1989 July 21

(SAVVIDES, KOURRIS, BOYADJIS, JJ.)

KYRIACOS MARKANTONIS,

Appellant,

v.

COSTAS DEMAKIS,

Respondent.

(Civil Appeal No. 7307).

Negligence/Contributory negligence — Road collision — Motor-cyclist entering major from a minor road without stopping at the «halt» sign — Driver of motor car on the major road flashed his lights, applied brakes and swerved to the right, but the collision was not avoided — Factual substratum of appeal an alleged «admission» that the driver of motor car had realized that the motor cyclist would not stop, before the latter arrived at the line separating the minor from the major road — As no such admission was ever made, the appeal must be dismissed.

Negligence/Contributory negligence — Road collision — Motor-cyclist entering major road without stopping at the «halt» sign — Statement by trial Judge that even if the driver in the major road had formed the impression that the motor-cyclist would not have stopped, he would not have been guilty of negligence, because «the test concerns the mind of a reasonable man and not of the driver involved» disapproved.

This appeal was dismissed, because the appellant failed to substantiate its factual substratum, namely that the respondent had in fact made the alleged admission, which has been referred to in the first of the hereinabove headnotes.

Appeal dismissed with costs.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Chrysostomis, P.D.C.) dated the 10th January, 1987

(Action No. 7749/84) whereby his claim for damages for negligence against the defendant was dismissed on the ground that he was solely responsible for the collision.

C. Melas, for the appellant.

C. Demetriades, for the respondent.

Cur. adv. vult.

SAVVIDES J.: The judgment of the Court shall be delivered by Mr Justice Boyadjis.

BOYADJIS J.: This appeal is directed against the judgment of the trial Court whereby the appellant's claim for damages for negligence against the respondent, defendant in the action below, was dismissed on the ground that he (the appellant), was solely responsible for the collision resulting to his injuries. The sub-judice decision is being challenged on the ground that, on the facts as found by it, the trial Court drew the wrong inferences regarding the issue of liability for the collision.

The quantum of special and general damages claimed by the appellant, plaintiff in the action, was by agreement of the parties fixed at £8,795 on a full liability basis. The trial proceeded solely on the issue of liability. The collision between the appellant's autocycle and the respondent's car occurred during the night of 13 December 1983 in Limassol within Paphos Street by its junction with Anagennisis Street. As it is usually the case, each driver came forward with his own version as to how and why the collision had occurred. The appellant's version was that, though he was himself guilty of contributory negligence, the respondent was also to blame in that he failed to react in time by taking proper avoiding action when he had or ought to have realised that the appellant would not have stopped, as he should have done, before entering into the main road along which the respondent was travelling. The version of the respondent was that he had realised that the appellant would not stop before entering into the main road when the latter was on the imaginary line marking the entrance into Paphos Street, and he had then reacted by flashing his lights and by applying his brakes immediately thereafter and also by swerving slightly to this right.

The trial Court accepted the version of the appellant and made detailed findings regarding the circumstances of this collision. These findings are accepted by appellant's counsel as correct. It is

pertinent to quote verbatim these findigns. At pages 50 and 51 of the record the trial Court stated the following:

«In the light of the evidence as I have accepted it, I make the following findings of fact:

(1) At the material time the Defendant was driving his motor-car along the main road at a speed of 20-25 m.p.h. and the Plaintiff was driving his autocycle along the side road at a very slow speed. Both drivers were approaching the road junction.

(2) At a distance of about 60 ft. prior to the junction towards east, there was a stationary car on the left hand side of the road towards the direction that the Defendant was following.

(3) Because of the stationary car, the Defendant was not driving on his extreme left, but at a distance of 10 ft. 6 inches away from the edge of the road to his left. This can be inferred from his evidence and the line of his brakemarks on the road.

(4) The said stationary car did not obscure the visibility of either driver. The Defendant could freely see the Plaintiff from a distance approaching the junction. That distance must have been well over 60 ft., bearing in mind the thinking distance and the fact that the brakemarks of the motor-car started at a point 60 ft. prior to the junction.

(5) The Defendant did not apply his brakes when he first saw the Plaintiff along the side road. He first saw him at a distance of about 20 - 30 ft. prior to the junction The Plaintiff was proceeding at a very slow speed and on approaching the junction, he reduced speed as if he was going to stop at the road junction. He then proceeded on and entered the main road. When the Defendant realised that the Plaintiff failed to stop, he used his flasher twice and he immediately applied his brakes and swerved very slightly to his right. The last finding is not only based on the evidence of the Defendant but also on the real evidence, i.e. the direction that the brakemarks followed on the road.

(6) The Plaintiff having failed to stop at the road junction, entered the main road diagonally and proceeded on to his right hand side at a slow speed, without taking any avoiding action.

(7) The head-on collision occurred at point «X» of Exh. 1 which was at a point 14 ft. away from the left edge of the main road towards the direction that the Defendant was following and 26 ft. away from the right edge of the side road, towards the direction that the Plaintiff was following.

(8) The Defendant in fact had almost succeeded to avoid the collision as his car came to a standstill one foot after the impact.»

The trial Court referred expressly to allegation of the appellant that the respondent could and should have taken his avoiding action at an earlier stage and answered it with the following very clear finding at p. 52 of the record:

«... On the contrary, as I have already found, the Defendant flashed his lights to warn the Plaintiff and he immediately applied his brakes, thus losing no time to take avoiding action when the emergency was created by the Plaintiff».

After referring to the several authorities* establishing that a motorist travelling along the main road need not anticipate, unless he has some forewarning of such an eventuality, that another user of the road will emerge on the main road from a side road without first stopping and making certain that it is safe so to do, the learned trial Judge formulated his final conclusion in the following words at p. 53 and 54 of the record:

«In the light of the evidence, as I have accepted it, of my findings and with the above considerations in mind, I have considered the conduct of both parties and I have arrived at the conclusion that the Plaintiff has failed to prove negligence or contributory negligence against the Defendant. Although the Plaintiff saw the oncoming vehicle of the Defendant approaching the junction, nevertheless he emerged onto the main road without first stopping and making certain that it was safe for him to do so. He failed to take any avoiding action and unfortunately he is the author of his predicament».

One would have thought that after the above clear finding and conclusion in the judgment of the trial Court there was nothing else that could usefully be said by the Court. Yet, our attention has

* *Vamakides v. PapaMichael and Another (1970) 1 C.L.R. 367, Panayiotou v. Mavrou (1970) 1 C.L.R. 215, and Karikatou v. Soteriou, Sotenou v. Apseros, (1979) 1 C.L.R. 150.*

been drawn to a statement which the trial Court made immediately after its last aforementioned final conclusion, upon which learned counsel for the appellant relies in support of his submission that the trial Court should have inferred that the respondent was also negligent in that his avoiding action was taken very belatedly. The trial Court had added the following statement immediately after its conclusion set out hereinabove:

«The fact that the Defendant said that he formed the view, that the Plaintiff did not intent to stop before emerging, does not, in my view, entitle the Plaintiff to a finding that the Defendant was guilty of negligence or contributory negligence as argued by learned Counsel for the Plaintiff.

Taking into consideration the evidence as I have accepted it and my findings, I am unable to accept that there was a reasonably apparent possibility of danger emerging, as the Plaintiff was driving along the side road at a very slow speed and even if the Defendant assumed that he was not to stop at the junction, there was no real justification, in his mind, that the Plaintiff was inevitably bound to be negligent. Had the Plaintiff been travelling at a high speed, things would have been different. Furthermore, the test concerns the mind of a reasonable man and not of the driver involved. In the circumstances of this case and even if the Defendant thought that the Plaintiff did not intend to stop, the Defendant cannot be held liable for not taking any precautions at an earlier stage than he did. He had no duty to do so, because he was wrong with his assumption as in fact and in truth he was not justified to make such an assumption. What the Defendant did was sufficient to exonerate him from liability».

Relying on the last aforementioned extract from the judgment of the trial Court, learned counsel for the appellant put forward a twofold argument. First, he submitted that it emerges therefrom - (a) that the respondent had admitted in the witness box that he had formed the impression that the appellant would not stop before emerging into the main road, when he (the appellant) was about 30 ft. away from the junction, inside Anagennisis Street; (b) that the trial Court had accepted this admission as true; and (c) that, having considered the admitted fact that the respondent flashed the lights and applied the brakes of his car when the appellant was on the imaginary line marking the entrance into the main road, the only inference to be drawn was that the respondent was late in

taking his avoiding action since he had remained totally inactive during the whole period of time which took the appellant to cover the distance of 30 ft. and reach the junction. Secondly, counsel submitted that, once on his own admission the respondent had formed the impression from the appellant's behaviour on the road, that the latter would not stop before entering the main road and such impression was formed by the respondent whilst the appellant was still 30 ft. away from the junction, there is no room for the application of the objective test suggested by the trial Court which had wrongly ignored the admitted actual impression formed by the respondent on the assumption that the respondent was wrong in forming such an impression.

Counsel for the respondent answered the arguments put forward by the appellant by saying that the passage relied upon by the appellant is not part of the operative judgment, it does not contain any findings different from those referred to earlier and that there is no evidence whatsoever emanating from the respondent or from any other source justifying the appellant's allegation that the respondent had realised that the appellant would not stop before entering the main road, at any stage prior to the moment when he had actually seen the appellant proceeding beyond the imaginary line marking the entrance into the main road along which he was driving.

Our first remark on the matter now under consideration is that we do not uphold the statement of the trial Judge that, in case where the driver involved in a collision relates to the Court at what stage he had formed a certain impression from the behaviour of the other driver, from which statement it can be inferred that he could have taken avoiding action earlier than that which he had actually taken, he cannot be relieved from liability on the ground that «the test concerns the mind of a reasonable man and not of the driver involved» and that he must have formed a wrong impression. Be that as it may, the use by the Court of the words «even if» twice in the aforesaid passage suggests that the Court was dealing, obviously ex abudanti cantela with the unsubstantiated version or theory put forward by the appellant, which the Court had earlier rejected. We might add in this respect that learned counsel for the appellant was unable to point out to us from the record of the evidence of the respondent the latter's alleged admission that he had formed the impression that the appellant would not stop when the latter was 30 ft. inside Anagennisis Street.

Finally, it is pertinent to add that learned counsel for the appellant has conceded that the respondent cannot be held responsible for the collision if he had formed the impression that the appellant would not stop only when the latter was crossing the imaginary line marking the entrance from Anagennisis Street into Paphos Street. The factual substratum of the submission of the appellant remained unsubstantiated. The respondent has never made the admission suggested by the appellant.

In the circumstances, we affirm the conclusion of the trial Court that the appellant was the only person to blame for the collision resulting to his injuries. The appeal is dismissed with costs.

Appeal dismissed with costs.