1977 July 5

[L. LOIZOU, HADJIANASTASSIOU & MALACHTOS, JJ.]

NICOS SOFOCLEOUS AND ANOTHER,

Appellants-Defendants,

v.

LEONTIOS GEORGHIOU AND ANOTHER,

Respondents-Plaintiffs.

(*Civil Appeal No.* 5511).

Nuisance—Public nuisance—Obstruction of highway—Danger—Lorry parked on side of highway at night time—Leaving a space of 8 *feet, out of* 19, *for other traffic—Highway unrestricted and unilluminated but front side lights and rear tail lights of lorry on—Collision of motor vehicle with lorry—Parking of lorry created a nuisance—Dangerous obstruction that contributed to the accident.*

Negligence — Contributory negligence — Causative potency — Blameworthiness—Road accident—Apportionment of liability—Principles on which Court of Appeal interferes with apportionment made by trial Court—Collision of motor vehicle with lorry parked on side of road—Lorry leaving space of 8 *feet, out of* 19, *for other traffic—Highway unrestricted and unilluminated but front side lights and rear tail lights of lorry on—Trial Court finding both drivers equally to blame—Had driver of motor car shown a proper lookout he should have been in a position to apply brakes earlier in order to avoid the collision—His proportion of blame should have been* 75%.

Whilst the respondent-plaintiff No. 1 was driving along the main road Nicosia-Famagusta he collided with a stationary lorry which was parked on the lefthand side of the road. The accident occurred at night time and at a time when the front side lights and rear red tail lights of the lorry were on and properly functioning. The road was not illuminated and was not subject to any speed restrictions. The parked lorry left a space of 8 feet, out of the 19 feet, to be used by approaching traffic from both directions; and it was left at that position and

was not moved more to the left because it could not be mobilized as the screws of one of its wheels were cut.

The trial Court reached the conclusion that both drivers were to blame for the accident; the said respondent because he failed to have a proper lookout in order to see the red tail lights of the lorry and take avoiding action in time; and the appellant (defendant 1) lorry-driver because he had created a dangerous obstruction on the road. Liability was apportioned equally between the two drivers.

On appeal by the defendant-lorry driver counsel appearing for him contended: (a) that the trial Judge misdirected himself by finding that the lorry created a danger to other traffic on the road as its driver was unable to park it on the left berm, in order to give more room on the road to other users, in view of the fact that he could not mobilized it after it had stopped and (b) that the apportionment of liability was wrong.

Held, (1) the parking of a lorry in that position, even with tail lights on, in that unrestricted and unilluminated road, leaving a space of 8 feet, out of 19 feet, to be used by approaching traffic from both directions created a nuisance; the obstruction was dangerous and contributed to the collision. In the absence of sufficient justification or excuse by the driver of the lorry, it is clear that he was, also, liable for the accident and the finding of the trial Judge on this issue is affirmed (pp. 155-160 *post*).

(2) (a) When it is necessary for a Court to ascribe the liability for the damage in proportion to more than one person regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness (see, *inter alia, Miraflores* v. *The Abadessa* [1967] 1 All E.R. 672 at pp. 677-678).

(2) (b) An appeal Court should be slow to interfere with an apportionment arrived at by the trial Judge, unless it concludes that the trial Judge is wrong on his assessment of the facts or on the principles to be applied (see *British Fame* v. *MacGregor* [1943] 1 All E.R. 33). Having regard to the particular facts of this case we have decided to interfere with the apportionment of liability because, though the appellant failed to take adequate steps to cope with a situation that already existed (*i.e.* by proper illumination of the lorry), had the respondent shown a proper

lookout, he would have been in a position to apply brakes earlier in order to avoid the accident. The right proportion of blame should, therefore, be 75% against the respondent and 25% against the appellant (pp. 160–62 *post*).

Appeal allowed.

Cases referred to:

Fardon v. *Harcourt–Rivington* [1932] All E.R. Rep. 81 at p. 83 (H.L.);

Donogue v. *Stevenson*, [1932] A.C. 562, at p. 619, (H.L.);

Hay v. *Young*, [1943] A.C. 92, at p. 107, (H.L.);

Blythe v. *Birmingham Water Works Co.* [1856] 11 Exch. 781, at p. 784;

Glasgow Corpn. v. *Muir* [1943] A.C. 448, at p. 474, (H.L.);

Trevett v. *Lee* [1955] 1 All E.R. 406, at p. 409;

Morton v. *Wheeler* (The Times of 1st February, 1956);

Dymond v. *Pearce* [1972] 1 All E.R. 1142, at pp. 1150–1151;

Rouse v. *Squires* [1973] 2 All E.R. 903 at pp. 906, 908, 910, 912–913;

Nance v. *Columbia Electricity Co.* [1951] A.C. 601, at p. 611;

Jones v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608;

Stapley v. *Gypsum Mines Ltd.* [1953] 2 All E.R. 478, at p. 486;

Miraflores v. *The Abadessa* [1967] 1 All E.R. 672, at pp. 677–678;

Charalambides v. *Michaelides* (1973) 1 C.L.R 66;

Davies v. *Swan Motor Co. Ltd.* [1949] 1 All E.R. 62;

British Fame v. *MacGregor* [1943] 1 All E.R. 33;

Emmanuel and Another v. *Nicolaou* (1977) 1 J.S.C. 9 (to be reported in (1977) 1 C.L.R.).

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Kourris, S.D.J.) dated the 11th October, 1975, (Action No. 3171/73) whereby they were found to be 50% to blame for an accident in which a car driven by plaintiff collided with their lorry, which was parked on the side of the road.

D. P. Liveras, for the appellants.

Chr. Ioannou, for the respondents.

The facts sufficiently appear in the judgment:

L. LOIZOU, J.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU, J.: This is an appeal by the defendants against the judgment of a Judge of the District Court of Nicosia dated October 11, 1975 allowing the plaintiffs' action for damages for personal injuries and consequential loss suffered as a result of an accident in which a motor car which was being driven by the first plaintiff ran into the stationary lorry which was driven by the first defendant and had been parked on the highway by the driver.

On February 20, 1973, the plaintiff, Leontios Georghiou of Nicosia, was driving his motor car along the new main road of Nicosia–Famagusta on his way to Nicosia at about 7.00–7.30 p.m. He was driving at a speed of 35–40 m.p.h. and when he was negotiating a right hand bend, he reduced his speed to about 30 m.p.h. and kept the left hand side of the road. He continued driving with the headlights dipped because there were oncoming vehicles on the road. He saw in front of him at about a distance of 60 ft. a motor lorry which was stationary on the left side of the road—with no tails or any other lights on its rear and no reflectors. When he saw the lorry, he reduced his speed, and at the same time he depressed the pedal of the clutch and applied brakes. He swerved to the right in order to avoid the collision, but he failed to avoid the accident and his car hit on the lorry. Because of that collision, he lost control of it. He switched off the engine and lost consciousness; he found himself when he recovered in the Nicosia General Hospital.

On the contrary, Nicos Sofocleous, defendant 1, driving a lorry, the property of the Cyprus Transport Co. Ltd.,—defendants 2—said that whilst he was proceeding in the direction of Nicosia, between the 10th and 11th milestone, just outside Exo Metochi village, he heard a noise from the rear of the lorry, and when he looked through the rear view mirror, he realized that the rear right wheel was loose. He pulled to the left and stopped the lorry on the extreme left side of the road in order to examine the damage. He also added that from the moment he heard the noise up to the moment he stopped, he had covered a distance of about 15 meters. When he alighted,

he examined the rear right wheel and noticed that the screws were cut and he could not move the lorry more to the left. He left it there, and whilst he was still examining the wheel, he instructed a certain Hjitheodoulou to telephone to the police to bring red lamps and other traffic signs, in order to regulate the traffic, to avoid any danger of collision. In the meantime, he took out a white handbag, and stood about 50 ft. from the rear of the lorry and was signalling to the oncoming vehicles in order to attract their attention or warn them of the presence of the lorry on the road. Whilst there, he saw a vehicle coming from the direction of Famagusta, driven as he alleged, at a fast speed, and when he realized that the car was going to collide with the said lorry, he jumped out of the road on to the berm. He admitted that the driver of the car applied brakes but he could not avoid the collision, and its left side hit on the hook which was fixed at the right edge of the rear door of the lorry—the hook being about 3 inches long.

As a result of that collision, the motor car was driven to the right. Because the driver lost control, it crashed into the fields, made a turn, and its resulting position was that the front part was facing the direction of Famagusta. The witness added that at the time the accident occured it was dark and from the moment he stopped the lorry up to the moment of the collision, the front side lights and rear red tail lights were on and properly functioning. In cross-examination, he further explained that when he heard the noise towards the rear of the lorry, he did not drive the lorry on to the berm because at that moment he did not know the nature and extent of the damage.

According to the police who arrived at the scene, the said lorry was stationed on the left hand side of the road to the direction of Nicosia, its rear left wheel remaining on the edge of the asphalt, the right front wheel was 4 inches from the berm—the road having a width of 19 ft.—and the tail lights and front side lights of the lorry were on.

The learned trial Judge, having weighed very carefully all the evidence before him, he was impressed favourably and was satisfied that defendant 1 told the truth. He accepted his evidence—it was corroborated on all material points by the evidence of Mr. Fanis Hjitheodoulou, and in particular he

reached the conclusion that at the time of the collision the rear red lights of the lorry were on, and properly functioning until the arrival of the police to investigate the accident. Finally, having posed the question whether defendant 1 contributed to the accident, he answered it in this fashion, that defendant 1 could only be blamed that he contributed to the accident if the parking of the lorry in question created a danger to other road users.

Having addressed his mind also to a number of authorities, he reached the conclusion that in those circumstances, the lorry parked in that position created a danger for other road users, and reached the conclusion that both the plaintiff No. 1 and defendant 1 were to be blamed for the accident. The former because he had failed to have a proper lookout in order to see the red tail lights and take avoiding action in time; and the latter contributed to the accident because he had created a dangerous obstruction on the road.

It has been said in a number of cases that negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case (*Fardon* v. *Harcourt – Rivington* [1932] All E.R. Rep. 81 H.L. at p. 83 per Lord Dunedin), and the categories of negligence are never closed. In *Donogue* v. *Stevenson*, [1932] A.C. 562, H.L. at p. 619, Lord McMillan said that " Negligence is a fluid principle which has to be applied to the most diverse conditions and problems of human life". See also *Hay* v. *Young*, [1943] A.C. 92, H.L. at p. 107. Negligence may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. In *Blythe* v. *Birmingham Water Works Co.*, [1856] 11 Exch. 781 at p. 784, Alderson B., said that "negligence is the omission to do something which a reasonable man guided upon the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." It should be added that where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen (*Glasgow Corpn.* v. *Muir*, [1943] A.C. 448 H.L. at p. 474) to be likely to cause feasible injury to persons or property. The degree of care, of course, required in the

particular case depends on the accompanying circumstances, and may vary according to the amount of the risk to be encountered (See Glasgow Corpn. (*supra*) as to the magnitude of the prospective injury).

Counsel on behalf of the appellants, though he conceded that the placing of that vehicle on or such an improper use of a highway as amounts to an obstruction of traffic on it, constitutes a nuisance at common law, nevertheless, he argued that in accordance with authority, the owner and driver of the lorry were not liable for the accident; and that the learned Judge misdirected himself that the stationary lorry created a danger to other traffic on the road; and that the first appellant was able to park his lorry on the left berm in order to give more room on the road to other users, in view of the fact that he could not mobilize it after the lorry stopped.

The first question is whether in all the circumstances described by the learned Judge, this particular lorry, parked as it was, constituted a danger to the road users. The law on the question as to what constitutes a public nuisance in a highway is plain, despite the fact that in certain authorities dealing with wholly different sets of facts, there can be found phrases apt to deal with those facts which, if taken out of context, could impair the clarity of the position. We think that the relevant law is compactly stated in the judgment of Sir Raymond Evershed M. R., in *Trevett* v. *Lee*, [1955] 1 All E.R. 406, where he said at p. 409:-

> "The law as regards obstructions to highways is conveniently stated in a passage in SALMOND ON TORTS (11th Edn., p. 303): 'A nuisance to a highway consists either in obstructing it or in rendering it dangerous' and then a number of examples are given. I will not take up time reading them, but a reference to these examples seems to me to show that *prima facie*, at any rate, when one speaks of an obstruction to a highway one means something which permanently or temporarily removes the whole or part of the highway from public use altogether.' "

In *Morton* v. *Wheeler*, [1956] The Times, 1st February, Lord Denning, L.J. (as he then was) dealing with a case which was concerned with danger "arising from some sharp, fearsome looking spikes bordering the highway", said:-

" As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely, a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely."

Then, a little later, his Lordship, dealing with the question as to what constitutes danger, said:-

" But how are we to determine whether a state of affairs in or near a highway is a danger? (and answered). This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance.... but if the possibility of injury is so remote that he (the reasonable man) would dismiss it out of hand, saying ' Of course, it is possible, but not in the least probable', then it is not a danger."

In *Dymond* v. *Pearce*, [1972] 1 All E.R. 1142, Edmund Davies L.J., in dismissing the appeal, dealt with the facts (which were substantially different from those of the present case before us, and said at pp. 1150-1151:-

" But in my judgment a different approach is called for where damages are sought to be recovered in respect of personal injuries said to have been caused by nuisance arising from the inexcusable presence of vehicles on highways. If deliberately created and clearly giving rise to danger to road users, fault is implicit and liability incontestable. But if an obstruction be created, here too, in my judgment, fault is essential to liability in the sense that it must appear that a reasonable man would be bound to realise the likelihood of risk to highway users resulting from the presence of the obstructing vehicle on the road."

Then, having come to the conclusion that although it constituted an obstruction (in the facts of the case), and, therefore, a public nuisance (having been deliberately and inexcusably

left parked for several hours) "it did not present a danger to those using the highway in a manner in which they could reasonably have been expected to use it". Thus, it appears to us that in order that a plaintiff may succeed in an action for personal injuries caused by a collision, because of an obstruction constituting a public nuisance, he must establish that the obstruction constituted a danger, and that danger is inextricably linked up with that of causation.

In *Rouse* v. *Squires*, [1973] 2 All E.R. 903, the *Dymond* case was distinguished. The trial Judge dismissed the claim for damages holding that "S" was wholly to blame for the accident since the broken down lorry was adequately lighted and, if "S" had kept a proper look-out, he would have seen it some 400 yards away, thereby giving himself sufficient time to take avoiding action. On appeal, Cairns L.J. delivering the first judgment at the request of Buckley L.J., said at p. 906:-

> " *Dymond* v. *Pearce* (*supra*) was a very different case. In that case a lorry 7 1/2 feet wide was parked on a carriage-24 feet wide in a well-lighted road. A motor-cyclist who had a clear view of it for 200 yards and had 16 feet of unobstructed road way available to him but was keeping no look-out ahead because he was watching some girls on the pavement ran into the lorry and his pillion passenger was injured. Bridge J. held the motor-cyclist solely to blame, and this Court affirmed that decision. There the case against the lorry driver was founded on nuisance to the highway. This Court held that, while there was a nuisance to the highway as being an obstruction, it did not constitute a danger, and, moreover, that the lorry driver was not negligent in parking in that way ..... It is not reasonable to expect that every user of the highway will use it in a reasonable manner. It is reasonable to expect that nobody will drive into a lorry parked so as to occupy only a third of a well-lighted carriageway. It would, however, be wholly unreasonable to expect that if you so mismanage a lorry that it obstructs two lanes of the carriageway on an unlighted motorway it is not going to constitute a danger to other road users".

Later on, his Lordship said at p. 908:-

> " The learned Judge, in my view, applied the wrong test

when he found that the scene of the obstruction was adequately lighted to warn any driver coming along and keeping a proper look-our. If one takes account, as I consider one must, of the driver who, while not deliberately driving against an obstruction, nor driving recklessly without regard to possible dangers, is driving at an excessive speed and not observing or not interpreting correctly lights ahead, I find it impossible to say that Mr. Allen's lorry did not continue to be a danger. Its danger was due to its being in a position where it caused an extensive obstruction, lighted in a way which would not make it clear to approaching traffic what the nature or extent of the obstruction was: and it must be taken into account that the road was frosty, so that it would be necessary for a driver coming along the carriageway to appreciate at an earlier stage than would ordinarily be necessary that there was something ahead which required him to apply his brakes. I do not think it can be said that the negligence of which Mr. Squires was undoubtedly guilty was of such a character or degree as to take it out of the conduct which another driver ought to expect may occur on the highway."

Finally, he said at p. 910:-

" If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper look-out, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction, collides with it or some other vehicle or some other person. Accordingly, I would hold in this case that Mr. Allen's negligence did contribute to the death of Mr. Rouse."

Buckley, L.J., delivering a separate judgment, said at pp. 912-913:-

" Anyone who by a negligent act creates a danger on a highway to other users of the highway can be liable to another user if damage results from the danger so caused. The question whether there is a danger is to be determined

by the ordinary test of foreseeability. But for that purpose, when considering how other road users can reasonably be expected to use the road, you are not entitled to assume that they will all exercise the proper degree of care. For instance, one should not proceed on the assumption that every driver will be able to stop within the limit of his own vision, because common experience shows that people do not always drive in that way. But when there is ample visibility and ample opportunity for the driver of an oncoming vehicle to see and appreciate the nature and extent of an obstruction and to take evasive action, then the obstruction does not constitute a danger, and in such a case there is a break in the chain of causation between the prior negligent act which caused the obstruction and the immediate consequences of the latter negligent act of a driver on the highway who causes an accident. In such a case there is what Lord Birkenhead L.C. in The Volute ([1921] All E.R. Rep. 193 at 201) described as a 'clear line'.

I ask myself, therefore, whether in the circumstances of the present case there was a reasonable likelihood that a driver using the north-bound carriageway at the time of this accident with which we are concerned would fail to appreciate the dangerous situation which resulted from Mr. Allen's negligence, or its extent, in time to avoid an accident. In considering that question, I think one must approach it, as Lord Birkenhead L.C. said in The Volute (*supra*) 'somewhat broadly and upon common-sense principles as a jury would probably deal with it', and one must bear in mind that not all users of the highway will be exercising that degree of care and circumspection which constitutes a proper look-out.

It is certain that Mr. Squires did not appreciate the dangerous situation, or its extent, in time. He did not appreciate, in the first instance, that the vehicles were in fact stationary; he thought for some time that they were moving. The learned Judge considered that he was not justified in having so thought; but he did in fact think so. And when he did appreciate that Mr. Franklin's lorry was stationary and pulled out into the middle lane, he still apparently did not appreciate that that lane also was

obstructed. It was only when he got into the middle lane that, because he realised that that lane was obstructed, he put on his brakes even harder than earlier he had done, and that caused him to skid, which caused the accident which resulted in the death of Mr. Rouse.

Taking these circumstances into consideration, it seems to me that the right inference from the facts is that the circumstances were not such as to be reasonably likely to bring to the notice of other users of the highway the existence and the extent of the hazard which was presented by Mr. Allen's lorry being across two lanes of the highway in sufficient time to avoid an accident. In those circumstances, this seems to me to be a case in which there is no break in the chain of causation between Mr. Allen's negligence and the accident: there is no 'clear line', to use the expression of Lord Birkenhead L.C. Accordingly, I have reached the conclusion that Mr. Allen's negligence did contribute to the accident which resulted in the death of Mr. Rouse."

Turning now to the facts of this case, so far as negligence is concerned, it is sufficient to say that the finding of the learned trial Judge against appellant No. 1 for contributing to the accident, was right. To park a lorry in that position, even with tail lights on, in that unrestricted unilluminated road, leaving a space of 8 feet out of 19 feet, to be used by approaching traffic from both directions, we are of the view that the lorry created a nuisance, the obstruction was dangerous, and contributed to the collision. In the absence of sufficient justification or excuse by the driver of the lorry, it is clear, that he was also liable for the accident and we would, therefore, affirm the judgment of the trial Judge on this issue.

With regard to the question of contributory negligence raised in this appeal, the trial Judge, as we said earlier, found both drivers equally to blame for the accident. It has been said in a number of cases that where the defendant is negligent, and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party to the party

sued, and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take the reasonable care of himself and contributed by his want of care to his own injury: See *Nance* v. *Columbia Electricity Co.*, [1951] A.C. 601 P.C. at p. 611. Furthermore, it has been said that the principle involved is that where a man is part author of his own wrong, he cannot call on the other party to compensate him in full. See *Jones* v. *Livox Quarries Ltd.*, [1952] 2 Q.B. 608.

Regarding the complaint of counsel that the apportionment of liability was wrong, we think we ought to state that the basis of assessment as to apportionment is that the proper apportionment is determined by the facts of each case. (*Stapley* v. *Gypsum Mines Ltd.*, [1953] 2 All E.R. 478 at p. 486 per Lord Reid). See also *Charalambides* v. *Michaelides*, (1973) 1 C.L.R. 66. When, therefore, it is necessary for a Court to ascribe the liability for the damage on the evidence before it, in proportion to more than one person, it is well-established that regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness.

In the *Miraflores* v. *The Abadessa* case, [1967] 1 All E.R. 672, Lord Pearce said at pp. 677-678: "..... but the investigation is concerned with 'fault' which includes blameworthiness as well as causation; and no true apportionment can be reached unless both those factors are borne in mind". See also *Davies* v. *Swan Motor Co. Ltd.*, [1949] 1 All E.R. 62, where it is shown that the true elements of causative potency and blameworthiness, being the relative factors regarding the apportionment of liability, were first adverted to by Denning, L.J., (as he then was).

Having considered the contentions of both counsel, and recognizing that the House of Lords decided in the shipping case of the *MacGregor*, [1943] 1 All E.R. 33, that an Appeal Court should be slow to interfere with an apportionment arrived at by the trial Judge unless the Appeal Court concludes that he is wrong on his assessment of the facts or on the principle to be applied, we have decided, having regard to the particular facts of this case, to interfere with the apportionment of the trial Court. We are prepared to say that the appellant was equally to blame for the reasons we have given earlier, and

though the appellant 1 failed to take adequate steps to cope with a situation that already existed, *viz.*, proper illumination of the lorry in question, nevertheless, in our view had the respondent shown a proper lookout, he would have been in a position to apply brakes earlier in order to avoid the accident. In our view, the right proportion of blame which should be put on the shoulders of both is 75% against the respondent and 25% against the appellant. (See *Emmanuel and Another* v. *Nicolaou*, (1977)* 1 J.S.C. 9.).

We would, therefore, allow the appeal and give judgment for the amounts calculated having regard to the proportion of blame cast on each party. Costs of the appeal allowed on the appropriate scale in favour of the appellant.

Appeal allowed with costs.

* To be reported in (1977) 1 C.L.R.