1977 February 18

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

MARIA DIETI

Appellant-Defendant,

v.

CLEANTHIS LOIZIDES,

Respondent-Plaintiff.

(*Civil Appeal No.* 5504).

Damages — Personal injuries — Special damages — C£734 medical expenses—For treatment at private clinic after three days stay in hospital where medical treatment was free—Whether reasonably incurred.

Negligence—Contributory negligence—Road accident—Apportionment of liability—Principles on which Court of Appeal interferes—Collision between vehicles moving in opposite directions—And whilst appellant's vehicle was in the process of turning to the right—Ample visibility enabling respondent to perceive early enough the possible danger and take avoiding action—Usable berm six feet wide on which he could have driven his vehicle for the purpose—Guilty of contributory negligence—Trial Court's apportionment that appellant solely to blame clearly erroneous—Set aside—Respondent guilty of contributory negligence to the extent of 25%.

The respondent-plaintiff was injured in a collision between a motor-cycle driven by him and a car driven by the appellant. The version of the respondent was that whilst he was proceeding on the road he noticed an on-coming car signalling that it was to turn to the right. When he noticed the car, he was about 20-30 paces away from the scene of the accident and at a distance of about 40 paces away from it. The respondent continued his way after reducing speed and when he got very near the car and noticed that the car did not stop but continued travelling and turning to the right, he pulled to the left to avoid a collision. His front wheel got on the berm but the rear wheel

was still on the asphalt when the car ran into him with its front right headlight.

According to the police constable, who investigated the accident, the asphalted part of the road at the scene of the accident was 21 feet wide and there were usable berms, 6 feet wide each, on either side of the asphalt. The point of impact was 6 feet away from the edge of the asphalt as one proceeds towards the direction the respondent was proceeding.

As a result of the accident the respondent's leg was fractured and he was removed to the Nicosia General Hospital. Three days later he became very worried, about the condition of his fractured leg, to the extent that he started fearing that it might become necessary to amputate it and he decided to leave the hospital and seek treatment at the private clinic of Dr. Nicos Ioannou, a specialist orthopaedic surgeon.

The trial Court found that the appellant was solely to blame for the collision because he did not stop to allow the respondent to pass safely, and awarded to the latter the amount of C£3,474 special and general damages.

Upon appeal counsel for the appellant contested (a) an amount of C£734, which constituted expenses incurred by the respondent in relation to his treatment at the said private clinic; and (b) the finding of the trial Court that she was solely to blame for the collision without the respondent being at all guilty of contributory negligence.

Regarding contention (a) above it has been argued that, in the particular circumstances of this case, it was unreasonable for the respondent to leave the Nicosia General Hospital, where he was initially taken and treated, and where he could have received as good treatment as at the clinic of Dr. Ioannou; and that he was moved from the hospital without having been medically advised that such a course was necessary.

Held, (1) the fact that respondent became very worried about the condition of his fractured leg, to the extent that he started fearing that it might become necessary to amputate it, is quite sufficient in order to satisfy us that it was not unreasonable on his part to decide to leave the hospital and to seek treatment at a private clinic; and we do not think that it was necessary

for him to obtain medical advice prior to proceeding to leave the hospital.

(2) On the basis of the testimony of the respondent and of the police constable, which was accepted by the trial Court, the respondent was guilty of contributory negligence, because he failed to take avoiding action in time, though there was a usable berm six feet wide on which he could have driven his motor-cycle for this purpose; and there was ample visibility so as to enable the respondent, had he been sufficiently careful, to perceive early enough the possible danger and to take avoiding action, or even to stop completely.

(3) Though apportionment of liability is primarily the task of a trial Court, and this Court should not interfere except in an exceptional case when there exists an error in principle or the apportionment is clearly erroneous, in this case the apportionment made by the trial Court will be set aside, as it is clearly erroneous; we find the respondent guilty of contributory negligence to the extent of 25%.

Appeal partly allowed.

Cases referred to:

Winkworth v. *Hubbard* [1960] 1 Lloyd's Rep. 150;

Charalambous v. *Pillakouris* (1976) 5 J.S.C. 767 (to be reported in (1976) 1 C.L.R.);

Stavrou v. *Papadopoulos* (1969) 1 C.L.R. 172 at p. 179;

Constantinou v. *Salachouris* (1969) 1 C.L.R. 416 at p. 421;

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

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Evangelides, Ag. D.J.) dated the 8th September, 1975, (Action No. 3332/72) whereby she was ordered to pay to the plaintiff the sum of C£3,474 special and general damages after she was found guilty of negligent driving which led to a collision between a motor-cycle driven by the plaintiff and a car driven by the defendant.

L. Papaphilippou, for the appellant.

E. Markidou (*Mrs.*), for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellant, who was the defendant before the trial Court, was ordered to pay to the respondent, who was the plaintiff, C£3,474, special and general damages, after she was found guilty of negligent driving which led to a collision, on January 5, 1971, at about 7.45 p.m., in Digenis Akritas avenue in Nicosia, between a motor-cycle driven by the respondent and a car driven by the appellant.

In this appeal the appellant contests, first, an amount of C£734, which constitutes expenses incurred by the respondent in relation to treatment at a private clinic for the injuries which he suffered as a result of the collision; and, secondly, the appellant complains against the finding of the trial Court that she was solely to blame for the collision without the respondent being at all guilty of contributory negligence.

We shall deal, first, with the issue of the said amount of C£734; the private clinic in question is that of Dr. N. Ioannou, in Nicosia, who is a specialist orthopaedic surgeon; in this amount are included the fees of another doctor, Dr. C. Kassianides, who treated the respondent for bronchopneumonia while he was in the clinic.

The injuries of the respondent, and the treatment which he has had in relation thereto, are described in the judgment of the trial Court as follows:-

> "As a result of the accident the plaintiff was injured and was removed to the Nicosia General Hospital where he stayed for three days. He was on the 8th January, 1972, removed from the Nicosia General Hospital to the private clinic of Dr. Nicos Ioannou, a specialist orthopaedic surgeon. On admission to the clinic the doctor found that the plaintiff had sustained the following injuries:-
>
> (a) A grossly displaced fracture of the right tibia and fibula at the junction of the middle to the distal third;
>
> (b) Necrosis of the skin at the site of the underlying protruding bone fragment; and,
>
> (c) Concussion.
>
> We have not been told what treatment the plaintiff received at the Nicosia General Hospital but Dr. Ioannou

said that he treated the fracture by remanipulation under anaesthesia, placed the bones in a better position and applied plaster from the middle of the thigh to the base of the toes. According to Dr. Ioannou, the plaintiff on 22.1.72 developed bronchopneumonia and was treated in consultation with Dr. C. Kassianides, a specialist physician. The bronchopneumonia resolved completely in three weeks' time.

Dr. Ioannou treated the skin necrosis over the fracture site by free skin graft after adequate preparation of the wound. The plaintiff was discharged from the clinic on the 3rd March, 1972. He was followed up until he was re-admitted on the 8th May, 1972, for the removal of the plaster and for physiotherapy. The doctor said that the rehabilitation of the plaintiff was slow due to the protracted immobilization of the right lower limb in plaster and of the nature of the injury that he suffered, *i.e.*, the compound fracture. Swelling and stiffness of the joints above and below the fracture were persisting for a protracted time. The plaintiff was initially allowed to walk with two crutches and later with one stick for external support. He kept attending the clinic of the doctor at regular intervals during the last years and during this period the plaintiff was complaining that he was feeling dizzy and had headaches. For these complaints the doctor advised him to see a specialist psychiatrist."

The appellant contended before the trial Court that the amount of C£734 should not be awarded to the respondent, as part of the special damages payable to him, because the respondent is a civil servant entitled to free medical treatment at the Nicosia General Hospital; the trial Court, however, dismissed this contention of the appellant as not being well-founded.

Before us the matter was argued not on the basis of a general principle that in no event a civil servant is entitled to seek, in a situation such as the present one, private medical treatment, but on the ground that, in the particular circumstances of this case, it was unreasonable for the respondent to leave the Nicosia General Hospital, where he was initially taken and treated, and where, according to counsel for the appellant, he could

have received as good treatment as at the clinic of Dr. Ioannou; it was stressed, in this connection, that the respondent and his family had, on other occasions in the past, taken advantage of the facilities for free medical treatment at the Nicosia General Hospital; and that, on the present occasion, the respondent was moved from the hospital to a private clinic without having been medically advised that such a course was necessary.

In McGregor on Damages, 13th ed., p. 761, para. 1128, the following general principle is stated:-

> "The plaintiff is entitled to damages for the medical expenses reasonably incurred by him as a result of the injury: no authority is needed to support this statement, for cases are legion which include such outlays in the damages awarded."

In Ogus on The Law of Damages (1973), p. 174, the following relevant passage is to be found:-

> "It is corollary of the doctrine of mitigation that the plaintiff in incurring expenses for treatment and recovery should pay no more than was reasonable in the circumstances. This requirement has been impliedly recognized by the legislature.* It is, of course, difficult to generalise on the standard of reasonableness applied, but the present practice of the English courts would seem to indicate that the test is by no means strict."

In *Winkworth* v. *Hubbard*, [1960] 1 Lloyd's Rep. 150, the question of whether medical expenses for the treatment of injuries caused in an accident were reasonably incurred was extensively dealt with; the plaintiff in that case was a Canadian who was injured in France by the propeller of the defendant's motor boat when he fell overboard from it; his injuries were very severe; it was found that it was reasonable for him, as he was going back to Canada, to seek treatment by a specialist in New York, although this course increased considerably the medical expenses over and above what they would have been had the plaintiff been treated till the end in France, or had he gone over to England on his way to Canada; in dealing with this matter Streatfeild J. said (at p. 157):-

* Law Reform (Personal Injuries) Act 1948, s. 2 (4).

" It is argued by the defendant, not unnaturally, that it was not reasonable for an injured plaintiff to go to the length of incurring the very great expense of medical and surgical attention in New York when it could be had, so it is said, much more cheaply in France or in this country. In this country, it is said, one can get these things for next to nothing or nothing at all under the National Health Scheme. But, as Mr. Faulks points out, we do that at the expense of charging our taxpayers about twice as much as they do in America, among other things. At all events, it is said that as good medical and surgical attention and treatment could have been obtained in London, and, after all, this young man was educated in England, or, so it was said, it could have been done in Paris. Something was said that that would not have been so satisfactory owing to the language difficulty, but I do not forget that the plaintiff had perfected his knowledge of the French language in Switzerland, and his mother lived in Paris and his uncle as well. So it is quite true that probably—I have no evidence one way or the other—he could have obtained at least as good—I must not say at least as good—but as good surgical and medical attention in Paris and in London. I hope that the American medical profession will not resent my remarks, but we in this country do pride ourselves on having surgeons who are, if not second to none, at least equal to any. So that is the position with regard to that.

However, I have come to the conclusion that it is a factor which I am bound to take into account, that, when a person is grievously injured and requires particular surgical attention, it is half the battle if he is dealt with by surgeons in whom he has confidence. If one goes to an unknown surgeon in a country which is not one's own, maybe the patient somehow fails to give, quite unwittingly, that co-operation which is so very important in surgery. I cannot think that it was unreasonable for a young man, through the agency of his uncle it is true, who lives in Canada and who, in any event, was going back to Canada after his holiday in France and Italy, to say to himself 'I am going to Canada anyway, and I am going via New York where I have an old family friend and excellent

expert in the person of Dr. Slaughter who can look after me and put me in touch with the very best surgical assistance'. Therefore, expensive though it undoubtedly is (so expensive that it almost frightens one), I cannot think that it is unreasonable for a Canadian, injured in France, and who is going back to his own country, to say 'I prefer to get to the other side of the Atlantic where I am bound anyway to get my major treatment'. So that was decided."

In the present instance it seems that the respondent became, three days after he had been taken to the Nicosia General Hospital, very worried, for some reason, about the condition of his fractured leg, to the extent that he started fearing that it might become necessary to amputate it. Though the evidence on this point is not very cogent, it is, nevertheless, quite sufficient in order to satisfy us that it was not unreasonable on his part to decide to leave the hospital and to seek treatment at a private clinic; and we do not think that it was necessary for him to obtain medical advice prior to proceeding to leave the hospital. It suffices, in so far as the reasonableness of his conduct in this respect is concerned, that he was genuinely and intensely feeling anxious about the fate of his leg. In the hospital, due to overcrowding, his bed was in a corridor and we are quite sure that this factor contributed towards making him feel pessimistic and despondent, with the result that he decided to seek treatment in a private clinic.

We see, therefore, no valid reason for disallowing the amount of expenses which the respondent has incurred because of his treatment at Dr. Ioannou's clinic.

Regarding the second issue, namely that of the liability for the collision, the trial Court stated the following in its judgment, having rejected, as unreasonable, the evidence of the appellant and having found as truthful the evidence of the respondent and of his witnesses:-

" ..... we have come to the conclusion that the collision occurred because the defendant did not stop to allow the plaintiff to pass safely. We further find that when the collision took place, the motor-car was in motion and that this is the reason why the collision occurred.

Considering now all the evidence before us, we find that there is no evidence which can lead us to the conclusion that the plaintiff contributed in any way to the accident."

The trial Court has summarized as follows in its judgment the version of the respondent as regards how the accident occurred:-

"The version of the plaintiff is that he was proceeding along Dighenis Akritas Avenue from the direction of Larnaca Road Police Station towards Ayios Antonios market. As it was dark, he had his lights on. Whilst he was proceeding, he noticed an on-coming car that had its right trafficator on, signalling that it was to turn to the right. When he noticed the car, he was about 20-30 paces away from the scene of the accident and at a distance of about 40 paces away from it. The plaintiff continued his way after reducing speed and when he got very near the car and noticed that the car did not stop but continued travelling and turning to the right, he pulled to the left to avoid a collision. His front wheel got on the berm but the rear wheel was still on the asphalt when the car ran into him and hit him with its front right headlight. The plaintiff explained that he did not stop to avoid the collision because had he stopped, the collision would have been a head-on one. That is the reason, he said, why he decided to pull to the berm."

It is, useful, too, to quote the part of the judgment of the trial Court which relates to the evidence of the police constable who investigated the accident:-

"Police Constable Andreas Marinos (P.W.1), who investigated this accident, prepared a sketch of the scene and took measurements. This sketch was produced and is *exhibit* No. 1 before us. According to this witness, when he went to the scene, the motor-car involved in the accident was not there and that is the reason why he did not mark its position on *exhibit* No. 1. This witness said that point 'X', which is marked on *exhibit* No. 1, is the point of impact as it was shown to him by the defendant. This point was 6 ft. away from the left edge of the asphalt as one proceeds towards Ayios Antonios market. The

asphalted part of the road, at the scene, is 21 ft. wide and there are usuable berms, 6 ft. wide each, on either side of the asphalt. The motor-cycle, the witness said, was damaged on the right side, *i.e.*, the right foot-rest and the motor-car was damaged on the corner of the right front mudguard. The visibility from the point of impact, according to this witness, is clear for a great distance towards both directions. At a distance of about 3 ft. from point 'X', *i.e.*, the point where, according to the defendant, the impact took place, the witness said, he noticed pieces of broken glass spread over a circle. These pieces were spread on the berm and on the asphalt."

In view of the above clear testimony of the respondent and of the police constable, which was accepted by the trial Court, we are not faced in the present case, as for example in *Charalambous* v. *Pillakouris*, (1976) 5 J.S.C. 767*, with the problem of having to decide how to try to deduce the exact manner in which the two vehicles collided; and on the basis of the said testimony we are of the opinion that the respondent was, indeed, guilty of contributory negligence, because he failed to take avoiding action in time, though there was a usable berm six feet wide on which he could have driven his motor-cycle for this purpose; and there was ample visibility so as to enable the respondent, had he been sufficiently careful, to perceive early enough the possible danger and to take avoiding action, or even to stop completely.

We are well aware that the apportionment of liability in a case such as the present one is primarily the task of a trial Court, and this Court should not interfere except in an exceptional case when there exists an error in principle or the apportionment is clearly erroneous (see, for example, *Stavrou* v. *Papadopoulos*, (1969) 1 C.L.R. 172, 179, *Constantinou* v. *Salachouris*, (1969) 1 C.L.R. 416, 421 and *Emmanuel and Another* v. *Nicolaou* (1977) 1 J.S.C. 9**).

We do feel certain, however, that in the present case we should set aside the apportionment made by the trial Court, as in our opinion it is clearly erroneous; we find the respondent

* To be reported in (1976) 1 C.L.R.

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

guilty of contributory negligence to the extent of 25%, with the result that the amount of damages awarded to him should be reduced accordingly, namely from C£3,474 to the round figure of C£2,606.

Regarding the costs of this appeal, as the appellant has been successful on only one of the two issues raised, we have decided to make no order as to its costs.

Appeal partly allowed.
No order as to costs.