

1986 July 11

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

HADJIANDREAS GEORGHIOU AND ANOTHER,

*Appellants-Defendants.*

v.

ANDREAS KYRIACOU,

*Respondent-Plaintiff.*

(Civil Appeal No. 6870).

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*Evidence—Admissibility of—Pleadings—Road traffic accident—Manner in which the two vehicles were driven put in issue by statement of claim—Allegation in the defence that other vehicle was driven on the wrong side of the road—Evidence at trial that such vehicle was zig-zagging on the road—Held admissible—Trial Judge not entitled to ignore it—Even if such evidence had not been admissible, once it was admitted and credited as reliable, defendants ought to have been allowed to amend their defence.* 5

*Negligence—Road traffic accident—Avoiding action—Car zig-zagging on the road—Driver of oncoming bus applying brakes and swerving to the right—In the circumstances such avoiding action was reasonable—Bus driver not to blame for the collision.* 10

The respondent (plaintiff) was a passenger in a saloon car driven along the main Nicosia-Morphou road towards Nicosia, which came into a collision with a bus coming from the opposite direction and driven by appellant 1 (defendant 1) in the course of his employment with appellant 2 (defendant 2). As a result the respondent was injured. In the course of the hearing the parties agreed that, on a full liability basis, the respondent would be entitled to £10,500 for general and special damages. 15 20

There were conflicting versions as to how the accident occurred. In the course of the hearing the appellants (de- 25

5      defendants) adduced evidence to the effect that at the material time the saloon car was zig-zagging in the road and that in view of such fact the driver of the bus was faced with an imminent danger of collision and had to take avoiding action and that in the agony of the moment the bus driver applied brakes and swerved to the right. No objection was taken as to the admissibility of such evidence.

10      Though the trial Judge accepted that the said version of the appellants was substantiated by credible evidence, he thought that as the "zig-zagging" was not pleaded, he could not act upon such evidence. In fact the defendants had pleaded that the saloon car was being driven all along on the wrong side of the road. As a result the trial  
15      Judge proceeded and made a finding that the saloon car was being driven with its right wheels slightly within the wrong side of the road and that that was its position when the distance between the two vehicles was 30 yards when the bus driver applied brakes and swerved to  
20      his right. The trial Judge, also, found that the bus driver could have seen the saloon car from a distance of 350 feet. In the light of such findings the trial Judge concluded that the avoiding action taken by the bus driver was very wrong and, consequently, he found that such  
25      driver was guilty of negligence. It should be noted that in the course of his judgment the trial Judge stated that he would have been prepared to grant an application for amendment of the defence, if such application had been made with a view to bring the defence in accord with  
30      the evidence.

35      *Held*, allowing the appeal: (1) The manner in which the two vehicles were driven was at issue by the very pleadings of the respondent-plaintiff. Every evidence relevant to the circumstances that preceded and surrounded the accident was highly relevant and admissible. The pleading of the defendants was not framed in precise terms, but nonetheless it raises the issue of the saloon car blocking the passage of the bus. It follows that the trial Judge was wrong to exclude evidence, which he had

accepted as credible, and to proceed and base his findings on a hypothetical state of affairs.

(2) Even if the issue had not been covered by the pleadings, once the evidence had been admitted and credited as reliable, the trial Judge ought to have allowed the defendants to amend their defence. 5

(3) In the light of the evidence adduced this Court has concluded that the appellants in no way contributed to the injuries of the respondent, as there was little they could do in the circumstances other than what was done, namely to take reasonable, in the circumstances, avoiding action. 10

*Appeal allowed with costs here and in the Court below against the respondent.* 15

**Appeal.**

Appeal by defendants against the judgment of the District Court of Nicosia (Boyadjis, P.D.C.) dated the 13th December, 1984 (Action No. 2369/79) whereby the sum of £10,500.- was awarded to the plaintiff as damages for injuries he sustained as a result of a motor car accident. 20

*G. Pelaghis*, for the appellants.

*Ch. Ierides* with *Chr. Clerides*, for the respondent.

*Cur. adv. vult.*

A. LOIZOU J.: The judgment of this Court will be delivered by Mr. Justice Demetriades. 25

DEMETRIADES J.: This is an appeal against the judgment delivered by Boyadjis P.D.C. in Civil Action No. 2369/79 of the District Court of Nicosia, by which the sum of £10,500.00 was awarded to the plaintiff, the respondent in this appeal, as damages for the injuries he sustained as a result of a motor car accident in which he and the defendants were involved. 30

As it appears from the record of the trial Court, the

facts that led to the proceedings before it were the following:

5      The plaintiff was a passenger in a saloon car driven along the main Nicosia-Morphou road towards Nicosia, which, at a point near the 11th milestone of that road, came into collision with a bus coming from the opposite direction and which was driven by the first appellant who, at the material time, was employed by the second appellant, its owner. As a result of the collision, which was  
10      a head-on one and very violent, the driver of the bus was killed and the respondent was severely wounded.

15      In the course of the hearing of the action the parties agreed that the plaintiff would, on a full liability basis, be entitled to the total sum of £10,500.00 as special and general damages. After that the trial proceeded on the only issue left for the Court to decide, namely that of liability.

20      The trial Judge, after referring in extenso to the evidence given by the witnesses of the parties, summarised the submissions of counsel which were based on it as follows:

25      "Mr. Pelagias for the defendants invited the Court to discard the evidence of the plaintiff as untrue and, accepting the defence version as true, to find that the bus driver was faced with a sudden emergency which was due to the negligence of the driver of the saloon car who was keeping his wrong side of the road; that in view of the fact that the saloon car was zig-zagging in the road, the bus driver was faced with an imminent danger of collision; that he had to take  
30      some avoiding action; that in the situation in which he was found he should not be expected to take perfect avoiding action; that he decided to apply brakes and swerve to his right; and that even if the avoiding action which he took were wrong, it should  
35      not be found to be negligent in the circumstances in which it was taken.

*Mr. Clerides for the plaintiff, on the other hand, has submitted that the evidence of the plaintiff should*

be preferred to that of the defence witnesses; that even if the plaintiff's evidence was not believed by the Court, the evidence adduced by the defence does not show that the bus driver was faced with a sudden emergency of the nature that would excuse his un- 5  
reasonable and wrong swerving to his wrong side of the road; that the bus driver had ample time and opportunity to take proper avoiding action by swerving to his extreme left-hand side of the road, by using the berm as well, by stopping his bus partly on the 10  
berm and partly on his left side of the road and warning the driver of the saloon car by sounding the horn and by flashing the lights of the bus. He concluded by saying that even if the defence version is accepted as true, the bus driver is negligent to a 15  
substantial degree."

The trial Judge then proceeded to commend on the submissions of counsel and to make his own findings on the evidence before him.

In order that the reader of my judgment can understand why I reached my conclusions in this appeal, I feel forced to quote rather long passages from the judgment of the trial Court. 20

In commending the submissions of counsel for the respondent (the plaintiff in the action), he said the following: 25

"He made no remark, however, regarding the fact that an important part of the defence version to be found in the evidence of all the defence witnesses, namely the alleged zig-zagging of the saloon car 30  
along the whole or part of the width of the road, is not pleaded and that nobody has moved the Court to allow an amendment at any time until today."

The trial Judge then proceeded as follows:- 35

"This inconsistency between the defence evidence and the defence pleading would have created no problem if I were to accept the version of the plaintiff as

to how the accident occurred. I would then have found the bus driver solely to blame because he suddenly swerved to his right without any reason or justification and blocked completely the passage of the saloon car which was rightfully proceeding along its proper side of the road at a speed which, even if it were about 50 miles per hour, was not unreasonable or dangerous in the circumstances. I am not satisfied, however, that from the moment the saloon car had negotiated the bend and confronted the oncoming bus and until the two vehicles collided, it was keeping its proper side of the road all along, or that the bus driver applied brakes and swerved to the right without any reason whatsoever as the plaintiff has alleged. I do not believe these allegations. This leaves me with the version of the defence and this is where the difficulty arises. If the allegation which is pleaded in the defence to the effect that the emergency situation putting the bus driver in a dilemma and requiring him to decide what to do in a fraction of a second, was created by the driver of the saloon car because he was driving all the way along his right-hand side of the road, is a different allegation to that put forward by the defence witnesses at the trial, and I think that it is different, then the first question which I have to answer is which is the defence allegation which I will consider and upon which I will ultimately decide whether it amounts to a sudden emergency depriving the bus driver from an opportunity to take effective avoiding action or exonerating him from liability in tort for having swerved to his wrong side of the road and there colliding with the saloon car.

Before answering this question it is pertinent to point out that since the collision occurred on the wrong side of the bus, this is prima facie evidence of negligence and breach of statutory duty by the bus driver, and the onus shifts on him to prove on the preponderance of evidence that the fact that he consciously drove his bus on his wrong side of the

road when faced with the oncoming saloon car was not an act of negligence on his part in the circumstances in which it was made. These circumstances are the gist of the defendants' defence and in compliance with the relevant rules of pleading the defendants have alleged the existence of these circumstances in their Defence. The version of the defendants is the one set out in their written Defence and no deviation from it in any material particular is allowed without the prior amendment of the Defence made with the leave of the Court. I would be prepared to allow an amendment of the Defence even at a late stage of the trial in this case if an application were submitted to that effect by the defendants for the purposes of bringing their pleading in accord with the evidence already given at the trial without objection. If by the end of the day, however, no application for amendment is made, my duty is to ignore completely evidence which is either contrary to or not covered by the pleadings even if same was admitted without objection. It has been stressed by the Supreme Court in *G.I.P. Constructions Ltd. v. Panayiota Neofytou and others* (1983) 1 C.L.R. 669, that pleadings serve a vital purpose for the definition of the issues in dispute by laying the rail-lines upon which the trial must proceed. In *Christakis Loucaides v. C. D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134, it was pointed out that the Court should confine itself to the issues as they appear at the close of the pleadings which should never be treated as amended.

It is convenient to examine at this juncture whether the defence witnesses are credible witnesses or not. If I were to act upon the evidence of D. W. 1 Eleftheria Tsangari alone, I would have felt unable to make any satisfactory finding. For reasons of her own, this witness repeatedly refused that she had there and then told the bus driver that he should have never driven the bus accross his right-hand side of the road and that he was to blame for the collision. She admitted making this remark when she

had identified her statement to the police in the hands of Mr. Clerides and when she realised that her lie would be revealed. She did not impress me as a truthful witness. Moreover, the story of the bus driver in the witness-box was not very consistent, to say the least. The picture which he attempted to create in Court regarding the events which immediately preceded the collision, taking his evidence as a whole, is a completely different picture from that given in his statement to the police—exhibit 3. There are substantial differences between his two versions which are not due to failure of his memory. He tried to make the behaviour of the driver of the saloon car much worse than it was in fact, in an attempt to exonerate himself completely from liability for the collision. The witness who has impressed me as a truthful witness is D.W. 3 police constable Andreas Stylianou. As he is attached to the traffic branch and has investigated many accidents, he is in a better position to estimate distances and speeds of vehicles and he is in a better position to relate more carefully, responsibly and accurately events which he had observed. It is mainly because of the trust which I have placed in this witness that I was led to the conviction that the plaintiff's evidence is unreliable.

In view of the pleadings and the evidence before me as a whole I find the following material facts: the bus was proceeding at a proper speed along its proper side of the road when it was first faced with the oncoming saloon car which the defendant saw or could have seen, if he had a proper look-out, from a distance exceeding 350 feet. When confronted with the bus, the driver of the saloon car failed to take his extreme left-hand side of the road as it was his duty to do having regard to the width of the road and the width of the two vehicles. He drove instead his saloon car with its right wheels slightly within his wrong side of the road. This was the position of the two vehicles when the distance between them was not below 30 yards. and this was the position of the



two vehicles when the bus driver applied brakes and swerved to his right. The bus driver could meet the situation and proceed his way safely if he had swerved to his extreme left probably making also use of the two-feet wide berm to his left. He could also stop with the left wheels of his bus on the edge of the asphalt. The bus driver decided instead to apply brakes and to swerve to the right with the result of blocking completely the passage of the saloon car which had itself swerved at the same time to its left and the collision occurred. This was an unnecessary and very wrong avoiding action on the part of the bus driver. Such an avoiding action might have been, perhaps, justified if the oncoming saloon car was proceeding throughout along its wrong side of the road blocking completely the passage of the bus, or if it had suddenly swerved to its right when the bus was too close to it. The bus driver, however, chose to say that the saloon car was zig-zagging along the the road from the moment it had negotiated the bend. Even if I were to accept this allegation I would have found again that his reaction to cut across the path and proper side of the saloon at a time that the latter was being driven almost along its proper side of the road at least 30 yards in front of the bus, was unjustified and wrong. I should, perhaps add that even if this allegation of the bus driver were true, he had ample time and opportunity to consider the alternative steps available to him and to act reasonably, because the saloon car was more than 300 or 350 feet away from the bus, when it started zig-zagging along the road. It is, of course, evident that the conflicting versions of the bus driver damaged his case considerably.”

The trial Judge, after reaching his above findings, made reference to a number of authorities that in his opinion illustrate the principles applicable in circumstances where in the agony of a collision a defendant takes insufficient or wrong avoiding action when suddenly faced with an emergency created by the negligent driving of the plaintiff, and concluded by saying:-

5      "The principle underlying all these authorities is  
that it is always a question of fact whether a party  
to a collision has taken proper avoiding action, which  
depends on the particular circumstances of each case,  
10      bearing always in mind that when two parties are so  
moving in relation to one another as to involve risk  
of collision, each owes to the other a duty to move  
with due care. It is also clear that the failure to  
take precautions amounts to actionable negligence or  
15      contributory negligence only when the possibility of  
the danger emerging is reasonably apparent. All the  
circumstances must be examined in each case with  
a view of ascertaining whether the driver who is  
accused of failing to take proper or sufficient avoid-  
20      ing action, had a reasonable opportunity to take such  
action. The time in the disposal of such driver be-  
comes an important and relevant consideration in  
this respect. Time in these cases starts running against  
such driver from the moment he becomes aware or  
25      from the time when he ought to have become aware  
of the respective position of the cars on the road  
and of the danger which is reasonably foreseeable  
as emanating from such position or situation. If  
this time is too short for a prudent driver to do  
30      anything to avoid the impact, he is not negligent.  
If on the other hand it is enough for a prudent  
driver to take sufficient avoiding action and he has  
failed to do so either through lack of proper look-  
out or through lack of proper skill, then he is ne-  
gligent.

35      Applying the above principles to the facts of the  
present case as I have found them, it is evident  
that the defendants did not substantiate their plea  
to the effect that the bus driver was placed in such  
a position and in such a difficult predicament and  
40      agony that he could not reasonably have avoided  
the collision or that no negligence should be attri-  
buted to him for his swerving to the right and col-  
liding with the saloon car almost on his right-hand  
side edge of the asphalt. I hope that I have made

myself clear in the difficult circumstances of this case that, although the defendants have satisfied me on the preponderance of evidence that the bus driver's swerving to the right was part of an avoiding action taken by him when the saloon car was approaching the bus keeping a small part of the bus's proper side of the road, and the driver of the saloon car was negligent in this respect, yet I am satisfied that no reasonable driver found in similar circumstances would have taken such an unreasonable and dangerous avoiding action. The defendant bus driver has substantially contributed through his aforesaid negligent act in the occurrence of the collision, the subject matter of this action. I need not and I should not make a finding regarding the percentage or degree of liability of each of the two drivers. It would make no difference in the outcome of this case since the plaintiff was a passenger in the saloon car and having been injured as a result of the joint negligence of both drivers, he is entitled to judgment for the full agreed amount against one of the joint tort-feasors, namely the defendant 1 and his employer defendant 2."

The complaint of the appellants in this appeal is in a nutshell that on the findings of facts by the trial Court judgment ought to have been given for the appellants-defendants and that the Judge erred in excluding evidence credited by him as reliable on the ground that it was not covered by the Statement of Defence of the defendants.

With respect we feel that the ground upon which this evidence was excluded was wrong. As it appears from the judgment of the trial Court, the Judge did accept that the car in which the plaintiff-respondent was a passenger was, immediately before the collision, travelling in a zig-zag, a fact that forced the driver of the bus to take avoiding action which, however, did not prevent a collision between the two vehicles. In any event, the manner in which the two vehicles were driven was at issue

by the very pleading of the respondent-plaintiff and it was, therefore, upon him to prove that his injuries were the result of the negligence of the appellants. In view of this, every evidence relevant to the circumstances that preceded  
5 and surrounded the accident was highly relevant and certainty admissible. We must, at this point, say that the evidence on this issue was admitted by the Court and that no objection was taken as to its admissibility. It is true that the pleading of the defendants-appellants is not framed  
10 in very precise and satisfactory terms. Nonetheless, it raises the issue of the oncoming vehicle blocking the passage of the bus, which necessitated the taking of avoiding action that did not, however, help to prevent the collision.

The learned trial Judge was, therefore, wholly wrong to  
15 exclude the evidence and base his findings on a hypothetical, in effect, state of affairs, for he contemplated a factual situation other than the one he accepted as correct. Even if the issue had not been covered by the pleadings, once the evidence had been admitted and in fact credited  
20 as reliable, the trial Judge ought to have allowed the defendants to amend their pleading.

The course that the trial Judge followed, to wholly ignore credible evidence, was certainly not open to him. On the  
25 other hand, the evidence as earlier mentioned was admissible and covered by the pleadings. Given the findings of the Court that the collision was precipitated by the failure of the driver of the car in which the respondent travelled as a passenger to keep proper control over it, as a result  
30 of which the passage of the appellants was blocked, the inevitable inference is that the injuries of the respondent were solely the result of the action of the driver of the car in which he travelled as a passenger.

Considering the evidence and the findings of the trial  
35 Court, it is our view that the appellants in no way contributed to the injuries the plaintiff-respondent sustained, as there was little they could do in the circumstances other than what was done, namely to take reasonable, in the circumstances, avoiding action.

In the result, the appeal is allowed, the judgment of the trial Judge is set aside and the action of the plaintiff against the defendants is dismissed.

The appeal is allowed with costs here and in the Court below.

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*Appeal allowed with costs.*