1982 December 13

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

MARIOS SHAKOLAS,

Appellant.

v.

THEODOSSIS AGATHANGELOU AND ANOTHER,

Respondents.

(*Civil Appeal No.* 6301).

Evidence—Road accident—Plan to scale—Prepared by witness who has not visited the scene of the accident—But based himself on sketches prepared by the Police constable who investigated into the circumstances of the accident—Does not amount to material evidence the exclusion of which could affect the outcome of the trial.

Negligence—Road accident—High speed alone not evidence of negligence—But finding of negligence not based merely on the fact of speed but clearly based on the finding that driving at a speed in the particular circumstances and at that locality was unreasonable.

Negligence—Road accident—Trial Judge not prevented from looking at the real and other relevant evidence establishing the totality of the circumstances in which an accident has happened and from drawing inferences and reaching conclusions as regards the existence of liability for negligence not in the form of an expert opinion but as a matter of sheer common sense.

Negligence—Road accident—Apportionment of liability—Appeal—Principles on which Court of Appeal acts—Collision between cars moving in opposite directions—Both drivers rightly held equally to blame in the circumstances of this case.

A motor car driven by the appellant (defendant 3 at the trial) came into collision with a car driven by defendant 1. The plaintiff who was a passenger in the car of the appellant sustained personal injuries. The trial Court found both the appellant

and defendant 1 to be equally to blame for the accident and apportioned their liability at 50% for each one of them.

By means of an appeal the appellant (defendant 3) alleged that he was wrongly found to be liable to the extent of 50% for the accident in question and that he should not have been found liable at all; or, at least, that defendant 1 ought to have been found to be liable up to an extent of 75%.

Defendant 1 has filed a cross-appeal contending that he should not have been found at all liable for the accident and that the appellant is wholly to blame for it.

Counsel for the appellant (defendant 3) mainly contended:

(a) That the trial Court wrongly excluded as evidence a plan to scale which was prepared by Soteris Yiallouros, an expert called by counsel for the appellant as a witness for the defence.

(b) That the trial Judges wrongly turned themselves into experts by drawing certain inferences and conclusions from the brakemarks left by the car of the appellant, the cubic capacity of the taxi driven by the respondent and the resultant position of the two vehicles.

(c) That the trial Court erroneously found the appellant guilty of negligence on the basis only of evidence that he was driving at a high speed in excess of the speed-limit for the area in question.

Regarding contention (a) above the expert defence witness did not visit at all the scene of the accident, but he prepared a plan to scale on the basis of measurements which were shown on two sketches which were not drawn up to scale and which had been prepared by a police constable who had investigated the accident and who had been called as a witness for the plaintiff.

Regarding contention (b) above the trial Court bearing in mind the brakemarks left by the motor car of defendant 3, coupled with the fact that the impact was very violent and the Mercedes car of 1988 cubic capacity was pushed back sideways

for approximately 12 ft., demolishing a brick wall, concluded that the car of defendant 3 was being driven at a considerable speed well over 40 m.p.h. admitted by him, "a speed which was unreasonable under the circumstances in view of the condition of the road and the fact that the car of defendant 3 was about to enter a rather narrow bridge from which the Mercedes taxi was just coming out".

Held, (1) that a plan to scale which was prepared by a witness who has not visited the scene of the accident, but has based himself on sketches prepared by the police constable who investigated into the circumstances of such accident does not amount to material evidence the exclusion of which could affect the outcome of the trial, so that as a result of such exclusion a new trial would have to be ordered on appeal, because it is well-settled that a new trial will not be ordered on the ground of the wrongful, admission or rejection of evidence if it could have had no legitimate effect on the verdict (see, the Supreme Court Practice, 1979, vol. 1, p. 904) or if, at least, there does not exist considerable doubt whether, in the absence of evidence which has been excluded, the trial Court would have arrived at the same conclusion (see, in this respect, inter alia, *Ioannou* v. *Demetriou*, 19 C.L.R. 72, 79); that, therefore, this Court has reached the conclusion that, even assuming—without so deciding —that the plan to scale which was prepared by the expert called for the defence of the appellant, as aforesaid, was wrongly excluded as evidence by the trial Court, its exclusion has not materially affected the outcome of the action before the trial Court, nor is there any doubt at all that the trial Court would have reached the same conclusion had such plan to scale been produced before it; accordingly contention (a) should fail.

(2) That a trial Judge is not prevented from looking at the real and other relevant evidence establishing the totality of the circumstances in which an accident has happened, and from drawing inferences and reaching conclusions as regards the existence of liability for negligence, not in the form of an expert opinion but as a matter of sheer common sense; and this is what has happened in the present case in relation to the complained of passage in the judgment of the trial Court; that, therefore, the trial Judges have not turned themselves into experts in a manner

inconsistent with their duty to determine whether the appellant was negligent on the basis of all the relevant evidence before them; accordingly contention (b) should fail.

(3) That though high speed alone is not evidence of negligence in the present case the finding of negligence on the part of the appellant was not based merely on the fact that he was driving at a considerable speed, well over 40 miles per hour, in an area where the speed-limit was only 30 miles per hour; that the finding regarding the appellant's negligence was clearly based on the conclusion that driving at the aforesaid speed in the particular circumstances and at that locality was unreasonable, in view of the condition of the road at that time and because of the fact that the car of the appellant was about to enter a bridge from which the taxi of defendant 1 was just coming out; that, therefore, speed was only taken into account, in establishing negligence, in conjunction with other relevant circumstances and this was a perfectly legitimate course for the trial Court to adopt; accordingly contention (c) should, also, fail.

Held, with regard to the apportionment of liability:

That the apportionment of liability was primarily the task of the trial Court and this Court should not interfere with it on appeal unless there exists an error in principle or such apportionment was clearly erroneous (see, in this respect, inter alia, *Dieti* v. *Loizides* (1978) 1 C.L.R. 233, 242); that there is no reason to disturb the finding of the trial Court that the appellant was negligent; that, also, this Court agrees with the trial Court that defendant 1 was negligent, too, in that he ought to have seen from a great distance the oncoming car of the appellant and he must have realized that it was driven at a high speed almost in the middle of the road; and as the car of the appellant had priority on the road, because it was proceeding straight along it, defendant 1 should have veered to his left on getting out of the bridge in order to allow room for the car of the appellant to pass and should not, instead, have merely slowed down with an inclination towards his right, in the course of turning in a manner cutting across the path of the car of the appellant; that, furthermore, this Court has not been satisfied by either counsel for the appellant or counsel for defendant 1

that the finding of the trial Court that both drivers were equally to blame for the accident was either based on an erroneous principle or that it is otherwise so clearly wrong that it should interfere with it on appeal; accordingly the appeal and cross-appeal should fail.

Appeal and cross-appeal dismissed.

Cases referred to:

Kouma v. *Police* (1967) 2 C.L.R. 230 at pp. 234-235;

Haloumias v. *Police* (1970) 2 C.L.R. 154;

Ioannou v. *Demetriou*, 19 C.L.R. 72 at p. 79;

HjiGeorghiou v. *Police* (1972) 2 C.L.R. 86 at pp. 87-88;

Constantinou v. *Police* (1972) 2 C.L.R. 89 at p. 91;

Eliasides v. *Police* (1978) 2 C.L.R. 114 at p. 116;

Salih v. *Sofocleous* (1979) 1 C.L.R. 248 at p. 253;

Siakos v. *Nicolaou* (1980) 1 C.L.R. 333 at pp. 342-343;

Alexandrou v. *Gamble* (1974) 1 C.L.R. 5 at pp. 7-8;

Demou v. *Constantinou* (1979) 1 C.L.R. 21 at p. 24;

Dieti v. *Loizides* (1978) 1 C.L.R. 233 at p. 242;

Antoniou v. *Sergis* (1979) 1 C.L.R. 169 at p. 176;

Papadopoullos v. *Pericleous* (1980) 1 C.L.R. 576 at p. 579-580;

Covotsos Textiles Ltd. v. *Serghiou* (1981) 1 C.L.R. 475 at p. 511.

Appeal.

Appeal by defendant 3 and cross-appeal by defendant 1, against the judgment of the District Court of Limassol (Loris and Hadjitsangaris, P.D.C.s.) dated the 25th July, 1981 (Action No. 2447/76) whereby they were ordered to pay jointly and severally to the plaintiff the amount of £3,600.- as special and general damages which he suffered in a traffic collision.

A. Dikigoropoulos, for the appellant-defendant 3.

A. Myrianthis, for the respondent-defendant 1.

M. Cleopas with *G. Triantafyllides*, for the respondent-plaintiff.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant, who was defendant 3 in action No. 2447/76 in the District Court of Limassol, appeals against a judgment by means of which he was ordered to pay to the respondent, the plaintiff in that action (hereinafter to be referred as the "plaintiff"), jointly and severally with defendant 1 in such action (hereinafter to be referred to as "defendant 1"), the amount of C£3,600, as special and general damages which the plaintiff suffered in a traffic collision.

The above amount of damages had been agreed between the parties and, thus, at the hearing of the action before the trial Court there was contested only the issue of liability.

The trial Court found both the appellant and defendant 1 to be equally to blame and apportioned their liability accordingly at 50% for each one of them.

The action against another defendant—defendant 2—had, earlier on, been dismissed as the writ of summons had not been served on him for a period of over twelve months from the date of its issue and no application for its renewal had been made.

By this appeal the appellant alleges that he was wrongly found to be liable to the extent of 50% for the accident in question and that he should not have been found liable at all; or, at least, that defendant 1 ought to have been found to be liable up to an extent of 75%.

On the other hand, defendant 1 has filed a cross-appeal contending that he should not have been found at all liable for the accident and that the appellant is wholly to blame for it.

The accident concerned occurred on 1st July 1976, in Limassol, while a motor car, No. GX773, which was driven by the appellant, came into collision with a taxi, No. TFW805, which was driven by defendant 1. The plaintiff was a passenger in car GX773 and sustained personal injuries.

Counsel for the appellant has, first, contended that the trial Court wrongfully excluded as evidence a plan to scale which was prepared by Soteris Yiallouros, an expert called by counsel

for the appellant as a witness for the defence. The said witness did not visit at all the scene of the accident, but he prepared a plan to scale on the basis of measurements which were shown on two sketches which were not drawn up to scale and which had been prepared by a police constable who had investigated the accident, P.C. 1834 Andreas Zenonos, and who had been called as a witness for the plaintiff.

The first of the said sketches was a rough one (and was exhibit 2 at the trial) and from that rough sketch another one was prepared (which was produced as exhibit 1 at the trial).

It seems that the purpose for which the plan to scale was prepared by the aforementioned expert witness for the defence was in order to enable the trial judges to appreciate better the circumstances of the occurrence of the accident, a thing which, according to counsel for the appellant, could not be adequately achieved on the basis only of the two sketches (exhibits 1 and 2), which were not to scale; and counsel for the appellant has argued that as the said plan to scale was very material evidence the decision of the trial Court to treat it as inadmissible affected the outcome of the trial.

We have been referred by counsel for the appellant, as regards the desirability of producing at trials plans to scale, to the cases of *Kouma* v. *The Police*, (1967) 2 C.L.R. 230, and of *Haloumias* v. *The Police*, (1970) 2 C.L.R. 154.

In the *Kouma* case, supra, Vassiliades P. stated the following (at pp. 234–235):

> "The second ground, that the plan produced, was not to scale, counsel for the appellant invited the Court to consider the difficulties which may arise in such important cases, from plans which are not to scale. Such difficulties depend, of course, in every case on the particular plan produced. There are plans to scale which may not be very helpful. And there are plans not to scale which are more helpful than no plan at all. Generally speaking one can say that a plan to scale, all other matters being equal,

is preferable to a plan which is not to scale, because it presents a more correct picture. We have no doubt that where the officer responsible for the prosecution is able to appreciate this difference, will do all he can to put before the Court the best available evidence and the best possible plan. This, of course, it is far from saying that plans which are not to scale are, generally speaking, useless. We have no doubt that the observations of defending counsel in this case, will be brought to the notice of the authorities concerned, by learned counsel for the prosecution".

In the *Halcumias* case, supra, Vassiliades P. said the following (at p. 158):

"This is why it is highly desirable that plans, prepared by the police with all due care, should be drawn to scale wherever possible, as suggested time and again by Judges dealing with traffic cases".

The above dicta, which are to be found in judgments given in relation to criminal cases, do not establish, in our opinion, that a plan to scale which was prepared, as in the present instance, by a witness who has not visited the scene of the accident, but has based himself on sketches prepared by the police constable who investigated into the circumstances of such accident, amounts to material evidence the exclusion of which could affect the outcome of the trial, so that as a result of such exclusion a new trial would have to be ordered on appeal. It is well-settled that a new trial will not be ordered on the ground of the wrongful admission or rejection of evidence if it could have had no legitimate effect on the verdict (see, the Supreme Court Practice, 1979, vol. 1, p. 904) or if, at least, there does not exist considerable doubt whether, in the absence of evidence which has been excluded, the trial Court would have arrived at the same conclusion (see, in this respect, inter alia, *Ioannou* v. *Demetriou*, 19 C.L.R. 72, 79).

We have, therefore, reached the conclusion that, even assuming—without so deciding—that the plan to scale which was prepared by the expert called for the defence of the

appellant, as aforesaid, was wrongly excluded as evidence by the trial Court, its exclusion has not materially affected the outcome of the action before the trial Court, nor is there any doubt at all in our minds that the trial Court would have reached the same conclusion had such plan to scale been produced before it.

Another point raised by counsel for the appellant is that the trial Court was wrong in finding that there was no substantial difference between the two sketches, exhibits 1 and 2. The trial Court made this statement in the course of giving its reasons for accepting as reliable the evidence of the police constable who had prepared the said sketches. We have carefully examined the two sketches in the light of the evidence as a whole of the said police constable, as well in the light of the arguments advanced by counsel before us, and all that we need to say, in this connection, is that we, also, share the view that there was no substantial difference between the two sketches in question which could have led the trial Court to reach erroneous conclusions as regards how the accident occurred or to misinterpret the real evidence in relation to its occurrence.

The next complaint of counsel for the appellant is that the trial Judges in the present case turned themselves into experts by drawing certain inferences and conclusions from the brake-marks left by the car of the appellant, the cubic capacity of the taxi driven by the respondent and the resultant position of the two vehicles.

In this respect our attention has been drawn to the following passage from the judgment of the trial Court:

> "We are also satisfied that the car of Defendant 3 was being driven at the material time at a high speed. The scene of this accident is, according to the evidence of P.W.1, within the speed limit area of 30 m.p.h. Defendant 3 admitted that he was driving at a speed of 35-40 m.p.h. at the most. Bearing in mind the brakemarks left by the motor car of Defendant 3, coupled with the fact that the impact was very violent and the Mercedes car of 1988 cubic capacity was pushed back sideways for approximately 12 ft.,

demolishing a brick wall, we can conclude that the car of Defendant 3 was being driven at a considerable speed well over 40 m.p.h. admitted by Defendant 3, a speed which was unreasonable under the circumstances in view of the condition of the road and the fact that the car of Defendant 3 was about to enter a rather narrow bridge from which the Mercedes taxi was just coming out. Therefore, we hold that Defendant 3 was negligent".

In *HjiGeorghiou* v. *The Police*, (1972) 2 C.L.R. 86, the following were stated by this Court (at pp. 87-88):

"This conclusion of the trial Court was based primarily on the fact that as a result of the application of the brakes by the Appellant there were left brakemarks 43 feet long before the point of impact and 13 feet and 6 inches long after such point; according to the evidence of the police constable who investigated the case the brakemarks were at the beginning 'light' and at the end 'more distinct', indicating that the Appellant applied at first the brakes 'lightly' and later with 'more strength'. The trial Judge says in his judgment that these brakemarks 'speak so fluently for themselves'.

We are unable to agree with the above view of the trial Judge: As no expert evidence has been adduced in order to explain the correct and full significance of the said brakemarks in the light of the particular circumstances of this case, we are of the view that it was not safe for the trial Judge to form any distinct opinion on the basis thereof regarding the speed at which the Appellant was driving at the material time; and since the Appellant's conviction was, as stated, based on the finding that he was driving at an excessive speed we have to set aside the conviction and the sentence imposed as a result thereof".

In *Constantinou* v. *The Police*, (1972) 2 C.L.R. 89, the following were said (at p. 91):

"It is true, bearing in mind the length of the brakemarks,

that the Appellant must have seen the boy from a distance longer than 34 feet; but it cannot, in the absence of any expert evidence regarding the 'thinking distance' that must have preceded the application of the brakes, be found exactly how far away was the Appellant when he first saw the boy".

In *Eliasides* v. *The Police*, (1978) 2 C.L.R. 114, this Court stated (at p. 116):

"The trial Judge did not decide how the accident did occur by accepting evidence which, in view of the demeanour of the witnesses concerned, appeared to be credible, but he chose to accept the version of the other driver, and reject that of the appellant, because of certain inferences which he drew from the nature of the damage suffered by the front bumper of the other car. There has not, however, been adduced at the trial any expert evidence in order to explain the significance of that damage and, as it has very fairly been submitted by counsel for the respondents, such damage could be treated as being equally consistent with both the versions of the other driver and of the appellant.

In the circumstances we cannot find that the conviction of the appellant can be upheld as a decision that was reached with the certainty required in a criminal case, and we have, therefore, to set it aside and allow the appeal".

In *Salih* v. *Sofocleous*, (1979) 1 C.L.R. 248, L. Loizou J. observed the following (at p. 253):

"In the present case we do not feel that we could from the mere fact that there was only one line of brake marks and in the absence of any evidence, act as experts and come to any conclusion as to the state of the taxi's brakes".

In *Siakos* v. *Nicolaou*, (1980) 1 C.L.R. 333, Hadjianastassiou J. said the following (at pp. 342–343):

"Before concluding our judgment, we think it is necessary

to point out in the present case, that trial Judges when dealing with the real evidence and particularly with a sketch should bear in mind not to turn themselves into experts merely on the result of their comparisons, without hearing evidence coming from an expert. This is what has happened in this case when the learned trial Judge turned himself into an expert in trying to explain how the accident occurred and whether it was due to speeding on the part of the appellant by looking to the brakemarks left by the car of the appellant, without first hearing expert evidence".

All the above dicta related to particular instances in which the trial Judges had turned themselves into experts in a manner unwarranted by the situation before them and, therefore, do not lead to the conclusion that a trial judge is prevented from looking at the real and other relevant evidence establishing the totality of the circumstances in which an accident has happened, and from drawing inferences and reaching conclusions as regards the existence of liability for negligence, not in the form of an expert opinion but as a matter of sheer common sense; and this is what has happened in the present case in relation to the complained of passage in the judgment of the trial Court which has been quoted above.

We, therefore, do not think that, in the present instance, the trial judges have turned themselves into experts in a manner inconsistent with their duty to determine whether the appellant was negligent on the basis of all the relevant evidence before them.

Counsel for the appellant has argued, also, that the trialCourt erroneously found the appellant guilty of negligence on the basis only of evidence that he was driving at a high speed in excess of the speed-limit for the area in question.

In *Alexandrou* v. *Gamble*, (1974) 1 C.L.R. 5, this Court stated the following (at pp. 7-8):

"The main contention of counsel for the appellant has

been that the respondent was driving, at the time, at an excessive speed and that, because of this, he should have been held liable in negligence for the collision to an extent even greater than the appellant.

Even if we were to proceed on the basis of the assumption that the respondent was, just before the collision, driving at a high speed, or exceeding the prescribed speed-limit in a built-up area, we cannot, in any case, accept the proposition, put forward by counsel for the appellant, that doing so was, inevitably, sufficient per se, and irrespective of the circumstances of the present case, to establish negligence. That such a proposition is not correct is to be derived from, inter alia, *Quinn* v. *Scott* [1965] 1 W.L.R. 1004, and *Barna* v. *Hudes Merchandising Corporation* (the full report of which is not available, but which is sufficiently reported in Bingham's Motor Claims Cases, 7th ed., p. 104).

In relation to the above matter we have been referred, by counsel for the appellant, to *Radif* v. *Paphitis*, 1964 C.L.R. 392, and reliance was placed on passages in the judgment therein as establishing that excessive speed was per se sufficient to establish negligence, or at least contributory negligence, in the case of a traffic collision. We have perused the full record of the *Radif* case and we have no difficulty in saying that such case was decided in the light of its own special circumstances, all of which are not set out in the judgment on appeal; one of them was that the driver who was found to be negligent, because of driving at an excessive speed, had been travelling at such a high speed that, as a result, he was not able to pull up in time or to bring his car under control and he went over to the wrong side of the road and then into an adjoining field where he struck the other party to those proceedings. It is, thus, clear that the *Radif* case is distinguishable from the present case.

That speed, in itself, is not sufficient to support

a finding of negligence, or of contributory negligence, is to be derived, too, from *Ioannou* v. *Michaelides* (1966) 1 C.L.R. 235, which was decided by the Supreme Court subsequently to the *Radif* case and, actually, by the same bench which decided that case (see, in particular, the judgment of Josephides, J. in the *Ioannou* case)".

In *Demou* v. *Constantinou*, (1979) 1 C.L.R. 21, A. Loizou J. said (at p. 24):

"Regarding the plea that the respondent contributed to the accident because of the speed at which he was driving, we again find no reason to interfere with the findings and inferences of the trial Court. There was no speed limit in the area and the mere presence of a military camp at that part of the road did not by itself impose any duty on the respondent to drive at a lesser speed in the circumstances. High speed alone—if a speed of 45-50 m.p.h. in a non-built up area could be said to be high speed—is not evidence of negligence unless the particular conditions at the time and place preclude it. The principle that driving at a high speed is not sufficient per se to establish negligence, was stated, inter alia, in the case of *Alexandrou* v. *Gamble* (1974) 1 C.L.R., at p. 8, where it was said that it had further to be shown that such speed was causative of the accident".

It is not, however, correct that in the present case the finding of negligence on the part of the appellant was based merely on the fact that he was driving at a considerable speed, well over 40 miles per hour, in an area where the speed-limit was only 30 miles per hour; the finding regarding the appellant's negligence was clearly based on the conclusion that driving at the aforesaid speed in the particular circumstances and at that locality was unreasonable, in view of the condition of the road at that time and because of the fact that the car of the appellant was about to enter a bridge from which the taxi of defendant 1 was just coming out.

Thus, speed was only taken into account, in establishing negligence, in conjunction with other relevant circumstances

and this was a perfectly legitimate course for the trial Court to adopt.

We have been invited by counsel for the appellant, in arguing the appeal, and by counsel for defendant 1, in arguing the cross-appeal, to interfere with the judgment of the trial Court as regards the apportionment of liability between the appellant and defendant 1, respectively.

The apportionment of liability in a case such as the present case was primarily the task of the trial Court and this Court should not interfere with it on appeal unless there exists an error in principle or such apportionment is clearly erroneous (see, in this respect, inter alia, *Dieti* v. *Loizides*, (1978) 1 C.L.R. 233, 242, *Antoniou* v. *Sergis*, (1979) 1 C.L.R. 169, 176, *Papadopoullos* v. *Pericleous*, (1980) 1 C.L.R. 576, 579, 580 and *Covotsos Textiles Ltd.* v. *Serghiou*, (1981) 1 C.L.R. 475, 511).

In the present instance we see no reason to disturb the finding of the trial Court that the appellant was negligent. We, also, agree with the trial Court that defendant 1 was negligent, too; in that he ought to have seen from a great distance the oncoming car of the appellant and he must have realized that it was driven at a high speed almost in the middle of the road; and as the car of the appellant had priority on the road, because it was proceeding straight along it, defendant 1 should have veered to his left on getting out of the bridge in order to allow room for the car of the appellant to pass and should not, instead, have merely slowed down with an inclination towards his right, in the course of turning in a manner cutting across the path of the car of the appellant.

Furthermore, we have not been satisfied by either counsel for the appellant or counsel for defendant 1 that the finding of the trial Court that both drivers were equally to blame for the accident was either based on an erroneous principle or that it is otherwise so clearly wrong that we should interfere with it on appeal.

As a result both this appeal and the cross-appeal have to be dismissed.

The costs of the plaintiff in this appeal to be paid by the appellant; and we make no order as to the costs of defendant 1 in this appeal.

Appeal and cross-appeal dismissed.
Order for costs as above.