1989 June 30

(KOURRIS, J.)

CHARALAMBOS ODYSSEOS,

Plaintiff,

v.

A. L. MANTOVANI & SONS LTD. AND ANOTHER,

Defendants.

(Admiralty action No. 82/79).

Damages — General damages for personal injuries — Multiple injuries, the most serious being fracture of the 8th and 9th right ribs and fracture of radius of right wrist — Mild post concussional syndrome — Slight thickening of wrist, mild limitation of range of palmar flexion, mild post-traumatic arthritic changes — Pain, discomfort and stiffness of right wrist following heavy manual work — £3,500 general damages for pain and suffering and loss of amenities of life.

Damages — General damages for personal injuries — Loss of future earnings — Man 41 years old, at time of accident, but 52 at time of trial — In determining the multiplier the basis should be his age at the date of trial — Multiplier fixed at 8.

Employers' liability — Lending forklift with its driver — Who bears liability for negligence of driver — Review of authorities — As in this case, the defendants were entitled to give the orders as to how the work should be done and controlled the method used, they are the persons vicariously liable for the driver's negligence — The general employers of the driver are not liable for such negligence.

Employers' liability — Scope of their duty towards their employees — Safe system and safe place of work — Safe passage from and to the actual place of work — Employee goint to W.C. — He is still acting within the course of his employment.

Negligence — Contributory negligence — What constitutes contributory negligence.

At the material time the plaintiff was working as a Stevedore A in the hold of the ship M/V MERCK CONTINENTAL, loading bags of asbestos The plaintiff felt the need to go to the W C and ease himself He asked for a portable ladder, but, as such ladder was not provided, he asked the driver of the fork lift to lift him up He stood on the forks and grasped with his hands on the fork lift When the forks reached the bags on which the plaintiff was about to step on, the fork lift moved and the plaintiff lost his balance and fell off and landed on the floor of the hold

As a result the plaintiff sustained the hereinabove described injuries

In the light of the evidence adduced the Court concluded that the plaintiff was not an independent contractor, but the servant of defendants 1, who broke their duty towards the plaintiff in that they failed to provide a safe place of work and a safe passage from and to the place of work A servant going to the W C is still, in the Court's opinion, acting within the scope of his employment

On the issue as to who should be held vicariously liable for the negligence of the driver of the fork lift the Court reached the conclusion on the grounds indicated in the hereinabove headnote that it is the defendants and not the general employers of the driver who are so liable for such negligence

A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself, and in his reckoning he must take into account the possibility of others being careless (See *Omer v Pavlides and Another* (1971) 1 C L R 404)

In this case the plaintiff is guilty of contributory negligence in that he failed to have a safer grip on the fork lift He could have had a safe grip on the fork lift and having landed on the bags he then should have let go

Applying the common sense approach in assessing degree of liability, the plaintiff is 25% to blame for this accident

Finally the Court assessed the damages as follows a) General damages for pain and suffering and loss of amenities of life £3,500 and for loss of future earnings (£800 per year multiplied, in the light of the plaintiff's age at the trial - 52 years old - by 8) £6,400 b) Special damages £9,841

Taking into account the aforesaid percentage of contributory negligence the Court gave judgment for the plaintiff as hereinafter referred to

Judgment for the plaintiff for £14 806 against defendant 1 with costs Action against defendant 2 dismissed with no order as to costs Claim of defendant 1 against third party, i e the general employers of the driver of the fork lift, dismissed with costs

Cases referred to

The Cyprus Palestine Plantations Co Ltd v Leandrou (1982) 1 C L R 880

Bhoumidas v Port of Singapore Authority [1978] 1 All E R 956

Mersey Docks and Harbour v Coggins and Griffiths (Liverpool) Ltd and MacFarlane [1946] 2 All E R 345,

Erodotou v Shoham (Cyprus) Ltd and Another (1987) 1 C L R 107,

Paraskevaides Ltd v Christofi (1982) 1 C L R 789,

Zacharia v Elmini Lyoness Inc and Another (1983) 1 C L R 415,

Nicolaides Ltd v Nicou as Administratrix of the Estate of the Deceased Andreas Nicou Ftanou (1981) 1 C L R 225

Kemal v Kasti, 1962 C L R 317

Omer v Pavlides and Another (1971) 1 C L R 404

Admiralty action.

Admiralty action for special and general damages as a result of an accident which occurred on 20 6 1977 on board the ship «Merck Continental».

N Anastassiades, for the plaintiff

St McBride, for the defendants

X Clerides, for the interested party

Cur adv vult

KOURRIS J read the following judgment The plaintiff's claim against both defendants or either of them is for special and general

damages as a result of an accident which occurred on 20.6.1977 on board the ship «Merck Continental» in the Port of Limassol.

It has been the case for the plaintiff that at the material time he was employed by both defendants or either of them and that the accident occurred whilst in the course of his employment and that it was due to their negligence in that they failed to provide him with a safe system and with a safe place of work.

On the other hand, it has been the case for the defendants that the plaintiff was an independent contractor and no relationship of master and servant existed between them and the plaintiff and that they are not guilty of negligence because the accident was due to a frolic of the plaintiff. They further alleged that defendants 1 were acting as agents for the third party and that if negligence is established then the third party is liable to compensate the plaintiff.

The third party denied that the defendants were acting as their agents at the material time and they alleged that if negligence is established then the defendants are liable to compensate the plaintiff.

It is common ground that the plaintiff is a stevedore of list «A» and that together with other stevedores was engaged in loading in the hold of the ship bagged asbestos belonging to the Cyprus Asbestos Limited, the third party in these proceedings.

A fork lift was in the hold assisting the stevedores in stacking the bagged asbestos to the side of the hold. The built in ladder through which one could obtain access to the hold was blocked by the bags. At about 1.30 p.m. the plaintiff wanted to go to the W.C. to ease himself and asked the driver of the fork lift to lift him up. He stood on the forks and grasped with his hands on the fork lift. When the forks reached the bags on which the plaintiff was about to step on, the fork lift moved and the plaintiff lost his balance and fell off and landed on the floor of the hold. The plaintiff intended to step on the bags which were near the top of the hold in order to obtain access to the deck of the ship.

As a result of the fall he suffered personal injuries and was removed to the Limassol Hospital for treatment.

The version of the plaintiff is that when the built-in ladder of the hold was blocked by the bags he asked the foreman Andreas Lambis (D.W. 2) to provide him with a portable ladder in order to

get on the deck, but the foreman failed to do so and that as he was in a desperate state because he wanted to go to the W.C. to ease himself, he was obliged to use the fork lift as the only means to obtain access to the deck.

The version of the defendants is that Andreas Lambis has expressly told the plaintiff prior to his fall to refrain from using the fork lift as a means of leaving the hold. Lambis in his evidence, also denied that the plaintiff asked him to fetch a ladder provided for the purpose of leaving the hold.

I was impressed favourably by the way the plaintiff gave his evidence and I accept his evidence as the true account of the accident in question. His evidence is also supported by the evidence of Andreas Demetriou (P.W. 2) who is also a stevedore and at the time he was working together with the plaintiff in the hold of the ship and he supported the evidence of the plaintiff to the effect that the plaintiff asked Lambis for the portable ladder and that Lambis failed to fetch it to enable the plaintiff to get on the deck. He also impressed me as a truthful witness and I accept his evidence and I reject the evidence of Andreas Lambis (D.W. 2) who did not impress me as a truthful witness.

In the circumstances, I find that the plaintiff was obliged to use the fork lift in that Lambis failed to provide him with a portable ladder.

The question which poses now for determination is whether the plaintiff was an independent contractor and if the answer is in the negative by whom he was employed.

When persons requiring the services of stevedores for the loading or unloading of cargo, the practice is for them to apply in writing to the District Labour and Social Insurance Officer of the Ministry of Labour and Social Insurance, stationed at the port the ship calls, and ask that they are supplied with a number of stevedores they so require. Their application is then passed to the stevedores who assign for each job a number of named stevedores from the list «A» and when any stevedore from this list is not available, they allocate stevedores who belong to the list «B». The persons requesting the services of stevedores must have a valid insurance, covering them for injuries caused during the time the stevedores rendered their services.

On 18.6.1977, Andreas Ergatoudes, (D.W. 3), who is employed by the defendant 1, who are the shipping agency which acts in

Cyprus on behalf of shippers and owners of cargo and ships, applied to the District Labour and Social Insurance Officer posted at Limassol to supply them with stevedores, for the loading of the cargo consisting of bagged asbestos on board the ship «Merck Continental». According to the evidence of this witness, his company was acting as a agents for the third party. His duties were to supervise the loading of the cargo.

It should be noted at this stage that Lambis, (D.W. 2), was employed by Defendants 1 as their foreman or «Cappo» as he was commonly called. The plaintiff was working in the hold with another 7 stevedores and another 3 stevedores were working at the winch and all were paid by defendants 1.

On the evidence adduced, I am satisfied that the plaintiff at the material time was not an independent contractor but a servant of defendants 1 and the question that falls for determination is whether the defendants 1 are guilty of negligence or not.

The duty of a master towards his servant is to provide him with a safe system and a safe place of work.

There is also a duty on the master to ensure safe passage from and to the actual place of work (*The Cyprus Palestine Plantations Co. Ltd. v. Kalliope Leandrou*, (1982) 1 C.L.R. 880). In the present case the defendants 1 failed to provide the plaintiff with a safe place of work and they also failed to ensure safe passage from the place of his work. When a servant is going to the W.C. he is acting within the course of his employment and the defendants 1 ought to have provided the plaintiff with a portable ladder. Their failure to do so establishes negligence against them.

In view of the above, the contention of defendants 1 that the plaintiff was a trespasser on the fork-lift and the accident was due to a frolic of the plaintiff cannot stand.

It has been defendant's 1 contention that for matters of loading of the bagged asbestos on the ship were the agents of Cyprus Asbestos Mines Ltd., the third party, and that they secured the employment of the stevedores, including the plaintiff for the third party.

The third party, on the other hand, denied that defendants 1 were their agents for matters of loading and they alleged that the defendants 1 acted as independent contractors.

The evidence of Edward Thompson, (D. W. 4), was to he effect that the ship was chartered by the third party, that the third party were loading the vessel, and that they met all loading payments, reimbursing defendant 1 for any payments made by them on their behalf as their agents. According to the evidence of this witness, the agency agreement was made orally with the shipping officer of the third party, namely, Christakis Anastassiades, otherwise known as «Dixon» who has since died and he did not give evidence in the present case.

Takis Michaelides, who is now the shipping officer and in charge of loading cargo on board the ships of third party, and who at the time was assistant to Christos Anastassiades and had his desk in the same office with him, was the only witness called by the third party. His evidence is to the effect that Anastassiades spoke through the telephone to a certain Napoleon Joseph of defendants 1 and agreed with him that defendants 1 would undertake the loading of the cargo upon payment as independent contractors. He denied that Anastassiades engaged defendants 1 as the agents of the Cyprus Asbestos Mines Limited. He said that his company could neither engage stevedores nor appoint agents to act on their behalf because they had no insurances to cover stevedores in case of accidents. He said that Napoleon Joseph has died. He also said that the third party never authorised defendants 1 to describe themselves on exhibit 11 as the agents of the third party.

Exhibit 11 is an overtime application in connection with stevedores made by defendants 1 to the District Labour and Social Insurance Officer and at the place where it is stated «the signature and status of the applicant» it is stated as follows: «A.L. Mantovani and Sons Ltd., for account Cyprus Asbestos Limited». This exhibit was produced by Ergatoudes (D.W. 3), who filled in the top part of exhibit 11 and said that he described his company acting for account of the third party from instructions received from the management of his company.

This issue caused me considerable anxiety because two of the protagonists, namely Christos Anastassiades of the third party and Napoleon Joseph of the defendants 1, have died and gave no evidence. On this issue, I accept the evidence of Michaelides, witness of the third party, who heard Anastassiades speaking to Joseph Napoleon, and who impressed me favourably. His version

is more consistent with the truth in view of the fact that the third party had no insurance to cover stevedores in case of accident, and, in view of the arrangements between the District Labour Officer and Social Insurance Officer, and the stevedores, and those who applied for the supply of stevedores, they could not apply to the said office to engage stevedores either by themselves or though agents. Again both defendants 1 and the third party are reputable companies and of long standing and I expected that if any agency agreement existed, to be reduced in writing. Further, exhibit 11 cannot be considered as bearing any weight on the matter because it was prepared by defendants 1 without any authorization by the third party.

For these reasons, I am satisfied that the defendants I were not acting as agents for the third party.

Defendants 1 further contended that the actual person who was instrumental in causing the plaintiff to fall, namely, the fork-lift driver, was never in the employment of defendants 1, but he was in the direct employment of the third party. It is common ground that the third party lent to defendants 1 a fork-lift together with his driver who was in their employment to work for the loading of the bagged asbestos.

The leading authority on the subject which was applied in the recent case of *Bhoomidas v. Port of Singapore Authority,* [1978] 1 All E.R. 956, is the case of *Mersey Docks and Harbour Board v. Coggins and Quiffiths (Liverpool) Ltd. and McFarlane,* [1946] 2 All E.R. 345, in which it was held:-

> (i) The question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver.
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> (ii) The board, as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the wokman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the

manner in which the crane was to be operated. The board were, therefore, liable for his negligence.»

Viscount Simon in his judgment said (at pp. 348, 349):

«It is not disputed that the burden of proof rests upon the general or permanent employer - in this case the board - to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantages of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances..... If, however, the hirers intervene to give directions as to how to drive which they have no authority to give, and the driver pro hac vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors.»

Lord Porter in delivering his judgment in the same case approached the problem by expressing his opinion as follows (at p. 351:

«Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed - all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But is is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders or whether any specific orders were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general

employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping.»

This case was followed in the case of *Erodotou v. Shoham (Cyprus) Ltd. and Another*, (1987) 1 C.L.R. 107.

In the light of the evidence before me, and the authorities which I have made reference, I am satisfied that defendants were entitled to give the orders as to how the work should be done, and they controlled the method used in the loading of the bagged asbestos in the hold of the ship. They, therefore, are vicariously liable for this accident and not the third party who lent to the first defendant the fork - lift with its driver.

Quantum of Damages.

The plaintiff, as a result of his fall on the floor of the hold of the ship lost consciousness for a few minutes and he was removed to the Limassol Hospital for treatment. The initial injuries received by the plaintiff as well as the reassessment of his condition resulting from the injuries suffered in the accident, are described in the medical reports which were produced by consent by both counsel and are marked as exhibits 8, 9 and 10. Exhibit 8 is the medical report of Dr. J. Kannavas who treated the plaintiff when he was taken to the hospital and he stated that the plaintiff suffered multiple injuries but the most serious were fracture of the 8th and 9th right ribs and fracture of radius of the right wrist. The plaintiff was discharged from the hospital on the 27th June, 1977 and he was advised to be followed up as an out-patient. The opinion of this doctor is that the injuries of the plaintiff entailed a moderate amount of pain and suffering initially subsiding gradually over a period of 6-8 weeks.

Dr George Doritis who examined the plaintiff on 9.11.1977, and prepared the medical report marked exhibit 9, stated that the plaintiff complained to him of headaches and dizziness aggravated by postural changes and sleeping disturbances which in the opinion of this doctor were consistent with a mild post-concussional syndrome. Appropriate treatment was advised and the plaintiff was followed up for two more occasions and during the last examination on the 29.10.1987, the plaintiff is stated to have improved.

On 4.11.1987, the plaintiff was jointly examined by Dr. K. Andreou on behalf of the plaintiff and Dr. G.S. Tornaritis on behalf of the defendants. They prepared a joint medical report which is exhibit 10. The plaintiff was seen and examined again on 29.10.1987 and 4.11.1987 by these two doctors for the purpose of re-assessing his condition resulting from the injuries suffered as a result of his accident on 20.6.1977. The recent examination referred to after effects of the injury to his right wrist, as the other injuries had already well improved as reported in the previous reports. At the time of the recent examination his complaints were of pain in the right wrist after doing heavy work. He had no pain after light duties or when at rest. The report states «on examination the findings were essentially unchanged in the interval between 1985 and now, i.e:

1. There is a slight thickening of the right wrist;

2. Mild limitation of the range of palmar flexion, radial deviation and supination;

3. No muscle wasting of the right arm of forearm;

4. The grip of the right hand is satisfactory;

5. The X Rays of the right wrist are also essentially without change.»

In the opinion of these doctors, the mild-post-traumatic arthritic changes present in 1985 do not seem to have progressed to a degree discernible in the recent X rays. They concluded that taking into consideration the injury, progress and findings of the past and present examinations that the use of the right wrist in heavy manual work will, after a while, start causing pain, discomfort and stiffness.

The plaintiff in his evidence stated that at the end of his sick leave, which was on 5.9.1977, he returned to work but he could not do heavy work. He stated that he cannot lift up anything which which is heavier than 10 kilos. He is not handicapped in his work, he said, when for loading or unloading are used pallets and his work is to tie or untie ropes. But, when the load consists of bags of 50-60 kilos each, such as fertilizers, he cannot work.

I think the plaintiff exaggerated his incapacity, which, is inconsistent with the medical reports and does not justify the plaintiff refusing to accept work because of his injuries because the

report certifies only that after use of the right wrist in heavy manual work, it will, after a while, start causing pain, discomfort and stiffness. His injuries were not such that he could turn down work in advance.

The damages awarded should be fair and reasonable. For the physical injury and pain and suffering, and loss of amenities of life I think that a sum of £3,500 is a reasonable compensation.

I now propose to award the plaintiff damages for loss of future earnings. A multiplier is used in order to reduce the element of uncertainty and provide an objective basis for the assessment of damages. *(Paraskevaides Ltd. v. Christofi,* (1982) 1 C.L.R. 789, followed in the case of *Zacharia v. Elmini Lyoness Inc. and Another,* (1983) 1 C.L.R. 415.

In the present case, the plaintiff at the time of the accident was 41 years old and he was earning as he said £8-£10 a day. At the time of the conclusion of the hearing, the plaintiff was 52 years old. I have given serious consideration to the physical injuries of the plaintiff and the resulting incapacity and having taken everything into account, I arrived at the conclusion that the plaintiff cannot pursue his pre-accident work as before. I cannot say that the plaintiff will be incapable of doing any heavy manual work at all, as he tried to impress me, but he will have a loss of earnings because of his incapacity and his handicap in the labour market. Bearing in mind the earnings of the plaintiff, I have reached the conclusion that the plaintiff will have an amount of £800 per year loss of earnings. An appropriate multiplier, bearing in mind the age of the plaintiff at the trial is 8 years. (See *Ntinos Arseniou Nicolaides Ltd. v. Charalambia A. Nicou as Administratrix of the Estate of the Deceased Andreas Nicou Ftanou,* (1981) 1 C.L.R. 225). Multiplying the sum of £800 by 8 years, there is an amount of £6,400 which I award to the plaintiff.

With regard to special damages, the plaintiff is entitled to £1026 for loss of wages for the period that he was out of work, which was not actually disputed by the defendants, i.e. from the time of the accident till 5.9.1977 which I also award to the plaintiff. The plaintiff is also entitled to partial loss of wages from 5.9.1987 till 9.7.1988 when the hearing of this action was concluded. (See *Halil Kemal v. Georghios M. Kasti,* 1962 C.L.R. 317). In point of fact, the action was conclused on 31.5.1989 but this was due to the delay of counsel to file their written addresses. The evidence was

concluded on 9.7.1988. Consequently, the plaintiff is entitled by way of special damages, to partial loss of wages for 10 years and 9 months which I estimate at £800 per year because of his incapacity. So, there is a sum of £8,600 for partial loss of wages till the conclusion of the hearing. The plaintiff proved to my satisfaction that he incurred £165 for transport and medical expenses which I award to him. I also award to him the sum of £50 for the preparation of medical reports, exhibits 9 and 10.

The defendants further alleged that if it were to be held that they were guilty of negligence, then the plaintiff also would have been guilty of negligence for contrubuting to the accident.

The principles of contributory negligence were expounded by the Supreme Court in a series of cases and I need not repeat them here. Suffice it to say that «just as actionable negligence requires the foreseeability of harm to others, so contrubutory negligence requires the foreseeability to harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself, and in his reckoning he must take into account the possibility of others being careless.» (See *Ali Riza Omer v. Ioannis Pavlides and Another*, (1971) 1 C.L.R. 404.)

I think that the plaintiff is guilty of contributory negligence in that he failed to have a safer grip on the fork lift. To my mind he could have had a safe grip on the fork lift and having landed on the bags he then should have let go.

Applying the common sense approach in assessing degrees of liability, I think that the plaintiff is 25% to blame for this accident, and the defendants are to blame 75% for this accident.

To sum up, the plaintiff is entitled to £3,500 for pain and suffering and loss of amenities of life, and £6,400 for future loss of earnings. So the plaintiff is entitled to £9,900 by way of general damages. The plaintiff is also entitled to the sum of £9,841 by way of special damages, making thus a total of £19,741 special and general damages. From this amount the sum of £4,935 is deducted representing the 25% liability of the plaintiff to the accident in question, leaving thus a balance of £14,806 which I award to the plaintiff. In assessing damages for the loss of actual and prospective earnings, I made allowance for any incidence of income tax on the earnings.

In the circumstances, there will be judgment for the plaintiff for £14,806 against defendants 1 only, with costs to be assessed by the Registrar. The action against defendant 2 is dismissed with no order for costs. Claim of defendants 1 against third party dismissed with costs to be assessed by the Registrar.

Judgment for £14,806 against defendant 1 with costs. Action against defendant 2 dismissed without costs. Claim of defendants 1 against third party dismissed with costs.