(WILSON, P., ZEKIA, J., JOSEPHIDES, J., AND TRIANTAFYLLIDES, AG. J.)

THE TUNNEL PORTLAND CEMENT CO. LTD.

Appellants-Plaintiffs,

v.

THE PRINCE LINE LIMITED AND ANOTHER

Respondents-Defendants.

(*Civil Appeal No.* 4403).

Admiralty—Civil Wrongs—Negligence—The Civil Wrongs Law, Cap. 148, *section* 51 (1) (*b*) *and* (2) (*c*)—*The doctrine of* res ipsa loquitur *not applicable in this case—Inevitable accident—The burden rests on the defendant to show inevitable accident.*

Section 51 (1) (*b*) of the Civil Wrongs Law, Cap. 148, provides that negligence consists of :—

" Failing to use such skill or take such care in the exercise of a profession, trade or occupation as a reasonable prudent person qualified to exercise such profession, trade or occupation would in the circumstances use or take.... "

Section 51 (2) of the said Law provides that a duty not to be negligent shall exist in the following cases that is to say,—(*a*) ... (*b*) ... (*c*) the owner of ... a boat or ship or other means of conveyance shall owe such a duty to all persons who are, or the owner of any movable property which is, carried for reward in or upon such ... boat, ship ... or other conveyance and to all other persons who are, and to the owner of any property which is so near to such ... boat, ship, ... as in the usual course of things to be affected by the negligence.

For the purposes of this paragraph it is immaterial whether or not such reward moves from the person who is, or the owner of the movable property which is, so carried.

The appellants (plaintiffs) were shipping 4,000 bags of asbestos fibre from Limassol to London by the m/v " Black Prince " owned by the respondents 1 (defendants 1). It was agreed between them and the ship owners that the risk of the cargo from the warehouse in Limassol to the vessel was to be borne by the plaintiffs. The respondents 2 (defendants 2) are a lighterage company which undertook for reward

to transport the aforesaid cargo from the shore to the vessel to be loaded. Whilst the "Black Prince" was at its moorings at Limassol Bay, a collision occurred between a lighter, owned by the respondents 2 (the lighterage company), and the "Black Prince", at the vessel's rudder. As a result the goods of the appellants loaded on the lighter were lost in the sea. The appellants brought an action in the High Court in its Admiralty jurisdiction claiming against the respondents £2,135 damages for negligence in respect of that loss, further alleging as regards the lighterage company that they were common carriers and as such liable for the said loss of the appellant's cargo of asbestos fibre. This action, heard by VASSILIADES, J., was dismissed, the learned judge holding that on the evidence negligence was not established and that the loss was due to inevitable accident, holding, further, as regards the defendants 2 (respondents 2) *i.e.* the owners of the lighter that they were not common carriers; (see *The Tunnel Portland Cement Co.Ltd* v. (1) *the Prince Lines Limited and* (2) *The Lighterage and Transport Co. Ltd.*, 1962 *C.L.R.* 236).

The circumstances under which the loss of the cargo occurred are fully set out in the judgment delivered in the first instance and just quoted, as well as in the judgment of the High Court on appeal which follows. The plaintiffs appealed from the aforesaid judgment of VASSILIADES, J., dismissing their action. The High Court in allowing the appeal against respondents 2, the lighterage company, the appeal against respondents 1, the shipowners, having been abandoned during the hearing of the appeal : –

Held, (1) with respect to defendants 2 (the lighterage company), the learned Judge held, in effect, that the collision was due to an inevitable accident caused by a choppy sea and a wind which carried the lighter towards the ship's rudder. He held that the plaintiffs and the defendants 2 clearly failed to prove negligence against defendants 1, and defendants 1 failed to prove their allegations of negligence against defendants 2.

(2) In our view this was not altogether necessary because there was no claim by defendants 1 against defendants 2.

(3) With respect to the issue of inevitable accident we adopt the view stated in "*The Saint Angus*", (1938) P. 225 in which Hodson, J. followed the law laid down in the "*Merchant Prince*" (1892) P. 179, at p. 189, where Fry, L.J., stated :

"The burden rests on the defendants to show inevitable

accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

(4) It is our view, with the greatest respect in this case, that the action lies to be decided in negligence and that it is not one of inevitable accident. We do agree, however, with the trial Judge's finding that it was not a case in which the doctrine *of res ipsa loquitur* applied.

(5) There is some discrepancy in the evidence as to whether the lighter or the tug cast off the tow line but we adopt the view that it was the man in charge of the lighter who cast off at a time when the lighter was approximately 50 yards from the ship. We do not, however, accept the opinion given in evidence that this was an inevitable accident. We arrive at our own conclusion.

(6) The witness Redman, the second Officer of the "Black Prince", was of the opinion that this accident could have been avoided and we are also of the same opinion.

The side to side swinging action of the vessel ought to have been appreciated by persons of the skill and experience in the lighterage work. It is worthy of note that cargo from another lighter was being loaded at the very time the collision occurred and other cargo was also loaded uneventfully during the day after the collision.

(7) It is unnecessary to determine exactly how the impact occurred. In the circumstances the burden was cast upon the defendants 2 to prove they were not responsible to the plaintiffs for the loss sustained.

(8) After considering all the evidence, we find that the contract between the plaintiffs and the defendants 2 was a contract of carriage for reward. This is a deduction from the evidence—there being no direct testimony on this point—and we think that this is proper in the circumstances of the case. It is very unlikely that a lighterage company would agree to transport 4,000 bags of asbestos from the shore to

the vessel to be loaded without being paid for its services. In any event if the services were *gratis* this would have been so pleaded by the Defendants 2.

(9) In the result the lighterage company failed to establish that the accident would have occurred without its negligence. It is liable, therefore, for the damage which the plaintiffs have sustained.

The amount has already been agreed upon.

(10) As to the ground urged at the trial on behalf of the plaintiffs that the lighterage company was a common carrier this was abandoned at the hearing of the appeal and we need not deal with this aspect of the case.

Appeal allowed with costs. Judgment for plaintiffs against defendants 2 for the amount agreed upon and costs throughout.

Cases referred to :

The Merchant Prince (1892) P. 179, at p. 189 ;

The Marpesia, L.R. 4, P.C., 212, at p. 220 ;

The Saint Angus (1938) *P.* 225.

Appeal.

Appeal against the judgment of a Judge of the High Court of Justice (Vassiliades J.) in Admiralty Action No. 4/60, dated 15.10.62 dismissing plaintiff's Claim for £2,315 being value of goods lost in the sea during a loading operation at Limassol road stead.

Chr. P. Mitsides for the appellants.

A. Michaelides for respondents No. 1.

M. Houry with *St. G. McBride* for respondents No. 2.

The judgment of the Court was delivered by :

WILSON, P. : This is an appeal by the plaintiffs from the judgment given on October 15, 1962, dismissing the action against the defendants with costs against the plaintiff for defendants 1 and no order as to costs with respect to defendants 2.

The action arises out of a collision between the Lighter No. LL 170, owned by defendants 2, with the Merchant Vessel " Black Prince " at the " Black Prince's " rudder while the vessel was at its moorings at Limassol Bay on May 25, 1959. The collision occurred while the lighter was passing the stern of the vessel.

The action was brought primarily against defendants 1 on the allegation that the " Black Prince ", while moving astern, had collided with the lighter. During the trial it bacame apparent such was not the case as the facts hereinafter stated will show.

The plaintiffs were shipping in all 4,000 bags of asbestos fibre from Limassol to London by " Black Prince ". It was agreed between them and defendants 1 that the risk of the cargo during the transfer from the warehouse in Limassol to the motor vessel was to be borne by the plaintiffs.

On the day in question there was a wind of velocity No. 6 and a choppy sea. The " Black Prince " arrived at her anchorage shortly after noon and dropped her port-side anchor at 12.25 hours before lighters were anywhere near. At 12.33 hours, after she settled on her anchor, she was brought up to four schackles of chain, *i.e.* 360 feet, and finished with her engines. A south-west breeze kept the ship, at the stern, heading into the wind with a swing of about 30 degrees which later was reduced to about 20 degrees by the dropping of the starboard anchor at 13.18 hours and without the ship moving forward or astern, as found by the learned trial Judge.

Accepting, as we do, and as the trial Judge did, the evidence of defence witness No. 1, Clifford John Redman, the 2nd Officer of the " Black Prince " we find that the collision occurred at 13.25 hours in the following circumstances :

The lighter in question was being towed by a tug into the wind from a quay, approximately one mile and a half distant from the ship. The tug owned and operated by defendants 2, was apparently also towing another lighter not involved in the accident. When the tug was a short distance from the ship, as is usual in such circumstances, it parted company with the lighter, the intention being that the lighter would continue under its own way to its place alongside the ship for unloading.

There is some discrepancy in the evidence as to whether the lighter or the tug cast off the tow line but we adopt the view that it was the man in charge of the lighter who cast off at a time when the lighter was approximately 50 yards from the ship—this was observed by Mr. Redman. We do not, however, accept the opinion given in evidence that this was an inevitable accident. We arrive at our own conclusion. Mr. Redman was of the opinion that this accident could have been avoided and we are also of the same opinion.

The side to side swinging action of the vessel ought to have been appreciated by persons of the skill and experience in the lighterage work. It is worthy of note that cargo from another lighter was being loaded at the very time the collision occurred and other cargo was also loaded uneventfully during the day after the collision.

For the reasons hereinafter given it is unnecessary to determine exactly how the impact occurred. In the circumstances the burden was cast upon the defendants 2 to prove they were not responsible to the plaintiffs for the loss sustained.

I come now to the law particularly applicable to this case.

Section 51 (1) (*b*) of the Civil Wrongs Law (Cap. 148) provides that negligence consists of "failing to use such skill or take such care in the exercise of a profession, trade or occupation as a reasonable prudent person qualified to exercise such profession, trade or occupation would in the circumstances use or take".

Subsection (2) provides that a duty not to be negligent shall exist in the following cases, that is to say, "(*c*) the owner of . . . . a boat or ship or other means of conveyance shall owe such a duty to all persons who are, or the owner of any movable property which is, carried for reward in or upon such . . . . boat, ship . . . . or other conveyance and to all other persons who are, and to the owner of any property which is so near to such . . . . boat, ship, ... as in the usual course of things to be affected by the negligence.

For the purposes of this paragraph it is immaterial whether or not such reward moves from the person who is, or the owner of the movable property which is, so carried".

After considering all the evidence, we find that this was a contract of carriage for reward. This is a deduction from the evidence—there being no direct testimony on this point—and we think that this is proper in the circumstances of the case. It is very unlikely that a lighterage company would agree to transport 4,000 bags of asbestos from the shore to the vessel to be loaded without being paid for its services. In any event if the services were *gratis* this would have been so pleaded by the defendants 2.

In the result the lighterage company failed to establish that the accident would have occurred without its negligence. It is liable, therefore, for the damage which the plaintiffs have sustained.

The amount has already been agreed upon.

We must deal now with the reasons for judgment of the learned trial Judge who dismissed the action against both defendants. But, firstly, we would like to say that the plaintiffs abandoned the appeal against defendants 1 during the hearing of the appeal and, in so far as defendants 1 were concerned, it was dismissed with costs up to the time the appeal was abandoned.

With respect to defendants 2 the learned Judge held, in effect, that the collision was due to an inevitable accident caused by a choppy sea and a wind which carried the lighter towards the ship's rudder. He held that the plaintiffs and the defendants 2 clearly failed to prove negligence against defendants 1 and defendants 1 failed to prove their allegations of negligence against defendants 2. In our view this was not altogether necessary because there was no claim by the defendants 1 against defendants 2.

With respect to the issue of inevitable accident we adopt the view stated in "*The Saint Angus*", (1938) P., 225 in which Hodson, J. followed the law laid down in the "*Merchant Prince*" (1892), P. 179, at p. 189 where Fry, L.J., stated :

> "The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable ; or they must show all the possible causes, one or other

of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident ".

And further at page 231 the learned Judge quotes from " *The Marpesia* ", L.R., 4, P.C. 212, at page 220 where Sir James Colvile stated that the " defendants must prove that something was done or omitted to be done which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone as the case may be ".

It is our view, with the greatest respect in this case, that the action lies to be decided in negligence and that it is not one of inevitable accident. We do agree, however, with the trial Judge's finding that it was not a case in which the doctrine of *res ipsa loquitur* applied.

As to the ground urged at the trial on behalf of the plaintiffs that the lighterage company was a common carrier this was abandoned at the hearing of the appeal and we need not deal with this aspect of the case.

For the reasons which have been given the appeal will be allowed with costs and plaintiffs will have judgment against defendants 2 for the amount agreed upon and costs throughout.

Appeal allowed with costs throughout.