in these terms:-

"In cases of contract, special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case".

10

The present distinction is set out also with regard to personal injury cases by Lord Goddard in *British Transport Commission v. Gourley* [1956] A.C. 185 where he said at p. 206:-

15

"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened, and I will endeavour to apply this in the first place to the special damage claimed in respect of loss of earnings".

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See also the case of *Hartley v. Sandholme*, [1974] 3 All E.R. 475 where this case was applied, also the case of

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Parry v. Cleaver, [1969] 1 All E.R. 555; and *Daish v. Wauton* [1972] 1 All E.R. 25 where this case was explained.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 In *Perestrello Ltd. v. United Paint Co. Ltd.*, [1969] 1 W.L.R. p. 570, Lord Donovan, speaking about special damages and the obligation of the plaintiff to particularise about such damage said at p. 579:-

10 “The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

15 The matter is clearly stated in *Mayne and MacGregor on Damages*, 12th ed. (1961), p. 813, para. 970, where the editors say:-

20 ‘Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial’.

25 The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung upon the defendants at the trial it requires to be pleaded so that the nature of the claim is disclosed. As Lord Dunedin said in *The Susquehanna* [1926] A.C. 655 at p. 661: ‘If the damage be general, then it must be averred that such damage has been suffered, but the
30 quantification of such damage is a jury question’.

35 What amounts to a sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiff claims ‘damages’ is not sufficient to let in evidence of a par-

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

ticular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to fair warning.

Not only was there no mention at all of loss of profits in the statement of claim in the present case, but, as has been pointed out, the case pleaded was inconsistent with such a claim. We agree with the view of the trial judge that the plaintiffs were not entitled without amendment to lead evidence of this loss".

It is said that where a car has been damaged by negligence the owner of the said car may recover the costs of repairing it. (*The Bernina* [1886] 55 L.T. 781), and the difference, if any, is between the value of the car before it was damaged and its value after repair. (*Owners of No. 7 Steam Sand Pump Dredger v. Owners of Greta Holme., The Greta Holme*, [1897] A.C. 596, H.L.). If the said car was damaged beyond repair, its value is recoverable, and this is ordinarily the market price of a similar article, the cost of replacement. (*J. & E. Hall Ltd. v. Barclay* [1937] 3 All E.R. 620).

In the case of a chattel, of course, which is of commercial value or is employed on a profitable trade, damages for the loss of use will give compensation for what, apart from uncertain, speculative or special profits, would otherwise have been earned by its use during the period when by reason of the tort that use was not available to the person entitled to it, for such is the direct loss suffered. (See *The Argentino* [1883] 13 P.D. 191 C.A. at p. 201; affirmed sub nom. *Owners of Gracie v. Owners of Argentino, The Argentino* [1889] 14 App. Cas. 519 H.L.). The plaintiff must show that the chattel was capable of profitable use, (*Carslogie S.S. Co. Ltd. v. Royal Norwegian Government* [1952] A.C. 292 H.L.), for otherwise, loss of profits does not enter in as an element of loss; (*Owners of Strathfillan v. Owners of Ikala, The Ikala*, [1929] A.C. 196, H.L. at p. 205, per Viscount Sumner. See also *B. Sunley & Co. Ltd. v. Cunard White Star, Ltd.*, [1940] 1 K.B. 740, C.A., at p. 748) and where damages are given for loss of profits the plaintiff cannot also in respect of the same period have damages for loss of use; (*Owners of Gracie v. Owners of Argentino, The Argentino* [1889]

5 Thus the damages will normally be such loss in trade
profits as are proved and where a substitute chattel has
been hired to take the place of the damaged chattel, in
order to avert or minimise the loss, the hire paid would
prima facie be the amount of the damage sustained; if no
other chattel could be found to replace the one damaged
the measure of damage is not altered but the court is de-
prived of one possible means of assessing it. (*Owners of*
10 *Strathfillan v. Owners of Ikala, The Ikala* [1929] A.C.
196, H.L. at p. 200 per Lord Hailsham L.C.). The lost
profits which are to be considered are those which would
have been earned in the ordinary course of employment
of the chattel during the period of lost use (*Re Trent and*
15 *Humber Co. Ex parte Cambrian Steam Packet Co.* [1868]
4 Ch. App. 112 at p. 117 per Lord Cairns) and in com-
puting the loss allowances will be made for expenses
saved. (See *The Gazelle* (1844) 2 Wm. Rob. 279):

20 Then, in dealing with the allegation of the plaintiff that
he had paid £1,592,000 to the person who had carried
out the repairs, the Judge reached the conclusion that the
evidence and the veracity of the plaintiff "leaves much to
be desired and that his allegation that he paid that amount
was uncorroborated, unexplained, and indeed contradict-
25 ed by the very signature of Theoklis Andreou on Mr. Lia-
sides' assessment; and that his allegation could not be ac-
cepted". This was indeed the assessment of the trial Judge
regarding the veracity of the plaintiff, and in making up
his mind which of the two reports of the experts he should
30 accept, he preferred that of Mr. Liasides, and said that
the assessment of Mr. Polycarpou might be too perfect
for an old heavily used and probably imperfect vehicle,
and added:-

35 "The defendant is bound to pay only for the restora-
tion of the vehicle in its pre-accident position and not
make it better than it was".

Having accepted the assessment of Mr. Liasides, as we
said earlier, the Judge thought that the amount of £50
allowed by the expert for unforeseen damages was too
40 low; and increased it himself to £150 because of the ex-
tensiveness of the damage.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

With the greatest respect to the learned Judge, we do agree with the counsel for the appellants that he was not entitled—once he accepted the assessment of Mr. Liasides in toto, and in the absence of any evidence before him—to increase the amount of £50 for any other unforeseen damage, and he acted contrary to the principle that damages are of a compensatory nature. 5

Then the Judge dealt with the question of what is the correct period required to carry out the repairs on the said lorry on the assumption that there were available spare parts. Having considered the evidence on this point given by both experts, he thought that a period of 40 days for carrying out the repairs, together with the previous period which was needed for the experts to conclude their assessment the reasonable period was one hundred working days. Finally, and having regard to the calculations he himself made, he reached this conclusion:- 10 15

“The loss of use, will be therefore confined to about 100 working days, at an average of £4 per day for the following reasons: The vehicle in question was on its last trip and then it would have been delivered to Messrs. Demades and Sons Ltd. in part exchange for a new vehicle, under Registration No. FT 316. The plaintiff-owner, clearly stated so and then in trying to escape from the trap in which he fell during the cross-examination, he alleged that it would have been given in part exchange for an unregistered vehicle of which he failed to give any particulars. However, the vehicle in question represents a certain capital, income producing outlay which is assessed at £4 per day. Furthermore, this figure is also allowed by Mr. Liassides, a man with experience in vehicles and vehicular transportation”. 20 25 30

We confess that we have some difficulty in understanding the conclusion reached by the learned Judge and we have been invited by counsel on behalf of the appellants to take the view that in the absence of any evidence in support of the loss of use of the vehicle in question, the conclusion of the learned Judge was wrong and that he misdirected himself in law in choosing that method, and in reaching the conclusion that income producing outlay was £4 per day. With respect, the Judge's duty was to 35 40

1977
Jan. 26

DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

determine what was the estimated loss of profit for the period of one hundred days only, and not to speculate in the absence of evidence by acceptable figures and calculations.

5 We would reiterate what we have said earlier in this judgment that it is for the plaintiffs to prove their claim for special damages, and we do not think that in the absence of any evidence to that effect the learned Judge was entitled to determine the quantum of damages and introduce the method suggested by him i.e. to take into consideration an amount of capital without taking into consideration that there was evidence that during that season the vehicle was not in demand. With this in mind we have reached the conclusion, therefore, that the Judge misdirected himself because what he ought to have done was to consider only the estimated loss of profits for the period of 100 days irrespective of whether the amount of money spent for the purchase of the lorry was (a) or (b) figure. If authority is needed we think the answer can be provided from the judgment in *Dixons (Scholar Green) Ltd. v. J. L. Cooper Ltd.*, [1970] R.T.R. 222. In that case the plaintiffs, who were hauliers, owning a fleet of articulated vehicles in constant use for transporting loads over long distances, lost the use of one of the vehicles for 11 weeks because of the defendant's negligence which was admitted in an action against them by the plaintiffs. The plaintiffs claimed only special damage, namely the estimated loss of profits for the 11 weeks, they provided particulars and called evidence, putting forward figures to represent the loss. The defendants challenged the figures, but called no evidence and contended that the plaintiffs had failed to prove the loss by acceptable figures and calculations. The trial Judge, stating that special damage had to be quantified and proved, and that it was not part of the Court's function to guess or think of a number, held that the plaintiffs have failed to establish the amount of their loss, and awarded nominal damages of £2.

40 Edmund Davies, L.J. delivered the judgment of the Court, and having observed that once liability was admitted the only issue for the Judge was what damages should be awarded to the plaintiffs by reason of the fact that for 11 weeks, from 19th November, 1965 until the 3rd February, 1966, that vehicle was in consequence out of commission, said at p. 223:-

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

“I find myself compelled to say that I think that such a result was singularly unfortunate, for it would be impossible to think that anyone could go away from the court feeling that, punctilious though this judge is in his work, he had on this occasion arrived at a just result. For this was a valuable vehicle; it had cost over £5,000. The evidence was that it and the six other vehicles forming part of the plaintiffs’ fleet were in constant demand; and there is no doubt that it was immobilised for 11 weeks. Accordingly, on those unchallenged facts the award of a mere £2 does not, on the face of it seem to be justifiable. As was said in the course of argument, even the loss of use of a private car for that period should result in a substantially greater award than the derisory sum these plaintiffs recovered”.

Then his Lordship, having observed that the problem that was confronting the Judge was how to calculate the loss of profit, and having in mind that the plaintiffs sought to do it by having regard to the trading position during the eleven weeks preceding the date of the accident and the eleven weeks beginning the 3rd February, 1966, and taking further into consideration that the income of the plaintiff company for the relevant year was said to have been in the region of £8,000, reached the conclusion that “this court must also arrive at a round sum which, when one looks at the figures as a whole, strikes one as not being immoderate—that is to say, not derisory on the one hand or extravagant on the other—and, in seeking to arrive at the happy mean, never losing sight of the fundamental fact that the plaintiffs must prove their case. But they had a just claim and, however difficult it might be to determine its exact proportions, it was the duty of the court to give recognition to it and do the best it could in the circumstances.

I have listened with interest and absorption to the submissions of counsel on both sides and I have had to come to a conclusion what I think is the fair sum to award, having regard to the size of this vehicle, the cost of the vehicle. the cost of running the vehicle, and its undoubted immobilization for the period of 11 weeks. I think the sum lies between the £396 which, upon certain hypotheses, Mr. Tucker, suggested to this court was the

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

maximum amount recoverable, and the £500 which Mr. Crowe said was the most moderate figure to which his clients were entitled. I think that the proper amount to award here would be the sum of £450. Accordingly, I would allow the appeal and substitute that sum for the £2 awarded in the lower court”.

In the *Owners of the Steamship “Gracie” (supra)*, referred to earlier in this judgment, the principle laid down was that where damages are given for loss of profits the plaintiff cannot also in respect of the same period have damages for loss of use. Speaking, therefore, in the House of Lords, Lord Herschell put the matter in these terms at p. 523:-

“I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore, not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision. I observe that no mention was made in the judgments of the learned judges in the Courts below of the claim for demurrage and the allowance of the registrar in respect of it”.

Then his Lordship goes on:

“The matter was pointedly brought before your Lordships in the arguments at the bar on behalf of the appellants, and it was urged that if the judgment

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER
v.
ANDRONICOS
NICOLAOU
AND ANOTHER

of the Court below were affirmed the respondents would get the damages twice over. I think it right, therefore, to state how this matter ought in my opinion to be dealt with.

Where no claim is made in respect of loss arising from the owner having been deprived of the earnings of a voyage which was in contemplation, and the engagement for which had been secured, it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of earnings which it must reasonably have been anticipated would ensue during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, be allowed in addition, as a separate item, demurrage in respect of the time the vessel was under repair. If he obtains as damages the loss which he has sustained owing to the loss of the employment he had secured he is put in the same position as if there had been no detention".

For the reasons we have advanced, in our opinion this is not a case where the respondents had ever attempted to prove special damages relating to loss of profits and/or of use of the vehicle in question, and we would therefore accept the contention of counsel for the appellants that in the absence of evidence as to the loss of profits, the calculations made by the learned Judge were wrong in law. Accordingly, we would allow the appeal on the issue of quantum of damages for loss of profit.

Finally, it was urged upon us by counsel for the appellants that the award of the sum of £360 in favour of respondent 2 in action No. 2342/72 was unreasonably high and invited this Court to interfere and reduce it. It seems to us that on the evidence which the learned Judge has summarized in his judgment, the plaintiff's doctor found a severe contusion, bruising and haematoma on his right thigh and right buttock. He also noticed that he was limping and had bruising on his shoulder and his movements were painful. Furthermore, he found abrasions on the right elbow but when he was x-rayed no fracture was revealed. He was kept in the clinic for a period of 5 days and after he was treated he was discharged, but due to the accident he continues to have pain over the right greater

trochanter and right shoulder and he is expected to experience some pain during weather changes. Then, the learned Judge, after observing that this would disappear in a few years time, awarded an amount of general damages in the sum of £ 360.

1977
Jan. 26

—
DEMETRIOS
EMMANUEL
AND ANOTHER

v.
ANDRONICOS
NICOLAOU
AND ANOTHER

5 Having considered the facts and the judgment in this case, we think that the judgment of the learned Judge is not out of line with some of the figures of other awards which we have in mind. In a recent case, *Kyriacos Antoniou v. Ioannis Iordanous*, (1976) 1 C.L.R. 341, we said that this Court will not interfere with the award of a Judge although they might themselves have awarded a different amount unless satisfied that the Judge in assessing the damages applied a wrong principle of law (as for instance by taking into account some irrelevant factor or leaving out some relevant one) or short of this that the amount awarded was so extremely high or low as to make it a wholly erroneous estimate of the damage. We would, therefore, dismiss this contention of counsel also.

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20 But with regard to the amounts of loss of use and the unforeseen damages, we partly allow the appeal and order that the sum of £ 500 be deducted from the original award. We also dismiss the cross-appeal, but in the circumstances, we are not prepared to make an order for costs.

25 *Appeal partly allowed.*

Cross-appeal dismissed.

No order as to costs.