1979 November 6

[SAVVIDES, J.]

ANDREAS MAHATTOU,

Plaintiff,

v.

VICEROY SHIPPING CO. LTD. AND ANOTHER,

Defendants.

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

Practice—Admission—Liberty to withdraw—Principles applicable—Action for damages for negligence—Defendants admitting before the Court that they are not relying on contributory negligence—Admission made unwarily and under a bona fide mistake of fact—Allowed to be withdrawn.

Admiralty—Practice—Pleadings—Amendment—Principles applicable—Action for damages for negligence—Contributory negligence not pleaded—Leave to amend defence, in order to include allegation of contributory negligence, granted after conclusion of plaintiff's case—No loss or detriment will be caused to plaintiff, by allowing the amendment, which cannot be made good by an appropriate order as to costs.

The plaintiff in this action claimed damages for personal injuries he sustained in the course of unloading a ship belonging to defendants 1. When the action came up for hearing counsel for the defendants made the following statement:

> " The main issue in this case is that the defendants are not liable in respect of this accident. We are not alleging any contributory negligence on the part of the plaintiff but our defence is two-legged.
>
> (a) That there is no relationship of master and servant between the plaintiff and the defendants, and,
>
> (b) that the injury suffered by the plaintiff is not the result of any negligence on the part of the defendants or their servants".

Counsel for the plaintiff agreed to the above statement. Plaintiff's case was concluded on May 29, 1979 on which day defendants also called one witness; the further hearing was adjourned to August 9, 1979.

On August 4, 1979 counsel for the defendants applied for an amendment of their answer to the petition by the addition of an allegation that the accident in question took place as a result of the contributory negligence of the plaintiff. Plaintiff opposed the application and the argument at the hearing turned on the following two questions:

"(a) Whether the defendants, in view of their statement to the effect that they will not allege any contributory negligence which amounts to an implied admission of such fact, are not estopped, at this stage, from applying to amend their pleadings and put forward an allegation to that effect.

(b) Whetner an amendment should be granted at this late stage of the proceedings".

In the course of the cross-examination of the plaintiff, counsel for the defendants has put questions to him concerning steps taken by him for his own safety and questions intended to establish contributory negligence on the part of the plaintiff. No objection was raised to such questions.

Held, (1) that in a proper case a party who has made an admission unwarily or under a bona fide mistake or prematurely will be allowed to amend or withdraw it on such terms as may be just (see *Hollis* v. *Burton* [1892] 3 Ch. 226); that having regard to all the circumstances of the case and the law, it is just and right to allow the defendants to withdraw their statement made to the Court concerning contributory negligence and any admission to that end because such statement was made unwarily and, obviously, under a bona fide mistake of fact.

(2) That, in a proper case, an amendment of the pleadings may be allowed at any stage of the proceedings; that before considering whether to grant an amendment the Court should take into consideration whether such amendment can be made without injustice to the other side which cannot be compensated for by costs, and whether the application is either mala fide or is made with the object of unduly delaying the other

party or will, in any other way, unfairly prejudice the other party, or is irrelevant or useless; that having regard to all material facts in the present case and the Law, this Court is satisfied that the application is not made mala fide or with the intention to prejudice the plaintiff in pursuing his claim, but the object of the applicants is to correct an omission on their part and include in the pleadings an allegation of contributory negligence which was necessary, once they wished to have such issue determined by the Court; that no loss or detriment will be caused to the plaintiff by allowing this amendment which cannot be made good by an appropriate order as to costs; that this Court is satisfied that with the payment of costs to the plaintiff, he is fully reimbursed for any loss suffered by him; that refusing this application in the circumstances explained above, would have amounted to punishing the defendants for their mistake in properly drafting their pleadings; that if, as a result of this amendment the calling of any evidence by plaintiff or the recalling of any witnesses will be necessary, the Court will consider such application on its merits; that, therefore, the application will be granted and an order for amendment of the pleadings is made accordingly.

Application granted.

Cases referred to:

Hollis v. *Burton* [1892] 3 Ch. 226;

Courtis v. *Iasonides* (1970) 1 C.L.R. 180 at pp. 182, 183;

Tildesley v. *Harper* [1878] 10 Ch. D. 393 at p. 396;

Clarapede & Co. v. *Commercial Union Association* [1883] 32 W.R. 262;

G. L. Baker Ltd., v. *Medway Building and Supplies, Ltd.* [1958] 3 All E.R. 540 at p. 546;

Lowther v. *Heaver* [1889] 41 Ch. D. 248;

Ellis v. *Manchester Carriage Co.* [1876] 2 C.P.D. 13, 35 L.T. 476;

Beck v. *Value Capital* [1976] 2 All E.R. 102;

Hopwood v. *Casa Musicale* [1971] 1 All E.R. 577; and on appeal (1971) 3 All E.R. 38;

Associated Leisure Ltd. and Others v. *Associated Newspapers Ltd.* [1970] 2 All E.R. 754 at pp. 756, 757;

Pourikkos v. *Fevzi* (1963) 2 C.L.R. 24 at pp. 33 and 34;

Karmiotis v. *Pastellis and Another*, 1964 C.L.R. 447;

Louca v. *Miliotou* (1974) 1 C.L.R. 55 at p. 58;
Georghiou and Another v. *Pistolia* (1969) 1 C.L.R. 613;
Patsalides v. *Yiapani and Another* (1969) 1 C.L.R. 84;
Christodoulou v. *Menicou & Others* (1966) 1 C.L.R. 17;
Fookes v. *Slaytor* [1979] R. Tr. R. 40, The Times, June 19, 1978.

Application.

Application for the amendment of the pleadings in an admiralty action in personam for damages for personal injuries, alleged as having been suffered by plaintiff as a result of the negligence of the defendants in the course of the unloading of S.S. "RONY".

G. Mitsides for *L. Papaphilippou*, for applicants-defendants.

A. Panayiotou, for respondent-plaintiff.

Cur. adv. vult.

SAVVIDES J. read the following judgment. This is an application for amendment of pleadings in an admiralty action in personam for damages for personal injuries alleged as having been suffered by plaintiff as a result of the negligence of the defendants, in the course of the unloading of S.S. "RONY". Defendants 1 are sued as the owners of the said vessel and defendants 2 as the agents of defendants 1 and/or as the persons in charge and responsible for the unloading operations.

By their statement of defence defendants deny any negligence on their part and further deny that any relation of master and servant existed between them and the plaintiff. Furthermore, they allege that the accident was the result of negligence of other persons and in particular of the winch operators employed by third parties and not by the defendants. In the pleadings there is no allegation of negligence or contributory negligence on the part of the plaintiff.

When the action came up for hearing, counsel for the defendants made the following statement:

"The main issue in this case is that the defendants are not liable in respect of this accident. We are not alleging any contributory negligence on the part of the plaintiff but our defence is two-legged.

(a) That there is no relationship of master and servant between the plaintiff and the defendants, and,

(b) that the injury suffered by the plaintiff is not the result of any negligence on the part of the defendants or their servants".

Counsel for the plaintiff agreed to the statement made. The quantum of damages having been agreed the action went on for hearing on the issue of liability.

Plaintiff and three witnesses gave evidence for the plaintiff and plaintiff's case was concluded on 29.5.1979 on which day defendants also called one witness; the further hearing was adjourned to 9.8.1979.

On 4.8.1979 counsel for the defendants filed the present application praying for an amendment of their answer to the petition dated 3.10.1979 by the addition in para. 5 of an allegation that the said accident took place as a result of the contributory negligence of the plaintiff, particulars of which are given in the application. The application is supported by an affidavit sworn by Mr. Simos Papadopoulos, an advocate's clerk at the office of counsel for the defendants. The facts disclosed by the said affidavit are to the effect that in the course of the hearing of the evidence of the plaintiff, facts came into light which tend to establish contributory negligence on the part of the plaintiff. Such facts were not within the knowledge of the defendants and they came to know about them at the hearing.

The application was opposed on the following grounds, as appearing in the affidavit of the plaintiff dated 18.8.1979 attached to the opposition filed on his behalf:

That the defendants had ample time to consider their defence and raise by their answer any matter which they could deem material in the case, in view of the fact that the petition was filed on 13.9.1978 and the particulars of negligence against the defendants are set out therein in detail.

Also, that at the application for amendment is made at a very late stage in the proceedings and after plaintiff's evidence has been concluded and a number of witnesses has been heard, and if granted, it will prejudicially affect the rights and interests of the plaintiff. It is further contended that in view of the statement made by counsel for the defendants at the commence

ment of the hearing on 6.4.1979 to the effect that no contributory negligence is alleged, defendants are not entitled to pray for an amendment.

The argument at the hearing of the application turned on two questions:

(a) Whether the defendants, in view of their statement to the effect that they will not allege any contributory negligence which amounts to an implied admission of such fact, are not estopped, at this stage, from applying to amend their pleadings and put forward an allegation to that effect.

(b) Whether an amendment should be granted at this late stage of the proceedings.

I shall deal first with the first question posing for consideration, as to whether the defendants are estopped from raising the question of contributory negligence in view of the statement made by them to the Court that no contributory negligence is alleged which impliedly amounts to an admission to that effect.

Looking at Bullen & Leake and Jacob's Precedents of Pleadings, 12th Ed. at p. 79, it reads:

> " In a proper case a party who has made an admission unwarily or under a bona fide mistake or prematurely will be allowed to amend or withdraw it on such terms as may be just."

Reference is made in the footnote to the case of *Hollis* v. *Burton* [1892] 3 Ch. 226. In that case, certain admissions were made both in the statement of defence and in answer to interrogatories and a payment of money was made into Court on the basis of such admissions. Defendants applied for leave to withdraw the admission and amend their defence and upon an order made to that effect plaintiff appealed. It was held on appeal that:

> " As the admission was shewn to have been made by mistake, it was right that B. should be allowed to amend his defence for the purpose of withdrawing it; and that on the materials before the Court, apart from that admission, there was no such admission by B. of receipt of the money

as would justify an order on him for payment into Court; but that, as on these materials there was still a strong case for contending that the firm had received the money, the order to amend ought not to have been made, except on the terms of the money being brought into Court."

The following is reported in the judgment of Lopes, L.J.:

"Here originally there was an admission which clearly justified the order for payment in Court, and an order was made in consequence of it. Subsequently the Defendant Burton says he has discovered that he had made a mistake and that his admission ought never to have been made; that he had subsequently investigated the matter, and found that what he had admitted was not the fact. Thereupon he applied to the Judge to set aside that order and to give him leave to amend the pleadings. The learned Judge set aside the order for payment into Court and gave the Applicant leave to amend his pleadings. Now, it appears to me that the learned Judge was perfectly right in permitting the pleadings to be amended, and in setting aside the order for payment into Court; ....."

And Kay, L.J. at p. 240:

"Now what position would he have been in at the trial if he had not had that leave? It seems to me that it would have been almost inevitable that judgment should have gone against him on his admission; and therefore he has the leave given to him not merely to put in affidavits and withdraw the admission he had first made, but to withdraw it for all purposes of this trial to amend his defence, and raise on the trial of this action all such defences as he possibly can raise."

Under the English Rules of the Supreme Court, 1960, Order 27, rule 2 which is applicable in admiralty proceedings, in view of the fact that there is no express provision in our Admiralty Rules, an admission made in compliance with a notice to admit facts may, at any time, be amended or withdrawn by leave of the Court on such terms as may be just. A similar provision has been embodied in our Rules of Court applicable to civil actions other than admiralty proceedings under Order 24, rule 4.

In the result, having regard to all the circumstances of the

case and the law, as already explained, I find that it is just and right to allow the defendants to withdraw their statement made to the Court concerning contributory negligence and any admission to that end. Such statement was made unwarily and, obviously, under a bona fide mistake of fact.

I come now to the second question as to whether the defendants should be allowed, at this late stage of the proceedings, to apply for an amendment of their pleadings. By rule 90 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, provision is made as follows: "Any pleading may at any time be amended, either by consent of the parties, or by order of the Court or Judge". Such rule is similar in effect with Order 28, rule 1 of the English Rules of the Supreme Court, 1960 and our Civil Procedure Rules, Order 25, rule 1.

As to the object of pleadings and the general principles concerning amendment, Vassiliades, P., had this to say in *Courtis* v. *Iasonides* (1970) 1 C.L.R. p. 180 at pp. 182, 183:

> "The pleadings in an action are the foundations of the litigation; they must be carefully prepared as the set of rails upon which the train of the case will run. The Civil Procedure Rules (Ord. 19 r. 4) are clear on the point; and daily practice lays stress on the need to apply strictly this rule. A case is decided on its pleaded facts to which the law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible in order to give full opportunity to the parties affected by the amendment to meet the new situation; to run their case, so to speak, on the new rails".

In that case, in which an amendment of the pleadings after the closing of the case and pending judgment was granted, Vassiliades, P. had this further to add at p. 183:

> "An amendment of the pleadings after the closing of the case and for the purpose of the judgment, is a matter which in exceptional circumstances may have to be done; but it should be avoided unless it is unavoidable in the circumstances of the particular case, in order to finalize litigation

in the interests of justice. In the circumstances of this case, it is clear to us that the amendment in question should not have been allowed at that stage. It was contended on behalf of the respondent that the amendment made no difference to the outcome of the case. If that were so, it should have not been attempted. To us, it appears to have been a material amendment; and we must treat it as such".

It has been the practice in England for a long time, in a proper case, to allow an amendment of the pleadings at any stage of the proceedings. The Court before considering whether to grant an amendment should take into consideration whether such amendment can be made without injustice to the other side which cannot be compensated for by costs, and whether the application is either mala fide or is made with the object of unduly delaying the other partly or will, in any other way, unfairly prejudice the other party, or is irrelevant or useless.

In *Tildesley* v. *Harper* [1878] 10 Ch. D. 393 which in a way is a locus classicus, Bramwell, L.J. at p. 396 said:

" My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In *Cropper* v. *Smith*, the practice was expressed on the basis of a wider principle by Bowen L.J.

'I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights ..... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace ..... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter

in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right'."

Reading also in Bullen & Leake & Jacob's Precedents of Pleadings, 12th Edition, at p. 124,

" Under its specific powers to amend pleadings, the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct ....."

In *Clarapede & Co.* v. *Commercial Union Association* [1883] 32 W.R. 262, Brett, M.R. is reported to have said:

" However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made".

And at page 263, in the same judgment per Bowen, L.J.

" Sometimes to correct the error will lead to injustice which cannot be cured, as when a witness who could give evidence cannot be got at, or the solvency of one party is doubtful".

In *G. L. Baker Ltd.* v. *Medway Building and Supplies, Ltd.* [1958] 3 All E.R. p. 540, Jenkins, L.J. at p. 546, had this to say:

" I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned Judge with which this Court should not in ordinary circumstances interfere unless satisfied that the learned Judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties".

He then proceeds in his judgment by reviewing the authorities and drawing the difference between cases in which an application for amendment was refused. (*Lowther* v. *Heaver*, [1889] 41 Ch. D. 248, *Ellis* v. *Manchester Carriage Co.* [1876] 2 C.P.D. 13, 35 L.T. 476; 19 Digest 40, 214) and he reiterates the principles set out in *Tildesley* v. *Harper* (*supra*) and *Clarabede* v. *Commercial Union Association* (*supra*) and he concludes as follows at page 549:

> " It appears, therefore, that in the present case the learned Judge ought in the exercise of his discretion to have granted this amendment if it appeared that this would involve no loss or detriment to the plaintiffs which could not be made good to them by an appropriate order as to costs. It should have been apparent to the learned Judge, and indeed it was apparent to him, that this was a vital point in the case and that unless it was adjudicated on, the real matter in issue between the parties would not be decided, for the case would proceed on an assumed state of the facts which, more likely than not, was wholly at variance with and bore no relation to the true facts of the case. Accordingly, in refusing this leave to amend out of hand, it does appear to me that the learned Judge here proceeded on a wrong principle".

The dictum of Jenkins, L.J. at p. 546 was applied in *Beck* v. *Value Capital* [1976] 2 All E.R. 102. The same principles were also mentioned in *Hopwood* v. *Casa Musicale* [1971] 1 All E.R. 577 and on appeal [1971] 3 All E.R. 38.

In *Associated Leisure Ltd. and others* v. *Associated* Newspapers Ltd. [1970] 2 All E.R. p. 754, an amendment in a libel action to plead justification at a late stage was allowed on appeal and Lord Denning had this to say at pages 756, 757:

> " The application to amend came before the master and the Judge. Both refused to allow it. It was made, they thought, too late. It came at the eleventh hour. If allowed, it would mean a very considerable delay. The case would not come on for trial, at the earliest, before the end of this year, or the beginning of next. It was, they thought in these circumstances, unjust to allow the amendment.
>
> I start with the principle, well settled, that an amendment

ought to be allowed, even if it comes late, if it is necessary to do justice between the parties, so long as any hardship done thereby can be compensated in money. That principle applies here. I think that justice requires that the matters alleged in this amendment should be investigated in a Court of law".

In *Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24, Josephides, J. after reviewing the authorities on amendment of the endorsement or the pleadings after verdict, he concludes as follows at pages 33 and 34:

" On these authorities I have no hesitation in holding that the plaintiff cannot recover the amount of special damage awarded in the judgment without having the indorsement of his writ and the prayer in the statement of claim amended. In my opinion in the circumstances of this case no injustice will be done by allowing the amendment on appeal, if leave was asked for. But respondent's counsel has not asked for leave to amend.

If an application for leave to amend is made before us and the desired amendment formulated, we are prepared to grant such leave on payment of the costs by the respondent.

However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings may lead to grave injustice to the other side and in such a case I apprehend that this Court would not be prepared to entertain an application for leave to amend on appeal.

It has been said more than once in this Court that it is the duty, not only of the Court but of counsel on each side, to see that the record is kept in order i.e. that a proper application is made to the Court for leave to amend the pleadings at the trial and where leave is granted an amended pleading is actually filed in Court".

In *Karmiotis* v. *Pastellis and another*, 1964 C.L.R. p. 447 which was a case where an application was made to the Court of Appeal to amend the statement of claim so as to connect it with the evidence already adduced, such application was refused.

The amendment was deemed unnecessary in view of the fact the the Court of Appeal found that the appeal should be dismissed on its merits.

In *Louca* v. *Miliotou* (1974) 1 C.L.R. p. 55, Triantafyllides, P. after reviewing the authorities on amendment and reiterating the principles set out in the *Baker* case concluded as follows at page 58:

> " Nor do we think that there really has occurred a transformation of the nature of the claim of the respondent, as plaintiff, in such a manner as to enable us to say that allowing the amendment was wrong in principle; this is not a case where a plaintiff is trying without good reason, or after considerable delay, to transform his cause of action; this is an instance in which the plaintiff is trying to adapt her claim in the light of the contents of the statement of defence in order to be enabled to obtain the relief which she seeks in the action; and we think that this was a course which the Court below was entitled, in the exercise of its discretion, to allow her to take".

In *Georghiou and another* v. *Pistolia* (1969) 1 C.L.R. 613, the Court of Appeal in dealing with an appeal from the refusal of the trial Court to allow an amendment, after the plaintiffs gave their evidence, on the ground that it was too late in the day and that the plaintiffs had ample time to have included all matters in their original statement of claim, found that the discretion of the trial Court was not properly exercised. The Court of Appeal allowed the amendment at the hearing of the Appeal and Josephides J. said the following at page 614:

> " By their proposed amendments the plaintiffs (appellants) were not asking to introduce a different claim and there was no allegation that the plaintiffs were acting mala fide. The plaintiffs had blundered and the injury to the defendant could be compensated for by costs. We are, therefore, of the view that the learned Judge ought, in the exercise of his discretion, to have granted this amendment which referred to the right of passage claimed by the plaintiffs".

In *Odysseas Patsalides* v. *Yiapani and another* (1969) 1 C.L.R. p. 84, Triantafyllides, J., as he then was, had this to say concerning amendment even at a very late stage: (page 97):

> " I do bear in mind that this Court can in a proper case

direct an amendment of pleadings even at the stage of delivering judgment on appeal (see, *inter alia*, *Kemal* v. *Kasti*); but, of course, such power is discretionary and has to be exercised when it is right so to do in the circumstances of the particular case".

I revert now to the facts under consideration. To raise a defence of contributory negligence such defence has to be pleaded in the statement of defence and full particulars to be given therein; if not pleaded, the Court has no jurisdiction to adjudicate on it. (Vide *Christodoulou etc.* v. *Menicou & others* (1966) 1 C.L.R. p. 17; also, *Pookes* v. *Slaytor* [1979] R. Tr. R. p. 40, The Times, June 19, 1978).

In the course of the cross-examination of the plaintiff, counsel for the defendants has put questions to him concerning steps taken by him for his own safety and questions intended to establish contributory negligence on the part of the plaintiff. No objection was raised to such questions.

Having regard to all material facts in the present case and the Law as explained above, I am satisfied that the application is not made mala fide or with the intention to prejudice the plaintiff in pursuing his claim, but the object of the applicants is to correct an omission on their part and include in the pleadings an allegation of contributory negligence which was necessary, once they wished to have such issue determined by the Court. No loss or detriment will be caused to the plaintiff by allowing this amendment which cannot be made good by an appropriate order as to costs. I am satisfied that with the payment of costs to the plaintiff, he is fully reimbursed for any loss suffered by him. Refusing this application in the circumstances explained above, would have amounted to punishing the defendants for their mistake in properly drafting their pleadings. If, as a result of this amendment the calling of any evidence by plaintiff or the recalling of any witnesses will be necessary, the Court will consider such application on its merits.

In the result, I grant the application and make an order accordingly, with costs of this application and any costs to be thrown away as a result of this amendment in favour of the plaintiff against the defendants.

Amended answer to be filed within 15 days from today and reply, if any, within seven days thereafter.

Application granted. Order for costs as above.