

1987 November 30

ΙΜΑΛΑΧΤΟΣ ΠΙΚΙΣ ΚΟΥΡΡΙΣ ΙΙ,

TEKLIMA LTD

Appellants Defendants No 1

v

1 A P LANITIS CO LTD

Respondents Plaintiffs

2 SALAMIS TOURS LTD

Respondents - Defendants No 2

(Civil Appeal No 6953)

Evidence Real evidence — Expert witnesses explaining implications of — Conflicting explanations — Trial judge believed the evidence of the one of such witnesses because his version was corroborated by the evidence of an eye witness — A serious misdirection — Retrial ordered

Evidence — Failure to examine testimonies of witnesses in their correct perspective — Retrial order 5

A long vehicle known as a trailer driven in the direction of Nicosia and a saloon car heading in the direction of Limassol collided on the old Nicosia Limassol road by the 24th milestone with fatal consequences for the driver of the saloon car 10

The trial was confined to the issue of liability. The two expert witnesses (Stavrides and Yiallourous) who testified before the trial Court gave conflicting versions as regards the implications of the real evidence. Stavrides asserted that the point of impact was 3.6 from the middle of the road on the side of the trailer whereas Yiallourous asserted that it was on the centre of the road 15

The driver of the trailer alleged that the collision occurred because the saloon car of the deceased which was coming from the opposite direction following another car came suddenly on the side of the lorry and knocked on it 20

Mr Strovolides the driver of another car that was driven behind the saloon car of the deceased though not able to point out the exact point of impact asserted in his testimony that the collision occurred in the middle of the road. Significantly the witness made no reference to a third car being driven ahead

of the saloon car nor was it suggested to the witness in cross examination that there did exist as alleged by the trailer driver a third car

5 The statement made before the Coroner by another witness namely A Nicolaou who passed away before the hearing of the action was produced in evidence by consent That witness too located the point of impact somewhere at the middle of the road and like Mr Strovolides made no reference to any vehicle being driven ahead of the saloon car

10 The trial Judge examined the evidence of the two experts and concluded that the testimony of Mr Stavrides should be preferred to that of Mr Yiailouris One of the reasons given for the preference of the testimony of Mr Stavrides was that his testimony was corroborated by the evidence of the driver of the trailer

Held allowing the appeal Malachos J dissenting

15 (1) The cogency of the evidence of an expert in the analysis of real evidence resulting from an accident depends on the reliability of his findings and their objective implications The real evidence is intended as often affirmed to furnish to whatever extent that is possible by the real evidence found at the scene an objective and reliable guide to the circumstances attending an accident thereby providing a yardstick for the assessment of the accuracy and reliability of witnesses to facts In this case there was a serious misdirection when the trial Judge found confirmation of the evidence of the expert coming from the testimony of an eye witness

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25 (2) Another misdirection no less consequential was the failure of the trial Court to appreciate in a correct perspective the evidence of witness Strovolides His evidence was essentially disregarded as inconsequential because of the inability of the witness to indicate the precise point of impact In no way did the trial Court focus attention on the inevitable conflict between the version of events given by that witness as to circumstances preceding and surrounding the accident and that expressed by the trailer driver

30 (3) Moreover the trial Judge did not approach in a correct perspective the statement of deceased Nicolaou

35 (4) The misdirection noticed above in the evaluation and assessment of evidence illuminating the circumstances of the accident and the omission to examine the evidence in its true perspective made the finding of the Court attributing sole liability for the accident to the saloon driver unreliable and unsustainable

*Appeal allowed with costs
Re-trial order Costs of the
trial to be costs in cause*

Cases referred to

- Mentesh and Another v HjiDemetrou* (1983) 1 C L R 1
- Charalambous v. Demetrou.* 1961 C L R. 14
- Mamas v The Firm «Arma» Tyres* (1966) 1 C.L.R 158.
- Thomaides and Co Ltd. v Lefkantis Bros* (1965) 1 C L R 20. 5
- Patsalides v Afshanan* (1965) 1 C L R 134
- Clarke v. Edinburgh Tramways Co.* (1979) S.C (H.L.) 36;
- Thomas v. Thomas* [1975] A C 484.
- Messiou v Eleftheriou* (1982) 1 C L R. 486:
- Adamis and Another v. Eracleous* (1982) 1 C L R 746. 10
- Charalambous and Another v Kaifas* (1986) 1 C.L.R 278.

Appeal.

Appeal by defendants 1 against the judgment of the District Court of Nicosia (Demetriou, Ag. P.D.C.) dated the 26th April, 1985 (Limassol Action No. 1881/82) whereby defendant 1 was ordered to pay to the plaintiff the sum of £4,233.= as damages due to a traffic accident. 15

A. Dikigoropoulos. for the appellants.

No appearance for respondents No 1.

L. Papaphilippou, for respondent No. 2. 20

The following judgments were read:

MALACHTOS, J : This case arose out of a collision between two motor vehicles between the 21st and 22nd milestones of the old Nicosia-Limassol road at about 10 a.m. on 2.7.81. The one vehicle involved was a small Austin Estate 1300 under Registration No. HE 95 driven at the time in the direction of Limassol by a certain Kypros Charalambous in the course of his employment with the appellants, Defendants 1 in the action, who died on the spot due to the injuries he received. 25

The other vehicle, an articulated lorry, loaded with a container, under Registration No. KU 600, belonged to Defendants No. 2 in the action, and was driven in the opposite direction by a certain Nicosios A. Michael in the course of his employment. 30

After the collision the lorry proceeded uncontrolled knocked on another car under Registration No KJ 303 which was following the Austin car from a distance of about 100 to 150 metres left the road and overturned in the fields on the right hand
 5 of the road as one faces Nicosia. The goods in the container which consisted, among other things, of 96 AEG Lavamat washing machines, the property of respondents No 1 the plaintiff company, carried from Limassol to Nicosia on reward sustained considerable damage

10 As a result the plaintiff company instituted legal proceedings against the two defendants claiming damages for negligence on the part of their respective drivers

It should be noted here that the amount of damages on a full liability basis was settled prior to the hearing of the case and also
 15 it was admitted by both defendants that they were vicariously liable for the negligence of their respective drivers if any and what remained for the trial court to decide was the question of liability as between the two defendants

At the trial, counsel for the plaintiff company since the only
 20 remaining issue was the degree of contribution of each one of the two drivers to the accident called as his only witness the Police investigator, Charalambos Stavrides a pensioner who was at the time of the accident a Police sergeant attached to the traffic branch and closed his case. This witness stated that on 27/81 in the
 25 morning, visited the scene of the accident where he found the three vehicles involved in their resultant position. The driver of the Austin was lying dead on the ground near it. There and then he took various measurements and prepared a sketch plan with an explanatory table and also took a number of photographs which
 30 he developed himself. The sketch with the explanatory table and the photographs were produced in court as exhibits. The width of the asphalt at the scene of the accident is 20ft 10ins with usable berms on both sides. The road is sloping towards the direction of Nicosia and is separated by a dotted white line. At a distance of 2ft
 35 5 ins to the right of the white line, as one faces Limassol there were five deep scratches on the asphalt which were caused by the belly of the engine of the Austin car at the time of the impact. On the belly of the engine of the Austin car there were traces of asphalt indicating that it came into contact with the asphalt road. Scuff
 40 marks corresponding to the front nearside wheel of the lorry were

noticed on the road starting from the left hand side of the edge of the asphalt opposite the five scratches. From the damage observed on the two vehicles, it was made clear that their front offside corners came into contact. The contact of the two vehicles was 1ft 6 ins wide

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Taking into consideration the above, this witness stated that in relation to the white line the Austin car at the time of the impact was occupying 3ft 6ins of the road over the white line to the side of the lorry. The point of impact, which is not a mere spot, is fixed at point X on the sketch and is well over the white line to the side of the lorry

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The case for the appellants/defendants 1 before the trial Court, was that the collision occurred on the side of the Austin car or approximately on the crown of the road and so the driver of the lorry was either entirely to blame or, alternatively, contributed equally with the driver of the Austin car to the accident

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In support of their case two witnesses were called, namely, Sotenos Yiallouros, an automobile and mechanical engineering consultant and assessor and Manios Strovolides the owner and driver of the motor car under Registration No KJ 303, which was following the Austin car at the time of the accident. Sotenos Yiallouros in giving evidence stated that on 3, 4, 5, and 13 July, 1981, investigated this accident and on 25 9 81 he prepared a report, which he produced by consent before the trial court. This investigation report which was based partly on the police sketch plan, was made for the purpose of specifying the cause and the way in which the accident occurred. He was retained to do so by the insurers of the Austin car. In his report this witness, after giving his own theory as to how the accident occurred, concluded as follows

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«From the examination carried out on KU 600 tractive unit, it was found that its RH front corner had been crashed during the initial impact with HE 95. Paints of the HE 95, however, were found on KU 600's RH front end of about 12 ins width from right to left. The width of same paints, in my opinion, could only be caused by the smashing side panels of HE 95, which was compressed and torn off the vehicle, covering a total max width of about 28 ins beyond the RH side of the same vehicle. From the above extensive examination it seems

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that the lorry KU 600 was driven beyond the center line of the road towards the right while HE 95 very close to the center line»

Manos Strovolides stated that he was driving his car under
5 Registration No KJ 303 following the Austin car and noticed the collision when he was about 100 to 150 metres away from it. There is a bend of the road and the collision took place on that bend. After the collision he reduced his speed and swerved to his right to avoid colliding with the lorry which was proceeding
10 uncontrolled and with great speed but he could not avoid it. This witness stated further in answer to a question in the examination - in chief as to whether on which part of the road he saw the collision since he saw the small car driven on the left hand side of the road but he could not say if the lorry had crossed to the side of
15 the small car or the small car to the side of the lorry.

In cross-examination this witness also stated in answer to a question that since according to his evidence the small car never
crossed over the white line to the other side of the road, the lorry must have crossed the white line and so the collision must have
20 occurred on the side of the small car. answered that from what he remembered no white line was in existence.

On the application of counsel for defendants 1 and with the consent of counsel for defendants 2 the evidence which was given
at the inquest of the driver of the Austin car by a certain Antonis
25 Nicolaou a professional driver who at the time of the accident was driving motor lorry under Registration No KR 813 from Limassol to the direction of Nicosia following the lorry, and who died before the commencement of the hearing of the action was produced as an exhibit before the trial court. The substantive part
30 of his evidence is the following

«Near the Forest Station of Kornos there is a bend. I noticed that the trailer was on the left hand side of the road. I did not see the other car which was coming from the opposite direction. When I saw the other car was when they came into
35 collision. When the collision occurred they were in the middle of the road. After the collision the trailer proceeded to the right and overturned. From the opposite direction another car was coming which proceeded to the left hand side of the road and

overtumed. I stopped in order to see if I could be of any assistance. I could not and so I left. I did not notice anything unusual in the road before the collision. I cannot say what was the position of the car coming in the opposite direction before the accident with regard to the road since I could not see it». 5

The case for defendant 2 company, before the trial court, was that the driver of defendants No. 1 was entirely to blame for the accident. Counsel for defendants 2 in support of his case called as his only witness Neofytos A. Michael, the driver of the lorry who gave an account as to how the accident occurred. The substance of the evidence of this witness is that in the morning of 2.7.81 he was driving the lorry in question from Limassol to Nicosia. At the place where the accident occurred there is a right hand bend. He was holding his left hand side of the road well within the white line which separates it. There he saw three cars coming from the direction of Nicosia. At the time when the first car was almost by the side of his lorry the car following it came suddenly to his side and knocked on the lorry. The only thing he had time to do was to remove his foot from the petrol pedal. The lorry then proceeded uncontrolled, and overturned in the fields on the other side of the road. When he was asked to give an explanation as to why the second car came towards his side he said that he was under the impression that its driver was trying to overtake the preceding car. 10 15 20

The trial Judge in his judgment after summing up the evidence adduced by the parties, accepted the evidence of the lorry driver on the question as to how the accident occurred, which evidence was corroborated by the evidence of the police investigator, and found that the driver of defendants No. 1 was entirely to blame for the accident and gave judgment in favour of the plaintiff company accordingly. 25 30

The case for the appellant, defendant 1 company, before us, is that the trial Judge wrongly accepted the evidence of the lorry driver and the police investigator and called upon this court to interfere with the findings of fact by the trial Judge. 35

As a general rule, an appellate court does not interfere with the findings of fact of the trial Judge. As to when an appellate court could interfere with such findings, I shall reiterate what has been stated in the case of *Mentesh v. HjiDemetriou* (1983) 1 C.L.R. 1 at page 8: 40

5 «The principles on which an appellate Court can interfere with findings of fact by the trial Court which depend on credibility of witnesses, are well known and have been stated in a line of cases both here and in England. In the case of *Philippos Charalambous v. Sotiris Demetriou*, 1961 C.L.R. 14, Zekia J., as he then was, said at page 19:

10 'While I am far from being satisfied of the way some judgments are given by trial Courts where without stating adequate reasons dispose of an issue in the case by merely saying 'I believe or disbelieve so and so', I will hesitate a lot on the other hand to introduce a principle the application of which might have the effect of amending the Evidence Law which would constitute a transgression on our part of the rights of the legislature'.

15 The special interest of this case lies in the fact that it closes the cycle of judicial pronouncements in Cyprus under the law as it stood prior to the enactment of the Courts of Justice Law, 1960, section 25(3), on the powers of a Court of Appeal of reviewing findings of fact of trial Courts based on the credibility of witnesses.

20 In *Sofocles Mamas v. The Firm «Arma» Tyres* (1966) 1 C.L.R. 158 at page 160, Vassiliades J., as he then was, referred to the case of *Thomaidēs & Co. Ltd. v. Lefkaritis Bros* (1965) 1 C.L.R. 20 and to the subsequent case of *Patsalides v. Afsharian* (1965) 1 C.L.R. 134 and said:

25 «The findings of the trial court will not be disturbed on appeal, unless the appellant can satisfy this court that the reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole».

30 In *Clarke v. Edinburgh Tramways Co.* (1919) S.C. (H.L.) 35, at page 36, Lord Shaw had this to say:

35 «When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not».

In *Watt or Thomas v. Thomas* [1957] A.C. 484, a House of Lords case, it was decided that:

«When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion because he saw and heard the witnesses and should not disturb his judgment unless it is plainly unsound. The appellate court is however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved»

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In the present case, taking into consideration the result of this appeal, I shall only say that counsel for the appellants did not discharge the burden which rests on him to persuade me that the reasoning behind the findings of the trial Judge was unsatisfactory or such findings are not warranted by the evidence adduced. It was reasonably open to the trial Judge to accept the evidence of the lorry driver and the police investigator as true and correct and to arrive at the conclusions he did

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For the above reasons I would dismiss the appeal

PIKIS J A long vehicle known as a trailer driven in the direction of Nicosia, and a saloon car heading in the direction of Limassol collided on the old Nicosia - Limassol road by the 24th milestone, with fatal consequences for the driver of the saloon car. Also damage was caused to the owners of the goods, conveyed by the trailer from Limassol to Nicosia. More than one action were raised in connection with this accident. The parties to the proceedings agreed that the question of liability should be determined in the present proceedings, therefore, the finding affected all those concerned with the implications of the accident

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The accident was investigated by an experienced Police Sergeant, namely, Mr Stavrides, of the Larnaca Police Division, who recorded his findings at the scene on a plan drawn to scale, illuminating the scene and the marks found thereat attributed to the accident. On the basis of those findings the investigating officer concluded that the collision between the two vehicles occurred on the side of the trailer, some 3 ft 6" from the white line that divided the 20 ft wide road into two parts. He determined the point of

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impact by reference to marks of real evidence identified at the scene and the direction of the vehicles after the collision. It was, by all accounts, a violent collision that caused the two vehicles to change course as a result of the force of the impact. In the process and at a time when it was by all accounts out of control, the trailer collided with a second car that was driven behind the saloon car involved in the major collision. That vehicle was driven by Mr Strovolidis who testified at the trial for the respondents. Subsequently to the accident the services of another road accident investigator were employed, namely, Mr Yialfourous, an Automobile and Mechanical Engineering Consultant and Assessor, with a view to analysing the real evidence found at the scene and drawing necessary conclusions therefrom. We shall not advert to the details of his evidence except to notice that he took a different view of the implications of real evidence from that taken by Mr Stavrides. In the opinion of Mr Yialfourous the most probable point of impact was the centre of the road.

The version of the driver of the trailer affecting the circumstances of the accident was to the following effect. As he negotiated a bend or more properly a curve of the road, he was confronted with three cars coming from the opposite direction in a line, notably, a van, the car of the deceased and that of witness Strovolidis. In no time, when a very short distance separated his vehicle from the first car opposite, the saloon car of the deceased took to the right, seemingly in an effort to overtake the car ahead of him, whereupon he cut across the line of travelling of the trailer precipitating the violent collision that followed. The tenor of the testimony of Mr Strovolidis, on the other hand, does not tally with the evidence of the driver of the trailer. The saloon car of the deceased kept, as he was able to notice from a short distance behind, to the left-hand side on the road. At no stage did the saloon car leave, to his comprehension, that side of the road nor did he perceive any sudden movement of the saloon car to the right. And as far as he could ascertain, the accident occurred in the middle of the road when the two vehicles moved in opposite directions without any perceptible changes in the route they followed. Although he was unable to identify the precise point of impact or determine their exact position measured from the respective edges of the asphalt, the inevitable inference from his testimony is that the accident occurred somewhere in the middle of the road.

Significantly the witness made no reference to a third car being driven ahead of the saloon car nor was it suggested to the witness in cross-examination that there did exist as alleged by the trailer driver, a third car

The only other evidence illuminating the circumstances of the accident stemmed from the statement of Antonios Nicolaou of Panaya, made before the coroner who inquired into the circumstances of the death of the driver of the saloon car. The witness passed away before the hearing of the action but his statement before the coroner was produced by the consent of the parties as evidence throwing light on the circumstances of the accident. That witness too located the point of impact somewhere at the middle of the road and like Mr Strovolides made no reference to any vehicle being driven ahead of the saloon car. Inevitably the value of the testimony of Antonios Nicolaou was diminished by the absence of an opportunity to cross-examine him.

The trial Judge examined the evidence of the two experts and concluded that the testimony of Mr Stavrides should be preferred to that of Mr Yiallourous. One of the reasons given for the preference of the testimony of Mr Stavrides was that his testimony was corroborated by the evidence of the driver of the trailer. That was a serious misdirection. The cogency of the evidence of an expert in the analysis of real evidence resulting from an accident depends on the reliability of his findings and their objective implications. The real evidence is intended, as often affirmed, to furnish, to whatever extent that is possible by the real evidence found at the scene, an objective and reliable guide to the circumstances attending an accident, thereby providing a yardstick for the assessment of the accuracy and reliability of witnesses to fact. In *Messiou v Elefthenou**, it was observed «Common experience tells us that in road accident collisions, the parties immediately involved thereto are apt to form a mistaken impression about a variety of facts, including their position on the road, not least because of the great speed with which events develop». Similar observations were made about the value of real evidence in *Adamis and Another v Eracleous*** , as well as in the

* (1982) 1 C L R 482

** (1982) 1 C L R 746

more recent case of *Charalambous and Another v Kaifas** The value of real evidence as a guide to what had happened was depicted in the following terms

5 «Real evidence does not of itself tell how an accident happened, but provides excellent material for testing the credibility and accuracy of conflicting testimony with regard to the circumstances of an accident The value of real evidence as a measure of the truth of a situation was stressed in *Georghios Prodrromou Haloumias v The Police* (1970) 2
10 C L R 154 Though *Haloumias* was a criminal case the pronouncements made therein apply afortiori to civil cases as well»

Obviously the trial Judge fell into an error in finding confirmation of the evidence of the expert coming from the
15 testimony of an eye-witness Later in his judgment he found confirmation of the testimony of the trailer driver coming from the evidence of the expert That is sound enough but the earlier acceptance of the testimony of the expert was fraught with the irregularity noted above To complete the picture relevant to the
20 aforementioned misdirection, we may note that once the trial Court thought fit to seek confirmation of the evidence of the expert from eye-witnesses, he should have noticed that the evidence of the other two witnesses, namely, Strovolides and Nicolaou, tended to support the conclusions of Mr Yiallourous Of course,
25 that would have been equally erroneous for the reasons explained above

Another misdirection no less consequential was the failure of the trial Court to appreciate in a correct perspective the evidence of witness Strovolides His evidence was essentially disregarded as
30 inconsequential because of the inability of the witness to indicate the precise point of impact In no way did the trial Court focus attention on the inevitable conflict between the version of events given by that witness as to circumstances preceding and surrounding the accident and that expressed by the trailer driver
35 Furthermore, he did not approach in a correct perspective the statement of deceased witness Nicolaou either Examined in conjunction the evidence of Strovolides and the testimony of

* (1986) 1 C L R 210

Nicolaou before the Coroner, tended to suggest that the accident occurred, contrary to the testimony of the trailer driver, close to the middle of the road without the occurrence of any sudden swerve of the saloon car to the wrong side of the road. The trial Judge wholly ignored the implications of the testimony of the 5
 aforementioned witnesses, including the inference deriving from their evidence that there was no third car on the road at or just before the occurrence of the accident. The existence of the third car was crucial for the assessment of the credibility of the trailer 10
 driver for as he ventured to suggest it was the misjudged attempt of the saloon driver to overtake the car ahead of him that precipitated the violent collision that followed.

The misdirection noticed above in the evaluation and assessment of evidence illuminating the circumstances of the accident and the omission to examine the evidence in its true 15
 perspective, made the finding of the Court, attributing sole liability for the accident to the saloon driver, unreliable and unsustainable. Not having had the benefit of seeing the witnesses testify before us, we cannot assume the task of evaluating their evidence from the printed record. This is a task that must be under- 20
 taken anew in a fresh trial to determine liability for the accident.

The appeal is allowed with costs. The judgment of the trial Court is set aside. The case is remitted to the District Court for retrial before another member of the District Court of Nicosia. The costs of the trial before the District Court will be costs in the cause. 25

KOURRIS J.: I am in complete agreement with the judgment delivered by Pikiis, J. and have nothing further to add.

COURT: In the result, this appeal is allowed by majority, the case is sent back to the District Court of Nicosia for retrial before another Judge. The appeal is allowed with costs. The costs of the 30
 trial before the trial Court to be costs in the cause.

*Appeal allowed with
 costs. Retrial ordered.*