

1987 February 27

[A LOIZOU DEMETRIADES PIKIS JJ]

G KASINOS CONSTRUCTIONS LIMITED,
Appellants-Defendants,

v

LEFTERIS CHRISTODOULIDES,

Respondent-Plaintiff

(Civil Appeal No 6904)

Negligence—Burden of proof—Shifting of to the defendants—Road traffic accident—Respondent injured as he was forced to jump from appellants' trascavator, whilst he was driving it—Trascavator's engine switched off and its steering and braking systems failed to operate—Finding that said events not due to respondent's negligence—In the circumstances burden of proof shifted to the appellants **5**

On the 23 82 the respondent, an employee of the appellants, was driving the latter's trascavator in the course of his employment. The engine of the trascavator switched off and neither the steering mechanism nor its braking system responded to the efforts of the respondent to control the trascavator. As the trascavator was heading towards a field, the level of which was 12 feet below that of the road, the respondent jumped from it and, as a result, he sustained injuries **10**

The only issue that was left for determination by the trial Court, was that of the appellants' negligence. In the light of the evidence adduced the trial Judge reached the following conclusions, namely that the engine switched off, because of a cause not due to bad driving or the negligence of the respondent, that, because the trascavator was travelling downhill, it accelerated speed, that despite respondent's efforts it could not be brought to a standstill and that the failure of its braking system to operate was due to some defect for which the respondent was not responsible. He, also, found that the test which was carried out after the accident was superficial, because the road conditions were not similar to those existing at the time the accident occurred **15**
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In the light of such conclusions the trial Judge held that the burden of proof had shifted to the appellants, who had to satisfy him that they were not responsible for the accident in question. Consequently, he found the appellants liable for the accident **25**

Held, *dismissing the appeal* (1) The findings of the trial Judge were

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warranted by the evidence adduced before him. In the circumstances he rightly held that the burden of proof had shifted to the appellants, who had to satisfy him that they were not responsible for the accident.

- 5 (2) The appellants failed to discharge such burden, because they did not adduce any evidence that they were diligent in servicing the machine and that whatever caused the switching off of the engine and the non operation of the brakes and steering gear could not have been prevented or foreseen.

Appeal dismissed with costs

Appeal.

- 10 Appeal by defendants against the judgment of the District Court of Limassol (Korfiotis, D.J.) dated the 11th February, 1985 (Action No.2250/82) whereby they were adjudged to pay to the plaintiff the sum of £1.120.- as damages for injuries sustained by him as a result of their negligence.

- 15 *V. Tapakoudes*, for the appellants.

Chr. Pourgourides, for the respondent.

Cur. adv. vult.

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

- 20 DEMETRIADES J.: This is an appeal against the judgment of a District Judge of Limassol by which he found that the respondent sustained injuries as a result of the negligence of his employers who are the appellants in this appeal.

- 25 As the question of the amount of damages, to which the respondent would be entitled, on a full liability basis, was agreed between the parties, the only issue that was left for the trial Court to decide was that of negligence.

- 30 The case for the respondent, before the trial court, was that he was an employee of the appellants, who are a construction company, and that on the 2nd March, 1982, he was instructed by them to drive a tractor under Registration No. HW750 to one of their sites; that whilst driving the machine along a side road, which joins the old with the new Nicosia main road, its engine switched off and that despite his efforts to control it, neither the steering nor

the brakes responded, as both systems went dead, and that because the trascalvator was heading towards a field, the level of which was 12 feet below that of the road, he jumped from it and was injured. In giving evidence he alleged that the speed of the trascalvator immediately before the accident was 5 m.p.h.

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The appellants denied that they were in any way liable for the injuries sustained by the respondent and alleged that their machine was properly serviced. They further alleged that immediately after the accident their machine was tested, in the presence of the Police Constable who investigated the accident, and it was found that both its brakes and steering gear operated satisfactorily. They further alleged that after the accident occurred the trascalvator was driven to a construction site where it worked both for the remainder of that day, as well as on the whole of the following day, without giving any problem and that after this work was completed, it was serviced at their garage and no fault was found with it.

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We should at this point remark that no evidence was adduced by the appellants as to what the people who serviced the trascalvator after the accident did or what they found.

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Each side called an expert mechanical engineer who gave evidence as to how the machine would respond after its engine was switched off. This evidence, the trial court, very rightly described as one of purely academic value as neither of them tested or checked the machine immediately after the accident in order to find out what caused the switching off of the engine.

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The trial court found that the test carried out by defence witness Chamboullides, in the presence of the Policeman who investigated the accident, was superficial. In any event, what Chamboullides said in his evidence, as this appears from the record before us, the test carried, that is the starting of the engine of the machine and its moving off the scene of the accident, as well as its performance later on that day and the following day, is not evidence that can exclude the possibility that a latent defect was caused by some unknown factor.

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The trial Court, after hearing the evidence, found that there were three issues that had to be decided upon, namely -

(a) Did the respondent drive carelessly and badly handled the

machine and as a result he lost control? Or

- (b) was the accident due to bad servicing or faulty maintenance, or mechanical damage of the machine caused by the negligence of the appellants? And
- 5 (c) was the loss of control of the machine, because of the switching off of its engine and the resulting non operation of its brakes and other parts, due to a latent defect, something that could not have been foreseen by the appellants, despite the fact that they exercised diligent care for its maintenance?
- 10 The trial Judge, after dealing in extenso with the evidence adduced, came to the following conclusions:
- (a) That whilst the trscavator was travelling in second gear, its engine switched off because of a cause not due to bad driving by or the negligence of the respondent.
- 15 (b) That because the trscavator was travelling downhill, it accelerated speed.
- (c) That despite the efforts of the respondent, who applied the brakes, the trscavator could not be brought to a standstill and as a result it overturned, and
- 20 (d) That the failure of the brakes to operate was possibly due to some defect for which the respondent, in any event, was not responsible.

25 The trial Judge further found that as the trscavator, after the accident, was tested on road conditions not similar to those existing at the time the accident occurred, the test which was carried out was a superficial one.

30 In our view, the findings of the trial Judge were warranted by the evidence before him. In particular, the evidence of the experts that were called by both sides and who agreed that when the engine switched off, the braking system of the machine, which was in good condition, ought to operate and lock the wheels, fully support the fourth conclusion reached by the trial court.

35 In the circumstances, the trial Judge rightly said that the burden of proof in this case had shifted to the appellants who had to satisfy him that they were not responsible for the accident. The appellants

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failed to call evidence that they were diligent in servicing the machine and that whatever caused its switching off and the non operation of the brakes and the steering gear could not have been prevented or foreseen and they, therefore, have failed to discharge the burden that had been shifted on them.

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In the result, this appeal is dismissed with costs.

*Appeal dismissed
with costs.*