1983 March 29

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

MUNICIPALITY OF NICOSIA AND ANOTHER,
Appellants-Defendants 1 and 3,

v.

ANDREAS KYTHREOTIS,
Respondent-Plaintiff.

(*Civil Appeals Nos.* 5926-5927).

Municipal Corporations—Statutory duty to control construction of, and prevent obstruction on, pavements—Section 123(1)(*t*) *of the Municipal Corporations Law, Cap.* 240 *and section* 2 (*definition of "street"*).

Independent contractor—Public Authority—Municipality—Employing of independent contractor to perform certain road works—Not exonerated from liability to pay damages to a person injured through negligence of independent contractor inspite of a stipulation in the relevant contract as to the latter's sole responsibility to pay such damages.

Negligence—Contributory negligence—Apportionment of liability—Principles on which Court of appeal intervenes—Reconstruction of pavement—Contractors guilty of negligence through failure to take proper precautions in guarding the public against possible danger arising from the works carried on by them, in that they placed no barrels which would operate as a warning to pedestrians —Injury to pedestrian—Pedestrian held guilty of contributory negligence to the extent of 20% *through failure to exercise proper care for his own safety since the works were apparent—Apportionment as found by trial Judge wrong—A* 50-50 *apportionment the reasonable one.*

Findings of fact—Based on credibility of witnesses—Appeal—Principles on which Court of Appeal acts.

Damages—General damages—Personal injuries—Crushing injury to right knee—Inpatient for 8 *days—Fair amount of pain for* 8-10

days followed by inconvenience and discomfort which subsided completely after 6-8 *weeks—Award of* £500 *though on the high side not so manifestly excessive as to justify interference with it.*

In 1973 the first appellant, the Municipality of Nicosia, prepared plans and specifications for the reconstruction of part of the pavement along the eastern side of Dionysiou Solomou Square in Nicosia. Tenders were invited and upon the second appellants undertaking to carry out the work a written contract* was entered between the first appellant and the second appellants whereby the latter were engaged to carry out the aforesaid work as independent contractors. It was, inter alia, provided in the contract that the Municipal Engineer would have had the right of supervision of the work at all stages of the execution of same.

Whilst the respondent-plaintiff was proceeding along the above pavement under reconstruction his feet were caught in the strings which were fixed on the poles by the persons carrying out the work as a warning to pedestrians and as a result he fell down and sustained a crushing injury to his right knee with acute sprain of the joint with slight haemarthrosis.

Respondent stayed as an inpatient in the Nicosia General Hospital from 26.12.1973-2.1.1974. He was then followed up as an outpatient mainly for physiotherapy until 15.2.1974. On an examination of the plaintiff on 12.3.1974 it was found that his knee was fully stable and exhibited full range of motion. This injury entailed to the respondent a fair amount of pain for 8-10 days followed by inconvenience and discomfort subsiding completely after 6-8 weeks. The knee showed normal function and sufficient muscle power.

In an action for damages by the respondent against the appellants-defendants the trial Judge by accepting the evidence of the witnesses of respondent and rejecting that of the appellants, found that they had not taken the proper precautions in guarding

* The second paragraph of term 2 of the contract provided as follows:

"The contractor will be responsible for the effective fencing of the works and the security of the workmen and all passing by citizens. He will also be responsible for the placing of the necessary traffic signs and the taking of all protective measures in the area of the works, both in respect of private and public safety and safety to property. Any damage or claim by third persons will be borne exclusively by him".

the public against possible danger arising from the works carried on by them and in consequence they were liable to respondent for the injuries sustained. The evidence so accepted was to the effect that no barrels were placed to operate as a warning to the pedestrians and no sign post diverting the traffic. The only thing that appellants did, according to the evidence before the trial Court, was to place iron bars protruding about 2 ft. over the surface of the road and that there was a string and not a rope which was tied all along the iron bars about 6 inches above the ground and which was used as a measure for putting the cement blocks straight and also there was another similar string about 4-5 inches from the top of the iron bars along the western part of the pavement. No fencing was placed on the southern part of the pavement because there were earth and other debris which were removed from the old pavement. The place where the buses stopped was about 4 ft. from the strings and the pedestrians were using the already constructed pavement by stepping over the strings.

The trial Judge further found that the respondent failed to exercise the proper care for his own safety since the works were apparent and the holes sufficiently obvious and found him guilty of contributory negligence to the extent of 20 per cent.

On the question of damages he assessed the special damages at £129 and awarded to respondent £500 as general damages, thus making a total of £629 out of which he deducted 20 per cent for his contributory negligence, and awarded him the sum of £504 against both appellants.

Upon appeal by the defendants:

Held, (1) that a statutory duty is imposed upon the Municipality to control the construction and divert or close any street and prevent obstructions thereon and failure to discharge such duty renders such body responsible for damage which may result from its breach (see section 123(1)(t) and section 2 (definition of "street") of the Municipal Corporations Law, Cap. 240); that having regard to the circumstances of the present case the employment by the first appellant (the Municipality) of an independent contractor, the second appellant, irrespective of a stipulation in the contract as to the latter's sole responsibility to pay any damage which might have resulted to any person or

property, does not exonerate the first appellant from liability to the respondent.

(2) *On the question whether there was negligence on the part of the appellants in the execution of the work and whether the findings of the trial Court in this respect were correct:*

That this Court in determining an appeal will normally not interfere with the findings of fact of the trial Court unless such findings are manifestly wrong or unwarranted by evidence before it; that matters touching the credibility of witnesses are within the province of the trial Court which is in a far better position to evaluate their evidence than this Court and only in cases where in their circumstances it becomes apparent that they are not warranted by the evidence considered as a whole or they are clearly wrong this Court will interfere; that having considered the evidence before the trial Judge and the reasons why he preferred the evidence of the respondent and his witnesses to that of the applicants, this Court has not been persuaded by counsel for appellants, upon whom the onus to do so rested, that it would be justified in interfering with his findings based on the evidence before him; that his findings that the proper precautions to avoid danger to pedestrians had not been taken, are amply warranted by the evidence accepted by him.

(3) *On the question whether there was contributory negligence on the part of the respondent:*

That the findings of the trial Judge that the plaintiff should have exercised care for his own safety since works were apparent and the holes sufficiently obvious is correct, especially taking into consideration the fact that the area where the accident occurred was illuminated; that though there would have to be a very strong case to justify any review of apportionment if an appellate Court accepted the same view of the law and facts as that taken by the trial Court, having directed its attention to the facts of the present case this Court has come to the conclusion that the apportionment of negligence between the parties as found by the learned trial Judge was wrong and that, in the circumstances of the case, a 50-50 apportionment of negligence between appellants and respondent is the reasonable one; and that, therefore, in this respect the appeal succeeds and the respondent's negligence is apportioned at 50 per cent.

(4) *On the quantum of general damages awarded:*

That the quantum of general damages awarded, though on the high side, is not so manifestly excessive as to justify interference with it.

Appeal partly allowed.

Cases referred to:

Griffiths v. Liverpool Corporation [1967] 1 Q.B.374;

Haydon v. Kent County Council [1978] 2 W.L.R.485;

Gray v. Pullen, 34 L.J.Q.B.265;

Dalton v. Angus, 6 App. Cas.740;

Hardaker v. Idle District Council [1896] 1 Q.B.335 at p.342;

Penny v. The Wimbledon Urban District Council and Iles [1898] 2 Q.B.212 at p.217;

Robinson v. Beaconsfield Rural District Council [1911] 2 Ch. 188 at pp. 197, 198;

Holliday v. National Telephone Company [1899] 2 Q.B.392 at pp. 398, 399;

Honeywill and Stein Limited v. Larkin Brothers (London's Commercial Photographers), Limited [1934] 1 K.B.191 at p.197 (C.A.);

Salsbury v. Woodland [1969] 3 All E.R.863 at p.869;

Polycarpou v. Polycarpou (1982) 1 C.L.R.182 at p.194;

Kkaffa v. Kalorkotis (1982) 1 C.L.R. 372 at p.378;

Epifaniou v. HjiGeorghiou (1982) 1 C.L.R. 609 at pp.613, 614;

Kyriacou v. Mata (1982) 1 C.L.R.932 at pp. 934, 935;

Kyriacou v. A. Kortas & Sons Ltd. (1981) 1 C.L.R.551 at p. 553;

Cyprus Palestine Plantations v. Leandrou (1982) 1 C.L.R. 880 at p. 892;

Ioannou and Another v. Michaelides (1966) 1 C.L.R.235 at pp. 238, 239.

Appeals.

Appeals by defendants against the judgment of the District Court of Nicosia (Artemides, D.J.) dated the 12th January, 1979 (Action No. 861/74) whereby they were adjudged to pay

to the plaintiff the sum of £504.- as special and general damages for injuries suffered by him as a result of an accident.

K. Michaelides, for the appellant-defendant 1.

N. Pelides, for the appellant-defendant 2.

A. Eftychiou, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: The appellants in these two appeals which were heard together, appealed against the judgment of the District Court of Nicosia, whereby they were adjudged to pay to the respondent the sum of £504 as special and general damages for injuries suffered by him as a result of an accident due to the alleged negligence and/or breach of statutory duty of the appellants. The action was originally brought against appellant 1 and defendant 2 and by an order of the Court the writ of summons was subsequently amended and appellant 3, together with another defendant, defendant 4, were added in the proceedings. Appellant in Appeal 5926, who, for the purpose of these appeals will be referred to as the first appellant, is the Municipality of Nicosia and was defendant 1 in the action before the District Court. Appellant in Appeal 5927 who, for the purpose of these appeals will be referred to as the second appellant, is a building contractor and was defendant 3 in the action. According to the statement of claim defendant 2 is a limited company carrying on building operations and defendants 3 and 4 are building contractors undertaking contracts either as directors and for the account of defendant 2 or in their personal capacity. Though such allegation was admitted by the second defendant, by his defence it was contended that defendant 2 company was under dissolution and that in so far as this action was concerned he was acting together with defendant 4 personally and not for the account of the company. When the case was fixed for directions before the Court, the action against defendants 2 and 4 was withdrawn without prejudice, and the hearing proceeded against the present appellants only.

The facts of the case are briefly as follows:

In 1973 the first appellant prepared plans and specifications for the reconstruction of part of the pavement along the eastern side of Dionysiou Solomou Square in Nicosia. Tenders were

invited and defendants 3 and 4 undertook to carry out the work. A written contract was entered between the first appellant on the one hand, and the second appellant and ex-defendant 4 of the other hand, whereby the latter were engaged to carry out the aforesaid work as independent contractors. The second paragraph of term 2 of the contract, provided as follows:

> "The contractor will be responsible for the effective fencing of the works and the security of the workmen and all passing by citizens. He will also be responsible for the placing of the necessary traffic signs and the taking of all protective measures in the area of the works, both in respect of private and public safety and safety to property. Any damage or claim by third persons will be borne exclusively by him".

And under the term "Miscellaneous" it is provided that the Municipal Engineer will have the right of supervision of the work at all stages of the execution of same.

The work so undertaken was to narrow the pavement on the eastern side to some extent and demolish the rest which was to be reclaimed by the carriage way of the road, so that same would be made wider for the use of vehicular traffic. According to the findings of the learned trial Judge, "works started around the 10th December, 1973 but it is disputed when they had been completed. It is common ground that on 26th December, 1973, when the plaintiff sustained the accident, the pavement had been laid on with cement blocks, but the edge of it to its western side, where the so-called 'linies' are placed, had not as yet been completed".

On 26th December, 1973, at about 6 p.m. the plaintiff left his motor cycle near a taxi office at a short distance from the pavement under construction and proceeded to Dionysiou Solomou Square to meet his wife and catch the bus for home. Dionysiou Solomou Square, as described by the trial Judge, in his judgment, is "probably the busiest square in Nicosia, in view of the fact that the buses of Nicosia use it as a starting and terminal point". The plaintiff proceeded along the pavement under reconstruction and was about to step down from it to go to the place where the buses stop, which was a few feet away, when his feet were caught in the strings which were fixed on poles by the persons carrying out the work as a warning to

pedestrians, and as a result he fell down and sustained the injuries in respect of which he filed the action.

The trial Court was faced with two versions as to how the accident occurred. The version of the plaintiff which was supported by his evidence and that of two other witnesses, and the version of the appellants supported by the evidence of the second appellant and two other witnesses. The version of the appellants as summarised by the trial Judge, was as follows:

"It is alleged by the defendants that they had taken all reasonably necessary precautions to guard the public using the pavement and the road against any possible danger arising from the works carried on. These precautions, according to their evidence, consisted of the following: Iron bars had been put along the side of the pavement under construction commencing from the north part of the pavement, that is to say, from Costakis Pantelides Avenue, towards the southern part, i.e. Homer Avenue. These iron bars were at regular spaces and two lines of plastic thick string had been tied on them so that it would be used as a fence protecting the pavement from entrance by the public. The height of the iron bars above the surface of the road was about 2 1/2 – 3 ft. In addition to that there were placed barrels which had been painted white so that the public would notice the works carried on at the spot. Furthermore traffic signs were placed diverting traffic from the place of the works.

That all these precautions had been taken by the defendants, it has been testified to me by Koulermis who, as I have said earlier, was the foreman of the Municipality under whose supervision the works had been carried, and defendant No. 3, Alexandrou. The defendants, therefore, allege that since they had taken all possible precautions, they are not to be held liable for the injuries sustained by the plaintiff, who was wholly to be blamed for what he has suffered because he was careless in using that part of the road where the constructions obviously were taking place".

The version of the respondent, as recorded in the judgment, was as follows:

"The plaintiff denies that all these precautions had been

taken by the defendants. He says that there were no white barrels and no traffic signs diverting the traffic. With regard to the iron bars on which the "ropes" were affixed along the side of the pavement to guard it, the plaintiff says that these iron bars, which he saw immediately after the accident, were of a height of not more than one foot and there were no 'ropes' affixed on them but only a kind of thick 'string' which was not visible at night-time.

It is the plaintiff's allegation that the 'strings', as he called them, were not visible in the night, were too low on the ground and in fact constituted a trap for the pedestrians".

The learned trial Judge in considering the legal position had this to say in his judgment:

"There is no need for me to refer to the law on the matter in view of the fact that both sides agree on it. If the defendants were negligent, in not warning the public against the possiblity of danger from the use of that part of the road under construction and not sufficiently guarding it against it, then they would be liable. What I have to decide is whether the defendants had discharged that onus placed upon them. This matter falls to be decided entirely on the evidence adduced".

The learned trial Judge then proceeded to make his findings on the evidence before him. He had this to say in his judgment:

"The issue between the litigants is whether the defendants actually took the precautions which they told the Court they had taken and which I have described earlier on. In this respect I have gone through the evidence very carefully and had the occasion to watch the demeanour of the witnesses whilst testifying before me. The witnesses for the defendants, Koulermis (D.W.1) and Alexandrou, the defendant, have lied on the issue of the precautions they alleged they took. I do not believe that the iron bars placed on the asphalt were of a height of 3' 6" above the ground, nor do I believe that there were three rows of 'rope' connecting them. There were no white barrels and no sign-posts diverting the traffic.

All these alleged precautions are marked on exhibit No. 4, which was the plan prepared by defendant No. 1 and pursuant to which the contractors carried out the works. However, Koulermis in answering questions put to him by the Court, he said that the markings on this plan refering to the precautions taken were written down by him when he was giving instructions to counsel to defend the case. These markings were not at the time the plan was prepared".

In dealing with the evidence called by plaintiff, he said the following:

"The plaintiff called two witnesses to corroborate his version. The first witness is Eleni Erodotou (P.W.2). She is an independent witness who is not related or even knows by sight the plaintiff. She said that she was also standing at the square waiting for the bus. She saw the plaintiff coming towards her, when suddenly his feet were caught into some strings and he fell down calling for help. She said that those strings were at a height of about 1 foot from the surface of the ground. She further said that she did not notice herself these strings until after the plaintiff had fallen down. She was emphatic in saying that the strings were not visible, unless one approached them very closely and looked down towards the ground to seen them. The strings were near to some diggings on the road and by the side of those diggings the buses stopped to collect their passengers. This version is also supported by Ioannis Procopiou (P.W.1), whose evidence was given preparatory to the hearing of the action and has been agreed to by counsel to be relied upon by this Court.

Procopiou was an employee of the contractors working at the material pavement. He gave a full description of the works carried out by them and he said that it was he personally who had placed on the ground the iron bars with the strings tied along them. He said that the pavement was dug in alongside, from north to south, so that the 'linies' would be placed along. These 'linies' are the coment blocks which are being placed along the edge of the pavement supporting it. The diggings had a depth of about 1 foot. Along the diggings the iron poles were placed by the witness and the string was tied connecting them.

According to this witness, the iron bars extended to about 2 ft. over the surface of the road. The diameter of the bar was half an inch. The buses stopped opposite the place where the works were being carried on at about 8 ft. from it. The south part of the pavement was not fenced with the iron bars and strings, because there were earth and other debris removed from the old pavement. The witness further said that it was a string which was tied connecting the iron bars and not a rope. In addition to this string there was another one extending from side to side which was 6" above the ground used to straighten the cement blocks ('fathin'). No other precautions were taken either during the day or during the night. The witness was emphatic in saying that no barrels were placed and he could not remember whether there were sign-posts diverting the traffic. He also said that the buses stopped about 4 ft. from the strings and the pedestrians were using the already constructed pavement by stepping above the strings".

In concluding and summarising his findings, the learned trial Judge accepted the evidence of the respondent and his witnesses as true and correct, and rejected the evidence of Koulermis and Alexandrou who were called by the appellants as untrue and unreliable. In the result, he found that the appellants had not taken the proper precautions in guarding the public against possible danger arising from works carried on by them and in consequence liable to respondent for the injuries he sustained.

After so finding, he proceeded to consider the question whether the respondent had also contributed to his predicament by his own negligence and he concluded that the respondent failed to exercise the proper care for his own safety since the works were apparent and the holes sufficiently obvious and found him guilty of contributory negligence to the extent of 20 per cent.

On the question of damages he assessed the special damages at £129 and awarded to respondent £500 as general damages, thus making a total of £629 out of which he deducted 20 per cent for his contributory negligence, and awarded him the sum of £504 against both appellants.

The appellants appealed both in respect of the findings of

the trial Court on the issue of negligence and, also, as to the quantum of general damages. Learned counsel for the first appellant by his address which was adopted by counsel for the second appellant, contended that the findings of the trial Court concerning the credibility of the witnesses were wrong and unjustified and also contrary to the real evidence and that the evidence of the plaintiff and his witnesses was self-contradictory. Further, that the finding of the trial Court that the first appellant abandoned his defence alleging that the second appellant was acting as an independent contractor for whose negligence the first appellant was not liable, was wrong. He further submitted that though the trial Court found that the appellants failed to take the proper protective measures to avoid any danger to the pedestrians, he failed to make any findings as to what protective measures the appellants should have taken in the case. On the question of contributory negligence, counsel argued that the percentage of 20 per cent found by the trial Court as the extent of contributory negligence of the respondent was, in the circumstances, wrong and that respondent was fully to blame in this case. Finally, he submitted that the amount of general damages awarded was excessive, having regard to the injuries suffered by the respondent.

We shall first deal with the contention of counsel concerning the findings of the trial Court as to the relations of the first appellant with the second appellant. The learned trial Judge in his judgment had this to say in this respect.

> "It is the appropriate stage here to refer to the statement of defence by defendant No. 1, paragraphs 3 and 4, in which it is alleged that defendant No. 3 was engaged by defendant No. 1 as an independent contractor, thus excluding defendant No. 1 from liability. This allegation has been abandoned, though not by a statement made by counsel expressly, yet in the course of the proceedings, quite properly to my judgment, it has been made clear by the evidence adduced from defendant No. 1 themselves, that the works carried out by defendant No. 3 had always been under their immediate supervision and control. In fact the contractor was following consistently the instructions of defendant No. 1's foreman, Koulermis (D.W.1). Furthermore during the hearing and in the written address of defendant No. 1, adopted by defendant No. 3's advocate,

the case of both defendants has been met as one of joint and several liability, if same exists".

The learned trial Judge in reaching his conclusion that the said allegation had been abandoned, acted so, having regard to the evidence of the main witness for the first appellant (D.W.1) the tenor of whose evidence was such as to identify himself with the execution of the work, as it appears from the record before us. In his evidence, in answering a number of questions both in examination-in-chief and in cross-examination, he spoke in such a way as if he was participating in the construction of the work carried out. He said, for example, "we were keeping a program of work", "we put iron poles consisting of iron of half an inch which the Municipality bought and also we bought rope.....", "first, we demolished two inches of the old pavement..... and we put poles all along to prevent anybody from entering upon the space where the works were carried out" and in answering a question as to whether anything else besides the poles was placed, he said, that the foreman put notices and signs and went on to say that "we put barrels painted black and white at some distance from each other". This witness was the person supervising and controlling the execution of the work on behalf of the first appellant. Furthermore, counsel for the first appellant in his written address did not make any submission that the first appellant was not liable as he had employed an independent contractor, but the whole trend of his address was to the effect that there was no liability on the part of the appellants. In dealing with the legal aspect of the case, after referring to the various authorities, counsel for the first appellant submitted that the appellants did not do anything which was dangerous to the public and that they have taken all due care for the safety of the public and that the accident was the result of the negligence of the respondent, and invited the trial Court to accept the evidence of the appellants which he analysed and summed up before the Court.

Irrespective, however, as to whether such contention was abandoned, or not, in dealing with this ground of appeal, we shall examine whether in the circumstances of this case the employment of an independent contractor exonerates the first appellant from any liability in the case.

Under the Municipal Corporations Law, Cap. 240, Part

III, headed "Duties and Powers of Councils", section 123(1)(t), the follwing provision is made:

"123(1) Subject to the provisions of this Law and of any other Law in force for the time being the council shall within the municipal limits—

(t) keep all streets clean and in good repair and sufficiently drained, lightened and clear of obstructions, and control the construction or alteration of any street, and divert or close any street and prevent obstructions thereover by awnings or otherwise ".

And under section 2, "street", is defined as including, "any square, road, bridle-path, pathway, blind-alley, passage, footway, pavement or public place".

Section 123 is one of the sections which has been preserved by the amending law of 1964, Law 64/64 (see section 8(2)).

Under the above provision a statutory duty is imposed upon the first appellant to control the construction and divert or close any street and prevent obstructions thereon and failure to discharge such duty renders such body responsible for damage which may result from its breach.

In dealing with a similar duty under the Highways (Miscellaneous Provisions) Act, 1961, Diplock, L.J. said in *Griffiths* v. *Liverpool Corporation* [1967] 1 Q.B. 374 that the statutory duty was an absolute one and this was confirmed by Lord Denning in *Haydon* v. *Kent County Council* [1978] 2 W.L.R. 485 in which the extent of the liability on local highway authorities in respect of accidents caused or alleged to be caused by the defective condition of a highway, was raised.

Quite apart, however, of liability, which may result from breach of statutory duty by a public authority such authority may also be liable for negligence. Furthermore, such authority, by employing a contractor to perform a duty cast upon it, cannot be discharged from liability for any failure by such contractor to properly discharge such duty on its behalf.

The relation between a public authority and an independent

contractor who was entrusted with the performance of a duty cast upon the authority and the consequences of the failure of such contractor to discharge such duty, has been considered in a series of cases dating back to the middle of last century. In *Gray* v. *Pullen*, 34 L.J. Q.B. 265 the Court of Exchequer Chamber, reversing the judgment of the Court of the Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain. On appeal in that case, it was held that it was the defendant's duty to fill up the drain, or to see that it was filled up, and that he was liable for the non-performance of this duty.

In dealing with the position of independent contractors, Lord Blackburn, J. in *Dalton* v. *Angus*, 6 App. Cas. 740, at p. 829 stated:

> "Ever since *Quarman* v. *Burnett*[1] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he should perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it; *Hole* v. *Sittingbourne Ry. Co.*[2]; *Pickard* v. *Smith*[3]; *Tarry* v. *Ashton*[4]".

The above extract was adopted by Lindley L.J. in *Hardaker* v. *Idle District Council* [1896] 1 Q.B. 335 who had this to add at page 342:

> "Lord Blackburn in this passage contrasts a contractor's negligence, which he calls 'collateral', with failure on the

1. 6 M. & W. 499.
2. 6 H. & W. 488.
3. 10 C.B. (N.S.) 473.
4. 1 Q.B.D. 314.

part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. Lord Blackburn's language in *Hughes* v. *Percival*[1] shews that this is really what he meant, for he points out that the employer's duty was to see that his contractor did his work properly".

And A.L. Smith L.J. in the same case, said at p. 344:

"In order to render a person liable for an act of negligence, which he did not himself commit, it must be shewn by the person injured, either that the person sought to be liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by delegating its performance to a contractor, rid himself of the duty".

In that case, the district council being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a gas-main was broken and the gas escaped from it into the house into which the plaintiffs resided and an explosion took place by which the wife was injured and the husband's furniture was damaged. It was held that the district council owed a duty to the public so to construct the sewer as not to injure the gas-main; that they had been guilty of a breach of this duty and notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach and that the damages were not too remote to be recovered. Lindley, L.J. at page 340 said:

"The powers conferred by the Public Health Act, 1875 on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves—i.e., by servants of their own. There is nothing to prevent them from employing a contractor to do their

1. 8 App. Cas. at p. 446.

work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more".

That case was followed in *Penny* v. *The Wimbledon Urban District Council and Iles* [1898] 2 Q.B. 212 which was a case in which a District Council acting under the Public Health Act, 1875 s. 150, employed a contractor to make good a highway, which was used by the public, but had not become repairable by the inhabitants at large. The work was to be executed according to instructions to be furnished to the contractor by the District Council's surveyor. In carrying out the work the contractor negligently left on the road a heap of soil and grass, unlighted and unprotected. A person walking on the road after dark fell over the heap, and was injured. Bruce J. at page 217 said:

"When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith*[1] is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdower probably will in fact be, used by persons lawfully entitled so to do."

Also in *Robinson* v. *Beaconsfield Rural District Council* [1911] 2 Ch. p. 188, Buckley L.J. had this to say at pp. 197, 198:

"They are at liberty to employe a contractor to do the work, but if the contractor failed to do that which it was the duty of these defendants to do or get done, then these defendants are liable

Whatever, therefore, were the contents of the contract,

1. 10 C.B. (N.S.) 473.

I think that on this ground these defendants were liable. They owed a duty of getting rid of this noxious staff. They have not performed that duty; they are consequently liable."

In *Holliday* v. *National Telephone Company* [1899] 2 Q.B 392, the Court of Appeal in reversing the judgment of a Divisional Court said:

"The defence is that the defendants are not liable in respect of the injury sustained by the plaintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival*[1] and that of the Privy Council in *Black* v. *Christchurch Finance Co.*[2], it is very difficult for a person who is engaged in the execution of dangerous work near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway". (per A.L. Smith L.J. at p. 400).

Also, at pp. 398, 399:

"There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works. . . . . .

It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the

1. 8 App. Cas. 443.
2. [1894] A.C. 48.

negligent performance of the work." (per Earl of Halsbury L.C.).

The principle in the above case was followed in *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers), Limited* [1934] 1 K.B. (C.A.) 191 in which Slesser L.J. said at p. 197:

"On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

Lastly, in *Salsbury* v. *Woodland* [1969] 3 All E.R. 863, Widgery L.J. in reviewing the authorities on this matter, had this to say at p. 869:

"The second class of case which is relevant for consideration of the present dispute concerns dangers created in a highway. There are a number of cases on this branch of the law, a good example of which is *Holliday* v. *National Telephone* Co.[1]. These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance unless authorised by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left on the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself if things go wrong merely because the direct cause of the injury was the act of the independent contractor."

In the light of the above authorities and having regard to the circumstances of the present case the employment by the first

1. [1899] 2 Q.B. 392; [1895-99] All E.R. Rep. at p. 361.

appellant of an independent contractor, the second appellant, irrespective of a stipulation in the contract as to the latter's sole responsibility to pay any damage which might have resulted to any person or property, does not exonerate the first appellant from liability to the respondent

Having reached the above conclusion, we are now coming to consider whether there was negligence on the part of the appellants in the execution of the work and whether the findings of the trial Court in this respect are correct

The learned trial Judge by accepting the evidence of the witnesses of plaintiff and rejecting that of the respondents, found that the defendants had not taken the proper precautions in guarding the public against possible danger arising from the works carried on by them and in consequence liable to plaintiff for the injuries sustained The evidence so accepted was to the effect that no barrels were placed to operate as a warning to the pedestrians and no sign post diverting the traffic. The only thing that appellants did, according to the evidence before the trial Court, was to place iron bars protruding about 2 ft. over the surface of the road and that there was a string and not a rope which was tied all along the iron bars about 6 inches above the ground and which was used as a measure for putting the cement blocks straight and also there was another similar string about 4 - 5 inches from the top of the iron bars along the western part of the pavement. No fencing was placed on the southern part of the pavement because there were earth and other debris which were removed from the old pavement. The place where the buses stopped was about 4 ft. from the strings and the pedestrians were using the already constructed pavement by stepping over the strings. According to the evidence of P.W.1 who was one of the labourers in the employment of the second appellant, no other precautionary measures were taken either during the day or during the night and the road was very busy by the circulation of buses and pedestrians.

It is well settled that this Court in determining an appeal will normally not interfere with the findings of fact of the trial Court unless such findings are manifestly wrong or unwarranted by evidence before it. Matters touching the credibility of witnesses are within the province of the trial Court which is in a far better

position to evaluate their evidence than we are, and only in cases where in their circumstances it becomes apparent that they are not warranted by the evidence considered as a whole or they are clearly wrong this Court will interfere (see, inter alia, *Polycarpou* v. *Polycarpou* (1982) 1 C.L.R. 182 at p. 194, *Kkaffa* v. *Kalorkotis* (1982) 1 C.L.R. 372 at p. 378, *Epifaniou* v. *HjiGeorghiou* (1982) 1 C.L.R. 609 at pp. 613, 614 and *Kyriacou* v. *Mata* (1982) 1 C.L.R. 932 at pp. 934, 935).

In *Kyriacou* v. *A. Kortas & Sons Ltd.* (1981) 1 C.L.R. 551, Loris, J. in expounding the principles on the strength of which an appellate Court may interfere with findings of fact, at p. 553, said:

> "It must be shown that the trial Judge was wrong in evaluating the evidence and the onus is on the appellant to persuade the Court that that is so. Matters relating to credibility of witnesses fall within the province of the trial Judge who has the opportunity to see and hear the witnesses. If on the evidence before him it was reasonably open to him to make the findings to which he arrived at, then this Court will not interfere unless the inferences drawn therefrom are not warranted by the findings whereupon this Court can draw its own conclusions."

Having considered the evidence before the learned trial Judge and the reasons why he preferred the evidence of the respondent and his witnesses to that of the applicants, we have not been persuaded by counsel for appellants, upon whom the onus to do so rested, that we would be justified in interfering with his findings based on the evidence before him. His findings that the proper precautions to avoid danger to pedestrians had not been taken, is amply warranted by the evidence accepted by him. In the result, the ground of appeal contesting such findings, fails.

We next come to consider whether there was contributory negligence on the part of the respondent.

As the learned trial Judge correctly found, the existence of the diggings along the pavement of the square and the material used should have given adequate warning to pedestrians that works were being carried out, who should, therefore, show

extreme care in using that part of the road for their own safety. His findings that the plaintiff should have exercised care for his own safety since works were apparent and the holes sufficiently obvious, is correct, especially taking into consideration the fact that the area where the accident occurred was illuminated.

In *Cyprus Palestine Plantations Co. Ltd.* v. *Kalliopi Leandrou* (1982) 1 C.L.R. 880 this Court had the opportunity to deal with the established practice followed by this Court when considering whether to review the apportionment of negligence made by a trial Court. The following was said in the said judgment at p. 892, which we adopt:

> "It is a well established practice both in England and in Cyprus that there would have to be a very strong case to justify any review of apportionment if an appellate Court accepted the same view of the law and facts as that taken by the trial Court (vide *Ekrem* v. *McLean* (1971) 1 C.L.R. 391 in which reference is made to the case of *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708) or unless 'some error in the judge's approach is clearly discernible' (per Lord Reid in *Baker* v. *Willoughby* [1969] 3 All E.R. (H.L.) 1528 at p. 1530)."

In *Christakis Ioannou and another* v. *Fivos Michaelides* (1966) 1 C.L.R. 235, Triantafyllides, J., as he then was, after concurring that the appeal should be dismissed, had this to say at pages 238, 239:

> "Though I do think that there is material on record on which the trial Court could possibly have found the respondent guilty of contributory negligence, sitting here on appeal I do not think that the view taken by the trial Court, to the effect that appellant was solely to blame, is so erroneous or unwarranted as to make it proper or necessary for this Court to interfere in the matter."

With the above in mind, and having had our attention directed to the facts of the present case, we have come to the conclusion that the apportionment of negligence between the parties as found by the learned trial Judge was wrong and that, in the circumstances of the case, a 50-50 apportionment of negligence between appellants and respondent is the reasonale one. In

the result, in this respect the appeal succeeds and respondent's negligence is apportioned at 50 per cent.

The last ground which we have to examine in these appeals is the quantum of general damages awarded. According to the findings of the trial Court the plaintiff sustained the following injuries:

> "According to the first medical report, the plaintiff suffered a crushing injury to his right knee with acute sprain of the joint with slight haemarthrosis. He stayed as an inpatient in the Nicosia General Hospital from 26.12.73 - 2.1.74. He was then followed up as an outpatient mainly for physiotherapy until 15.2.74. On an examination of the plaintiff on 12.3.74 it was found that his knee was fully stable and exhibited full range of motion. He could stand on tip-toe and squat although persistent squatting gave pain to his knee. This injury entailed to the plaintiff a fair amount of pain for 8-10 days followed by inconvenience and discomfort subsiding completely after 6-8 weeks. His knee showed normal function and sufficient muscle power.
>
> On the 14th October, 1976, when the plaintiff was again examined, the objective findings contained in the first report were confirmed. The plaintiff complained of occasional aching after strenuous physical activities and during changes of weather but, according to the medical report, these inconveniences give no functional incapacity to the plaintiff."

And on the basis of such findings an award of £500.- as general damages for pain and discomfort, past and future, was made, in addition to £129.- for special damages (including loss of earnings).

We find that the quantum of general damages awarded, though on the high side, is not so manifestly excessive as to justify our interfering with it.

In the result the appeals fail on all other grounds save the apportionment of negligence. In view of such apportionment, the amount of special and general damages to which the respondent is entitled are reduced to £315.- which is half of the amount

to which he would have been entitled had he not been found guilty of contributory negligence.

Regarding costs, as these appeals succeed partly, we make no order for costs. Respondent is entitled to his costs before the trial Court on the scale applicable to claims not exceeding £500.-. The judgment of the trial Court to be varied accordingly.

Appeals partly allowed.