1985 February 14

[L. LOIZOU, DEMETRIADES, SAVVIDES JJ.]

CHARALAMBOS GEORGHIOU NICOLAOU,

Appellant-Defendant,

v.

ANGELIKI GEORGHIOU LOUKA,

Respondent-Plaintiff

(Civil Appeal No. 6623)

Negligence—Contributory negligence—Road accident—Apportionment of liability—Principles on which Court of Appeal interferes with apportionment of liability made by trial Court—Duty of pedestrians and cars when making use of the road—Old age and infirmity of a pedestrian not matters which impose a special duty on the driver unless he knows or should have known of the infirmity of the pedestrian—Pedestrian knocked down by motor car, whilst crossing the road and after covering a distance of 11-12 feet—Motor car driven at slow speed—Pedestrian started crossing without looking round to see whether any car was coming—Causation—Blameworthiness—Apportionment of liability, two-thirds on the driver and one-third on pedestrian clearly erroneous—Set aside and substituted by apportionment of 30 per cent on the driver and 70 per cent on the pedestrian.

Practice—Evidence—Road accident—Plea of guilty before the Criminal Court—Effect—Allegations of fact in the pleadings which are not denied are deemed to be admitted and cannot be put in issue at the trial.

Whilst the appellant-defendant ("the defendant") was driving his car along Kritis Street in Limassol, a busy street, at night time he knocked down and injured a pedesrian, the respondent-plaintiff in this appeal who was crossing the road from left to right in the direction of the defendant. At the material time there was a number

of cars parked on both sides of the road, occupying part of the road. The plaintiff a woman of 78 years of age, left the house of a friend which was on the lefthand side of the road intending to proceed to the house of her daughter which was on the opposite side. When she came out of the house she looked to the right and did not see any car coming from the direction the appellant was driving. After proceeding for a distance along the pavement she started crossing the road at a slow pace, passing through the parked cars on the lefthand side of the road and then proceeded ahead, without looking again to her right to see if any car was coming; and whilst so proceeding she was knocked down by a car driven by the defendant which was coming from her right. The point of impact was 16 feet from the edge of the lefthand side pavement, the direction the plaintiff was coming. The plaintiff, who was driving at a speed of 20 miles an hour, at a certain stage applied his brakes and swerved more to his right but could not avoid the accident. The trial Judge found that the defendant was negligent because he failed to apply his brakes or to take any other avoiding action in time, so as to avoid the collision as he ought to have done, the moment he first saw the plaintiff crossing the road among the parked cars; and because had he done so in time, the plaintiff would not have covered a distance of above 16 feet and then been hit. He further found that the plaintiff was guilty of contributory negligence because she failed to keep a proper look-out; and on these findings he apportioned liability between the parties as resting by one-third on the plaintiff and two thirds on the defendant.

Upon appeal by the defendant against the above apportionment of liability.

Held, after dealing with the principles on which the Court of Appeal interferes with apportionment of liability—vide p. 100 post, (1) that the finding of the trial Court that from the moment the appellant saw the respondent crossing the road between the parked cars she had covered a distance of 16 feet is inconsistent with its earlier finding that there were parked cars on the left hand side of the road which obviously occupied part

of the road; that it could not have been possible for the appellant to see the respondent whilst she was walking between the parked cars as the existence of such cars obstructed his visibility as regards persons walking or standing behind them; that assuming that such cars were occupying 4'—5' of the road the distance covered by the respondent from the time she emerged between the parked cars up to the point of impact, could not be more than 11'—12'.

(2) That when an accident occurs between a pedestrian and a car both being users of the road at the material time, they owe a duty of care to each other and to other road users and depending on the circumstances of the case, either or both of them may be found guilty of negligence which has led to the accident.

(3) That concerning the negligence of the appellant, bearing in mind the fact that the respondent was walking at a slow pace and covered a distance of 11'—12' before she was hit by the car and bearing in mind also the speed at which the car of the appellant was driven, which, according to his evidence, was 20 miles per hour, the appellant could have seen the respondent from a longer distance than that alleged by him and could have taken avoiding action earlier; that though both parties contributed by their negligence to this accident, the apportionment of liability of the trial Court is clearly erroneous and that the conduct of the respondent in connection with the causation of this accident and the blame to be attributed to her, was by far higher than that of the appellant; that in consequence, the appellant should have been found to blame to the extent of 30 per cent and the respondent to the extent of 70 per cent.

Held, further, (1) that old age or infirmity are not matters which impose a special duty on the driver, unless he knows or should have known of the infirmity of the person concerned.

(2) *On the question arising from the failure of defendant to traverse or qualify plaintiff's allegation in her pleadings that he pleaded guilty to a charge of careless driving.*

It is a well established rule of practice that any alle-

gation of fact in the pleadings which is not denied, is deemed as admitted and cannot be put in issue at the trial.

Appeal allowed.

Cases referred to:

Jones v. *Livox Quarries* [1952] 2 Q.B. 608;

Hollingston v. *Hewthorn & Co. Ltd.* [1943] 2 All E.R. 35 at p. 43;

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;

G.I.P. Constructions v. *Neophytou* (1983) 1 C.L.R. 669;

Tavellis v. *Evangelou* (1984) 1 C.L.R. 460;

Ekrem v. *McLean* (1971) 1 C.L.R. 39;

Brown and Another v. *Thompson* [1968] 2 All E.R. 708;

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

Appeal and cross - appeal.

Appeal by defendant and cross-appeal by plaintiff against the judgment of the District Court of Limassol (Chrysostomis, P.D.C.) dated the 14th September, 1983 (Action No. 1209/82) whereby the liability in an action for damages for personal injuries as a result of a traffic accident was apportioned at 2/3rds on the defendant and at 1/rd on the plaintiff.

G. Michaelides, for the appellant.

V. Tapakoudes, for the respondent.

Cur. adv. vult.

L. Loizou J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

Savvides J.: This is an appeal by the defendant against the judgment of the District Court of Limassol whereby the liability of the parties in an action for damages for

personal injuries as a result of a road traffic accident was apportioned at 2/3rds against the appellant-defendant and 1/3rd against the respondent-plaintiff and on the basis of such apportionment the plaintiff was awarded the sum of £4,433.833 mils as damages. The respondent-plaintiff cross-appeals against such apportionment and maintains that the appellant-defendant should have been found wholly to blame for the accident.

The quantum of damages had been agreed upon between the parties at £6,650 on a full liability basis and the only issue which was left for determination by the trial Court was that of liability. The trial Court found that the appellant-defendant who was driving his car GX832 along Kritis street and knocked down the respondent-plaintiff was to blame to the extent of two-thirds and the appellant-defendant was to blame to the extent of one-third. Hence, the agreed amount of damages was reduced accordingly by one-third.

Counsel for the appellant by this appeal disputes the said apportionment on the ground that in the light of the evidence and the inferences drawn by the trial Court the apportionment of liability was manifestly wrong and not warranted by the evidence before it.

The salient facts of the case are briefly as follows:

On the 3rd March, 1981 at about 6.45 p.m. appellant whilst driving his car GX 832 along Kritis street in Limassol knocked down and injured the respondent who, at the material time was crossing the road from one side to the other. Kritis street is within the municipal boundaries of Limassol and according to the findings of the trial Court, is a busy street. At the time of the accident it was dark but the road was illuminated by street lighting. At the scene the road was straight, 30 ft. wide with pavements on both sides, the one on the lefthand side 7' wide and the opposite one 7' 3". At the material time there was a number of cars parked on both sides of the road occupying part of the road. At the point of impact the visibility was clear for a distance of about 500 meters on either side.

The respondent, a woman of 78 years of age, left the

house of a friend which was on the lefthand side of the road intending to proceed to the house of her daughter which was on the opposite side. When she came out of the house, according to her evidence, she looked to the right and did not see any car coming from the direction the appellant was driving. She proceeded for a distance along the pavement, holding a walking stick, and then turned to her right, stepped off the pavement and started crossing the road at a slow pace, passing through the parked cars on the lefthand side of the road and then proceeded ahead, without looking again to her right to see if any car was coming. Whilst so proceeding, she was knocked down by the car driven by the appellant which was coming from the direction on her right. The point of impact was 16 feet from the edge of the lefthand side pavement, that is from the direction respondent was coming. From blood stains found on the road by the investigating officer he concluded that the respondent, after she was hit by the car, fell down at a point 9' ahead of the car. In its resultant position the car was in a slightly oblique position towards the right, with its front right hand side at a distance of 9' 7" from the pavement on the right and the rear right hand side 11' 8" from the same pavement. The car, before stopping, left brake marks on the road 9' long. At the material time and shortly before the respondent started to cross the road, a group of young persons, one of which was P.W.5, dressed in fancy dresses (it was carnival time) had crossed the same road from left to right and reached the pavement on the opposite side when the respondent started crossing the road and P.W.5 heard the noise from the application of the brakes of the appellant and when she looked back, she saw that the respondent had been hit by appellant's car. The appellant, according to his evidence, was driving his car at a speed of 20 miles an hour.

In the light of the evidence before it, the trial Court made the following findings of fact:

"(a) The defendant was driving his car along Kritis street at a low speed keeping almost the middle of the road.

(b) At the same time the plaintiff left the house

No. 27, which is situated on the lefthand side of the road towards north, she proceeded along the pavement and started crossing the road at a slow pace for the purpose of going opposite, to the house of her daughter. When the plaintiff came out of the said house, she looked around and, having seen no traffic on the road, she proceeded along the pavement and then she started crossing the road without looking again for any traffic on the road.

(c) The defendant saw the plaintiff for the first time when she was walking among two parked cars on the left hand side of the road towards north. The defendant at a certain stage applied his brakes and swerved more to his right, but the plaintiff who kept on crossing the road was eventually knocked down by the defendant at point 'X', which is 16 ft. away from the edge of the road. Thus, the plaintiff covered a distance of 16 ft. and then she was hit by the car of the defendant".

On the basis of such finding the Court proceeded to examine the question of liability and concluded as follows:

"I do not intend to embark into mathematical calculations and ascertain the position of the car when the defendant first saw the plaintiff as that will be unprofitable bearing also in mind that the various distances given by the defendant cannot be relied upon if they are compared with the real evidence adduced. I feel that in the light of the totality of the evidence adduced before me and the findings that I have made, I can safely proceed and decide the issue of liability and contributory negligence without invoking the help of such evidence

With the above considerations in mind, I have considered the defendant's conduct and in doing so it is my view that the defendant omitted to take due care and attention for the safety of the plaintiff; he

failed to apply his brakes or to take any other avoiding action in time, so as to avoid the collision, as he ought to have done, the moment he first saw the plaintiff crossing the road among the two parked cars. Had be done so in time, the plaintiff would not have covered a distance of about 16 ft. and then been hit. Evidently the application of brakes and the swerving to the right was done at a later stage and when it was too late. For these reasons, I find that the defendant was negligent".

And after making reference to the case of *Jones v. Livox Quarries Ltd.* [1952] 2 Q.B. 608, and applying the test set out therein, by Lord Denning, concluded as follows:

"Applying this test to the facts of this case, it seems clear that the plaintiff started crossing the road, without having sufficient regard for her own safety, she failed to notice the lights of the on-coming car of the defendant which at the material time was travelling along Kritis street, at a point well prior to the point of impact and she also failed when she was at the edge of the pavement and was about to cross the road, and when she was in fact crossing the road, to look for any traffic on the road. Had the plaintiff kept a proper look-out, she would have been in a position to take in time measures for her safety. So, she is guilty of contributory negligence".

Having reached such conclusion the trial Court apportioned the liability between the parties as resting by one-third on the respondent-plaintiff and two-thirds on the appellant-defendant.

As it appears from the evidence before the trial Court, prior to the institution of the civil action, the appellant was prosecuted on a charge accusing him for driving without due care and attention and pleaded guilty to the charge. Such fact was alleged in the pleadings and was not traversed or qualified by counsel for the appellant in his defence. It is a well established rule of practice that any allegation of fact in the pleadings which is not denied, is deemed as admitted and cannot be put in issue at the trial. Though till the enactment in England of sec. 11 (1) of Civil

Evidence Act 1968 the fact of a conviction in a criminal case was immaterial and in consequence not admissible in evidence in civil proceedings, nevertheless, an admission of guilt was always admissible under the rules that an admission can always be given in evidence against the party who made it. The position in England in this respect prior to 1968 is explained in the leading case of *Hollingston* v. *E. Hewthorn & Co. Ltd.* [1943] 2 All E.R. 35 in which it was held that—

> "A certificate of a conviction cannot be tendered in evidence in civil proceedings. On a subsequent civil trial the Court should come to a decision on the facts before it without regard to the proceedings before another tribunal".

In the course of the considered judgment of the Court given by Goddard, L.J. he said at page 43:

> "If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal: and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case".

As to the admissibility of an admission of guilt, Goddard, L.J. had this to say at page 42:

> "Proof by a witness present at the trial of the confession is admissible, because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty, or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial".

Counsel for appellant in arguing this appeal contended that the trial Court erred in finding that the appellant was to blame by two-thirds and the respondent only by one third. This, counsel submitted, is obvious from the findings of the trial Judge that the respondent entered into the road between two parked cars on the nearside of the road and proceeded to cross the road without looking whether there

was traffic on the road. Also, that the Court put too much weight on the fact that the respondent covered a distance of 16' across the road before she was knocked down by the car of the appellant, whereas part of this distance includes the part of the road occupied by the cars which were on the nearside of the road, between which the respondent emerged into the road. The respondent, counsel stressed, could not be seen whilst walking between the parked cars. Counsel further added that the main cause of the accident was respondent's negligence of entering the road and proceeding to cross same without looking for any traffic on the road and without making sure that it was safe for her to cross the road. He finally submitted that the appellant was not to blame at all, or at least to the extent found by the trial Court, as he was driving his car at a low speed occupying almost the middle of the road and upon seeing the respondent crossing the road, he immediately applied the brakes and manoeuvred to the right to avoid the accident.

Counsel for the respondent, on the other hand, submitted that the appellant was wholly to blame and that any attribution of liability on the respondent was wrong.

It is well settled that this Court does not interfere on appeal to disturb the apportionment of liability as found by a trial Court, unless a very strong case is made out justifying such review of apportionment and provided it is satisfied that the trial Court has erred in principle or has made an apportionment of liability which is clearly erroneous. (See, in this respect, inter alia, *Papadopoulos* v. *Pericleous* (1980) 1 C.L.R. 576 at p. 579, the *Municipality of Nicosia v. Kythreotis* (1983) 1 C.L.R. 154, 175, *G. I. P. Constructions Ltd. v. Neofytou* (1983) 1 C.L.R. 669 and the recent judgment of the Court of Appeal in *Tavellis* v. *Evangelou*, Civil Appeal 5702 not yet reported.* See also *Ekrem v. Mclean* 1971 C.L.R. 39 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 1530).

On the totality of evidence and the material before the

* Now reported in (1984) 1 C.L.R. 460.

trial Court and the findings of the trial Court as to the sequence of events which led to this accident, we find ourselves unable to agree with the trial Court that the apportionment of liability in the present case is the proper one.

It is an undisputed fact that when the respondent left the pavement and started crossing the road between the row of cars which were parked on the nearside of the road and before she emerged on the road between the stationary cars, she did not look to her right to see if any car was coming from such direction and whether it was safe for her to proceed and cross the road. Had she done so, she would have seen the lights of the car driven by the appellant and proceeding towards her, which were on at the time.

When an accident occurs between a pedestrian and a car both being users of the road at the material time, they owe a duty of care to each other and to other road users and depending on the circumstances of the case, either or both of them may be found guilty of negligence which has led to the accident.

The finding of the trial Court that from the moment the appellant saw the respondent crossing the road between the parked cars she had covered a distance of 16 ft., is inconsistent with its earlier finding that there were parked cars on the lefthand side of the road which obviously occupied part of the road. It could not have been possible for the appellant to see the respondent whilst she was walking between the parked cars as the existence of such cars obstructed his visibility as regards persons walking or standing behind them. The appellant could only have a view of the respondent after the respondent emerged between the parked cars. Assuming that such cars were occupying 4'—5' of the road, the distance covered by the respondent from the time she emerged between the parked cars upto the point of impact, could not be more than 11'—12'.

The respondent in this case at the material time was 78 years of age and was walking with the assistance of a walking stick, proceeding at a slow pace. Old age or infirmity are not matters which impose a special duty on

the driver, unless he knows or should have known of the infirmity of the person concerned. As to the duty of a pedestrian when making use of the highway useful reference may be made to Halsbury's Laws of England, 4th Edition, Vol. 34, p. 40, para. 49 which reads as follows:

> "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".

In *Tavellis v. Evangelou (su*pra) Triantafyllides, P. had this to say in delivering the judgment of the Court of Appeal:

> "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)".

Concerning the negligence of the appellant, bearing in mind the fact that the respondent was walking at a slow pace and covered a distance of 11'—12' before she was hit by the car and bearing in mind also the speed at which the car of the appellant was driven, which, according to his evidence, was 20 miles per hour, the appellant could have seen the respondent from a longer distance than that

alleged by him and could have taken avoiding action earlier.

There are two elements which the Court should always take into consideration in assessing liability. The one is the causation and the other one is blameworthiness Having examined carefully all the material before us respecting the part which the appellant and respondent had played in the accident, we have reached the conclusion that though both parties contributed by their negligence to this accident, the apportionment of liability of the trial Court is clearly erroneous and that the conduct of the respondent in connection with the causation of this accident and the blame to be attributed to her, was by far higher than that of the appellant. In consequence, we are of the opinion that the appellant should have been found to blame to the extent of 30 per cent and the respondent to the extent of 70 per cent. On the basis of such apportionment the amount of damages awarded to respondent should be reduced to £1,965.—. In the result, the appeal is allowed and the amount of damages is reduced to £1,965.—. The cross-appeal is dismissed.

As regards costs, the appellant is entitled to the costs of this appeal and we award them accordingly. No costs for the cross-appeal.

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