1982 March 3

[L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, LORIS, STYLIANIDES, PIKIS, JJ.]

VICEROY SHIPPING CO. LTD.,
Appellants-Defendants No 1,

v.

ANDREAS MAHATTOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 6310).

Evidence—Admissibility—Documentary evidence—Bill of lading —Existence of F.I.O. clause therein—Sought to be proved by oral evidence subject to the production of the bill of lading—Bill of lading not produced and therefore premise upon which oral evidence was introduced collapsed—Oral evidence inadmissible and rightly ignored.

Port Workers (Regulation of Employment) Law, Cap. 184 *and the Regulations made thereunder—Regulate employment of port workers for the purposes of having an adequate supply of workers for the smooth functioning of the ports and the avoidance of trade disputes—And does not change the relationship of master and servant between employers and port workers.*

Negligence—Master and servant—Safe system of working—Unnecessary risk—Occupational hazard—Volenti non fit injuria—Unloading of ship—Spreading of cargo—Port worker injured when box broke open, whilst been unloaded, as a result of its unsafe fastering on sling of the crane—Lack of supervision by employer's foreman—Fellow employees failing to secure box properly—Employer liable in negligence—Causes of the jujury not the ordinary risks of the employment but emanated from negligent fixing of the cargo—Principle of volenti non fit injuria not applicable in the absence of a finding that plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it—Plaintiff not guilty of contributory negligence.

Whilst the respondent 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, it was being lifted and unloaded in an inclined position which was increasing the danger of its breaking open.

The respondent'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 respondent 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 respondent 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 respondent for damages against the appellants, as owners of the said ship and against ex-defendants 2, as agents of the appellants the latter 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 respondent was guilty of contributory negligence.

As far as the unloading was concerned the F.I.O. clause meant that the consignee of the goods had to reimburse the ship or her agents for the expenses incurred for the unloading of his goods.

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 which was admitted subject to the production of the bills of lading. The defendants failed to produce the original bills of lading or certified copies thereof and the trial Judge excluded the evidence regarding the F.I.O. clause.

The employment of port workers is regulated by the Port Workers (Regulation of Employment) Law, Cap. 184 and the Regulations made thereunder. The trial Judge, after holding that ex-defendants 2 were acting all along as agents of the ship and its owners and that respondent was employed by appellants, through their agents, ex-defendants 2, held:

> That as the particular winch load which resulted in the accident was not safe; that as there was lack of supervision by the foreman of the appellants; and that as the stevedores employed by appellants acted in a negligent way in failing to secure properly the load, the accident was the result of the negligence of the appellants; and the respondent was not guilty of contributory negligence.

Upon appeal by the ship-owners it was contended:

(a) That in view of the manner the port workers were employed under the provisions of Cap. 184 and the Regulations made thereunder, there did not exist a relationship of master and servant between them and the persons for whom they carried out the loading or unloading of the ship;

(b) That once there was adduced oral evidence with regard to the existence of the F.I.O. clause in the bill of lading, the trial Judge was wrong not to rely on the oral evidence.

(c) That no negligence was established by the evidence in as much as the system of work was not defective

not was there any lack of supervision or any unnecessary risk of which the respondent did not know.

It was urged in this connection that there existed an operational hazard and that the respondent and his fellow workers knew about it and that the risk of the said cargo spreading was present when almost every set of it was landed on the quay and that they had assented to the assumption of the risk.

Held, (1) that the whole philosophy of the Port Workers (Regulation of Employment) Law, Cap. 184 and the Regulations made thereunder being to regulate employment for the purposes of having an adequate supply of workers for the smooth functioning of the ports and the avoidance, as far as possible, of trade disputes, and not to change the relationship of master and servant between employers and port workers, this Court cannot subscribe to the view that there did not exist a relationship of master and servant between the respondent and the appellants; accordingly contention (a) should fail.

(2) That since the documents (the bills of lading) were never produced the premise upon which oral evidence was introduced collapsed, the oral evidence became inadmissible and was rightly ignored; accordingly contention (b) should. also, fail.

Held, further, that the obligation of a consignee to reimburse the ship–owner for the costs of unloading does not render the people employed by the ship–owner for that purpose as employees of a consignee.

(3) That negligence was clearly established in this case and the defence amounting in effect to voluntary assumption of liability, volenti non fit injuria, cannot stand on the facts of this case; that the causes of the injury were not the ordinary risks of his employment but emanated from the negligent fixing of the slings on the said cargo; that had the stevedores placed two slings, certainly, even if the bottom of the case broke off, the contents of such box would not have fallen out as the bottom would have been adequately secured; that the principle of volenti non fit injuria has no application in this case in the absence of a finding "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly

agreed to incur it" (see *Osborne* v. *L. & N.W. Railways* [1888] 21 Q.B.D. 220, at pp. 223 and 224); accordingly contention (c) should fail.

(4) That the conclusion of the trial Judge that the respondent was not guilty of contributory negligence was duly warranted by the evidence before him inasmuch as it was not the inclined position in which the box was being lowered that caused the accident, but the absence of a second sling, a hazard against which the respondent had no opportunity to guard against; that on the totality of the circumstances, it is clear that the respondent by his conduct did not contribute to the damage as he could not reasonably have avoided the consequences of the negligence of the employees of the appellant Company and he cannot be said to have failed to take, in his own interest, reasonable care of himself and so found to have contributed by his want of care to his own injury (see *Nance* v. *British Columbia Electric Railway* [1951] A.C. p. 601, at p. 611); accordingly the appeal should be dismissed.

Appeal dismissed.

Cases referred to:

Lazarou v. *Ieropoulos & Co. Ltd. and Another* (1982) 1 C.L.R. 99;

Ashford v. *Scrutton Ltd.* [1958] 2 Lloyd's Rep. 223;

Blackwell v. *Port of London Master Porters & Stevedoring Co. Ltd.* [1962] 2 Lloyd's Rep. 245;

Osborne v. *L. & N.W. Railways* [1888] 21 Q.B.D. 220 at pp. 223 and 224;

Yarmouth v. *France* [1887] 19 Q.B.D. 647 at p. 657;

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

Nance v. *British Columbia Electric Railway* [1951] A.C. 601 at p. 611.

Appeal.

Appeal by defendants 1 against the judgment of a Judge of the Supreme Court (Savvides, J.) dated the 17th September, 1981, (Action No. 76/78) whereby they were adjudged to pay to the plaintiff the sum of £1,800.– as special and general damages for the personal injuries sustained by him as a result of

the negligence of their employees whilst engaged in the unloading of the ship "RONY" owned by them.

L. Papaphilippou, for the appellants.

L. Pelekanos, for the respondent.

L. Loizou J. The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. Loizou J. The appellant Company was adjudged* by a Judge of this Court, in the exercise of the original jurisdiction, to pay to the respondent the sum of C£1,800.– (agreed by the parties in the course of the hearing), as special and general damages for the personal injuries sustained by him on 19th December, 1977, as a result of the negligence of their employees whilst himself being in their employment and engaged at the Port of Larnaca in the unloading of the ship "RONY" owned by them.

The respondent together with other port workers, stevedores and crane operators were engaged by the appellant Company, through their agents, ex-defendants 2, to take part in unloading goods in store aboard.

The employment of port workers is regulated by the Port Workers (Regulation of Employment) Law, Cap. 184, as amended, and the Regulations made thereunder. But, as rightly found by the learned trial Judge, this left unaffected the relationship of master and servant inasmuch as from the evidence established port workers were bound to obey the orders of the employer not only as to the work they had to carry out but also with regard to details of the work and the mode of its execution. The degree of control exercised, as it emerged from the testimony of Minas Zenios (P.W.2), was such as to put beyond dispute the existence of a relationship of master and servant between the parties.

It has been argued on behalf of the appellant Company that in view of the manner the port workers were employed under the provisions of the aforesaid law and regulations there did not exist a relationship of master and servant between them and the persons for whom they carried out the loading or unloading of the ship. We do not subscribe to that view inasmuch as there was ample evidence that these port workers are under

* See (1981) 1 C.L.R. 335.

the instructions of a foreman—in this case Andreas Georghiou; the whole philosophy of the aforesaid law and regulations being to regulate employment for the purposes of having an adequate supply of workers for the smooth functioning of the ports and the avoidance, as far as possible, of trade disputes, and not to change the relationship of master and servant between employers and ports workers (see *Lazarou* v. *Ch. Ieropoulos & Co. Ltd. and Another*, Admiralty Action No. 141/78—judgment delivered on the 5th November, 1981, as yet unreported).*

Whilst on this point regarding the relationship of master and servant, another related point may conveniently be dealt with at this stage, namely that the Bills of Lading evidencing the contract of carriage of the goods in question contained a F.I.O. clause which term stands for Free In and Out and which, as explained at the trial, it means, as far as unloading is concerned, that the consignee of the goods has to reimburse the ship or its agents for the expenses incurred for the unloading of his goods and consequently the porters engaged for such unloading were in the employment of the consignee and not in the employment of the ship owners or its agents.

The Bills of Lading were never produced in evidence, so there did not exist before the learned trial Judge evidence as to whether there was a F.I.O. clause in the Bill of Lading or not. Evidence, however, was admitted for the oral explanation of the contents of the non-produced Bills of Lading upon a statement made by counsel for the appellants that the witness might be allowed to give these oral explanations and that the Bills of Lading would be produced later by another witness, something which was never done.

From the statement made by counsel before witness Andreas Fellas gave evidence in order, as counsel put it "to clarify a few things", it is clear that oral evidence was admitted subject to the production of the necessary documents and such documents could not be but the Bills of Lading which were alleged to contain the F.I.O.S. clause. The learned trial Judge excluded the evidence explaining the meaning of a F.I.O. term, because when allowed in it was as a result of a statement made by counsel that the relevant documents would be produced eventually

* Now reported in (1982) 1 C.L.R. 99

by another witness. The documents, however, were never produced and thereupon the premise upon which oral evidence was introduced collapsed and the oral evidence became inadmissible and was rightly ignored. Counsel for the appellant has complained that once these clarifications, as were described, were led in, the learned trial Judge was wrong not to rely on them. We do not subscribe to that view as they were clarifications of a nonproved clause. In any event the obligation of a consignee to reimburse the ship–owner for the costs of unloading does not render the people employed by the ship–owner for that purpose as employees of a consignee.

In any event, the submission that the respondent was in no way fettered from suing the appellant Company because of the F.I.O.S. clause or in any other relationship between the appellant and the third party, undisclosed to the respondent, cannot succeed. In the absence of evidence that relationship was brought to the notice of the respondent, the alleged agent cannot avoid his liabilities under a contract of employment in view of the plain provisions of section 190(2)(b) of the Contract Law, Cap. 149, laying down that the agent remains liable to a third person where the principal is undisclosed.

Consequently, even if the evidence surrounding the relationship of the appellant Company and the suggested consignee was held to be admissible, it would in no way qualify the agent's liability to the respondent. Relevant, of course, to the issue of liability are the facts of the case and the findings of the trial Court having a bearing on the issue are as follows:

> "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 who were working in the hold and who were employed by the defendants, 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 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 orane 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 fastening 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".

On the aforesaid facts, the learned trial Judge found that a case of negligence has been established against the stevedores and other employees of the appellant Company and vicariously

against the appellant Company, their employers, on the ground 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 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.

Counsel for the appellant has argued that no negligence was established by the evidence inasmuch as the system of work was not defective nor was there any lack of supervision or any unnecessary risk of which the plaintiff did not know. It was urged that there existed an operational hazard and that the respondent and his fellow workers knew about it and that the risk of the said cargo spreading was present when almost evey set of it was landed on the quay and that they had assented to the assumption of the risk. In support of this approach of counsel for the appellant Company, we have been referred to two cases: *Ashford* v. *Scrutton Ltd.* [1958] 2 Lloyd's Law Reports, 223; *Blackwell* v. *Port of London Master Porters & Stevedoring Co. Ltd.* [1962] 2 Lloyd's Law Reports, 245.

On the material before us we cannot uphold the submissions of counsel. Negligence was clearly established in this case and the defence amounting in effect to voluntary assumption of liability, volenti non fit injuria, cannot stand on the facts of this case. The causes of the injury were not the ordinary risks of his employment but emanated from the negligent fixing of the slings on the said cargo. Had the stevedores placed two slings, certainly, even if the bottom of the case broke off, the contents of such box would not have fallen out as the bottom would have been adequately secured. The principle of volenti non fit injuria has no application in this case in the absence of a finding "that the plaintiff freely and voluntarily, with full

knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it", as stated by Wills J., in *Osborne* v. *L. & N.W. Railways* [1888] 21 Q.B.D. 220, at pp. 223 and 224, following the words of Lord Esher M.R. in *Yarmouth* v. *France* [1887] 19 Q.B.D. 647, at p. 657; nor can the ground of contributory negligence succeed.

The learned trial Judge, after referring to the authorities on the subject, including *Christodoulou* v. *Menikou & Others* (1966) 1 C.L.R., 17, and the English authorities referred to therein, had this to say:

> "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".

We find that the aforesaid conclusion was duly warranted by the evidence before the Court inasmuch as it was not the inclined position in which the box was being lowered that caused the accident, but the absence of a second sling, a hazard against which the respondent had no opportunity to guard against.

On the totality of the circumstances, it is clear that the respon-

dent by his conduct did not contribute to the damage as he could not reasonably have avoided the consequences of the negligence of the employees of the appellant Company and he cannot be said to have failed to take, in his own interest, reasonable care of himself and so found to have contributed by his want of care to his own injury, as the matter was put with regard to contributory negligence by Lord Simon in the case of *Nance* v. *British Columbia Electric Railway* [1951] A.C. p. 601, at p. 611.

For all the above reasons the appeal is dismissed with costs.

Appeal dismissed with costs.