1982 June 21

[HADJIANASTASSIOU, LORIS AND PIKIS, JJ.]

KYKON LIMITED,

Appellants-Defendants 2,

v.

MICHAEL DEMETRIOU,

Respondent-Plaintiff,

and

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent-Defendant 3.

(*Civil Appeal No.* 6264).

Negligence—Master and servant—Hire of excavator and driver—Driver the servant of the owners of the excavator—Accident due to negligence of driver—Driver not subject to control of hirers in respect of manner of driving—Owners responsible for negligence of driver.

Negligence—Contributory negligence—Principles applicable—Contributory negligence lies in failure to take appropriate precautions for one's safety.

Administration of Justice—Delays and adjournments in the hearing of cases—Deprecated.

The appellants hired to the second respondents an excavator adopted for the digging of trenches for the carrying out of road works on the Nicosia-Ayii Trimithia road. It was part of the arrangement that the excavator would be manned and operated by a servant by the appellants ("the driver") who was paid by and was subject to the control of his employers, the appellants. On January 7, 1974, respondent 1, a foreman in the employment of the hirers ("the foreman") descended into a ditch dug by the driver in order to examine whether it was sunk according to specifications. After inspection he decided

that some more digging had to be done a fact he intimated to the driver before climbing-up to the surface; and proceeded to tell the driver that he should resume digging as soon as he was safely out of the ditch. Thereafter the foreman climbed-up to the surface, to the full view of the driver, and whilst in the process of crossing to the other side of the road so as to clear the ground for the resumption of works, the driver, quite unexpectedly, set the machine in motion and moved forward, in consequence of which the foreman was hit by the handle of the excavator and thrown into the ditch, sustaining injuries agreed at the trial at £1,400.

In proceedings by the foreman for damages the trial Judge sustained his action against the driver and the appellants his employers and absolved the foreman of contributory negligence, finding—

(a) that defendant 1 was negligent in the discharge of his duty of care to the plaintiff, and

(b) the appellants were vicariously liable for the negligence of defendant 1, their servant.

The hirers were exonerated on the ground that responsibility for the acts of the driver of the excavator remained with his employers, the appellants. The trial Judge made reference in this connection to the case of *Mersey Harbour Board* v. *Coggins* [1946] 2 All E.R. 345 (H.L.), establishing the principles that regulate the relationship between the general employer and the hirer with regard to responsibility for the actions of employees assigned to carry out works for the hirer; and that responsibility for the actions of the driver remained firmly with the appellants who were, consequently, held liable, jointly with the driver, for the damage suffered by the foreman.

Upon appeal by the employers of the driver it was mainly contended:

(a) That the foreman should have been found guilty of contributory negligence because he has chosen the most hazardous route to safety.

(b) That on the authority of *Mersey* (supra) there was room for ascribing some liability to the hirers for the

reason that the directions of the foreman to the driver amounted to an act of intervention rendering the hirers liable as joint tortfeasors.

(c) That the trial Court wrongly found that the appellants and not the hirers were liable for the acts of the driver.

Held, (1) that contributory negligence lies in failure to take appropriate precautions for one's safety and that what precautions are necessary for one's safety is a matter of fact and degree; that, as the trial Judge indicated, none of the routes that the foreman might choose posed any reasonable hazards for his safety, given the position of the driver, his full view of the foreman and the momentary interval of time needed to get with safety to the other side of the road; that any person in the position of the foreman could assume, more so in view of the fact that he was in communication with the driver, that the excavator would not be set in motion before the foreman stepped out of the area of operations; that the conclusions of the trial Court on this regard were fully warranted, in fact inevitable; accordingly contention (a) should fail.

(2) That there was nothing akin to intervention by the hirers in this case, as to how the driver should drive his machine or carry out excavation works; and that, therefore, contention (b) is groundless.

(3) That in *Mersey*, supra, it was emphatically decided that, prima facie the general employer remains liable for the acts of an employee hired to carry out specified works for the hirer; that the presumption it was indicated, is a strong one and the burden resting on the shoulders of the hirer to discharge, is a heavy one; that the trial Court, on application of the principles approved in *Mersey*, supra, found that the appellants failed to discharge this burden; that this was a proper finding, considering that the driver remained, throughout, subject to their control, both as regards his employment as well as the manner of discharging his work; that the fact that the hirers were specifying the work to be done, did not, in any way, place the driver under their control; accordingly contention (c) should, also, fail.

Appeal dismissed.

Observations: Arising out of the many adjournments (16) and the delay in the hearing and disposal of this case (4 years)

the Court of Appeal deprecated adjournments and delays and drew attention to the provisions of Article 30.2 of the Constitution requiring that judicial causes have to be determined within a reasonable time (pp. 461–462 post).

Cases referred to:

Mersey Harboyr Board v. *Coggins* [1946] 2 All E.R. 345;

Nicolaou and Another v. *Constantinides* (1969) 1 C.L.R. 117;

Glasgow Corporation v. *Meir* [1943] A.C. 448;

Bloomidas v. *The Port of Singapore Authority* [1978] 1 All E.R. 956.

Appeal.

Appeal by defendant 2 against the judgment of the District Court of Nicosia (Artemides, S.D.J.) dated the 28th March, 1981 (Action No. 5869/76) whereby defendants 1 and 2 were adjudged to pay to the plaintiff the sum of £1,400.—for loss and injuries he sustained in an accident due to their negligence and whilst he was a foreman in the employment of the Republic of Cyprus.

M. Christofides, for the appellant–defendants 2.

Ph. Houri (*Mrs.*), for the respondent–plaintiff.

Cl. Antoniades, Senior Counsel of the Republic, for respondent–defendant 3.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by PIKIS J.

PIKIS J.: The appellants, second defendants at the trial, hired to the second respondents, defendants 3 in the District Court action, an excavator adapted for the digging of trenches for the carrying out of road works on the Nicosia—Ayii Trimithia road. It was part of the arrangement that the excavator would be manned and operated by a servant of the appellants, the driver, the first defendant in the District Court action. The driver was paid by and was subject to the control of his employers, the appellants.

Respondent No. 1, the plaintiff, was a foreman in the employment of the hirers, the Republic of Cyprus, responsible for earmarking the work to be done and supervising its execution.

On 7th January, 1974, the foreman descended into a ditch dug by defendant 1, in order to examine whether it was sunk according to specifications. After inspection, he decided that some more digging had to be done, a fact he intimated to defendant 1 before climbing-up to the surface. Defendant 1, who was then seated behind the controls of the machine, then at a standstill, evidently awaiting the instructions of the foreman, seemed to heed these instructions.

What the foreman told him is that he should resume digging as soon as he was safely out of the ditch. Thereafter, the foreman climbed-up to the surface, to the full view of the driver, and was in the process of crossing to the other side of the road so as to clear the ground for the resumption of works. Notwithstanding his proximity to the excavator, the driver, quite unexpectedly, set the machine in motion and moved forward, in consequence of which the foreman was hit by the handle of the excavator and thrown into the ditch, sustaining injuries agreed at the trial to amount to £1,400.—.

Artemides, S.D.J., as he then was sustained the action of the foreman against defendant 1 and the appellants, finding—

(a) that defendant 1 was negligent in the discharge of his duty of care to the plaintiff, and

(b) the appellants were vicariously liable for the negligence of defendant 1, their servant.

The Republic was exonerated on the ground that responsibility for the acts of the driver of the excavator remained with his employers, the appellants. The learned trial Judge made reference in this connection to the case of *Mersey Harbour Board* v. *Coggins* [1946] 2 All E.R. 345 (H.L.), establishing the principles that regulate the relationship between the general employer and the hirer with regard to responsibility for the actions of employees assigned to carry out works for the hirer. He concluded that responsibility for the actions of the driver remained firmly with the appellants who were, consequently, held liable, jointly with the driver, for the damage suffered by the foreman.

The plaintiff was absolved of every charge of contributory negligence because neither reason nor prudence could, in the

circumstances of the case, alert him to the risk of being run down before he had the opportunity to cross over to safety to the other side of the road. As the trial Judge pointed out, the driver had a panoramic view of the scene and the plaintiff could legitimately assume that nothing would be done to put his safety to risk.

The findings and conclusions of the trial Court were challenged on appeal, as well as his application of the principles in *Mersey*, supra, to the facts of the case. Learned counsel for the appellants made no secret of the difficulties that lay ahead of him in persuading this Court to interfere with the judgment of the trial Court. He took-up every point that could arguably be taken on behalf of the appellants in support of his submission that there were valid grounds for upsetting, at least in some respects, the judgment of the trial Court.

We were invited to attribute, in the first place, some fault to the foreman for his injuries, arising, in the submission of counsel, from his choice of the most hazardous route to safety. The plaintiff could choose another way of getting to the other side of the road, such, as would put him totally out of range from possible hazards associated with the resumption of digging works. We are unable to sustain this submission. As the trial Judge indicated, none of the routes that the foreman might choose posed any reasonable hazards for his safety, given the position of the driver, his full view of the plaintiff and the momentary interval of time needed to get with safety to the other side of the road. Any person in the position of the foreman could assume, more so in view of the fact that he was in communication with the driver, that the excavator would not be set in motion before the foreman stepped out of the area of operations. The conclusions of the trial Court in this regard were fully warranted, in fact inevitable. There is no room for interference whatever.

Contributory negligence lies in failure to take appropriate precautions for one's safety. What precautions are necessary for one's safety, is a matter of fact and degree. As with negligence, foreseeability is the guide to determining whether the plaintiff has taken appropriate precautions for his safety. An element of fault and a degree of blame must attach to plaintiff,

consisting of failure to take appropriate precautions for his safety, before a finding of contributory negligence is justified. We may remind that the tort of negligence is designed as a code of reasonable conduct. What is reasonable in the given circumstances of a case, is a matter of fact and degree. The facts must, in each case, be judged with common sense and experience as a guide. As the Supreme Court pointed out in *Nicolaou and Another* v. *Constantinides* (1969) 1 C.L.R. 117, treading along the lines of what was said in *Glasgow Corporation* v. *Meir* [1943] (A.C.) 448, what is reasonable may vary from case to case, depending on the risk involved and the magnitude of the prospective injury. In his lucid judgment, the trial Judge found no fault with the plaintiff. We agree.

Counsel for the appellants took-up two more points on appeal, revolving round the findings of the trial Judge, that the appellants remained liable for the acts of the driver. The first is that, on the authority of *Mersey*, supra, there was room for ascribing some liability to the Republic, for the reason that the directions of the foreman to the driver to resume digging work, amounted to an act of intervention, rendering the Republic liable as joint tortfeasors. Viscount Simon, in his judgment in the case of *Mersey*, supra, envisaged the possibility of the hirers being held liable as joint tortfeasors, notwithstanding the control exercised by the general employers over the driver, if they intervene and give directions as to how the work should be done, and in consequence thereto a third party suffers damage (page 349). We need not debate the implications of these dicta for there was nothing akin to intervention in this case, as to how the driver should drive his machine or carry out excavation works. We find the submission of the appellants to be groundless.

The second submission is that the driver ceased to be the servant of the employers by the time of the accident, on account of the fact that he became the owner of the excavator. As counsel candidly admitted, the argument is thin for, there was no change in the relationship between the appellants and the Republic with regard to the services to be rendered, nor did the driver enter into any direct relationship with the Republic. The driver remained, vis-a-vis third parties, the servant of the appellants for whose negligence they were rightly found to be liable. Nothing more need be said.

Lastly, counsel for the appellants challenged, albeit peripherally, the finding of the Court that appellants and not the hirers, the Republic, were liable for the acts of the driver. On the evidence before the Court, the finding of the trial Judge was inevitable. In *Mersey*, supra, it was emphatically decided that, prima facie, the general employer remains liable for the acts of an employee hired to carry out specified works for the hirer. The presumption, it was indicated, is a strong one and the burden resting on the shoulders of the hirer to discharge, is a heavy one. The trial Court, on application of the principles approved in *Mersey*, supra, found that the appellants failed to discharge this burden. This was a proper finding, considering that the driver remained, throughout, subject to their control, both as regards his employment as well as the manner of discharging his work. The fact that the hirers were specifying the work to be done, did not, in any way, place the driver under their control. They merely indicated the work that his employers had agreed to perform in virtue of their contract with the hirers. One may mention with benefit the recent decision of the Privy Council in *Bloomidas* v. *The Port of Singapore Authority* [1978] 1 All E.R. 956, where it was held that, for responsibility for the acts of the employee of another to pass in the hands of the hirer, there must be a transfer putting the entire and absolute control of the servant in the hands of the new master. The case serves to illustrate the magnitude of the onus to be discharged by the general employers before a finding is justified that responsibility for the acts of their servant passed to the hirers.

Before leaving the appeal, we feel duty-bound to draw attention to an unsalutary aspect of the proceedings. It is the many adjournments before the case was heard and the ease with which apparently the Court kept adjourning the case. Suffice it to say that the case was adjourned on sixteen occasions before being heard. It was heard on the seventeenth occasion that it came up before the Court. On numerous occasions, the case was adjourned, as the record reveals, "by consent", whatever this may mean. One is apt to form the impression, to say the least, that the judicial process is subject to the convenience of the parties. We are not, of course, referring to the Judge who ultimately tried the case who, very appro-

priately and commendably heard the case on the first occasion it was listed before him for hearing.

It is pertinent to remind of the constitutional provisions set out in Article 30.2 of the Constitution, requiring that judicial causes be determined within a reasonable time, necessitating the speedy determination of court cases. Ensuring observance of this all important requirement for the administration of justice, is primarily the responsibility of judges. The disposal of judicial causes within a reasonable time is not only a fundamental precept of the Constitution but, under any circumstances, it is fundamental for the proper administration of justice. It took more than four years for this case to be finally disposed of. Delays of this order cannot but undermine faith in the administration of justice and leave litigants with a lingering sense of injustice. Delay in the administration of justice, leads, as it was recognised as far back as 1215, when Magna Carta was enacted, to denial of justice. We have no doubt that these observations will be duly heeded in the interests of justice and the effectiveness of the judicial process.

Appeal dismissed with costs.