1984 January 28

[DEMETRIADES, J.]

DEMETRIS CHALALAMBOUS,

Plaintiff

v.

FAMALIFT SHIPYARD LTD.

Defendants.

(*Admiralty Action No.* 258/79)

Master and servant—Employee claiming damages for injuries he suffered in the course of his employment—Injuries cannot in any way be connected with his work—Claim dismissed.

The plaintiff in this case claimed special and general damages for injuries he allegedly suffered whilst working on the ship "Blue Coast", as an oxy welder in the employment of the defendants who were ship repairers.

After setting out the facts vide p. 124 post.

Held, that the injury suffered by the plaintiff cannot in any way be connected with his work in the employment of the defendants; accordingly his claim must fail.

Action dismissed.

Cases referred to

Zachariou v. *Lioness Inc.* (1983) 1 C.L.R. 415 at p. 429;

Ioannou and Paraskevaides (Overseas) Ltd. v. *Christofis* (1982) 1 C.L.R. 789 at p. 794.

Admiralty action.

Admiralty action for special and general damages for injuries suffered by plaintiff whilst working on the ship "Blue Coast".

A. Lemis, for the plaintiff.

V. Tapakoudes, for the defendants.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. The plaintiff by his action claims special and general damages for injuries he alleges that he suffered whilst working on the ship "BLUE COAST".

At the material time the plaintiff was employed by the defendants, who are ship repairers, as an oxy-welder.

It is the case for the plaintiff that on the 29th May, 1979, whilst he was carrying out oxy-welding work on the deck of the ship, the welding machine ran out of gas and oxygen, that, on the instructions of the assistant foreman who was supervising the work, he attempted to lift with a rope a full cylinder from a boat that was tied along side the ship, and that when the cylinder reached the railings of the deck and he tried to pick it up, he met with the accident.

The ship on which the plaintiff was working was not in dry dock but was anchored in the open sea, i.e. it was afloat. The cylinder, according to the plaintiff, was weighing between 60 and 70 okes.

The plaintiff gave evidence and said that when the cylinder ran out of gas he asked the assistant foreman to let one of the other employees working on the ship help him lift a cylinder from the boat that was tied along the ship, but the assistant foreman told him that none was available and that he had to lift it himself. He then proceeded to have the cylinder lifted by himself. After the boatman in charge of the boat where the cylinder was, tied it on a rope he started pulling it up. He had no problem lifting the cylinder up to the railing of the deck of the ship, but when he tried to pick it with his hands he felt a pain in his waist and could not straighten himself. He then called one of his colleaques who was working in the hold of the ship, a certain Demetrios Georghiou (P.W.2), and told him what had happened. Georghiou then went up to the deck and helped him get off the ship. He then rode his motorcycle and drove to Dr. Elias Georghiou, an orthopaedic surgeon at Limassol, who examined him.

It is not in dispute that during the time the ship was under repairs there were no mechanical means of lifting loads of any kind that were in the boat tied along her.

The defendants called no witnesses to rebut the allegations of the plaintiff as to how the alleged accident took place, though they adduced evidence (a) with regard to the safety of the system of work they were employing for the lifting of gas cylinders from a boat that was tied along a ship that was afloat for repairs, and (b) to prove that on the date on which the plaintiff alleged that he met with the accident he did not attend work.

Two witnesses gave evidence on behalf of the defendants on the issue as to the safety of their system of work, namely Christos Georgallas (D.W.2) a boatman, and Renos Phokas (D.W.3) a mechanical engineer. In support of their allegation that the plaintiff did not suffer any injuries in the course of his employment, the defendants, in addition to the evidence given by D.W.3 Phokas, which is to the effect that the name of the plaintiff did not appear in their daily working lists on the 29th May, 1979, called Dr. Elias Georghiou (D.W.1) who gave evidence and said that the plaintiff first visited him and complained to him of his injury on the 30th May, 1979.

Considering the defence put forward by the defendants, the issue that first arises for decision is whether the plaintiff suffered his injury whilst working on the ship "BLUE COAST".

On this issue, the plaintiff, in addition to giving evidence himself, and to which I have already referred, called Demetrios Georghiou (P.W.2) who testified that on the 29th May, 1979, he was working in the hold of the ship together with a certain Zenon Pantelis, the assistant foreman, and that at an unspecified time which, however, he set at before noon of that day, he heard the plaintiff, who was on the deck of the ship, asking him for help as he had met with an accident. According to his evidence, after informing the assistant foreman that he was going up to the deck to see what had happened to the plaintiff, he climbed to the deck and helped the plaintiff get off the ship and that after his offer to give to the plaintiff further assistance was turned down, he returned to his work. He then saw the plaintiff proceed slowly towards the offices of the defendants. After he got back to his work, he said that he had reported to the assistant foreman that the plaintiff had left work and, also, told him why he had to leave work.

Costas Charalambous, the foreman of the defendants at the material time, told the Court that in the afternoon of the

29th May, 1979, he was informed by the assistant foreman that the plaintiff met with an accident at about 9 a.m. of that day, whilst he was lifting a gas cylinder from the boat, and that he had to leave work in order to see a doctor. He then informed orally a certain Mr. Anastassiades about the incident. They did not, the witness said, pay particular attention to this accident, nor did they try to get in touch with the doctor to see what was the condition of the plaintiff because he had heard that the plaintiff was not injured—in that there was no blood—but that the plaintiff had only complained that he had some pain in his back. He denied that the accident came to his knowledge on the 30th May and that he reported same to the defendants on that day.

Mr. Phokas (D.W.3) in giving evidence said that the defendants in order to invoice or charge for a particular work carried out by them, keep daily time sheets which show where each of their employees works, what their duties are and that these sheets were at the material time prepared by Mr. Costas Charalambous, the defendants' then foreman who is P.W.3, and that these sheets show that the plaintiff was absent from work on the 29th May, 1979, but that he worked on the 28th May, 1979. They further show, he said, that Mr. Georghiou (P.W.2) was absent from work on the 28th May, 1979, but that he was working on the ship on the 29th May, 1979.

These time sheets, which this witness alleged that they were prepared by Mr. Charalambous, were not shown to him and he was not cross-examined as to their contents.

Dr. E. Georghiou (D.W.1) told the Court that he first examined the plaintiff on the 30th May, 1979, but, he said, he based his statement on information written on the personal card of the plaintiff by his receptionist, though in cross-examination he said that he could not claim that either he or his receptionist are unmistaken. There is no other evidence, except that of the plaintiff, to contradict the statement of the doctor that he, the plaintiff, first visited the doctor on the 30th May, 1979. The receptionist of the doctor was not summoned to give evidence with regard to this very material issue.

The evidence of the plaintiff and his witness Georghiou (P.W.2) raise in my mind a number of questions that are neces-

sary for me to decide whether the plaintiff has proved that he suffered his injury in the course of his employment and which have remained unanswered. For instance—

(a) What happened to the cylinder that the plaintiff attempted to lift from the barge. His evidence on this question stops at what happened when he attempted to pick it after he lifted it up to the rails of the deck of the ship and his witness did not even mention that he saw it anywhere on the deck or hanged from the railings tied on the rope. There is no doubt that the cylinder was not left to fall back into the barge or else the boatman in charge of her would definitely remember of such a serious incident. After all, the falling from a height of such a heavy object would cause considerable damage to such kind of a boat.

(b) Why the plaintiff, since he was in a position to ride on a motorcycle in order to go to a doctor, he did not report the accident to a responsible officer of the defendants, but left work after merely informing accordingly in fact one of his colleaques and, further, why he did not call the defendants from the doctor's clinic or even, later on, send a message to them about what happened and his condition.

(c) Why the assistant foreman was not called to give evidence and explain why, though he was told about the accident, he felt that it was not necessary to inform Mr. Charalambous (P.W.3), the foreman, till late in the afternoon or let the defendants know of the accident immediately when Georghiou (P.W.2) told him about it.

Considering all the above and in view of the opinions expressed by Dr. A. Pelides, who was called by the plaintiff and is P.W.5, and Dr. Elias Georghiou (D.W.1), to the effect that the kind of injury the plaintiff was diagnosed to have suffered, i.e. a lumbar disc lesion, could occur by merely bending or lifting a very light object, I have come to the conclusion that the injury suffered by the plaintiff cannot in any way be connected with his work in the employment of the defendants. I further find that in the light of the evidence of Mr. Phokas (D.W.3) and Dr. Elias Georghiou (D.W.1), the injury which the plaintiff alleged that he had suffered, could not have occured on the 29th May, 1979.

In the result, and in view of my above findings, the plaintiff's claim fails and it will eventually be dismissed.

Having reached the conclusion that the plaintiff failed to prove that he suffered his injury in the course of his employment with the defendants, I feel that it is my duty to decide a number of other issues in case my judgment is reversed on appeal, namely—

(a) Was the system of work employed by the defendants in the lifting of heavy objects a safe one?

(b) Assuming that the plaintiff had proved that the accident occurred in the course of his employment, was he solely or partly to blame for it?

(c) What was the amount of damages to which he would be entitled?

(*a*) *Safe system of work:*

It is clear from the evidence of the plaintiff's witnesses, and, in particular, the evidence of the secretary of the Trade Union of fitters and welders, Mr. Paraschos Christodoulou (P.W.4), that serious problems existed between the defendants and their employees with regard to the safety of the system of work employed for the lifting of heavy objects from barges tied along ships which were afloat and which were under repairs. From the evidence adduced it is clear that the defendants demanded from their employees to carry out this kind of work under conditions that were unsafe for them and that on one occasion the defendants, in an attempt to force on them their method of work, went as far as to dismiss on the spot workmen because they refused to follow their instructions.

With regard to this issue the defendants insisted that the system employed by them for the lifting of heavy articles from barges tied along vessels which were under repair afloat was safe and in support of their allegation they called Georgallas (D.W.2), a boatman. In giving evidence Georgallas said that he was in the employment of the defendants and that his duties as a boatman were to transport workmen, tools and machinery to ships that were under repairs afloat. Oxygen cylinders, he said, which he carried on his boat, weighed 50 okes each and that they were hoisted to the ship by means of a winch, if one

was available, or else a rope would be thrown from the deck and that after he would tie the cylinder with it, two or three men who were on board would pull it up. The witness emphatically denied that he would allow one man to attempt to lift a cylinder with the help of a rope because, he said, the cylinder could fall and "either injure him or cause damage to his boat". In any event, he went on to say, no person could lift a cylinder by himself by using a rope and he had never seen the plaintiff or any other employee of the defendants do so. The witness was not in a position to say, as he did not remember, whether during the repairs to the ship and, in particular, on the day the plaintiff alleges that he met with the accident, he was the boatman who transported personnel and tools to her.

I have gone carefully through what this witness had said and I have come to the conclusion that his evidence is of no help in reaching any conclusion as to how this accident had occurred, or even whether his description of the system used in lifting loads is not but a put up story, so that the defendants, in whose employment he is, can be absolved from any liability for the accident with which the plaintiff alleged that he had met.

(*b*) *Contributory negligence*:

Having found that the system of work of the defendants was not a safe one, the next question that poses for decision is whether the plaintiff contributed to the accident.

What is required by a defendant in order to succeed in a defence put forward by him to the effect that the plaintiff was solely or partly to blame for the injuries he received, was discussed and decided in a number of English and Cyprus case-law and going through them I feel that I can summarise the position as follows: A defendant has to prove that the injury suffered by the plaintiff was caused solely or partly by the plaintiff's failure to take such ordinary care that would be expected of him in the circumstances of the particular case, so that he would not bring himself under any risk which he could have foreseen.

In the particular circumstances of this case, I find that the plaintiff was to blame to the extent of 50%. I have come to this conclusion having in mind that he knew that the system of work employed by the defendants in the lifting of heavy

objects was dangerous, or else employees would not go on a strike; that it was not within his duty to lift the gas cylinder, as he was an oxy-welder; and that he was entitled to refuse to carry out this dangerous work once the assistant foreman denied him any help.

(c) *Damages:*

Having dealt with the question of liability, I now turn to the issue of the amount of damages to which the plaintiff would be entitled. As the nature of the injuries which the plaintiff had suffered and their effect on his ability to continue his work as an oxy-welder are relevant to this issue, I shall examine first the medical evidence adduced.

According to the plaintiff, immediately after the accident he visited Dr. Elias Georghiou (D.W.1), an orthopaedic surgeon. This doctor, who was called not by the plaintiff but by the defendants and is their first witness, said that in examining the plaintiff, he diagnosed that he was suffering from a lumbar disc lesion and that there was limitation of the spinal movements and straight leg raising along with muscle spasm over the lower spine. The doctor said, also, that the condition of the plaintiff was the same when he examined him again on the 6th June, 1979 and that on both occasions he saw the plaintiff he advised him to rest in bed. Though, on the second occasion, he told the plaintiff to call again for re-examination, the plaintiff did not visit him till the 11th June, 1980, when he examined the plaintiff at the request of counsel for the defendants. On this occasion the doctor said that his findings were the following: "The straight leg raising was normal on both sides, the knee and ankle jerks were normal on both sides, there was no tenderness over the lower spine, the spinal movements appeared to be satisfactory and there was no muscle spasm present".

The doctor said that he examined the plaintiff for the last time on the 2nd June, 1981, and that this examination revealed that the patient could walk normally, there was no deformity of the spine, the straight leg raising was normal on both the right and left side, the jerks were also normal on both the right and left side, there was no muscle spasm over the spinal muscles and the plaintiff was able to flex his spine to a point so that he could reach his toes with the tips of his fingers.

The doctor said that what caused the injury was not the actual lifting of an object, a heavy one, because if he was to consider the lifting of a heavy object as the main cause, then he would expect everybody who lifted a heavy object to suffer from a disc lesion. In his opinion there was a pre-existing condition, i.e. damage to the disc which was aggravated through the years.

As regards the capacity of the plaintiff to work the doctor expressed the opinion that prolonged bending and lifting heavy objects predisposes attacks of pain and suffering over the lower spine of the plaintiff and in his opinion the plaintiff, if he was to carry out his work as an oxy-welder, his capacity to work would be five hours out of eight working hours per day. In other words, his capacity to work would be reduced by 40%.

In giving evidence the plaintiff said that after he was examined by Dr. Elias Georghiou, he visited, on a number of occasions, Dr. Savvides at the Larnaca Hospital, who gave him sick-leave for five months. He had, he said, physiotherapy treatment and that during this treatment he was having strong pains but that he now feels less pain, though his legs are weak. He cannot now work as a welder because he cannot bend, cannot stand, cannot lift weights and all these because of the pains in his waist. As a result of his injury, he was forced to change work and become an upholsterer.

The plaintiff did not call Dr. Savvides as a witness and I have only his evidence that he was given by him five months sick leave.

Dr. Pelides (P.W.5), another orthopaedic surgeon, examined the plaintiff once only on the 20th January, 1981. He found that at the time of his examination the plaintiff was suffering from spasm of the lower lumbar muscles which were causing diminution/reduction of the normal lumbar curve, and that his normal lordosis was evened out of the spasm of the muscle. He further found that there was restriction of the terminal degrees of forward flexion and rotation of the lumbar spine, but the straight leg raising tests were normal. The plaintiff complained to him that he was still having backache episodes and stiffness when overdoing things and straightening his back. He further found that there was terminal weakness in the back

of the plaintiff and that his back was liable to have further episodes of low backache and sciatica if he was not careful, that is to say if the plaintiff kept on lifting heavy weights and bending unduly his spine. The condition of the plaintiff, he said, could improve up to a point and could stay improved provided the plaintiff does not do abnormal movements. This type of incident, the doctor said, can occur by the plaintiff merely bending or lifting a very light object. He did not know anything about the job of the plaintiff and he did not know what work a welder does.

Considering the fact that Dr. Pelides only examined the plaintiff once, and that Dr. Elias Georghiou examined the plaintiff six months later, I am inclined to accept the evidence of Dr. Georghiou and I find that the plaintiff is in a position to carry out his old work but with reduced capacity.

The plaintiff alleged that as a result of his injury, he is no longer able to work as a welder and that because of this his earnings were considerably reduced. The plaintiff further alleged that after he found that he could no longer work as a welder, in order to earn his living, he started at his house a foundry in which he upholsters chairs and that his average earnings from his work are between £15.– to £20.– per week. However, when he was answering questions in cross-examination as to how much he had to pay on a mortgaged loan—for which he said he was paying £30.–to £40.– per month—and for food and maintenance of his family, his reply was that he was earning £20.– to £25.– per week.

Though I entertain great doubts as to the truthfulness of the evidence of the plaintiff regarding his present earnings, his ability to work as a welder and that he was given five months sick-leave by Dr. Savvides, and though there is not much before me on which to base my assessment, I shall proceed to make an assessment of the amount to which the plaintiff would be entitled had he been successful in the case.

According to the evidence of P.W.3 Costas Charalambous, the plaintiff was, at the material time, earning between £37.– to £40.– per week and this is supported by the evidence of Paraschos Christodoulou (P.W.4), the secretary of the Trade

Union of Fitters and Welders. According to the last named witness, welders were, in 1981, earning between £60.- to £70.- per week.

Considering that workmen are entitled to at least two weeks summer holidays, for which they are paid out of the Social Insurance Scheme, that they also have unpaid holidays during Christmas and Easter and that an employee receiving a weekly wage of £60.- which I accept that the plaintiff would be earning had he not met with his predicament - is bound to pay income tax on his earnings, I am of the view that any loss of wages that the plaintiff might have suffered should be calculated at 40 weeks per annum.

In the light of the evidence of Dr. Georghiou as to the capacity of the plaintiff to work, the loss in his weekly earnings would have been £24.-, i.e. £60.- less 40%. In other words, the the plaintiff would be losing £24.- by 40 weeks, which equals £960.- per annum.

The plaintiff in giving evidence said that after the accident his employers continued to pay him wages but he could not remember whether they did so for one and a half or two months.

It has been repeatedly decided that general damages are awarded for the injuries suffered by a plaintiff and for the pain and suffering, loss of amenities of life and loss of future earnings and that a multiplier should be used in order to reduce the element of uncertainty and provide an objective basis for the assessment of damages (see *Zachariou v. Lioness Inc.*, (1983) 1 C.L.R. 415, at p. 429 and, also, *Ioannou and Paraskevaides (Overseas) Ltd. v. Christofis*, (1982) 1 C.L.R. 789, at p. 794).

Having in mind the principles expounded in the aforementioned judgments and, also, having in mind the age of the plaintiff, who at the material time was 25 years old and, further, having in mind that no accurate figure was given to me by the plaintiff as to when his employers stopped paying him any wages, I have decided to adopt a multiplier of 12 and I find that assuming that the plaintiff was successful in his action, he would be entitled to receive the sum of £11,520.- for loss of future earnings.

No accurate figures and no reliable evidence was given by the plaintiff with regard to any special damages that he has suffered, so I find that I am unable to award any amount under this head.

Having in mind the injury the plaintiff received, his pain and suffering and loss of amenities in life, I award, under this head, the sum of £1,500.-.

Assuming that the plaintiff was successful, the total of the above amounts, which comes to £13,020.-, would be reduced by 50%, but in view of my findings on the issue of liability, I dismiss the action but, in the circumstances of the case, I make no order as to costs.

Action dismissed with no order as to costs