1984 June 28

[TRIANTAFYLLIDES, P., LORIS, PIKIS, JJ.]

PREMIXCO ETERIA ASFALTOSTROSEON LTD.,

Appellants-Defendants,

v.

ANDREAS PSYLLOU,

Respondent-Plaintiff.

(*Civil Appeal No.* 6581).

Negligence—Contributory negligence—Apportionment of liability—Principles on which Court of Appeal intervenes in order to find that there exists contributory negligence or to vary the apportionment of liability—Respondent falling in a ditch at night-time, whilst driving his car, which was opened by appellants—Absence of sufficient warning of the existence of the ditch—But existence of street-lighting enabling respondent to see that the road ahead of him had been dug—Apportionment of 100% *liability on the appellants clearly erroneous—Varied—And apportioned two thirds on the appellant and one third on the respondent.*

Whilst the respondent was driving his motor-car along Kennedy avenue in Pallouriotissa, he fell into a ditch which the appellants had opened in the course of works necessary for the execution of their contract with a local authority. The trial Court found that the appellants were solely to blame for the accident on the ground that they failed to give sufficient warning of the existence of the ditch at the particular place. Hence this appeal.

Before the trial Court there was evidence that there was street lighting at that particular spot which should have enabled the respondent to see that the road ahead of him had been dug up.

Held, that the respondent was guilty of contributory negligence, especially because of the existence of street lighting at that particular spot which should have enabled him to see

that the road ahead of him had been dug up; and it can, therefore, be safely inferred that he failed to keep a proper look out while approaching the ditch ahead of him; that though this Court does not intervene on appeal in order to find that there exists contributory negligence, or to vary the apportionment of liability made by a trial Court, unless the trial Court has erred in principle or has made an apportionment of liability which is clearly erroneous the apportionment of liability by the trial Court in the present case is clearly erroneous and that it ought to be found that the appellants were to blame to the extent of two thirds and the respondent to the extent of one third for the accident in question (observations regarding views of Mr. Justice Pikis at pp. 846-847 post).

Appeal allowed

Cases referred to:

Municipality of Nicosia v. *Kythreotis* (1983) 1 C.L.R. 154;

G.I.P. Constructions Ltd. v. *Neofytou* (1983) 1 C.L.R. 669,

Shakolas v. *Agathangelou* (1983) 1 C.L.R. 1007;

Kassinou v. *Efstathiou* (1984) 1 C.L.R. 77

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Stavrinides, D.J.) dated the 30th April, 1983 (Action No. 1126/81) whereby it was found that they were solely to blame in respect of an accident in which the plaintiff was injured.

St. Kittis with *N. Flourentzou*, for the appellants.

E. Vrahimi (*Mrs.*) with *A. Christofidou* (*Miss*), for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. By means of this appeal the appellants complain against the finding of the trial Court that they were solely to blame in respect of an accident which occurred on the 12th January 1980 and in which the respondent was injured.

The trial Court assessed the general damages at C£100 and the special damages at C£371.

The accident occurred when the respondent, while he was driving at night his motor-car along Kennedy avenue in Pallouriotissa, fell into a ditch which the appellants had opened in the course of works necessary for the execution of their contract with a local authority.

Having examined carefully all the material before us we have reached the conclusion that the trial Court was wrong in attributing the blame for what happened solely to negligence on the part of the appellants, on the ground that they failed to give sufficient warning of the existence of the ditch at the particular place.

We are of the view that the respondent was guilty of contributory negligence, especially because there is evidence that there was street lighting at that particular spot which should have enabled him to see that the road ahead of him had been dug up; and it can, therefore, be safely inferred that he failed to keep a proper look out while approaching the ditch ahead of him.

It is correct that this Court does not intervene on appeal in order to find that there exists contributory negligence, or to vary the apportionment of liability made by a trial Court, unless the trial Court has erred in principle or has made an apportionment of liability which is clearly erroneous (see, inter alia, in this respect, *Municipality of Nicosia* v. *Kythreotis*, (1983) 1 C.L.R. 154, *G.I.P. Constructions Ltd.* v. *Neofytou*, (1983) 1 C.L.R. 669, *Shakolas* v. *Agathangelou*, (1983) 1 C.L.R. 1007 and *Kassinou* v. *Efstathiou*, (1984) 1 C.L.R. 77).

We are of the opinion that the apportionment of liability by the trial Court in the present case is clearly erroneous and that it ought to be found that the appellants were to blame to the extent of two thirds and the respondent to the extent of one third for the accident in question; and, therefore, the amount of damages awarded to the respondent should be reduced from C£471 to C£314.

Before concluding our judgment there should be mentioned that one of us—Mr. Justice Pikis—agreed with some reluctance

o the outcome of this appeal which is stated in this judgment, ecause he was of the view that, due to the manner in which he trial Court evaluated erroneously the evidence before it, he better course would have been to order a retrial.

As regards costs we have decided to award to the appellants half the costs of this appeal.

Appeal allowed.