1981 September 17

[SAVVIDES, J.]

ANDREAS MAHATTOU,

Plaintiff,

v.

VICEROY SHIPPING CO. LTD. AND ANOTHER,

Defendants.

(*Admiralty Action No.* 76/78).

Evidence—Admissibility—Documentary evidence—When primary evidence can be adduced secondary evidence not admissible—Bill of lading—Existence of F.I.O. clause therein—Sought to be proved by oral evidence—Original bills of lading or certified copies thereof not produced and no explanation given for such failure—Oral evidence inadmissible.

Principal and agent—Shipping agent acting on behalf of ship-owner—Principles applicable—Claim against ship-owners and agents for damages for injuries sustained by stevedore in the course of unloading of ship—Unloading a matter of the ship-owners to arrange—Agents not liable.

Negligence—Contributory negligence—Master and servant—Safe system of work—Principles applicable—Unloading of ship—Box suddenly breaking open and its contents falling and injuring stevedore's leg—Opening due to unsafe fastening of box on winch—System of work unsafe—Lack of supervision by ship-owner's foreman—Negligence by fellow employees in failing to secure box properly—Ship-owners liable in negligence—Stevedore having no time to move away or take precautions for his own safety—Not guilty of contributory negligence.

Costs—Successful defendants—Deprived of their costs in view of their line of defence.

Whilst the plaintiff, together with other porters, was working on the quay, loading on trailers heavy wooden boxes containing mechanical parts, which were being unloaded from the ship "Rony"

by a mobile crane, one of the boxes broke open and an axle fell on his leg and injured him. Due to the nature of the goods in question, the unloading of which was dangerous, the stevedores had to use double slings attached to the hook of the crane to keep the boxes level, so that they could be lifted and landed safely. In this case the stevedores instead of using double slings they used a single sling and whilst the boxes were loaded, one of them instead of being lowered in a level position, itwas being lifted and unloaded in an inclined position which was increasing the danger of its breaking open.

The plaintiff's duty was to stand near the trailers which were on the dock to push the boxes on the trailer before they were loosened by the crane operator. Upon seeing that the boxes were lowered, ready to be loaded on the trailers, he tried to put the case on its proper side to be placed on the trailer but before touching it the side of the box was detached and its contents started falling out suddenly and before the plaintiff had any chance to move away one of the iron axles, which had fallen from the box, fell on his foot and injured him. According to the evidence of the plaintiff and his witnesses, which remained uncontradicted, the box broke open as a result of its unsafe fastening on the winch of the crane. The unloading was supervised by a foreman whose duty was to see that the goods were safely unloaded.

In an action by the plaintiff for damages against defendants 1 as owners of the said ship and against defendants 2, as agents of defendants 1, the defendants contended:

(a) That there was no relationship of master and servant between the defendants and the plaintiff because the persons responsible for the unloading of the ship and for whose account the dock porters were employed, were the consignees under the bills of lading in view of the F.I.O. ("free in and out") clause embodied therein;

(b) that the plaintiff was guilty of contributory negligence.

The original bills of lading or certified copies thereof were not produced in evidence and no explanation was given for this failure. The existence of the F.I.O. clause in the bills of lading was sought to be proved by oral evidence.

Held, (1) that it is well established that when primary evidence

can be adduced, especially in the case of documents,secondary evidence is not admissible unless the case comes within any of the recognised exceptions to such rule (see Phipson on Evidence, 12th ed. paras. 1813–1822 pp. 755–762); that as the defendants failed to produce the original bills of lading or certified copies thereof without offering an explanation for such failure the oral evidence as to the existence of an F.I.O. clause in the bills of lading is not admissible.

(2) (*After stating the principles governing liability of shipping agents acting on behalf of ship-owners*) that defendants 2 were acting all along as agents of the ship and its owners and that the plaintiff was employed by defendants 1 through their agents, defendants 2; that the operation of the unloading of the ship was a matter of the ship-owners to arrange; that they did so through their agents, who, acting as such, engaged for them port workers, stevedores, mobile cranes operating from the dock and crane operators; that, therefore, the plaintiff was the servant of defendants 1 and the action against defendants 2, fails; that in view, however, of the line of defence followed by defendants 2 in an unsuccessful effort to throw the blame on the consignees as being the employers of the plaintiff there will be no order as to costs in so far as the plaintiff and defendants 2 are concerned.

(3) (*After stating the principles governing the common law duty of a master to provide a safe system of work*) that as the particular winch load which resulted in the accident was not safe; that as there was lack of supervision by the foremen of the defendants whose duty was, upon seeing that the load was not properly fixed, either to warn the labourers who were working on the dock to move away till this load was safely landed, or give any other directions to the crane operator for the safe landing of such box; and that as the stevedores employed by the defendants acted in a negligent way in failing to secure properly such heavy box, the accident was the result of the negligence of defendants 1.

(4) (*After stating the law governing contributory negligence*) that as the accident occurred when the sling load was brought down over the trailer and the porters who were on the dock had to push it towards the trailer; and as that the box broke open suddenly and its heavy contents spread out immediately giving

no time to the plaintiff to move away or take any precaution for his own safety defendants 1 have failed to prove their allegation of contributory negligence on the part of the plaintiff and they are solely to blame for this accident; accordingly the plaintiff is entitled to the special and general damages (C£1,800.–) the quantum of which has been agreed upon between the parties.

Judgment for plaintiff against defendants 1 *for* C£1,800 *with costs. Action against defendants* 2 *dismissed with no order as to costs.*

Cases referred to:

Djemal v. *Zim Israel Navigation Co. Ltd. and Another* (1967) 1 C.L.R. 227; (1968) 1 C.L.R. 309;

Skapoullaros v. *Nippon Yusen Kaisha and Another* (1979) 1 C.L.R. 448;

Domestica Ltd. v. *Adriatica and Another* (1981) 1 C.L.R. 85;

Kakou v. *Adriatica and Another* (1980) 1 C.L.R. 357;

Christodoulou v. *Menicou and Others* (1966) 1 C.L.R. 17.

Admiralty action.

Admiralty action for special and general damages for personal injuries sustained by plaintiff on the ship "RONY" as a result of the negligence of the defendants.

L. Pelekanos, for the plaintiff.

Ph. Valiantis for *L. Papaphilippou*, for the defendants.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The plaintiff in this action is a licensed porter working in the Larnaca Port. He is 49 years old. On the 15th December, 1977 whilst he was engaged in the unloading of ship RONY, at Larnaca Port, he met with an accident as a result of which the present action emanated.

It is the allegation of the plaintiff that the accident was the result of the negligence of defendants 1, the owners of the ship, and of defendants 2, their agents, who were responsible for the unloading of the said vessel and who employed him for such purpose.

The accident which gave cause to this action occurred under

the following circumstances: The plaintiff together with other porters was working on the quay, loading on trailers goods which were being unloaded from the ship by a mobile crane. In the course of such unloading, a box containing heavy iron axles, broke open and one of such axles fell on the leg of the plaintiff and injured him. Plaintiff alleges that the accident was the result of breach of duty of care and negligence on the part of the defendants and negligence by their servants and employees.

The allegations of negligence and breach of duty, as set out in para. 4 of the petition, are to the effect that the defendants failed to take any or sufficient precautions for the safety of the plaintiff, that they exposed the plaintiff to risk and injury, that they failed to supply an adequate and/or safe system of work, they failed to show reasonable diligence in ascertaining that the plaintiff's place of work was safe enough, that they failed to warn the plaintiff of the possible danger and in any event that the doctrine of res ipsa loquitur applies in the present case.

As a result of this accident the plaintiff suffered the injuries set out in para. 6 of the petition and the special damages set out in para. 7 to which I need not refer in detail, in view of the fact that the quantum of special and general damages was agreed upon in the course of the hearing of the action, at a figure of £1,800 (£1,150 for special damages and £650 for general damages).

By their amended joint answer the defendants deny any responsibility for this accident. They deny that any relationship of master and servant existed between them and the plaintiff and allege that the unloading of goods from the ship RONY was carried out by the receivers and/or importers of the goods in view of the fact that the bills of lading were containing an F.I.O. clause, under which the responsibility for unloading was casted upon the receivers of the goods. They further deny any negligence on their part and they also deny that they had any control over the stevedores or any other person working on the ship as a result of whose negligence the accident occurred. In conclusion they allege that the plaintiff was guilty of contributory negligence in that he knew that it was dangerous to stand under a load sling during the unloading without taking reasonable care for his own safety.

Plaintiff's witnesses 1 and 2 gave evidence in support of the plaintiff's version as to how the accident occurred. Their evidence has not been contradicted by any witness called by the defendants. Also plaintiff's witness 1, the Chief Porter supervising the porters working on the dock including the plaintiff, and plaintiff's witness 3, Georghios Mikellides, Port Manager of the Larnaca Port, gave evidence as to the procedure of loading and unloading of ships and the employment of labourers. According to such evidence, daily, at 11 a.m., a meeting is held at the office of the Port Manager, of the agents of the ships which are anchored within the port area waiting their turn for unloading, for the purpose of arranging the order in which the unloading or the loading of ships will commence. At such meeting, besides the ship's agents, the Port Pilots and the Port Manager attend and, on occasions, representatives of the Licensed Porters' Association also attend, to be informed about the order of unloading. Each one of the ship's agents to whom berth is allotted for the following day, has to make arrangements through the labour office, for the supply of labourers for the various gangs. Also, if the ship has no cranes on board, then the ship's agents have also to provide a crane operating from the quay and for this purpose, they have to make arrangements with the Port Authorities for the supply of mobile cranes. According to the evidence of P.W.3, in this particular case, the ship had not sufficient cranes, and the ship's agents (defendants 2), applied to the Port Authorities for the supply of two mobile cranes. Photocopy of their application was produced by consent as *exhibit* 1. Such cranes were supplied to defendants 2 under an express condition and/or undertaking signed by them on the application form, (*exhibit* 1) which reads as follows:

> "We also agree to bear the costs of any damages caused during the employment of the above cranes to any cargo or craft to be lifted and/or the crane and/or government or other private property and/or any person and/or individual, thereby absolving the government of any responsibility whatsoever for any such damage, loss and/or bodily injuries".

The only witness who testified for the defendants, was one Andreas Fellas, who, at the material time, was the Managing Director of defendants 2 and who had resigned in the meantime.

This witness, according to a statement made by counsel for the defendants, was called to produce certain documents which he was handling at the material time and which he thought, were still in his possession, but as in the meantime he had resigned, counsel stated that he was intending to call another witness to produce such documents. Such documents were the bills of lading containing the alleged clause concerning the unloading of the goods. This witness said in his evidence that the bills of lading in the present case contained an F.I.O. clause, and explained that when there is such a clause, the ship and its agents undertake the unloading of the ship, but the agents will not hand the delivery order to the consignees unless the consignees reimburse the agents for the expenses incurred for the unloading and the loading.

According to para. 1 of the statement of claim, defendants 1 are alleged to be the owners of the ship RONY and defendants 2 their agents, responsible for the unloading of the said ship. This allegation has not been denied in the statement of defence. Furthermore, on the evidence adduced by the defendants, it is admitted that defendants 2 were the agents of defendants 1 and at the material time they were operating for the account of the ship they were representing.

The first issue which poses for consideration is whether the plaintiff was employed by the defendants or either of them in the course of the unloading of the ship RONY.

It is the allegation of the defendants that in the present case the persons responsible for the unloading of the ship and for whose account the dock porters were employed, were the consignees under the bills of lading in view of the FIO clause embodied in the said bills. In consequence there was no relationship of master and servant between the defendants and the plaintiff.

What is the position under a bill of lading containing an FIO clause has been explained by P.W. 3 and by D.W.1. P.W.3 Georghios Mikellides, said in cross-examination:

"*Q.* Do you know what FIO means on a bill of lading?

A. Yes.

Q. Could you tell the Court?

A. FIO means free in and out.

Q. Who is responsible for the unloading of the cargo under a FIO term?

A. Normally, in such cases, the recipient of the goods to be unloaded is responsible for this 'in-and-out' expenses. The agents may pay these expenses for account of the consignee of the cargo".

And D.W.1, said in his evidence in answer to a question put to him by the Court:

"*Q.* When there is a FIO clause, does it mean that the consignee himself will go and make arrangements for the unloading of the ship and its agents undertake the unloading, and the consignee has to reimburse them for the expenses incurred for such purpose?

A. Yes, that is correct. The ship and its agents will undertake the unloading of the ship, but the agents will not hand a delivery order to the consignees, unless the consignees reimburse the agents for the expenses incurred for the unloading and the loading".

And in cross-examination, the same witness said the following in respect of the employment of the labourers:

"*Q.* Who paid the labourers who were working on the quay?

A. We paid them, but we collected what we paid for them from the consignees.

Q. Who was responsible in the first instance, to the Labour Office or the Porters Association to pay the wages of the labourers employed on the quay?

A. The defendants 2 in this particular case were responsible to pay, but they were paying for the account of the consignees. If for any reason any of the consignees refused to pay, we were not going to issue a delivery order to him. The consignees have no connection with the labourers".

It is clear from the evidence of D.W.1, the Managing Director of the defendants 2 and P.W.3, that even where the bills of lading contained an FIO clause, the porters engaged for the unloading of the ship were employed and paid by the defendants,

and the defendants were reimbursed from the consignees who were burdened with all "in-and-out" expenses. In case the consignees refused to pay such expenses, defendants 2 were entitled to refuse to issue a delivery order enabling the consignees to clear and collect the goods from the customs stores. In the present case, however, the oral evidence of D.W.1, that there was an FIO clause in the bills of lading, is not admissible in the absence of the original bills or certified copies thereof, which had to be produced and which counsel for the defendants said he was going to produce, something which he failed to do without offering any explanation for his failure to produce them. It is well established that when primary evidence can be adduced, especially in the case of documents, secondary evidence is not admissible. The only recognised exceptions to such rule are:

(a) When the original is a public or judicial document, or private one required by law to be enrolled or registered.

(b) When the original is in the possession of the adversary.

(c) When the original is in the possession of a stranger.

(d) When the original has been lost or destroyed.

(e) When the original could not be traced after proper and sufficient search for same has been carried out.

(f) In case of impossibility or inconvenience of production.

(g) In interlocutory proceedings.
(Vide Phipson on Evidence, 12th Ed. paras. 1813-1822, pp. 755-762).

In consequence, defendants have failed to prove their allegation that the bills of lading were subject to an FIO clause under which they were exempted from any liability which was shifted on the consignees as the persons who in fact employed the plaintiff. There is ample evidence before me coming from the witnesses of both sides that the plaintiff was employed by the defendants. He was employed through his Association, who, under the provisions of Cap. 184 and the Regulations annexed thereto and the subsequent amendments under Laws 38/73 and 59/77, were the only licensed persons entitled to work in the port and this is the reason why they were employed by

the defendants through their Association. As to the existence of the relationship of master and servant between plaintiff and defendants, P.W.2 said in his evidence:

> "We were bound by the instructions of the employees of the ship's agents or by the agents themselves as to how to perform the work or if they do not like the way we were handling the unloading they give directions as to how they want it to take place",

and also in the evidence of D.W.1, who said that the labourers working on the quay were paid by the defendants.

In the result, I find that the plaintiff was in fact employed to work for the unloading of the ship RONY and was employed by the defendants for such purpose. Having found so, I am now coming to consider whether defendants 2 are jointly liable with defendants 1 or whether they were acting in the present case merely as agents for the account of defendants 1.

As I have already mentioned earlier in this judgment, the plaintiff in his petition alleges under para. 1(a) that the plaintiff was employed by defendants 1 and/or that he was employed by defendants 2 as agents and/or servants of defendants 1. Also, under para. 1(c) that defendants 2 were the agents of the ship owners, defendants 1. Throughout the evidence, defendants 2 are referred to as the ship's agents and that the plaintiff was employed to work on the ship. Also, D.W.1 who gave evidence for the defendants said in his evidence that defendants 2 were the ship's agents at the material time and as such they were operating for the account of the ship which they represented and his evidence on this issue was not contested.

The legal principles with regard to the liability of shipping agents acting on behalf of the ship owners have been explained in a number of cases of this Court. (Vide *Djemal* v. *Zim Israel Navigation Co. Ltd. and another* (1967) 1 C.L.R. 227 and on appeal (1968) 1 C.L.R. 309; *Skapullaros* v. 1. *Nippon Yusen Kaisha*, 2. *A.L. Mantovani & Sons Ltd.* (1979) 1 C.L.R. 448; *Domestica Ltd.* v. *Adriatica and Another* (1981) 1 C.L.R., 85; *Kakou* v. *Adriatica and Another*, (1980) 1 C.L.R. 357).

From the evidence before me I am satisfied that defendants 2 were acting all along as agents of the ship and its owners

and that the plaintiff was employed by defendants 1 through their agents, defendants 2. The operation of the unloading of the ship was a matter of the ship owners to arrange. They did so through their agents, who, acting as such, engaged for them port workers, stevedores, mobile cranes operating from the dock and crane operatois. In the result, the action against defendants 2 fails. In view, however, of the line of defence followed by defendants 2 in an unsuccessful effort to throw the blame on the consignees as being the employers of the plaintiff, I make no order for costs in so far as the plaintiff and defendants 2 are concerned.

Having found that the relationship of master and servant between defendants 1 and the plaintiff has been established, I am now coming to consider whether any negligence and/or breach of Common Law duty of care due by a master to his servant has been established.

The circumstances under which the accident occurred and as described by the witnesses called for the plaintiff and which have not been contested by any evidence called by the defendants were as follows: The goods were unloaded from the hold of the ship by a mobile crane operating on the quay. Such crane, though belonging to the Port Authorities was hired by the defendants on their undertaking, as already mentioned earlier, that in case of an accident they were personally responsible for any injury caused to any person as a result of the operation of the said crane.

Among the merchandise which was being unloaded there were some heavy wooden boxes of oblong shape containing mechanical parts. Due to the nature of such goods, the unloading of which was dangerous, the stevedores whc were working in the hold and who were employed by the defendants, had tc use double slings attached to the hook of the crane to keep the boxes level, so that they could be lifted and landed safely. In this particular case the stevedores instead of using double sling they used a single sling and whilst the boxes were unloaded, one of them instead of being lowered in a level position, it was being lifted and unloaded in an inclined position which was increasing the danger of its breaking open. On the deck there was a foreman of the defendants supervising the unloading and giving instructions to the stevedores who were working

in the hold and also to the crane operator as to when and how to lift and lower the goods. This foreman is known as the hatchman (koumandos). This foreman, whose duty, as already mentioned, was to see that the goods were safely unloaded must have seen, and it was his duty to see, that in the case of this particular load one of the two boxes was being lowered in an inclined position and fastened with one sling instead of two slings to make its unloading safer.

The plaintiff, whose duty was to stand near the trailers which were on the dock to push the boxes on the trailer before they were loosened by the crane operator, upon seeing that the boxes were lowered, ready to be loaded on the trailers, tried to put the case on its proper side to be placed on the trailer, but before touching it the side of the box was detached and its contents started falling out suddenly and, before the plaintiff had any chance to move away one of the iron axles which had fallen from the box fell on his foot and injured him. According to the evidence given by the plaintiff and his witnesses, the box broke open as a result of its unsafe fastering on the winch of the crane.

The evidence called by the plaintiff concerning the circumstances of the accident stands uncontradicted by any witness who could be called by the defendants. It is in evidence that the unloading was taking place in the presence of one Andreas Georghiou, who was an employee of defendants 2 and also Loukis Voas, who was the hatchman directing the procedure of the unloading and also of another foreman employed by the defendants, namely, Georghios Yerasimou, who was present at the time when this sling load was unloaded, but none of these witnesses—though mentioned by the plaintiff and his witnesses in their evidence—was called to contradict the evidence adduced by the plaintiff.

In the case of *Kakou* v. *Adriatica* (*supra*), recently delivered by me, I had the opportunity of dealing extensively with the Common Law duty of a master to provide a safe system of work and proper supervision to avoid the cause of injury to any of his employees, and I adopt what I have said in that case concerning such duty.

In the present case, I am satisfied that the plaintiff has proved that:

(a) the system of work concerning the unloading of the

particular winch load which resulted to the accident was not safe;

(b) there was lack of proper supervision by the hatchman and the other foreman of the defendants whose duty was, upon seeing that the load was not properly fixed, either to warn the labourers who were working on the dock to move away till this load was safely landed, or give any other directions to the crane operator for the safe landing of such box;

(c) the stevedores employed by the defendants acted in a negligent way in failing to secure properly such heavy box.

In the result I find that the accident was the result of the negligence of defendants 1.

I come now to the last issue before me, as to whether the plaintiff has contributed by his own negligence to this accident. The defendants by their amended answer, allege that there was contribution of negligence on the part of the plaintiff in that:

(a) he knew or ought to have known that it was dangerous to stand under the sling load during the unloading; nevertheless, he remained there without moving to the side, and,

(b) he failed to take reasonable precautions for his own safety.

The position as to contributory negligence in Cyprus is the same as in England and our section 57 of the Civil Wrongs Law, Cap. 148, reproduces the provisions of the English Law Reform (Contributory Negligence) Act, 1945. The principle is well established and has been followed for years. Even though a servant, however, succeeds in establishing that his master's breach of duty was a cause of his injuries, he may, nevertheless, be found guilty of contributory negligence if there has been an act or omission on his part amounting to negligence, which has in fact caused the damage of which he complains (vide in this respect among others *Christodoulou* v. *Menicou & Others*, (1966) 1 C.L.R., 17 and the English authorities referred to therein and also *Kakou* v. *Adriatica* (*supra*)).

According to the evidence the plaintiff had to stand near the trailers which were on the dock and on which the goods were loaded, after being lowered by the crane, for transportation to the Customs stores. It was his duty when the goods were being lowered to push them on the trailer, together with other labourers who were working with him at such spot, before they were completely released by the crane operator. The accident occurred when the sling load was brought down over the trailer and the porters who were on the dock had to push it towards the trailer. It was at that time that the accident occurred. The box broke open suddenly and its heavy contents spread out immediately, giving no time to the plaintiff to move away or take any precautions for his own safety. The accident did not occur whilst the plaintiff was standing under the sling load, as alleged by the defendants, but whilst he was at its side.

On the evidence before me, I find that defendants 1 have failed to prove their allegation of contributory negligence on the part of the plaintiff, and, in the circumstances defendants 1 are solely to blame for this accident and the plaintiff is entitled to the special and general damages, the quantum of which has been agreed upon between the parties.

I, therefore, give judgment for the plaintiff and against defendants 1 for C£1,800.- with costs on such amount. The costs to be assessed by the Registrar.

The action against defendants 2 stands dismissed with no order for costs.

Judgment for plaintiff against defendants 1 *for* C£1,800 *with costs. Action against defendants* 2 *dismissed with no order as to costs.*