1983 September 26

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

PANAYIOTIS STYLIANOU TAVELLIS,
Appellant-Plaintiff.

v.

ELIAS IOANNOU EVANGELOU AND ANOTHER,
Respondents-Defendants.

(*Civil Appeal No.* 5702).

Negligence—Contributory negligence—Apportionment of liability—Causation—Blameworthiness—Pedestrian knocked down by motor vehicle at night-time, whilst walking on asphalted part of the road and not along the berm—Apportionment of liability 50 *per cent on each side set aside—Pedestrian found liable to the extent of* 30 *per cent.*

Damages—General damages—Personal injuries—Cerebral concussion with short loss of consciousness and post-traumatic amnesia—Lacerated wound on left ear and left parietal area of the skull two inches long and contusion of the chest—Hearing of left ear reduced by about 10 *to* 15 *per cent—Award of* £1,000 *sustained.*

Whilst the appellant-plaintiff was walking along the Nicosia-Limassol main road, at night time, he was hit by a car driven by the respondent-defendant. He sustained a cerebral concussion with short loss of consciousness and post-traumatic amnesia, a lacerated wound on the left ear, a lacerated wound on the left parietal area of the skull two inches long and contusion of the chest, but he did not suffer injury to any bone. Because of the wound on his left ear and infection which ensued the appellant had to undergo medical treatment, including an operation, and there has resulted serious stenosis of the left ear canal with the consequence that the hearing of the left ear of the appellant was reduced by about ten to fifteen per cent. Such stenosis could be corrected by a further operation which, at the time of the assessment of the damages by the trial Court, had not yet taken place.

In an action for damages by the plaintiff the trial Court held that he was liable to the extent of fifty per cent for the accident on the ground that he was walking at the time on the asphalted part of the road and not along the berm and that he had failed to notice in time, through lack of proper look-out on his part, the approaching car of the defendant and to move away from its path.

Upon appeal by plaintiff against the apportionment of liability and against the amount of C£1,000.- damages-which included C£29 special damages-on a full liability basis:

Held, (1) that the main blameworthiness for the happening of the accident lies with the defendant, in that had he kept a proper look-out he ought to have seen in time the appellant and he could have avoided the accident; that there are two elements in an assessment of liability, causation and blameworthiness; that, on the basis of the aforesaid two elements and, particularly, that of blameworthiness, the defendant was much more responsible than the appellant for what has happened; and that, therefore, this Court will interfere with the assessment of liability and alter it so that appellant is to be treated as being contributory negligent to the extent of only 30 per cent.

(2) That this Court has not been persuaded by the appellant - on whom the onus lay to do so - that this is a proper case in which to find that the amount of damages awarded to him is so low that it should intervene, on appeal, in order to increase it.

Appeal partly allowed.

Cases referred to:

Omer v. Pavlides (1971) 1 C.L.R. 404;

Papadopoulos v. Pericleous (1980) 1 C.L.R. 576 at p. 579;

Municipality of Nicosia v. Kythreotis (1983) 1 C.L.R. 154 at p.175;

Baker v. Willoughby [1969] 3 All E.R. 1528 at p. 1530;

Mentesh v. HadjiDemetriou (1983) 1 C.L.R. 1 at pp. 11, 12.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Orphanides, S.D.J.) dated the 7th April, 1977 (Action No. 6767/71) whereby he was found equally to blame with the defendant regarding the occurrence of a traffic accident.

Ph. Clerides, for the appellant.

G. I. Pelaghias, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant, who was the plaintiff before the trial Court, has appealed against its judgment by means of which he was found equally to blame with respondent 1 (to be referred to hereinafter as "the defendant") regarding the occurrence of a traffic accident, along the Nicosia-Limassol main road, at night-time, in the course of which the appellant, who was at the time walking towards Nicosia along the said road, was hit by a car driven by the defendant and suffered injuries.

It is common ground, according to the pleadings, that respondent 2 was, at all material times, the owner of the car which was driven by the defendant when the appellantiwas hit by it and that the defendant was driving such car in the course of his employment by respondent 2. The liability of respondent 2 towards the appellant does not appear to have been disputed at all at the trial and, of course, it depends on, and it is co-extensive with, the liability of the defendant.

It was not contested by the defendant that when he hit the appellant he was driving negligently since the appellant must have been visible to him within the distance of the range of his lights and yet he failed to notice in time the presence of the appellant and take the necessary avoiding action.

What has been in issue during the hearing of this appeal was whether the appellant was to blame at all and, if so, to the extent of fifty per cent, as was found by the trial Court on the ground that he was walking at the time on the asphalted part of the road and not along the berm and that he had failed to notice in time, through lack of proper look-out on his part, the approaching car of the defendant and to move away from its path.

It would not, of course, be correct to state that whenever a pedestrian is hit by a car the driver of such car is solely to blame and the pedestrian cannot be found guilty of any contributory negligence. They are both of them users of a road at the material time and they owe a duty of care to each other and to other road users; and if they fail to discharge such duty then, depending on the circumstances of the particular case, either or both of them could be found guilty of negligence which has led to the accident (see, for example, *Omer v. Pavlides*, (1971) 1 C.L.R. 404).

It is useful to refer, also, at this stage, to the following passage from Halsbury's Laws of England, 4th ed., vol. 34, p.40, para.49:

"49. *Pedestrians.* Persons on foot have a right to be on the highway and are entitled to the exercise of reasonable care on the part of persons driving vehicles on it, but they must take reasonable care of themselves, and may be answerable if they occasion accidents to vehicles. The amount of care reasonably to be required of them depends on the usual and actual state of the traffic, and on the question whether or not the foot passenger is at an approved and indicated pedestrian crossing. A driver owes no special duty to infirm persons on the highway unless he knows or should have known of their infirmity."

It is well settled that this Court, as an appeal Court, will not interfere with the apportionment of the liability made by a trial Court except in an exceptional case where there exists an error in principle or the apportionment is clearly erroneous (see, inter alia, in this respect, *Papadopoullos v. Pericleous*, (1980) 1 C.L.R. 576, 579, and the *Municipality of Nicosia v. Kythreotis*, (1983) 1 C.L.R. 154, 175).

In the present case we think, indeed, that there exists a "clearly discernible error" (see *Baker v. Willoughby*, [1969] 3 All E.R. 1528, 1530) in the judgment of the trial Court in relation to the apportionment of liability and we have, therefore, found it necessary to interfere with such apportionment.

We do agree with the trial Judge that the appellant was negligent too, but, in the circumstances of this case, it is clearly obvious that the main blameworthiness for the happening of the accident, in which the appellant was hit by the car driven by the defendant, lies with the defendant, in that had he kept a proper look-out he ought to have seen in time the appellant and he could have avoided the accident.

In the *Baker* case, supra, where a pedestrian was knocked down by a car, it was stressed by Lord Reid (at p. 1530) that "there are two elements in an assessment of liability, causation and blameworthiness" and we are quite satisfied that, on the basis of the aforesaid two elements and, particularly, that of blameworthiness, the defendant was much more responsible than the appellant for what has happened.

We have, therefore, decided to interfere with the assessment f liability in this case and alter it so that instead of each one of iem being, as was found by the trial Court, equally to blame, ie appellant is to be treated as being contributorily negligent) the extent of only thirty per cent and the defendant to the xtent of seventy per cent.

The next issue which we have had to consider is whether the mount of damages awarded in favour of the appellant is so low s to entitle us to increase such amount on appeal in the light of ie well settled principles governing the exercise of our relevant owers in a case of this nature (see, inter alia, in this respect, *Ientesh v. HadjiDemetriou*, (1983) 1 C.L.R. 1, 11, 12).

The special damages amounted only to C£29 and did not ppear to be disputed and the trial Court assessed a global mount of damages, including the aforesaid special damages, of £1,000 on the basis of full liability.

The injuries which the appellant was found to have suffered, 'hen he was taken to hospital after the accident, were cerebral)ncussion with short loss of consciousness and post-traumatic mnesia, a lacerated wound on the left ear, a lacerated wound on ie left parietal area of the skull two inches long and contusion f the chest, but he did not suffer injury to any bone. Because f the wound on his left ear and infection which ensued the ppellant had to undergo medical treatment, including an peration, and there has resulted serious stenosis of the left ear inal with the consequence that the hearing of the left ear of the ppellant was reduced by about ten to fifteen per cent. Such enosis can, according to medical evidence adduced at the trial, e corrected by a further operation which, at the time of the ssessment of the damages by the trial Court, had not yet taken lace and, as was rightly held by such Court, it is up to the ppellant to decide whether he wishes to submit himself to an peration with the hope of improving his hearing but without ıy guarantee that such operation will be successful.

Having taken all the foregoing into consideration we have not een persuaded by the appellant - on whom the onus lay to do) - that this is a proper case in which to find that the amount of ımages awarded to him is so low that we should intervene, on ppeal, in order to increase it.

We, therefore, have decided to allow this appeal only in so fa as the apportionment of liability is concerned and to dismiss i in respect of the amount of damages.

On the basis of the apportionment of liability which we hav found to be the correct one the damages payable to the appellan should be increased from C£500 to C£700, and the costs awarde by the trial Court should be reassessed on the basis of suc amount; and, furthermore, the appellant is awarded half th costs of this appeal.

Appeal partly allowed. Orde for costs as above.