1978 August 11

[HADJIANASTASSIOU, A. LOIZOU AND MALACHTOS, JJ.]

VASSILIKO CEMENT WORKS LTD.,

Appellants-Defendants,

v.

CHRISTOS STAVROU,

Respondent-Plaintiff.

(*Civil Appeal No.* 5532).

Master and servant—Safe system of work—Noise in quarry from operation of drilling machines—Reduction of hearing capacity of workman—No ear plugs or ear shields provided by employer—Master in breach of his duty to provide a safe system of work and exposing workman to a reasonably foreseeable risk—Delegation of duty of providing a safe system of work to a competent agent or Manager—When master will be liable.

Evidence—Expert evidence—Best evidence—Function of expert witness—Noise in quarry—Action for damages due to reduction of hearing capacity—Plaintiff's expert not allowed by defendants to measure volume of noise in their quarry—But plaintiff adduced evidence of volume of noise in another quarry—No evidence to the contrary by the defendants—In the circumstances of this case trial Court's findings on volume of noise properly made.

Volenti non fit injuria—Law applicable—Master and servant—This defence rarely finds application in cases of injuries suffered by workers in the course of their work.

Findings of fact—Appeal turning on findings of fact based on credibility of witnesses—Approach of Court of Appeal.

The respondent has been in the employment of the appellants, as an operator of three makes of drilling machines at their Kalavasos quarry for a period of four years. He filed an action for damages against the appellants because his hearing capacity had been reduced on account of the failure of the appellants to provide a safe system of work against the hazards of noise

produced by the said machines. In his evidence before the trial Court he said that no protection was given to him against the hazards of noise and that he was only equipped with a head helmet to protect his head from falling objects and a mask to protect him from dust; and after the action was filed on 31.7 1973, an official of the appellants, who knew that an action was pending equipped him with ear shields on September 12, 1973. Dr. Mantides, who gave evidence on behalf of the respondent, said that it was impossible to attribute his partial deafness of overall loss of hearing of 50% to any specific cause, but that it was more probable than not that his deafness was the result of his exposure to noise; he was inclined to exclude genetic causes as the cause of the deafness and his opinion was strengthened by his findings on a subsequent examination of the respondent on September 2, 1975, when he noticed a slight improvement in his condition and which he attributed to the fact that he had stopped working at the quarry of the appellants.

As the appellants refused to allow an expert for the respondent to inspect and test the volume of noise produced by the machines in question, his expert on sound measurement measured the sound produced from the operation of an Atlas Copco compressor at another quarry and stated before the Court that the noise produced was damaging to the hearing if one were exposed to such noise for longer than two hours without wearing ear shields or ear plugs. No evidence was produced by the appellants in rebuttal as to the sound produced by the machines but they alleged that as from 1968 ear plugs have been made available to quarry workers.

The trial Court accepted the evidence of the respondent in toto and found that he had not been supplied either with ear plugs or ear shields until after the action had been instituted; and after reaching the conclusion that the appellants' work involved a reasonably foreseeable risk for the health of the respondent and that the appellants were under a duty to take reasonable steps in order to protect workers from this kind of risk he awarded to the respondent an amount of £1,200 general damages and £10 special damages. Hence the present appeal by the employers.

Counsel for the appellants contended:

(a) That the trial judge misdirected himself as to the credibility of the respondent and erroneously disre-

garded evidence adduced by the appellants; and that he erred in holding that the appellants did not provide the respondent with ear plugs or ear shields before the action was brought by the respondent and evidence adduced to the contrary was completely disregarded.

(b) That the trial Judge erred in holding that the sound of different equipment measured at a different place and under different environmental conditions, was the sound produced by the appellants' equipment.

(c) That the trial Judge arbitrarily reached the conclusion that the system of work was altogether unsafe, though evidence to the contrary was available and wrongly applied the legal principles concerning safe system of work.

(d) That the trial Judge misdirected himself as to the effect of the defence of volenti non fit injuria because in effect the respondent accepted the risk of his employment.

Held, dismissing the appeal, (1) that the findings of the trial Judge were warranted by the evidence when considered as a whole,and that the reasoning behind such findings is satisfactory; that it is for the trial Judge to watch the demeanour of the witnesses and reach his findings of fact based on the credibility of the witnesses and the onus remains on the appellants to convince this Court that the evaluation of the evidence was wrongly made; that the appellants have failed to convince this Court and that, accordingly, there is no reason for interfering with the findings of the trial Court based on the credibility of the witnesses.

(2) That in the particular circumstances of this case this Court is of the view that the respondent had no alternative but to produce the best available evidence before the trial Court, once permission was refused to enable an expert to test the machines of the appellants; and that in the absence of evidence to the contrary this Court has reached the conclusion, not without some difficulty, to affirm the judgment of the trial Court on this issue.

(3) That the defendants were in breach of their duty to provide a safe system of work and in exposing the respondent

to a reasonably foreseeable risk. (Dicta in *Wilsons and Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57 (H.L.), *Berry* v. *Manganese* [1972] 1 Ll.L.R. 182 and *Bath* v. *British Transport Commission* [1954] 2 All E.R. 542 adopted and followed); and that, moreover, once the appellants have delegated to a competent agent and manager the duty of providing a reasonably safe system of working, the latter's failure of seeing that the employees were using the ear plugs or ear shields does not absolve the appellants from liability who are under a duty to take due care in the provision of a reasonably safe system of working.

(4) That the trial Judge properly applied his mind to the legal effect of the defence of volenti non fit injuria and this Court endorses and approves his statement that this defence rarely finds application in cases of injuries suffered by workers in the course of their work and as a result of hazards emanating from the system of work. (pp. 400–401 *post*).

Appeal dismissed with costs.

Cases referred to:

Anastassiades v. *The Republic* (1977) 5 J.S.C. 516 at p. 766 (to be reported in (1977) 2 C.L.R.);

Kouppis v. *The Republic* (1977) 11 J.S.C. 1860 at p. 1948 (to be reported in (1977) 2 C.L.R.);

Khadar and Another v. *The Republic* (1978) 2 C.L.R. 132;

R. v. *Lanfear* [1968] 1 All E.R. 683;

R. v. *Rivett* [1950] 34 Cr. App. R. 87;

Wilsons and Clyde Coal Co. Ltd., v. *English* [1938] A.C. 57 (H.L.);

Berry v. *Stone Manganese* [1972] 1 Ll. L.R. 182;

Thomas v. *Quartermaine* [1887] 18 Q.B.D. 685 at pp. 691, 696;

Bath v. *British Transport Commission* [1954] 2 All E.R. 542;

Yarmouth v. *France* [1887] 19 Q.B.D. 647 at p. 659;

Smith v. *Baker & Sons* [1891] A.C. 325 at p. 337;

Smerkinich v. *Newport Corporation* [1912] 76 J.P. 454 D.C.;

Herd v. *Weardale Steel, Coal and Coke Co. Ltd.*, [1915] A.C. 67;

Robertson v. *Primrose & Co.* [1910] S.C. 111;

Lindsay v. *Charles Connell & Co. Ltd.*, [1951] S.C. 281;

Cullen v. *Dublin United Tramways Co. (1986) Ltd.*, [1920] 2 I.R. 63;

Letang v. *Ottowa Electric Railway Co.* [1926] A.C. 725;

Watt v. *Hertfordshire County Council* [1954] 2 All E.R. 368 at pp. 370-371;

Bennett v. *Tugwell* [1971] 2 All E.R. 248;

Costa and Another v. *Municipal Corporation of Limassol* (1975) 1 C.L.R. 84;

Cyprus Trading Corporation v. *Chimonas* (1975) 1 C.L.R. 211.

Appeal.

Appeal by defendants against the judgment of the District Court of Larnaca (Pikis, Ag. P.D.C.) dated the 20th November, 1975 (Action No. 709/73) whereby they were ordered to pay to the plaintiff the sum of £1,210.- as damages in respect of injuries sustained by him while in the employment of defendants.

K. Chrysostomides, for the appellants.

L. Georghiadou (*Mrs.*), for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment of the Court. On November 20, 1975, the President of the District Court of Larnaca awarded to the respondent and against the appellants, an amount of £1,200 general damages and £10 special damages, in respect of injuries sustained by him, while employed at the appellant's Kalavassos quarry. The Cement Company Limited, now appeals against the decision of the learned President on a number of legal points.

The facts may be briefly stated as follows:-

The respondent was employed by the appellants as an operator of three makes of drilling machines, *viz.*, Atlas, Joy and Ingerson, at the Kalavassos quarry for a period of four years. It was not challenged by the appellants that those machines were producing some noise. The respondent's case was all along that because no proper system of working was provided by the appellants against the hazards of noise, his hearing capacity had been reduced. He complained to the officials of the appellants, and having attended the company's doctor, he was sent to Dr. Bamborides, a specialist, who issued to him a certificate which he handed over to the company's doctor. He was re-

quired to attend for examination at six-monthly intervals. Because his condition was deteriorating, he visited another E-N-T- Specialist, Dr. Mantides, who reported his findings to the Court in giving evidence for the respondent.

The present case was filed on July 31, 1973, and on March 3, 1975, the appellants denied the averments that the machinery used by the respondent did cause any noise more than one would have expected having regard to the nature of the work carried out, and of which the respondent was at all material times well aware.

The respondent told the trial Court that no protection was given to him against the hazards of the noise and that he was only equipped with a head helmet to protect his head from falling objects, and a mask to protect him from dust. But, he added, after the action was filed, he was approached by the officer in charge of the office at Vasiliko who knew that an action was pending and equipped him with ear shields on September 12, 1973. He tried those shields but he found that they did not fit him whilst he was wearing the helmet. He complained to the engineer of the company, a certain Stelios Hartouchos, and asked that the helmet should be changed because he could not wear it while he was wearing the shields. Because the latter did nothing about it, he saw the officials once again who told him that he had to wear the shields or he would be dismissed from his employment. He further tried to explain to them that he could not work without wearing a head helmet for the reasons stated earlier, but they insisted that he should sign a declaration that if he would not wear the ear shields and a helmet he should be dismissed.

As we said earlier, Mr. Mantides in giving evidence said that it was impossible to attribute his partial deafness of overall loss of hearing of 50% to any specific cause, but expressed the opinion that it was more probable than not that his deafness was the result of his exposure to noise. He was inclined to exclude genetic causes as the cause of this deafness and his opinion was strengthened by his findings of a subsequent examination of the respondent of September 2, 1975, when he noticed a slight improvement in his condition and which he attributed to the fact that he had stopped working at the quarry of the appellants.

On the contrary, it was the case for the appellants that as from the year 1968 ear plugs had been made available for use by the workers at the quarry who had to operate earth drilling machines. Mr. Hartouchos, although he had no personal knowledge whether workers were using such plugs while at work, stated that the respondent, like himself, were members of the safety committee of the mine and tried to show that the complaints of the respondent were not genuine on account of the fact that the former never complained to the safety committee either about the damage to his ears or the non-supply of ear plugs. Mr. Hartouchos went even further and said that those machines produced no great noise. Finally, he added that early in 1973 the ear plugs were replaced by ear shields, and accused the respondent of failure to comply with their instructions of wearing ear shields.

The respondent was found guilty of a number of safety regulations—a finding recorded in *exhibit* 4—and was required to admit the breach of the regulations and submit to disciplinary punishment. The trial Court, in dealing with that point, observed that it was rather strange that the interest of the respondent in the matter of the protection of workers from the hazard of noise was manifested after the institution of that action.

Finally, the Court, having addressed its mind to the duty of the employer to provide a safe system of work, and having evaluated the evidence, accepted the evidence of the respondent in toto and made a finding that the respondent had not been supplied either with ear plugs or ear shields until after the action had been instituted. The Judge went even further and expressed the view that he was inclined to accept the submission that the reprimand of the respondent for failure to wear ear shields and the attempt made to discipline him, was a reaction of the appellants to the institution of the present action and an attempt on their part to avoid liability.

As the appellants refused to give leave to the respondent to inspect and test the sound of the noise produced by the machines in question, inevitably the respondent turned to Mr. Andreas Zenios, a senior engineer in charge of the Radio Broadcasting Corporation, an expert on sound measurement. Accompanied by the respondent, this witness measured the sound produced

from the operation of an Atlas Copco compressor at a quarry near Kythrea. In effect he found that the noise produced was 100 decibels to scale A, a volume of noise damaging the hearing if one was exposed to such noise for longer than two hours without taking any protection by wearing ear shields or ear plugs. On the other hand, the appellants produced no evidence in rebuttal as to the sound produced by the machines when in operation.

The first complaint of counsel was (a) that the trial Judge misdirected himself as to the credibility of the respondent and erroneously disregarded evidence adduced by the appellants; (b) that he erred in holding that the appellants did not provide the respondent with ear plugs or ear shields before the action was brought by the respondent and evidence adduced to the contrary was completely disregarded.

We have considered carefully the evidence in this case, and having heard counsel on both sides, we have reached the conclusion that the findings of the trial Judge were warranted by the evidence when considered as a whole, and that the reasoning behind such findings is satisfactory. We would reiterate that it is for the trial Judge to watch the demeanour of the witness and reach his findings of fact based on the credibility of the witnesses and the onus remains on the appellants to satisfy this Court that the evaluation of the evidence was wrongly made. As we have said earlier, going through the evidence, we are satisfied that the appellants have failed to convince this Court and we see no reason for interfering with the findings of the trial Court based on credibility of the witnesses. We would, therefore, dismiss this contention of counsel.

The second complaint of counsel was that the trial Judge erred in holding that the sound of different equipment measured at a different place and under different environmental conditions, was the sound produced by the appellants' equipment.

We have indeed considered very carefully this contention of counsel, but in the particular circumstances of this case, we are of the view that the respondent had no alternative but to produce the best available evidence before the trial Court—being more or less a similar machine—once permission was refused, to enable an expert to test the drilling machine of the appellants.

It has been recently said in a number of cases that the duty of an expert is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of those criteria to the facts proved in evidence. On the other hand, it is equally true that the Judge or jury is not bound to adopt the views of an expert even if they should be uncontradicted (as in this case) because the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert. (See *Anastassiades* v. *The Republic*, (1977) 5 J.S.C. 516 at p. 566*; also *Kouppis* v. *The Republic*, (1977) 11 J.S.C. 1860 – 1948*; and *Khadar Another* v. *The Republic* dated July 31, 1978 (unreported)**.

Furthermore, in *R.* v. *Lanfear*, [1968] 1 All E.R. 683, it was held that the evidence of even a doctor giving medical testimony at a criminal trial should be treated, as regards admissibility and any other matters of that kind, like that of any other independent witness, but, though a doctor may be regarded as giving independent expert evidence to assist the Court, the jury should not be directed that his evidence ought, therefore, to be accepted by the jury in the absence of reasons for rejecting it.

It appears further that the opinions of experts are generally admissible whenever an issue comprises a subject of which knowledge can only be acquired by special training or experience. But the weight, if any, to be attached to expert evidence is a matter for the Judge. (See *R.* v. *Rivett*, [1950] 34 Cr. App. R. 87 C.C.A.; see also 15 Halsbury's Laws of England, 3rd edn., 321–322 paras. 587–588.

We have no doubt that the learned trial Judge must have had in mind the principles enunciated in those cases and must have approached the evidence of the expert with great caution because he says:

> "I have given careful consideration to the evidence of Mr. Zenios, that of the plaintiff and the testimony of Mr. Hartouchos on the volume of the sound produced by the

* To be reported in (1977) 2 C.L.R.

** Reported in (1978) 2 C.L.R. 132.

machines that plaintiff was required to operate at the work of the defendants and the proximity to such machines at which plaintiff had to work in order to carry out his duties effectively. In making my findings on this aspect of the case I did not overlook the evidence of Dr. Mantides as to the circumstances under which sound may become dangerous to hearing. I have unhesitatingly come to the conclusion that the plaintiff had to stand very near the machine he had to operate and that the machine when in operation was producing sound of the order of at least 100 decibels to scale 'A', something that was very dangerous for the hearing of a worker who had to operate the machine for any appreciable interval of time, particularly for the plaintiff who, as I find, had to operate it for at least eight hours a day."

In the light of all the circumstances of this case, and not underestimating the difficulties which the learned trial Judge was facing, and in the absence of any evidence to the contrary, we have reached the conclusion, not without some difficulty, to affirm the judgment of the trial Court on this issue, that the amount of noise was dangerous to the hearing of a worker who had to operate the machine for an appreciable interval of time as in the case in hand. We would, therefore, dismiss this contention of counsel also.

The third complaint of counsel was that the learned Judge arbitrarily reached the conclusion that the system of work was altogether unsafe, though evidence to the contrary was available and wrongly applied the legal principles concerning safe system of work; and erroneously held that defendants did not do everything in their power to protect their employees.

It is true that the trial Judge, having addressed his mind to the duty of the employer to provide a safe system of work, reached the conclusion that the appellants' work involved a reasonably foreseeable risk for the health of the respondent; and that in consequence the appellants were under a duty to take reasonable steps in order to protect workers from this kind of risk, a risk that every prudent employer would have sensed. With that in mind, the trial Judge said:-

"This could easily be done by supplying workers with ear plugs or ear shields, well known devices for the protection

of persons who work in noisy surroundings. There is nothing to suggest that the cost of acquiring such devices was in any way disproportionate to the risk involved. On the contrary on balance it may be inferred that such devices could easily be secured at a relatively low cost.....

The plaintiff did, in point of fact, lodge with the doctor of the defendants a complaint about his hearing, a complaint that persisted over a number of years. The knowledge acquired by the defendants through Dr. Eliades, of this complaint evidently imposed upon them an enhanced duty to protect the plaintiff from the hazards of noise. Instead they did nothing and left him exposed to the grave risk of having his hearing capacity impaired.

The evidence of Dr. Mantides, the only medical evidence before me, makes it more probable than not that the partial deafness suffered by the plaintiff is the result of his exposure to noise. This view is further strengthened by the evidence of the plaintiff, that I accept, that before starting work with the defendants he had no complaint whatever with his hearing. I find that in consequence of the breach by the defendants of their duty to provide a safe system of work and in exposing the plaintiff to a reasonably foreseeable risk, the plaintiff suffered a loss of hearing to the extent of 50 per cent."

Regarding the safety of employment, it has been said that the common law has from early times imposed a duty on the master to take fitting care to see that the servants, jointly engaged with him in carrying on his work or industry, shall not suffer injury either in consequence of his personal negligence, or through his failure properly to superintend and control the undertaking in which he and they are mutually engaged (See *Wilsons and Clyde Coal Co. Ltd.* v. *English*, [1938] A.C. 57 H.L.; [1937] 3 All E.R. 628. See also *Berry* v. *Stone Manganese*, [1972] 1 Lloyd's Rep. 182, a case regarding deafness).

A breach of this duty causing personal injury has always given the servant a right of action for reparation. For his own personal negligence a master was always liable, and still is liable, at common law (*Thomas* v. *Quartermaine* [1887] 18 Q.B.D. 685, C.A., at p. 691 per Bowen L.J. Actions are fre-

quently brought in which damages are claimed first at common law and secondly for breach of statutory duty; see e.g., *Bath* v. *British Transport Commission*, [1954] 2 All E.R. 542, C.A.

Directing ourselves with these weighty judicial pronouncements, we would adopt and follow the reasoning of those judgments and would affirm also the judgment of the learned Judge on the question that the appellants were in breach of their duty to provide a safe system of work, and in exposing the respondent to a reasonably foreseeable risk.

Furthermore, we are of the view that once the appellants have delegated to a competent agent and Manager the duty of providing a reasonably safe system of working, the latter's failure of seeing that the employees were using those ear plugs or ear shields does not absolve the appellants from liability—being under a duty to take due care in the provision of a reasonably safe system of working.

Finally, the question is whether the appellants can invoke the defence of volenti non fit injuria. Counsel for the appellants contended that the Judge misdirected himself as to the effect of the doctrine volenti non fit injuria, because in effect the respondent accepted the risk of his employment.

It has been said time after time that where an employee relies on the breach of a duty to take care, owed by the defendant to him, it is a good defence that the employee consented to that breach of duty, or, knowing of it, voluntarily incurred the whole risk entailed by it. (*Thomas* v. *Quartermaine*, [1887] 18 Q.B.D., 685, C.A., at p. 696, per Bowen L.J., approved in *Yarmouth* v. *France* [1887] 19 Q.B.D. 647, C.A., at p. 659, per Lindley, L.J., and in *Smith* v. *Baker & Sons* [1891] A.C. 325, H.L., at p. 337; *Smerkinich* v. *Newport Corpn.* [1912] 76 J.P. 454, D.C.; *Herd* v. *Weardale Steel Coal and Coke Co. Ltd.*, [1915] A.C. 67, H.L.; c.f. *Robertson* v. *Primrose & Co.*, [1910] S.C. 111; *Lindsay* v. *Charles Connell & Co. Ltd.*, [1951] S.C. 281; *Cullen* v. *Dublin United Tramways Co.* (1896), *Ltd.*, [1920] 2 I.R. 63, C.A.).

In the light of these authorities, it appears that in such a case, the maxim volenti non fit injuria applies. But this defence is to be distinguished from the plea of contributory negligence, for a plaintiff may have voluntarily exposed himself to the risk

of being injured whilst himself exercising the utmost care. The plaintiff's knowledge of danger is a factor in considering contributory negligence.

There is no doubt that in order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, (*Smith* v. *Baker and Sons* (*suppra*)), but also to have appreciated fully (*Letang* v. *Ottowa Electric Railway Co.* [1926] A.C. 725 P.C.) and voluntarily accepted the risk. The question whether the plaintiff's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances.

It is to be added however, that where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available. (*Watt* v. *Hertfordshire County Council*, [1954] 2 All E.R. 368, C.A., at pp. 370–371). Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against the employer.

The learned trial Judge, dealing with the defence of volenti non fit injuria, raised by the appellants, reached the conclusion that the findings of the Court left no room whatever for the invocation of that defence in the present case. In our opinion, the learned trial Judge properly applied his mind to the legal effect of that doctrine and we endorse and approve his statement in the light of the authorities quoted earlier that this defence rarely finds application in cases of injuries suffered by workers in the course of their work and as a result of hazards emanating from this system of work. The gist of the defence, in the words of Ackner J., does not lie in the assent to the infliction of injury but involves an assumption to the risk. (See *Bennett* v. *Tug-well*, [1971] 2 All E.R. 248). In order to establish the defence the plaintiff must agree to waive any claim that he may have to injury that may befall him due to lack of reasonable care on the part of the defendants. Knowledge or willingness to take the risk will not substantiate the defence of volenti. (See also *Stavrinou Costa and Another* v. *Municipal Corporation of Limassol*, (1975) 1 C.L.R. 84; and *Cyprus Trading Corporation* v. *Chimonas*, (1975) 1 C.L.R. 211).

For the reasons we have endeavoured to explain at length, we have reached the conclusion that the appellants were negligent, and we would dismiss this appeal with costs in favour of the respondent.

Appeal dismissed with costs. 5