1983 April 7

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

CHRISTOS POLYCARPOU,

Appellant-Defendant.

v.

1. D.I. SIOUKIOUROGLOU LTD.,
2. ANDREAS ANTONIOU,

Respondents-Plaintiffs.

(*Civil Appeal No.* 6234).

Negligence—Contributory negligence—Apportionment of liability—Road accident—Car on main road colliding, whilst overtaking an omnibus, with car which emerged on main road from a side road—Side road driver, not stopping before entering the main road but stating in evidence that there was a halt sign on side road and that he was under a statutory duty to stop before entering the main road—Trial Court's apportionment of liability 65% on side road driver and 35% on main road driver set aside because trial Court failed to take into consideration this evidence—Liability of side road driver apportioned at 80% and that of the other driver at 20%.

Evidence—Compensation for loss of use of car—Assessed by taking into consideration report of expert who had died and rejecting evidence of technical manager of the garage where car was repaired—Trial Court's finding wrongly based on the said report.

Costs—Two actions for damages arising out of a road accident—Consolidation—Plaintiffs ought to have been awarded costs for both actions up to their consolidation and full costs for one action for all proceedings that followed the consolidation.

Civil procedure—Practice—Evidence preparatory to the trial after conclusion of the pleadings—Judge who took it should continue the hearing and such evidence should be treated as part of the trial.

Whilst respondent 2 (plaintiff 2) was driving the car of his employers (respondents 1) on the Nicosia-Morphou road from

the direction of Morphou and whilst overtaking an omnibus he collided with the car of the appellant (defendant) which had emerged and/or entered that road from a side road. In actions by the respondents against the appellant the trial Court found that the appellant was 65% and respondent 2, 35% to blame for the accident and awarded to respondent 2 damages for the personal injuries he had sustained and to respondents 1 compensation for the loss of the use of their car: In awarding such compensation the trial Court preferred the estimate in a report prepared by an expert, who had subsequently died and not that of the technical manager of the garage that repaired the company's car as regards the period of time required for repairing it.

There was evidence from the appellant that at the intersection of the side road, along which he was travelling, with the main road there was a halt sign and that he was under a statutory duty to stop before entering the main road. The two actions of the respondents were consolidated and the trial Court did not award costs to them up to the consolidation of the two actions; and awarded to them half of their costs.

Upon appeal by the defendant and cross-appeal by the respondents:

Held, (1) in arriving at his decision regarding liability the trial Judge failed to give any significance to the evidence of the appellant that at the intersection of the side road, along which he was travelling, with the main road there was a halt sign and that he was under a statutory duty to stop before entering the main road; that in the light of the failure of the Court to take into account the above-mentioned evidence of the appellant, the appellant's contribution to the accident was 80% and that of respondent 2, 20%.

(2) That the trial Court wrongly based its finding on the report of the expert who had died and rejected the evidence of the technical manager of the garage where the car was repaired.

(3) That the reasons given by the trial Court in not awarding costs to the plaintiffs up to the consolidation of the two actions concerned and, also, in awarding half of the costs of the hearing, were wrong; that the trial Court ought to have awarded costs for both actions up to their consolidation and full costs for one action for all proceedings that followed the consolidation.

Per curiam:

We take this opportunity to express the opinion that in cases where the evidence of the plaintiff is taken preparatory to the trial, after the conclusion of the pleadings the Judge who took it should continue the hearing and such evidence should be treated as part of the trial.

Appeal dismissed. Cross-appeal allowed.

Appeal.

Appeal by defendant and cross appeal by plaintiffs against the judgment of the District Court of Nicosia (Hadjiconstantinou, S.D.J.) dated the 23rd February, 1981 (Actions Nos. 1539/79 and 584/79) apportioning liability at 65% against the defendant and at 35% against the plaintiffs.

E. Vrahimi (*Mrs.*), for the appellant.

A. Pandelides, for the respondents-cross-appellants.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of this Court will be delivered by Mr. Justice Demetriades.

DEMETRIADES J.: The appellant, was the driver of motor car under registration No. HZ. 363 when it collided with motor van under registration No. JS. 843 driven by respondent 2, Andreas Antoniou who, at the material time, was an employee of respondent 1, Shukuroglou Ltd. (hereinafter to be referred as the "company").

The company and Antoniou were the plaintiffs in the consolidated Actions in the District Court of Nicosia Nos. 1539/79 and 584/79, respectively, filed against the appellant as defendant.

Motor car under registration No. JS. 843 was the property of the company. The accident occurred on the 26th June, 1978, at about 06.30 hrs. on the Nicosia - Morphou main road, outside Akaki village. Antoniou, who was driving along that road from the direction of Morphou, whilst overtaking an omnibus collided with the car of the appellant which had emerged and/or entered that road from a side road.

By their respective actions the company claimed special and general damages for damage caused to its car and Antoniou claimed special and general damages for the injuries he sustained. The appellant had filed a counterclaim claiming damages for damage caused to his car. The respondents, by their defence to the counterclaim of the appellant, admitted that his car had suffered C£783.950 mils damage.

The trial Court found that the appellant was 65% and Antoniou 35% to blame for the accident; that the respondent company was entitled to receive compensation for the loss of the use of its car, but not to the extent claimed by it and, also, for the diminution of the value of such car and awarded to the company the amount of C£795.990 mils. With regard to the claim of Antoniou for personal injuries, the Court awarded to him the sum of C£68.200 mils by way of special damages and C£48.700 mils by way of general damages. The damages awarded in favour of the three litigants were based on the percentage of the blame of the two drivers.

The appellant complains that the apportionment of liability by the trial Court was wrong in law and in fact and that the damages awarded by it for the loss of the use and the diminution of the value of the van were not warranted by the evidence adduced.

The respondents filed a cross-appeal based on the following grounds:

1. The court was wrong in finding that Antoniou was guilty of contributory negligence to the extent of 35%.

2. The court was wrong in preferring the estimate contained in a report prepared by an expert who had subsequently died and not that of the technical manager of the garage that repaired the company's car as regards the period of time required for repairing it.

3. The quantum of general damages awarded to plaintiff in Action No. 584/79, namely Antoniou, was low.

4. The court was wrong in not awarding costs for Action No. 584/79 or at least costs until the consolidation of this action with the action of the company.

5. The court was wrong in awarding only half of the costs of the plaintiffs-respondents.

With regard to the issue of liability, the trial Judge had this to say in reaching his assessment:

"In the present case the plaintiffs' employee admitted, as stated earlier, that he had not noticed the traffic sign warning of the junction ahead; this was obviously due to an insufficient look-out. On the other hand, in the Motor Vehicles and Road Traffic Regulations of 1973 there is a prohibition in respect of overtaking at crossroads, and in the Highway Code an admonition not to overtake at a road junction. Though acting contrary to these does not in itself indicate negligence, yet they do in a sense set a standard of prudence to be followed by drivers. This driver ought to have guarded and/or reasonably have anticipated the danger, not uncommon, of other drivers emerging from the side-roads.

In my view, all the facts in this case, establish negligence on the part of the employee of the plaintiffs, and in respect of this the plaintiffs are vicariously liable.

The defendant, on the other hand, as found earlier, failed to stop before entering the main road. He must, in addition, have failed to notice in time and before entering the main road the traffic coming from the direction of Morphou although he should and could have so noticed it before reaching even the asphalted part of the main road. He appears, in my view, to have shown complete disregard for the traffic travelling on the main road and stopped only after having seen the traffic coming from the direction of Morphou and only after having covered 7 ft. into the main road.

For these reasons I find that the defendant is much more to blame than the plaintiffs' employee.

In the above circumstances, exercising my duty in apportioning the degree of negligence exhibited by the two drivers, in the best of my judgment I find the plaintiffs' employee 35% and the defendant 65% to blame for this accident."

In arriving at this decision the trial judge, however, failed to give any significance to the evidence of the appellant that at the intersection of the side road, along which he was travelling, with the main road there was a halt sign and that he was under a statutory duty to stop before entering the main road.

In the light of the failure of the Court to take into account the above-mentioned evidence of the appellant, we find that the appellant's contribution to the accident was 80% and that of the respondent Antoniou 20%.

With regard to the issue of the loss of the use of the car by the company, the Court found that the time required for repairing the car was 19 days. Such finding was based on a report of an expert, produced in evidence during cross-examination, but who did not give evidence as, in the meantime, he had died. The Court found that the estimate of this expert was preferable to that of the technical manager of the firm that had repaired the car, because, it said, there was no evidence at all before it to the effect that the plaintiffs had taken any steps for the purpose of having their van repaired the soonest possible so as to minimize their loss.

In our view, the trial Court wrongly based its finding on this report and rejected the evidence of the technical manager of the garage where the van was repaired. For this reason we find that the respondent company is entitled to be compensated in full for the 52 days that it took the garage to repair the van.

The Court had found further, on this issue, that it was reasonable for the respondent company to recover C£5.- per day for the loss of the use of its van. We are in agreement with this finding, especially since no evidence was allowed to be adduced on this issue after an objection by counsel for the appellant to the production by the witnesses of the company in verification of this claim.

With regard now to the finding of the Court that the respondent company was entitled to C£300.- as depreciation of their van, we see no reason to disturb this finding in view of the fact that there was no conflict of evidence on this issue and of the evidence of the technical manager of the garage.

Counsel for the appellant had submitted that the evidence of Antoniou, which was taken preparatory to the hearing, was not

properly put before the Court and that the Court erroneously took it into account. Even if this submission was correct and the evidence is discarded, the real evidence, coupled with that of the appellant, are sufficient to warrant the conclusions reached by the trial Court on the issue of negligence with the exception of the percentage of contribution.

We take this opportunity to express the opinion that in cases where the evidence of the plaintiff is taken preparatory to the trial, after the conclusion of the pleadings the judge who took it should continue the hearing and such evidence should be treated as part of the trial.

Respondent Antoniou by his cross-appeal had complained that the special and general damages awarded to him as a result of the injuries sustained by him were inadequate. On this issue the trial Court had found that Antoniou was entitled to receive the sum of C£105.- as special damages for wages and medical expenses and C£75.- general damages. In the light of the evidence which was before the trial Court, we find no reason to disturb this finding, but the necessary variations must be made to the figures of the judgment in view of the apportionment of the liability as found by this Court.

We now come to the two grounds of appeal regarding the costs awarded by the trial Court. By the first ground the respondents complain that the trial Court failed to award costs for Action No. 584/79 or at least costs up to the consolidation of the two actions, and by the second ground the respondents complain against the award to them by the Court of only half of their costs.

We find that the reasons given by the trial Court in not awarding costs to the plaintiffs up to the consolidation of the two actions concerned and, also, in awarding half of the costs of the hearing, were wrong. We feel that the trial Judge ought to have awarded costs for both actions up to their consolidation and full costs for one action for all proceedings that followed the consolidation.

In view of our finding on these two grounds, we direct that the judgment of the trial Court be varied accordingly.

In the result the judgment of the trial Court is varied as follows:-

(a) There will be judgment in favour of respondent 1 for C£1,191.600 mils.

(b) Judgment in favour of respondent 2 for C£144.-, and

(c) Judgment in favour of the appellant for C£156.790 mils.

As regards the costs of the present proceedings, we find that the respondents are entitled to their costs for the cross-appeal.

Appeal dismissed. Cross-appeal allowed.

Appeal dismissed. Cross-appeal allowed. Order for costs as above.