1980 March 24

[HADJIANASTASSIOU, J.]

ANDREAS CHARALAMBOUS,

Plaintiff,

v.

DEMETRIOU GARGOUR & CO. LTD.,

Defendants.

(*Admiralty Action No.* 121/79).

Negligence—Master and servant—Safe system of work—Duty of master to take reasonable care for the safety of his employees—Such duty personal to the master and when its performance is entrusted to a servant or agent, he is vicariously liable for any negligence on the part of the person so appointed—Onus on servant to establish both the breach of duty and fact that such breach was the cause of his injuries—Standard of proof—Unloading of ship—Injury to stevedore when his foot was trapped in a plastic band present at place of work—Master's foreman warned of the danger arising from presence of plastic bands but declined to take steps for the safety of working conditions—Master vicariously liable for negligence of his foreman—Once possibility of danger emerging was reasonably apparent then to take no precautions was negligence—Plaintiff established, on balance of probabilities, the breach of duty of the employers and that such breach was the cause of his injuries.

Damages—General damages—Personal injuries—Stevedore sustaining extensive bruise over posterior aspect of right chest, bruise of right loin, abrasions and bruises over left shin and left ankle and sprain of lumber spine—Stiffness and weakness of lumber spine after bending and lifting and pain when moving—Permanent weakness and pain expected to remain—Changes of circumstances, after infliction of the injury, which increase or diminish plaintiff's loss to be taken into account—Award of £500.-

The plaintiff, who was in the employment of the defendants as a stevedore, was on April 18, 1979 injured whilst in the course

of such employment he was working in the hold of a vessel helping in the unloading of cartons of canned food. In the course of the unloading there were scattered plastic bands in the hold; and when the employees asked the foreman of the defendants to give instructions to get the place clean he replied: "No they will remain as they are and you have to work as it is here". The accident occurred when one of those plastic bands was caught on the pallet and plaintiff's foot was caught in the plastic band. Whilst the pallet was being hoisted plaintiff was, also, lifted and was hit against an iron pillow.

As a result of the accident the plaintiff suffered extensive bruise over the posterior aspect of the right chest and bruise over the right loin, abrasions and bruises over the left shin and left ankle; and sprain of his lumber spine. He was having stiffness and weakness of his lumber spine after bending and lifting and pain when moving. Forward flexion was moderately restricted. Permanent weakness and pain was expected to remain, especially after doing work which involved repetitive bending, heavy lifting or overloading his spine. He was advised to start light work only.

In an action for special and general damages:

Held, (1) that a master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his workmen, in all the circumstances of the case, not to expose them to unnecessary risk; that the duty to exercise reasonable care is, however, one which is personal to the master, and if he entrusts its performance to a servant, agent or, it seems an independent contractor, he is vicariously liable for any negligence on the part of the person so appointed in performing that duty; that though the foreman of the defendants was warned of the danger as to the presence of the plastic band he refused to take any steps for the safety of the working conditions there; that once, therefore, the duty to exercise reasonable care is personal to the master, and he entrusted its performance to his foreman he is vicariously liable for any negligence on the part of the foreman appointed in performing that duty; that once the possibility of the danger emerging was reasonably apparent then to take no precautions was negligence on the part of the master.

(2) That a plaintiff must prove not only negligence or breach

of duty but, also, that his injuries were caused by the master's breach of duty; that he must prove, on a balance of probabilities, that the breach of duty, caused, or materially contributed to his injury; that the plaintiff has established and proved his case on a balance of probabilities, that his injuries were due to the breach of duty of the employers or under the common law in failing to provide to the employed persons a reasonably safe place of work and that the breach was the cause of his injuries.

(3) (*After awarding an amount of* £570 *by way of special damages*) that the plaintiff has recovered and he is now in a position to work; that there is nowadays a universal acceptance of the sensible and realistic rule that trial Courts must look at the position at the time of their judgments and take account of any changes of circumstances which way have taken place since the injury was inflicted on the plaintiff; that this applies both to change which increases the plaintiff's loss and to change which diminishes it; that having regard to the nature of the injuries which plaintiff sustained, and to the fact that he is now in a position to work, the amount of damages which should be awarded to him against the defendant company for general damages is the amount of £500.

Judgment accordingly.

Cases referred to:

Wilsons and Clyde Coal Co. v. *English* [1938] A.C. H.L. 57 at pp. 83, 84;

Paris v. *Stepney Borough Council* [1951] A.C. 367 at p. 384 (H.L.);

Smith v. *Baker & Sons* [1891] A.C. 325 at p. 362;

Davie v. *New Merton Board Mills Ltd.* [1958] 1 Q.B.D. 210 at pp. 219–220;

Vassiliko Cement Works v. *Stavrou* [1978] 1 C.L.R. 389;

Berry v. *Stone Manganese* [1972] 1 Ll.L.R. 182;

Thomas v. *Quartermaine* [1887] 18 Q.B.D. 685;

Fardon v. *Harcourt–Rivington* [1932] Rep. All E.R. 81 H.L. at p. 83;

Georghiou v. *Jovanis* (1980) 1 C.L.R. 102;

Bonnington Castings, Ltd. v. *Wardlaw* [1956] 1 All E.R. 615 at p. 618.

Admiralty Action.

Admiralty action for special and general damages sustained by plaintiff, as a result of the regligence and/or breach of statutory duty of the defendants whilst in their employment and in the course of loading or unloading the vessel "BERYTE".

B. Vassiliades, for the plaintiff.

Defendant absent.

HADJIANASTASSIOU J. gave the following judgment. On 15th May, 1979, the plaintiff Andreas Charalambous, by a writ of summons was claiming against the defendants, Demetriou Gargour & Co. Ltd., special and general damages for injuries, loss and damage sustained by him on or about 18th April, 1979, on board the vessel "BERYTE" within the territorial waters of Limassol while in the employment of the defendant company and in the course of loading or unloading as a result of the negligence and/or breach of statutory duty and/or breach of contract on the part of the defendants, their servants or agents.

The defendant company having been served did not appear before the Court. See affidavit of service. On 2nd July, 1979, in the absence of the defendant company leave was granted to counsel for plaintiff to file the petition. According to the statement of claim the plaintiff was employed by the defendant company as a stevedore and his monthly earnings were £350.—. The defendant company are independent contractors and/or the owners or charterers and/or agents of undisclosed owners and/or occupiers of the ship "BERYTE" which was lying at the port of Limassol. The plaintiff was employed by the defendant company and it was an express or implied term of the contract of employment, between the plaintiff and the defendant company, that it was the duty of the latter to take all reasonable precautions for the safety of the plaintiff while he was engaged in the said work; and not to expose him to a risk of damage or injury of which they knew or ought to have known; and provide or maintain a safe place of work and a safe and proper system of working. On 18th April, 1979, while the plaintiff during and in the course of his employment was working in the hold of the vessel helping in unloading canned food his foot was trapped in a plastic band hanging loose from a pallet which was being

hoisted by means of a derrick or derricks or winch and was lifted to a height of 2–3 metres and while so suspended below the pallet, the pallet swung and the plaintiff was hit against an iron pillow and suffered severe injury, loss and damage. The said injuries were occasioned to the plaintiff by the negligence and/or breach of statutory duty on the part of the defendants their servants or agents.

On 19th February, 1980, the plaintiff in support of his statement of claim said that—having been instructed from the Government Labour Office, he started work with the defendant company and the man in charge of the operations was a certain Adamos Panayides. He took him as well as the other employees on board the ship "BERYTE" and whilst they were in the hold of the ship, a pallet was being hoisted and they were loading it with cartons containing canned food. As there were plastic bands scattered, some of the employees told the foreman Adamos Panayides to give instructions to get the place clean, and he immediately told them: "No they will remain as they are and you have to work as it is here." At some stage of the loading of the cartons one of those plastic bands was caught on the pallet and his foot was caught in the plastic band. While the pallet was being hoisted he was lifted as well upside down position. When he was being so lifted there were shouts by the other employees and when finally they stopped the lifting up of the pallet, the pallet swung and he was hit against an iron pillow. As a result of that accident he was injured and he was taken to the hospital, and after that he went to Dr. Kyriakos Andreou. He stayed away from his work from 18th April, 1979 to 24th May, 1979; he was also advised by his doctor not to do heavy work. According to the medical report the plaintiff has suffered extensive bruise over the posterior aspect of the right chest and bruise over the right loin; abrasions and bruises over the left shin and left ankle; and sprain of his lumber spine. He was having stiffness and weakness of his lumber spine after bending and lifting; and pain when moving. Forward flexion was moderately restricted. Finally, according to the report permanent weakness and pain was expected to remain, especially after doing work which involved repetitive bending, heavy lifting or overloading his spine. He was advised to start light work only.

Time and again it was said that a master is under a duty, arising out of the relationship of master and servant, to take

reasonable care for the safety of his workmen in all the circumstances of the case (see *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. H.L. at p. 84) not to expose them to unnecessary risk. The duty to exercise reasonable care is, however, one which is personal to the master, and if he entrusts its performance to a servant, agent or, it seems an independent contractor, he is vicariously liable for any negligence on the part of the person so appointed in performing the duty. The master's duty to take reasonable care so to carry on his operations as not to subject his servants to unnecessary risk, is a single duty applicable in all circumstances (see *Paris* v. *Stepney Borough Council* [1951] A.C. H.L. 367 at p. 384), and has an obligation to provide a proper system and effective supervision as well as to provide a reasonably safe place of work.

The first question raised is whether the defendant company was under a duty not to expose the plaintiff to an unnecessary risk. Counsel for the plaintiff argued that it was the duty of the employer to see that the place in which his workers were working was safe and in this particular case his foreman was warned and yet has failed to take steps to remove the plastic bands which as it appeared was a danger to the workers. In *Wilsons and Clyde Coal Co.* (*supra*) Lord Wright speaking in the House of Lords about the master's duty not to expose his servant to unnecessary risk said at pp. 83, 84:-

> "The true question is, What is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As Lord Macmillan said in the *Lochgelly* case [1934] A.C. 1, 18, with reference to a duty to take care: 'It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case, and in either case it is a duty imposed by law.' To the same effect Lord Atkin says

ibid. 9: 'Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence.' The same opinion is expressed by the other members of the House who took part in that case. The House in overruling *Rudd's* case [1933] 1 K.B. 566 did, I think inferentially overrule *Fanton's* case [1932] 2 K.B. 309.

It is not perhaps necessary to add that the employer's duty at common law in these matters is not affected by the Workmen's Compensation Act or by the Employers' Liability Act.

I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer takes any share in the conduct of the operations."

In *Smith* v. *Baker & Sons* [1891] A.C. 325 Lord Herschell said at p. 362:-

"Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, 'Volenti non fit injuria', applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say

that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, 'Volenti non fit injuria', becomes applicable."

In *Davie* v. *New Merton Board Mills Ltd.* [1958] 1 Q.B.D. 210 Jenkins, L.J., dealing with the question whether a master is vicariously liable for any negligence of his servant or agent, said at pp. 219-220:-

"One may take as a starting point in the discussion of this question the well-known case in the House of Lords of *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57. By that case it was clearly established that an employer's duty to take reasonable care for the safety of his employees is a duty personal to him, of which he cannot divest himself by entrusting the performance of it to a servant or agent however competent. It follows that if in the present case the first defendants had employed some competent person as their servant or agent to make drifts for the use of their fitters, and the person so employed had negligently made the defective drift which broke and injured the plaintiff, the first defendants would clearly have been liable to the plaintiff for breach of their common law duty to take reasonable care to provide sound tools, and the fact that they had employed a competent servant or agent to perform that duty would have afforded no defence.

I think it must also be regarded as settled that the same result would have ensued if the defective drift had been made by the second defendants to the order of the first defendants, the second defendants being in the position of independent contractors, as distinct from servants or (in the strict sense) agents of the first defendants.

It is true that the speeches in the Wilsons & Clyde Coal Co.'s case [1938] A.C. 57 do not in terms refer to independent contractors, for the very good reason that the case then before the House was one in which the employers claimed to have delegated their statutory duty of providing

a reasonably safe system of work to an agent in the strict sense, and to have thereby performed it, with the result that any negligence on the part of the agent would as between the agent and any employee injured thereby be negligence on the part of a fellow employee to which (as the law then stood) the doctrine of common employment afforded the employers a complete defence. But I think the same ratio decidendi must be taken to apply where the performance of the employer's duty has been entrusted to an independent contractor. This seems to me to be implicit in the passage from *Bain* v. *Fife Coal Co.*, cited with approval by Lord Thankerton and also expressly commended by Lords Atkin, Macmillan and Maugham. From the complete citation I need take only this concluding passage: 'The duty may not be absolute, and may be only a duty to exercise due care, but, if, in fact, the master entrusts the duty to someone else instead of performing it himself, he is liable for injury caused through the want of care of that someone else, as being, in the eye of the law, his own negligence'."

In *Vassiliko Cement Works* v. *Stavrou* (1978) 1 C.L.R. 389 the question was whether the defendants have taken reasonable care for the safety of the people who were working for them. Having addressed our mind to the *Wilson and Clyde Coal Co.* (*supra*) as well as to the cases of *Berry* v. *Stone Manganese* [1972] 1 Ll. L.R. 182 and *Thomas* v. *Quartermaine* [1887] 18 Q.B.D. 685, on the question of action for reparation we had this to say at p. 400:–

"Directing ourselves with these weighty judicial pronouncements, we would adopt and follow the reasoning of those judgments and would affirm also the judgment of the learned Judge on the question that the applicants were in breach of their duty to provide a safe system of work, and in exposing the respondent to a reasonably foreseeable risk.

Furthermore, we are of the view that once the appellants have delegated to a competent agent and Manager the duty of providing a reasonably safe system of working, the latter's failure of seeing that the employees were using those ear plugs or ear shields does not absolve the appellants from

liability—being under a duty to take due care in provision of a reasonably safe system of working."

There is no doubt that the foreman of the defendant company was warned of the danger as to the presence of the plastic bands, but he refused to take any steps for the safety of the working conditions there. Indeed the foreman went even further and repudiated the conduct of the employees in telling him what to do. Once, therefore, the duty to exercise reasonable care is personal to the master, and he entrusted its performance to his foreman he is vicariously liable for any negligence on the part of the foreman appointed in performing that duty. I would reiterate that once the possibility of the danger emerging was reasonably apparent then to take no precautions was negligent on the part of the master. See *Fardon* v. *Harcourt-Rivington* [1932] Rep. All E.R. 81 H.L. at p. 83; and *Charalambos Georghiou* v. *Michalakis Jovanis*, (1980) 1 C.L.R. 102, where I adopted and followed the principles enunciated in *Fardon* case (*supra*).

The second question is whether in order to succeed in an action for damages against the master the plaintiff must show that his injuries were caused by the master's breach of duty. It is said that the onus is on the plaintiff, the workman, to establish both the breach of duty and the fact that the breach was the cause of his injuries. In *Bonnington Castings, Ltd.* v. *Wardlaw* [1956] 1 All E.R. p. 615 Lord Reid in delivering the first speech in the House of Lords said at p. 618:-

> "It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have

been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty, caused, or materially contributed to, his injury."

There is no doubt that although the decision in *Bonnington Castings Ltd.* v. *Wardlaw* (*supra*) is based on breach of statutory duty, nevertheless, the principles laid down in it are equally applicable to breaches of common law duty. With that in mind, it is clear in my view, that the plaintiff has established and proved his case on a balance of probabilities, that his injuries were due to the breach of duty of the employers or under the common law in failing to provide to the employed persons a reasonably safe place of work and that the breach was the cause of his injuries.

Once, therefore, the plaintiff has succeeded in proving that the defendant company was negligent, the final question is what is the correct amount to be awarded by this Court for pain and suffering. The plaintiff as I have said earlier claimed by way of special damages the sum of £570.—viz., (a) £35.—medical fees, (b) travelling expenses £10.—and (c) loss of earnings £525.—. There is no doubt that the plaintiff in the present action has recovered and he is now in a position to work. As I have said earlier there is in nowadays a universal acceptance of the sensible and realistic rule that trial Courts must look at the position at the time of their judgments and take account of any changes of circumstances which may have taken place since the injury was inflicted on the plaintiff. This applies both to change which increases the plaintiff's loss and to change which diminishes it. With this in mind and fully aware of the nature of the injuries he sustained, and of the fact that he is now in a position to work, I have decided that the amount of damages which should be awarded against the defendant company for general damages is the amount of £500.—.

For the reasons I have given and in the light of the authorities, I have reached the conclusion to give judgment in favour of the plaintiff for the sum of £1,070.—with interest thereon at 4% per annum as from today. Costs to be assessed by the Registrar.

Judgment accordingly.