1979 March 20

[STAVRINIDES, HADJIANASTASSIOU, MALACHTOS, JJ.]

SYLVANA KARIKATOU,
Appellant-Third Party,

v.

VASILIKI ANTONIOU SOTERIOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 5372).

VASILIKI ANTONIOU SOTERIOU,
Appellant-Plaintiff,

v.

CHRISTAKIS ANDREOU APSEROS,
Respondent-Defendant.

(*Civil Appeal No.* 5373).

Negligence—Contributory negligence—Road accident—Collision between two vehicles at road junction—Main road—Side road—Failure to stop at a side road controlled by a halt sign—Accident would have happened in any event even if major road driver was concentrating on side road—Finding of trial Judge that side road driver solely to blame for the accident sustained—Main road driver not expected to take extraordinary precautions

Whilst the third party was driving her car along a side road, controlled by a halt sign and having as a passenger the plaintiff she collided with a car driven on the main road by the defendant.

The trial Judge found that the 3rd party entered the main road without stopping at a speed which could not possibly be described as creeping or inching forward and that this alone was sufficiently strong evidence of negligence on her part. He further found that the accident would have happened in any event, even if the defendant was concentrating on the side street

and that the "violence of the impact, the damage to the car of the 3rd party, the place where the collision took place and the part of the defendant's car that was damaged, all indicate that the 3rd party came out of the side street without any warning and at such a speed that it was humanly impossible for the defendant to have avoided the accident"; and after holding that the accident was solely due to the negligence of the third party, he gave judgment for the plaintiff, against the third party, (after directing that the third party be added as a defendant), dismissed the action against the defendant and, also, dismissed the claim of the third party against the defendant.

The plaintiff and the third party* appealed.

On the question whether the defendant took sufficient precautions to avoid the accident and whether those precautions were sufficient in the circumstances:

Held, that negligence is the failure to take reasonable care in the particular circumstances and in each case the question is also whether a person has been guilty of contributory negligence; that though it is true that the defendant knew that drivers occasionally failed to stop at the junction in entering the main road the trial Court already found that even if the defendant was concentrating on the side street, the accident would have happened in any event, once the third party came out of the side street without any warning at such a speed; that having regard to the facts and circumstances of this case, the respondent was not expected to take extraordinary precautions; that, therefore, this Court supports the finding of the trial Judge that the defendant was not guilty of contributory negligence; and that, accordingly, the appeal of the plaintiff must be dismissed.

Appeal dismissed.

Cases referred to:

Glasgow Corporation v. *Muir* [1943] A.C. 448 at p. 456 (H.L.);

Carmarthenshire County Council v. *Lewis* [1955] A.C. 549 (H.L.);

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

* The appeal of the third party was dismissed because she failed to appear when the appeal was called on for hearing.

Mersey Docks Trustees v. *Gibbs* [1866] L.R. 1 H.L. 93 at pp. 121, 122;

Crookall v. *Vickers-Armstrong Limited* [1955] 2 All E.R. 12 at p. 16;

Grant v. *Sun Shipping Co. Ltd. and Others* [1948] 2 All E.R. (H.L.) 238 at p. 242;

Panayiotou v. *Mavros* (1970) 1 C.L.R. 215 at p. 219;

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

Davies v. *Swan Motor Company Ltd.* [1949] 1 All E.R. 620;

Jones v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608 at p. 615;

Charalambides v. *Michaelides* (1973) 1 C.L.R. 66 at p. 73;

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

Nance v. *British Columbia Electric Railways Company Ltd.*, [1951] A.C. 601 at p. 611.

Appeals.

Appeals by the third party and the plaintiff against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C.) dated the 23rd November, 1974 (Action No. 713/71) whereby their claim against the defendant for damages for personal injuries suffered in a traffic accident was dismissed, and the third party, who has been made defendant, was ordered to pay to plaintiff the sum of £2,000.– as damages.

No appearance for the appellant in appeal No. 5372.

St. Charalambous, for the respondent in appeal No. 5372.

St. Charalambous, for the appellant in appeal No. 5373.

G. I. Pelaghias, for the respondent in appeal No. 5373.

Cur. adv. vult.

STAVRINIDES J.: The judgment of the Court will be delivered by Hadjianastassiou J.

HADJIANASTASSIOU J.: The main question raised in this appeal is whether the trial Judge wrongly found that the defendant was not guilty of contributory negligence once he knew that drivers failed to stop at the junction of Klimentos and Kleomenous Streets.

According to Sylvana Karikatou, on November 16, 1970, she

was driving a motor car under Registration No. ZEC 74 with the lights on, at about 6.30 p.m., having as a passenger Vasiliki Soteriou, the plaintiff in this action, sitting next to her. Just before the accident, the driver stopped, and before entering the junction which was illuminated, she stopped once again at the halt. She looked to both directions—having a clear view only of the main street to her left, she proceeded forward by about 5–6 feet in order to have a clear view to her right; she saw a car coming from her right with its lights on, and she stopped. But the other car, driven by the defendant, under Registration No. DD 10, along Klimentos Street coming from Evghenias and Antoniou Theodotou Streets at a high speed, hit the front right corner of her car. The car, after the collision, swung about the defendant's car proceeded and hit the railings of a house on its right side. Because the car of this witness was swinging around, it caused damage to the side of the other car. The defendant, this witness claimed, was going at a high speed just before the accident. He sounded the horn, but he did not apply brakes and did not flash the headlights which were on.

There was further evidence in support of the statement of this witness by the plaintiff, who said that just before the accident took place between the two vehicles, the driver in whose car she was travelling, stopped at the halt sign. Their speed before reaching the junction was very low, because the driver had negotiated another junction earlier. She stopped, and when she started moving at a very low speed, she had reached the main street by 5–6 feet inside the road. She stopped again in order to see whether the road was clear because the visibility to her right was obstructed by a house which had a rather high hedge, and the visibility was restricted. She saw a car coming at a high speed from their right but it was quite some distance away. She saw a flash and after that there was a collision. Their car at the time of the collision was stationary, she added. The other driver did nothing and at the time of the collision, because she was injured and lost her consciousness, was not in a position to add anything more.

In cross-examination, when it was put to her that in her statement to the police she said that she saw nothing, her reply was that what she said was that she did not know anything

after the accident, but she added, she stated to the police what happened before the accident.

Then the plaintiff was questioned in these terms:–

"*Q.* Did you discuss your evidence with the driver of the car or with your advocate or are you speaking from memory?

A. I have discussed it with my advocate but I remember what happened.

Q. What were your relations with Sylvana in those days?

A. She was a colleague of mine and a friend.

Q. Did you see the lights of the oncoming car?

A. I saw a flash and after that the collision occurred.

Q. I put it to you that you did not stop at the halt, that you entered the main road, and you hit with the front of your car the other car, that happened to be passing by, at the side.

A. We stopped at the halt."

The defendant, Christakis A. Apseros, tried to throw the whole blame regarding the accident on the driver of the car in which the plaintiff was travelling, and alleged in his statement of defence that the said accident was due to the exclusive negligence of Sylvana Karikatou, who was joined as a third party, because the latter failed to stop at the halt sign on Kleomenous Street, and she entered into the cross-road colliding with the left side of his car. It was further pleaded that at the time of the collision, the third party was driving with the lights off and at a high speed having regard to the circumstances at the time.

In support of his allegation, the defendant said that his father was sitting next to him and his speed was about 20 m.p.h.; it was dark and there were no other cars coming from the opposite direction, he had his headlights on, coming from Evghenias and Antoniou Theodotou Streets. When he reached the junction, a car came from the side street on his left and hit with its front the left side of his car. The headlights of that car, he added, were not on, and only the side lights were on. He did not see at all that car before he entered the junction

and he did not hear the sound of the horn. Furthermore, the witness said that he did not see any car coming out of Kleomenous Street, because as he was going, he could not see into that street. The corner formed by Kleomenous Street and Klimentos Street on his right was planted with high bushes. One must reach very closely the junction to see if there are any cars in Kleomenous Street. After the collision, his father fell on him and he lost control of the car which continued on its way and hit a nearby house. Then this witness was cross-examined by counsel in these terms:-

"*Q.* Can you give us an idea about the distance?

A. I am not bound to look into this side street; I must approach it by about 20 feet approximately. I was careful because I knew that cars occasionally failed to stop at the junction on entering Klementos Street.

Q. Did you reduce your speed on approaching this junction lest there was another car coming out of Kleomenous street?

A. My speed was already low. It was night time and if there was a car, I would have seen its lights.

Q. Is the junction illuminated?

A. Yes.

Q. How is the street lightened?

A. With ordinary electric bulbs. If the other car had its head-lights even in tipped position, I would have noticed it because there would have been an illuminated patch on the road.

Q. When did you first see the car of the 3rd party coming out of the side street?

A. After the accident. I did not hear the application of brakes. I did not apply myself the brakes because as soon as I entered the junction I was hit by the other car on the left side.

Q. Can you tell us if the other car was travelling at high or low speed?

A. Definitely it was travelling at high speed."

Finally, the witness in explaining why he was going at a low speed, said that it was because on previous occasions he noticed cars failing to stop at the junction of those two streets.

The learned trial Judge, having carefully considered the two different and conflicting versions as to how the accident occurred, rejected the version of the plaintiff and that of the third party that they stopped twice before entering the intersection and that their car was stationary at the time of the collision. On the contrary, the learned Judge added:-

> " The version of the defendant is definitely more probable and natural, corroborated greatly by the nature of damage found on the car of the 3rd party. Regarding his allegation about his speed, I entertain grave doubts as to its correctness. His speed could not have been 20 m.p.h. as he alleged, as this is a rather low speed and incompatible with the distance covered after the collision and the impetus with which it collided with the railings of a nearby house. Although no definite findings can be made about the exact speed, yet it can be said without any reservation that it was higher than 20 m.p.h.
>
> In conclusion, I find that the 3rd party entered the main street (Klementos) without stopping, at a speed which cannot possibly be described as creeping or inching forward. This alone is sufficiently strong evidence of negligence on her part".

Then, having found that the third party was guilty of negligence in entering the main street without stopping, the learned Judge considered the question whether the defendant contributed in any way to the accident and said:-

> " The defendant alleged that he did not see, at any time prior to the collision, the car of the 3rd party and this may be of some importance in determining whether he is guilty of contributory negligence. In my opinion, this alone has nothing to do with the accident which would have happened in any event, even if the defendant was concentrating on the side street. The violence of the impact, the damage to the car of the 3rd party, the place where the collision took place and the part of the defendant's car that was damaged,

all indicate that the 3rd party came out of the side street without any warning and at such a speed that it was humanly impossible for the defendant to have avoided the accident. Moreover, his speed, even if higher than normal, cannot be anything but a sine qua non in the circumstances the accident happened.

For all the above reasons, I find that the accident was solely due to the negligence of the 3rd party".

Finally, with that finding in mind, the learned Judge gave Judgment against the third party for the sum of £2,000.—with costs and dismissed the action against the defendant, and dismissed also the claim of the third party against the defendant. Before doing so the Judge directed that the third party be made defendant.

On appeal, counsel for the appellant–plaintiff argued at length (1) that the decision of the Court that the defendant was not guilty of negligence and/or of contributory negligence is wrong and is contrary to the evidence adduced; (2) that the findings of the trial Court that the third party was wholly to blame for the accident are wrong in law and are contrary to the facts and to the evidence adduced and/or they are not supported by the evidence as a whole; (3) the Court wrongly came to the conclusion that it was humanly impossible for the defendant to avoid the collision; and that the said Court wrongly failed to take seriously into consideration that the defendant could and/or was bound to notice the presence on the road of the vehicle of the third party having regard to the place, the lights and the time the accident took place.

With that in mind, counsel complained, the Court failed to take into consideration that the defendant placed himself in such a position that he could not see earlier or at all the vehicle of the third party and failed to foresee reasonably the traffic or the dangers involved atthesaid cross roads.

Before dealing with the submissions of counsel, we consider it pertinent to state once again that negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand: (See *Glasgow Corporation*

v. *Muir*, [1943] A.C. 448, H.L. at p. 456 per Lord McMillan; and *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549 H.L.). It is equally important to add that 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 that the categories of negligence are never closed. It 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. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of idiosyncrasies of the particular person whose conduct is in question. Some persons are unduly timorous and imagine every path to beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from overconfidence. (*Glasgow Corporation* v. *Muir* (*supra*) at p. 457). The degree, of course, of care required in the particular case depends on the accompanying circumstances and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury.

It is true also that the test of reasonable foreseeability of risk must be based not only upon existing facts known to the defendant, but also upon those he had opportunity to learn. It is said where there is a duty to know of the safety of a particular place or thing the neglect to avail oneself of an existing means of knowledge renders one as much liable if damage results as would be the failure, if the danger were known, to take precautions necessary to guard against it. (See *Mersey Docks Trustees* v. *Gibbs*, [1866] L.R. 1 H.L. 93 at pp. 121, 122; and also *Crookall* v. *Vickers-Armstrong Limited*, [1955] 2 All E.R. 12 at p. 16).

A man may reasonably be expected to take extra precautions on account of better knowledge of the facts. In every case, we would reiterate, it is a question of fact whether conduct which disregards such knowledge or opportunity of knowledge amounts to negligence or not. If the possibility of the danger

emerging is reasonably apparent, then to take no precautions is negligence; but if the possiblility of danger emerging is only a mere possibility, which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extra precautions.

In *Fardon* v. *Harcourt-Rivington*, (*supra*), Lord Dunedin said at p. 83:-

> "The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".

In *Grant* v. *Sun Shipping Co. Ltd. and Others*, [1948] 2 All E.R. H.L., 238, Lord Porter, speaking about the question of contributory negligence said at p. 242:-

> "There remains the question whether the pursuer was himself guilty of contributory negligence. This matter is largely a question of fact and if there was evidence from which a tribunal could fairly come to the conclusion that the pursuer was not himself negligent, and if the Judge or jury before whom the case was tried came to that conclusion, I imagine your Lordships would not interfere with the decision. It is, I think, not in dispute that the decision has to be made in the light of the characteristics of the type of men affected. In this case the pursuer was a stevedore, used to taking the ordinary risks of loading and unloading a ship, no doubt not very ready in describing his mental processes, but plainly by his acts and, indeed, as I think, by his words indicating that it never occurred to him as a possibility that the men who had been working on No. 2 hatch would take down the cluster lighting it and leave the covers off or, indeed, in defiance of their duty, would leave the hatch open after their work was done, more particularly as they knew that stevedores were passing and repassing the hatch in the course of their work and as they had been reminded by the third officer to leave all in

order. In these circumstances, he stepped on to the hatch without thinking of danger. It may be that 'inadvertently' does not describe the act with complete accuracy, and perhaps 'without conscious thought' is more exact—but everyone acts constantly on the instincts gained by a lifetime of experience and I do not think the pursuer can be blamed for so acting. It is, I understand, common ground that the only question which your Lordships have to determine on this part of the case is: Would a prudent stevedore with a lifetime of experience behind him reasonably think that workmen who had both apparently and in fact gone and had taken down the light which had previously shone across the deck instinctively conclude that the hatch covers were on? I myself think he was justified in doing so and hold the view the more strongly in as much as the Lord Ordinary came to that conclusion and had evidence on which he could do so. I should allow the appeal, and hold the defenders liable for damages and costs."

Lord Du Parcq, speaking about the same question, said at p. 247:-

" My own conclusion, therefore, is that the pursuer did not fail to take the ordinary care that would be expected of him in the circumstances. If the standard of the conduct of 'an ordinary prudent man' is preferred, I do not think that his own conduct fell below it. Almost every workman constantly and justifiably, takes risks in the sense that he relies on others to do their duty, and trusts that they have done it. I am far from saying that everyone is entitled to assume, in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common. Where, however, th negligence is a breach of regulations, made to secure the sa ety of workmen, which may be presumed to be strictly en.orced in the ordinary course of a ship's discipline, I an not prepared to say that a workman is careless if he as.umes that there has been compliance with the law. The real complaint of the defenders is that the pursuer reposed an unjustified confidence in them. No

doubt, his confidence was not justified in the event, but he is not, I think, to be blamed for that. The Courts have long recognised that in some circumstances an omission to make sure for oneself that others have done what they ought to have done is not negligent. Thus, in *Gee* v. *Metropolitan Ry. Co.*, [1873] L.R. 8 Q.B. 161, when a railway passenger who had leant against a carriage door, which he had erroneously supposed to be properly fastened, had fallen through it and suffered injury, it was unanimously held in the Exchequer Chamber that he was entitled to hold a verdict against the company, and three of the Judges were of opinion that there had been no evidence of contributory negligence to go to the jury. He had, in the words of Keating, J. (L.R. 8 Q.B. 161, 174):

> ... a right to assume that the company were not negligent, and that all the doors were properly shut..."

In *Elpiniki Panayiotou* v. *Georghios Kyriacou Mavros*, (1970) 1 C.L.R. 215, Josephides, J. adopting the principle enunciated in Fardon (*supra*) said at p. 219:-

> " ... if the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. This statement is regarded as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others; and it must follow that a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common..."

We think we would add that when it is necessary for a Court to apportion 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 and the Abadesa 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."

It appears further that the two elements of causative potency and blameworthiness, being the relative factors regarding the apportionment of liability, were first adverted to by Denning L.J. in *Davies* v. *Swan Motor Company Ltd.*, [1949] 1 All E.R. 620.

Lord Denning, dealing with the question of contributory negligence in *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608 said at p. 615:-

" Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

In *Christos Charalambides* v. *Polyvios Michaelides*, (1973) 1 C.L.R. 66, in delivering the judgment of the Court—having adopted the test enunciated by Lord Denning in *Jones* v. *Livox* (*supra*), I said at p. 73:-

" Respectfully adopting this test, it seems clear to us that the appellant had no right to enter the main road at all, unless he was satisfied that it was safe for him to do so, and once he had entered it, he had no right to proceed further across the cross-roads without taking the utmost care to make sure that no-one was on the road. There is no doubt that the act of driving into the main road without any warning at all was an act in a high degree potently causative of the collision and of the injuries suffered by the respondent.

The trial Court found that the appellant-defendant was at fault and was wholly to blame for the accident, and we

are not prepared to say otherwise; because in our view the respondent in the light of the evidence, could not have contributed to this accident. It must be remembered that the respondent was riding his motor cycle when no other vehicle was coming from the opposite direction, and in our opinion the driver could not reasonably have foreseen—once he acted as a reasonable prudent driver in overtaking the stationary van—that the appellant would suddenly emerge into the cross-roads not caring at all and breaking well-known safety rules, endangering the safety of the respondent who was using lawfully the main road.

Furthermore, we fail to see that the appellant—on whom the burden rests—has established that the respondent who was confronted with an emergency would have been able to do anything more effective in order to avoid the accident. Certainly, we are not satisfied with the argument of counsel that had the respondent not found himself at that place, the collision might have been avoided. On the contrary, we believe that even if the cyclist was more to his own side, again it would have been impossible to avoid the collision, once the plaintiff, as he had admitted in evidence, was crossing into the main road and was looking to his right only and had not seen at all the cyclist.

For the reasons we have tried to explain, we would affirm the judgment of the trial Court on this issue and dismiss this complaint of counsel that the trial Court was wrong in not finding the respondent guilty of contributory negligence. Cf. *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708; also *Patsalides* v. *Yapani and Another* (1969) 1 C.L.R. 84 at p. 100 where the principle enunciated by Denning, L.J. in Jones case (*supra*) was adopted and followed. Cp. also *Ekrem* v. *McLean* (1971) 1 C.L.R. 391."

The question which falls to be determind is whether on these facts, the respondent took sufficient precautions to avoid the accident; and whether those precautions were sufficient in the circumstances; (see *Pourikkos* v. *Fevzi*, (1963) 2 C.L.R. 24 at p. 31, where reference was also made to the case of *Nance* v. *British Columbia Electric Railways Company* Limited, [1951] A.C. 601 at p. 611 regarding the duty of users of the road to one another).

Counsel for the appellant argued with force, relying on the principle enunciated in *Elpiniki Panayiotou* (*supra*), that the respondent was guilty of contributory negligence once there was some evidence of negligence. It is now well settled, as we have indicated earlier, that negligence is the failure to take reasonable care in the particular circumstances, and in each case the question is also whether a person has been guilty of contributory negligence.

In the present case, it is true that the respondent knew that drivers occasionally failed to stop at the junction in entering Klementos Street. But the Court already found that even if the defendant was concentrating on the side street, the accident would have happened in any event, once the third party came out of the side street without any warning and at such a speed.

In our view, having regard to the facts and circumstances of this case, the respondent was not expected to take extraordinary precautions, and we therefore support the finding of the trial Judge that the respondent was not guilty of contributory negligence. We would, therefore, dismiss the appeal, with costs in favour of the respondent.

Appeal by the plaintiff dismissed with costs.

There was also an appeal by the third party (No. 5372), who as already stated had been made defendant. By notice dated December 5, 1977, Counsel who were until then acting for her informed the Registrar of this Court that due to lack of instructions from her they have ceased to act as her advocates in the appeal and applied for leave to withdraw. When the appeal was called on for hearing the appellant failed to appear. Now this Court acting pursuant to O.35 r. 13 of the Civil Procedure Rules dismisses the appeal of the third party without costs.

Appeal of plaintiff dismissed with costs. Appeal of third party dismissed without costs.