ALGOL MARITIME LIMITED v. ACORI

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.): December 28th, 1995

Shipping—seamen—negligence—contributory negligence—accident to seaman doing dangerous work on ship in hazardous conditions not in itself evidence that contributorily negligent

Shipping—seamen—employment—term in seaman's contract of employment providing for annuity if injured "through no fault of his own" to be construed against employer, by operation of contra proferentem principle, even if incorporates standard terms written by trade union

Tort—negligence—causation—novus actus interveniens—medical treatment exacerbating injury not new cause breaking chain of causation unless given without reasonable care and skill—not sufficient that difference of medical opinion whether treatment appropriate

Shipping—seamen—employment—seaman's right to compensation for injury caused "through no fault of his own" in form of annuity not "wages" within Merchant Shipping Ordinance, s.44(1) preventing waiver of right to claim

Shipping—seamen—employment—action against employer for annuity payment due under seaman's contract of employment is action for payment of debt, not damages—mere denial of liability to pay not per se breach of contract and no damages recoverable for loss of future instalments—may only claim sums already due

The respondent brought an action in the Supreme Court against his employer, the appellant, for compensation for injuries sustained in the course of his employment.

The respondent, a seaman, was employed by the appellant company, his contract of employment incorporating the standard terms of the International Transport Workers' Federation Collective Agreement. They stipulated, *inter alia*, that (a) he was entitled to sick pay for any period, up to a specified maximum, during which he was sick or injured and unable to work; (b) if in the course of his employment he suffered an accident "through no fault of his own" and was injured, thus impairing his "ability to work," he was entitled to compensation in the form of an annuity, calculated according to the degree of his disability; and (c) his employer

could not require him to enter into any agreement by which the terms of the contract were varied.

Whilst working on board the appellant's ship in icy and hazardous conditions, the respondent slipped and fell, suffering a serious back injury. He suffered severe and continuing pain and when his condition did not improve, the doctor employed by the appellant recommended that he undergo an operation. This operation did not improve the respondent's condition and he continued to feel pain, and experts subsequently questioned the value of the treatment he had been given and testified that the operation carried out often itself resulted in long-term pain; however, there was no indication that the doctor had acted negligently in any way.

Being unable to work, the appellant claimed sick pay, which the appellant's agent paid to him in part, requiring him first to sign a document by which he agreed that he found the payment to his entire satisfaction and purported to waive all further claims against the appellant. On subsequently discovering that his disability was permanent, the respondent sought to be paid an annuity, based on medical evidence that he was 100% disabled from working as a seaman (although he was estimated as being only 40% disabled generally, the respondent was unable to find suitable light work on shore).

On the appellant's refusal to pay him any compensation, the respondent brought the present proceedings in the Supreme Court for damages to recover the sums allegedly due to him to date, plus a sum representing future annuity payments to which he claimed to be entitled up to the age of 65, on the basis that the appellant was in breach of the contract of employment by refusing to accept this entitlement. The court (Pizzarello, A.J.) found in his favor and awarded the sums claimed.

On appeal, the appellant submitted, *inter alia*, that (a) because the respondent was an experienced seaman, the fact that he had slipped at all, working as he had been in difficult conditions of which he had been aware, was *prima facie* evidence that he had been contributorily negligent, and he had not provided any evidence to rebut this inference; it could not therefore be said that the accident had occurred "through no fault of his own" and since on a strict interpretation of that phrase the respondent had to be completely without fault, he was accordingly not entitled to an annuity under the contract; (b) the judge had erred in basing his award on a 100% and not a 40% reduction in the respondent's ability to work, since this amounted to reading the words "ability to work" in his contract as meaning "ability to work as a seaman," which was not the ordinary and natural meaning of those words; this also had the effect that the respondent would receive annuity payments and still be able to work; (c) on the available medical evidence, the respondent's ongoing pain was a result not of his original accident but of his inappropriate treatment, which was a *novus actus interveniens* breaking the chain of causation between the accident and his continuing condition; (d) the respondent had waived his right to any further payment on receipt of his sick pay and could not now claim an annuity; and (e) in any case, even if the

respondent were due annuity payments to date, his claim was properly one for the payment of a debt and not an action for damages, there having been no breach of contract, and he was not therefore entitled to receive a sum representing those payments up to the age of 65, since they had not yet fallen due and could not be claimed as damages.

The respondent submitted in reply that (a) he had not been negligent in any way, but had been undertaking intrinsically dangerous work in the course of his employment and in the absence of any evidence that he had been at fault, by the operation of the principle of *contra proferentem*, the contract had to be taken as making no provision for the apportionment of blame as contended by the appellant; (b) it could not be said that his entitlement to an annuity required him to be unable to work generally, since his contract applied specifically to his work as a seaman and again applying the *contra proferentem* principle, the relevant degree of disability was 100% and not 40%; (c) since there was no evidence that the operation he had undergone had been performed negligently or that it should not have been performed, even though other doctors might not have recommended it as the best treatment, it could not be said to be a *novus actus interveniens* and the accident remained the primary cause of his disability, even though the operation might have exacerbated his condition slightly; (d) he had had no choice but to sign the document put before him by the appellant's agent since without the sick pay he had no means of support and in any case, in signing he had intended only to acknowledge receipt of the money and not to waive any future claim (of which he had not then known); furthermore, any such purported waiver was invalid because it was precluded by the terms of his contract and also by s.44(1) of the Merchant Shipping Ordinance, which prohibited any agreement purporting to deprive a seaman of "any remedy for the recovery of his wages"; and (e) because the appellant had been in breach of his contract of employment in refusing to pay his annuity, it was liable to pay damages, including not only the outstanding instalments but also a sum representing the future instalments up to his retirement at 65.

Held, dismissing the appeal in respect of the annuity payments already due but allowing the appeal in respect of the future payments:

(1) There was no evidence that the respondent had been responsible for causing the accident. Whilst he had been doing a job which was clearly difficult and dangerous, he had been doing so in the normal course of his employment and in these circumstances, it could not be said that the mere fact that the accident occurred was evidence that the respondent had been contributorily negligent. Moreover (*per* Huggins, J.A.), although on a strict interpretation of the wording of the contract (namely, that the injury to the respondent had to have occured "through no fault of his own") he had to be completely blameless to be entitled to an annuity, applying the *contra proferentem* principle any ambiguity had to be construed in his favour and in the light of the available evidence, it could not be said that the trial judge had erred in finding that the respondent had

not been at fault (page 151, line 41 – page 153, line 17; page 166, line 7 – page 168, line 17; Fieldsend, P., dissenting, at page 182, line 14 – page 184, line 32).

(2) It was clear from the context of the respondent's employment as a seaman that the words "ability to work" in his contract referred to his ability to work as a seaman and not to his ability to work generally; and in any case, were the meaning of this phrase unclear, again, by the operation of the *contra proferentem* principle, that provision of the contract had to be construed in favour of the respondent, even though the contract incorporated the standard terms of the ITWF, a trade union. The judge had therefore been right to find that the relevant degree of disability in calculating the annuity was 100% and not 40% (page 158, lines 5–25; page 173, line 42 – page 174, line 29).

(3) Whether medical treatment amounted to a *novus actus interveniens* was also a question for the trial judge and in the present case, he had been justified in his finding that the operation undergone by the respondent had not broken the chain of causation between the accident and his subsequent injury. Even though the operation may have exacerbated the respondent's pain, the competence of the medical treatment he had received was not in doubt, in spite of the reservations of experts as to whether it was best medical practice. Only if the doctor treating the respondent had exhibited a lack of reasonable care or failure to act with reasonable skill would the injury be attributable not to the original accident but to the subsequent treatment (page 153, line 30 – page 155, line 24; page 168, line 35 – page 171, line 14).

(4) Furthermore, the respondent's signing the receipt for his sick pay did not operate as a waiver of all future claims against the appellant, because such a waiver was prohibited by the terms of the contract between the parties; however, although s.44(1) of the Merchant Shipping Ordinance prohibited any waiver of the respondent's right to "wages," that expression did not include his right to compensation for injury under the contract (page 160, lines 12–45; page 178, line 27 – page 179, line 31).

(5) Finally, although for the above reasons the judge had been right to find that the respondent was entitiled to an annuity based on 100% disability, he had been wrong to award the respondent a lump sum representing annuity payments up to the age of 65. He was not entitled to such a sum because the payments had not yet fallen due and it could not be said that the appellant's repudiation of its liability to pay the annuity amounted to a breach of contract entitling the respondent to claim damages for future loss. Rather, the respondent's action was properly described as an action to recover a debt and he could not therefore recover any sums which were not yet owing to him. The court would accordingly (a) order that the appellant pay the respondent the

outstanding annuity payments; and (b) make a declaration that the appellant remained liable to pay the remaining instalments as they fell due, until the respondent attained the age of 65 (page 158, line 38 – page 159, line 5; page 161, lines 1–7; page 175, line 43 – page 177, line 4; page 184, line 37 – page 185, line 9).

Cases cited:

(1) *Annie Sherwood, The* (1865), 12 L.T. 583; 13 W.R. 641, 965, considered.
(2) *Benmax* v. *Austin Motor Co. Ltd*., [1955] A.C. 370; [1955] 1 All E.R. 326.
(3) *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd*., [1949] 1 All E.R. 588; [1949] L.J.R. 865, *dicta* of Lords Simonds and Normand applied.
(4) *Hooper* v. *Accidental Death Ins. Co*. (1860), 29 L.J. Ex. 340; on appeal, 29 L.J. Ex. 484; 157 E.R. 1297, distinguished.
(5) *Lang* v. *Metropolitan Life Ins. Co*., [1937] 2 W.W.R. 453, distinguished.
(6) *Marsh* v. *Kerwin*, Winchester District Registry, February 23rd, 1995, unreported, considered.
(7) *Nance* v. *British Columbia Elec. Ry. Co. Ltd.*, [1951] A.C. 601; [1951] 2 All E.R. 448.
(8) *Nonpareil, The* (1864), 33 L.J.P.M. & A. 201; 167 E.R. 399, applied.
(9) *Overstone Ltd*. v. *Shipway*, [1962] 1 W.L.R. 117; [1962] 1 All E.R. 52.
(10) *Pead* v. *Furness, Withy & Co. Ltd*., [1956] 2 Lloyd's Rep. 149, *dicta* of Slade, J. considered.
(11) *Rothwell* v. *Caverswall Stone Co. Ltd*., [1944] 2 All E.R. 350, *dicta* of du Parcq, L.J. applied.
(12) *Staveley Iron & Chemical Co. Ltd*. v. *Jones*, [1956] A.C. 627; [1956] 1 All E.R. 403, *dictum* of Lord Tucker considered.

Legislation construed:

Merchant Shipping Ordinance (1984 Edition), s.44(1): The relevant terms of this sub-section are set out at page 160, lines 13–19.

G. Aldous with *L.E.C. Baglietto* for the appellant;
P.J. Isola with *C.C. Hernandez* for the respondent.

HUGGINS, J.A.: The respondent claimed damages for breach of his contract of employment with the appellant. The contract related to his employment on board the *M.V. Meonia*, which contract incorporated the terms of a Collective Agreement between the International Transport Workers' Federation and the appellant. By Article 18 of the Collective Agreement, headed "Disability," the appellant agreed as follows:

"A Seafarer who suffers an accident whilst in the employment of the Owners through no fault of his own, including accidents

occurring whilst travelling to or from the ship or as a result of marine or other similar peril, and whose ability to work is reduced as a result thereof, shall receive from the Owners in addition to his sick pay (Articles 13 and 14 above), an annual annuity calculated on his basic pay at the rate given in the table below:

Degree of Disability %	Rate of Compensation % of basic pay
100	86
75	63
60	48
50	40
40	30
30	20
20	12
10	6

The annuity may be converted into a lump sum if the injured party so agrees. If agreement cannot be reached as to the amount of the lump sum the matter shall be referred to a mutually acceptable third party whose findings shall be binding. If a third party cannot be agreed upon, the Owners, the Seafarer and the ITWF shall retain full freedom of action.

Any payment effected under this clause shall be without prejudice to any claim for compensation made in law.

The Owners shall conclude appropriate insurance to cover themselves fully against the possible contingencies arising from Articles 16 and 18."

The respondent alleged that he suffered an accident on January 29th, 1987 while he was stowing deck cargo in icy conditions in a Swedish port. The cargo consisted of timber which had been stacked by the respondent and other members of the crew. That done, the timber was covered with a tarpaulin, which was to be held in place by chains. To prevent chafing of the canvas, planks of wood were to be laid on top of it as required. At the time of the alleged accident the other men had gone below, and the respondent was carrying a plank approximately $16\frac{1}{2}$ ft. $\times$ 4 in. $\times$ 2 in. to complete the job. He slipped and wrenched his back, as a result of which he claimed to be 100% disabled and therefore entitled to the annuity prescribed by Article 18. The trial judge upheld his claim and the ship owner appeals to this court on the grounds indicated hereafter.

Ground 1

This ground was that the judge's finding that the respondent was not "at fault" within the meaning of Article 18 of the Collective Agreement was not supported by the evidence. Although it is not entirely clear from the record which parts of the relevant paragraph relate to the argument of counsel for the plaintiff and which to the judge's own conclusions, it

would seem that he was directing himself that the plaintiff had to be at fault "in a contractual setting" in order to disentitle himself to the annual annuity. The judge then said:

> "He was doing his job: it is not suggested he was doing it carelessly, nor was he improperly dressed in breach of contract, nor was he on a frolic of his own. He slipped whilst he was carrying a heavy weight, a natural hazard, I would have thought, of such work. Indeed, the Captain himself said that he had had about 200 or so reports of this sort of thing. I cannot conceive that to be the plaintiff's fault."

When the judge said that it was not suggested that the respondent was doing his job "carelessly," I do not think he was treating "care" as synonymous with "lack of fault" but merely indicating that what the respondent did (rightly or wrongly) he did with care. The contention of the appellant is that the concept of fault in relation to this agreement is no different from that in relation to contributory negligence in tort, namely, "that the plaintiff failed to use reasonable care for his own safety and so contributed to his own damage": see *Clerk & Lindsell on Torts*, 16th ed., para. 1–144, at 101 (1989). For the respondent, it is submitted that this is too narrow an approach and that it produces an absurd result similar to that which existed in relation to contributory negligence before the Law Reform (Contributory Negligence) Act 1945, which now requires an apportionment of blame. I agree with the appellant's approach. This may produce a harsh result, but it is not necessarily absurd. It was open to the parties to the agreement to incorporate such conditions as they thought fit. On the strict words of Article 18, the seafarer had to be entirely without fault. However, it is then argued that the agreement should be construed in favour of the seafarer on the principle of *contra proferentem* so as to require wilful misconduct on his part. If it were ambiguous, no doubt it should be construed in favour of the seaman, but it is not ambiguous. It makes no provision for apportionment of fault.

That still leaves the question whether the finding of no fault can be supported. The respondent slipped and fell in a manner which resulted in injury. As I understand the argument for the appellant, if the respondent had been taking proper care, he would not have slipped at all and if he did slip, he should have fallen in a manner which avoided injury to himself. Reliance is placed on *Marsh* v. *Kerwin* (6), but that seems to me to be distinguishable: the plaintiff there did not recognize the danger until he had stepped onto the icy step and was committed to the descent. Had he taken proper care, he would have appreciated that the step might be slippery and he should have tested the foothold before committing himself by transferring his weight to his leading foot. Here, the respondent was aware of the risk of slipping and said that he "walked with great care." In spite of that, he kept on slipping. This is hardly surprising in the circumstances and the only way in which he could have

avoided the accident was to refuse to do the work he had been ordered to do—at least, without assistance. In my view, to suggest that he could in some way have ensured that if he did fall he would fall so as not to injure himself is unrealistic.

One must not lose sight of the fact that the respondent was engaged in positioning an awkward load which must have required accurate balancing, but it was not one which the respondent would normally have had difficulty in handling. Nevertheless, it is argued that in the conditions existing at the time, it was dangerous for the respondent to attempt to carry it by himself—he should at least have obtained help or manoeuvred the plank by lifting one end at a time. There is no evidence as to who had positioned the other similar timbers and whether they were handled by one man or more.

The factual issue was one for the trial judge and he decided in favour of the respondent. Whilst appreciating the argument that what the respondent was doing was inherently dangerous, I am not persuaded that the judge was wrong and I would not interfere on this ground of appeal.

Ground 2

It is contended that the judge was in error in finding that the laminectomy which was carried out on the respondent did not break the chain of causation, there having been experts called on both sides who said that on the evidence before them, the symptoms had not justified the operation and that even if they had, the operation should not have been carried out until more conservative treatment had been tried and had failed. It must be borne in mind that that opinion was expressed, admittedly by specialists of great experience, but by surgeons who never saw the X-rays and the CAT scan which had been available to the surgeon who advised and performed the operation.

The law was clearly stated by du Parcq, L.J. in *Rothwell* v. *Caverswall Stone Co. Ltd.* (11) ([1944] 2 All E.R. at 365), in a passage cited in *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd.* (3) ([1949] 1 All E.R. at 592):

> "In my opinion, the following propositions may be formulated upon the authorities as they stand: first, an existing incapacity 'results from' the original injury if it follows, and is caused by, that injury, and may properly be held so to result even if some supervening cause has aggravated the effects of the original injury and prolonged the period of incapacity. If, however, the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury, even though, but for the original injury, there would have been no incapacity. Secondly, negligent or inefficient treatment by a doctor or other person may amount to a new cause

> and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury. This is so even if the negligence or inefficient treatment consists of an error of omission whereby the original incapacity is prolonged. In such a case, if the arbitrator is satisfied that the incapacity would have wholly ceased but for the omission, a finding of fact that the existing incapacity results from the new cause, and not from the injury, will be justified.
>
> In stating these propositions I am far from seeking to lay down any new principles of construction. I have sought only to collect, by a process of induction, such general, and necessarily vague, rules as seem to emerge from the decided cases. Such rules do no more than indicate the bounds within which an arbitrator is free to decide—the province of fact. It is constantly being said, and must always be remembered, that the arbitrator is the sole judge of the facts."

However, where a supervening cause is alleged, it is often difficult to decide as a matter of fact whether the disability complained of is a continuing result of the original accident or a new result of a supervening cause. The difficulty may be especially great where, as here, the supervening event is a surgical operation which has not been negligently performed but may have been unnecessary in relation to the injury done in the accident. *Hogan* v. *Bentinck W. Collieries (Owners) Ltd.* is distinguishable because there the operation to remove the top of a normal thumb was found to have been "a proper one to cure [a] congenital deformity but not to cure the pain consequential on the accident . . ." ([1949] 1 All E.R. at 588). By a majority of three to two, the House of Lords held that the county court judge had been entitled to make that finding. The questions we have to ask ourselves are whether there was evidence that the disability (pain and lack of movement) which the respondent was suffering at the time he brought his action can be identified as the same disability which he suffered before the laminectomy and whether, but for the operation, it would by then have disappeared.

The evidence of the respondent was that the pain was "the same" and Mr. Wade's report states: "This man has exactly the same pain as when he originally injured himself on the ship in 1987." Mr. Wade's conclusion in his report was that "a patient with a soft tissue injury to the back or indeed, a patient who had undergone a successful laminectomy, would expect to have pain from time to time in the back and I would accept that he does have such pain, although I question the degree of severity." Later he added:

> "I would say that an accident of this sort could well produce back pain for several months, but I cannot attribute all the symptoms he has now to the accident. I believe that an accident of the sort described to me . . . would normally have produced symptoms for

six months but that in a small percentage of cases, some of the symptoms might go on to become permanent."

In his oral evidence he is recorded as having said: "The damage was laminectomy, might become permanent. I would attribute his present troubles to the operation . . . the effects of the accident did not get better but it should have: it was the subsequent operation." He does not seem to have been questioned about the possibility that the original pain may merely have been prolonged by the operation. As to advisability of the operation, he said: "Although the laminectomy may have been proper, I would not know."

Mr. Brueton's conclusion in his report was rather more direct: "Mr. Acori continues to experience low back pain that is no doubt the result of the original injury together with discomfort related to the laminectomy." In his oral evidence, he said that "a pull-off injury would have healed by now," although he could not confirm that there was a pull-off injury. It is also to be noted in relation to the operation that he said: "On my information, and I do not have it all, I do not understand the laminectomy but there was a CAT scan," which is no doubt why he was not prepared to go further than to wonder if a laminectomy was necessary.

On that evidence, I think it was open to the judge to find that the respondent's present disability did not stem entirely from the removal of a disc from his spine in the laminectomy operation performed on him in Spain. Pizzarello, A.J. was the judge of fact and I would not disturb his finding.

Ground 3

In his reply to interrogatories, the respondent admitted that it was his duty to advise the appellant of the occurrence of the accident and subsequently, when the extent of the disability was known, to advise the appellant of the same. He further admitted that that duty extended to giving notice within a reasonable period (i) that the accident had occurred in the course of his employment; (ii) that it had occurred through no fault of his own; (iii) that his ability to work had been reduced as a result of the accident; and (iv) of the extent to which he was disabled. It is contended by the appellant that the judge "failed to find facts indicating that the plaintiff's duty had been satisfied."

It is true that the judge did not make clear express findings as to all these matters. Somewhat surprisingly in view of an entry in the ship's log for January 29th, 1987 (the date of the accident) to the effect that the respondent had reported pain in his back, the judge expressly rejected the respondent's evidence that he reported the accident to the Captain and the Chief Officer on that date. If he reported the pain in his back (as he must have done), one would have thought that he must have been asked when and how the pain originated, and it is not suggested that he gave any explanation other than an accident. However, the judge did believe

that the respondent reported the accident to the ship's agent in Santander on February 14th, and he held that that was sufficient notice of the accident. He did not say expressly that that notice satisfied all the requirements as to notice other than that relating to the extent of his disability, but I think that is implicit. As I understand it, the appellant contends (a) that this notice was not given within a reasonable time; (b) that it did not identify the date of the accident; and (c) that no notice was given as to the extent of his disability until February 27th, 1990.

In all the circumstances, I do not think that the judge's conclusion that the notice at Santander was given within a reasonable time can fairly be condemned. There being no witnesses to the accident other than the respondent himself, it would have as effectively enabled the ship's officers to enquire into the accident as if it had been given 16 days earlier. It is complained that when notice was given, it related to a date other than that on which the accident is now alleged to have occurred, a date after that on which the respondent was logged as having reported he was in pain. It appears that the ship's officers gave no credence to the accident report because on the date indicated, the vessel was at sea and the accident was said to have occurred in port. The judge appreciated that the mis-statement of the date could be important if it resulted in the ship's officers' being reasonably misled, but it is implicit that he was satisfied they were not misled: proper enquiry would quickly have shown that it was the date of the accident and not the place where it had occurred which was mis-stated.

The extent of the disability could obviously not be known for a considerable time. The ship owners were well aware that the respondent was seeing various medical practitioners and accepted responsibility for paying their bills. It can hardly have come altogether as a surprise to them when they received the letter of February 27th, 1990 from the International Transport Workers' Federation which, it is conceded, gave notice that it was alleged that disability would be permanent. The judge did not say in so many words that he thought that that notice was given within a reasonable time, but such a finding must be implicit or he would have dismissed the claim. I do not think such a finding unreasonable.

Ground 4

This ground is concerned not with the liability of the ship owner to pay any compensation but with the extent of any compensation which may be payable. Under Article 18, compensation is to vary with the degree of the "disability to work" and the judge held that that meant "disability to work as a seafarer." He said:

> "It seems to me that the words 'as a seafarer' are implicit in the Article read on its own and this reading gathers greater strength on a perusal of the contract as a whole. The absence of the words does not mean that [the respondent's] general disability is the measure of

> his loss contractually: the lesser the disability as a seafarer, the greater are his chances of employment other than as a seafarer. I wonder what real employment can be offered to a seafarer once he has any sort of disability and it seems to me that this adds weight to the interpretation of disability as disability as a seafarer."

The main thrust of the appellant's argument is that there is no justification for reading in words which are not there: the words used should be given their ordinary and natural meaning and the omission of the words "as a seafarer" was deliberate. It is argued that the table listing the various degrees of disability shows an obvious intention that the compensation shall be discounted if the claimant is fit to work at all, whether as a seafarer or on shore: it could not have been intended that a ship owner would have to pay 100% of the specified compensation to a man who, though 100% disabled from going to sea, was quite capable of working ashore (and possibly earning as much as he had been earning as a seafarer), for with the compensation he could be better off financially than a man who was disabled from working either at sea or on shore. Here the judge had found that the respondent was 100% disabled for work at sea but only 40% disabled for work on shore. He had also suggested that the chances of the respondent's actually finding employment on shore were nevertheless remote (since his training was as a seafarer and the few jobs available in a recession would not be likely to go to an ex-seafarer), so that he should be compensated on the basis of 100%. I agree that there is an inconsistency here and I shall return to this in a moment. Counsel for the appellant argues that his construction of Article 18 is supported by the fact that a man who is 100% disabled is to receive only 86% of his basic pay: this was to take account of any difficulty in obtaining work ashore. However, it seems to me that the figure of 86% was intended to take into consideration the fact that compensation under Article 18 is payable whether or not the ship owner is at fault: this compensation is not a substitute for damages for loss of earnings in tort, which, though based on 100% of earnings, must be reduced if he is able to do other work, since he is required to mitigate his damage. That such compensation was to be paid at all was a recognition merely of the dangerous nature of employment at sea.

For the respondent, it is argued that the judge rightly concluded on the evidence that the respondent "for all practical purposes . . . is incapacitated from doing work" as was the plaintiff in *Lang* v. *Metropolitan Life Ins. Co.* (5). In that case, the only kind of job that the plaintiff was capable of holding down was one which involved the performance of "practically no real work." That is not the case here: the respondent is capable of light work but unfortunately he cannot find it. This argument adopts the inconsistency in the judgment of the trial judge to which I referred: it confuses "ability to work" and "ability to find employment." Again, I do not think the respondent can derive any comfort from *Hooper*

v. *Accidental Death Ins. Co*. (4), in which the question was whether a strained ankle suffered by a solicitor "wholly [disabled] him from following his usual business" when he was confined to a sofa in a room adjoining his bedroom.

Of greater substance is the respondent's contention that where there is uncertainty in a mariner's contract of employment, it should be construed in the manner most favourably to him and that in any contract, ambiguity should be resolved in favour of the grantee. Counsel relied on *The Nonpareil* (8) and *The Annie Sherwood* (1), both of which were cases in which contracts had been made for payment of wages in United States dollars and the dollar had depreciated in value during the course of the voyage. The former case is still cited as good law in Meeson, *Admiralty Jurisdiction & Practice*, at 43 (1993), despite the great social changes which have taken place during the past century, and "wages" have now been defined to include social benefits incorporated into a contract of service. Although the ITWF contract in which Article 18 appears was not itself a contract between shipowner and seaman but one between shipowner and a trade union, which may be regarded as having been at arm's length, it was incorporated into the respondent's contract with the shipowner and any uncertainty as to its meaning should be resolved in favour of the respondent.

I think there is uncertainty here which a seaman should not have been expected to foresee and, although the matter did not at first appear as plain to me as it clearly did to the trial judge (who dealt with it very shortly), I think his conclusion can be justified.

Ground 5

Article 18 provides for the payment of an annuity with power to convert the annuity into a lump sum "if the injured party so agrees." There was no such agreement. The judge awarded to the respondent an annuity from February 13th, 1987 to the date of judgment and converted the annuity thereafter until the date of his retirement (with a discount for the contingencies of life) by way of damages for breach of contract. The appellant contends that there was no jurisdiction to make such an order. The respondent says that the judge was perfectly entitled to make such an order for damages not under Article 18 but under the general law of contract.

With respect, I do not think the respondent's argument is correct. The annuity was payable annually and the payments did not fall due until January 29th in each year, that being the date of the accident and the date on which his ability to work was reduced. The writ was issued on January 29th, 1993 and, strictly, by that date the respondent had become entitled (if at all) to six annual payments and no more. There had been no breach of contract in relation to future payments and no cause of action had arisen in respect thereof. Although the claim for the first six instalments

was framed as one for damages for breach of contract, it was in truth a claim in debt (see 1 *Chitty on Contracts*, 25th ed., para. 1675, at 918–919 (1983)). No question of damages for breach arose as to the future instalments: at most the respondent could properly have claimed a declaration and I would be disposed to make such a declaration.

Although I have said that on a strict view the respondent could be entitled to six annual payments and no more, it is to be noted that while the memorandum of appeal might suggest that the judge had "erred in awarding accrued annuity to date" (the "date" being the date of judgment), counsel for the appellant in his written submissions said: "On [the basis of Article 18] the learned judge's judgment should have been limited to the annuity that he held had accrued *to the date of proceedings or judgment*" [Emphasis supplied]. No oral argument was addressed to us as to the two instalments which fell due between the date on which the action was brought and the date of the judgment. I therefore agree with the other members of the court that the judgment for eight instalments can properly stand. The statement of claim did not allege a breach of the undertaking to conclude appropriate insurance against claims under Article 18 but quite the contrary.

Ground 6

It is contended that the judge was wrong to hold that the respondent had not compromised his claim under Article 18 of the ITWF Agreement by signing a receipt in the following terms for part of the sick pay due to him under the agreement:

> "I, the undersigned, Antonio Galleguillos Acori, hereby declare to have received the amount equivalent to US$2,545.20 as final settlement of 84 days of sick wages finding them to my entire satisfaction therefore I will have no further claim against *M.V. Meonia*, her owners, operators, managers, agents, *etc*."

It was eventually agreed that the respondent had been entitled not only to 84 days' sick pay but to 90 days' and the balance of six days' pay was paid into court. There was evidence that on paying off the respondent, the ship's agent in Santander produced a certificate from a doctor "declaring [the respondent] fit after having been ill" and demanded that he sign this receipt. The respondent says that he had to sign because he would have had no money to live on if he was not paid his wages. He understood it to be "a discharge in settlement of my rights as a person who has sustained an accident." The judge said: "I do not read that document to be a compromise and a full discharge by the plaintiff of his claim against the defendant. It is my view that it is a discharge for the moneys due for the 90 days under Article 14 and limited to that," and I have no doubt that he fully understood the submission which had been addressed to him. He was clearly not satisfied that in signing the receipt the respondent appreciated that "a discharge in settlement of my rights as a person who

has sustained an accident" might be said to constitute a waiver not only of his right to another six days' sick pay but also of any other claim he might have in consequence of the accident. It is conceded before us that the receipt was ambiguous.

The case on behalf of the respondent has been argued on the basis, first, that even assuming the receipt to relate, *inter alia*, to a claim under Article 18, he was not bound by it and, secondly, that properly construed, it does not relate to such a claim.

As to the first point, reliance is placed on ss. 21 and 44 of the Merchant Shipping Ordinance. Section 21 is concerned with erasures, interlineations and alterations of agreements with the crew and can clearly have no relevance here. Section 44(1) is in these terms:

> "A seaman shall not by any agreement forfeit his lien on the ship, or be deprived of any remedy for the recovery of his wages, to which in the absence of the agreement he would be entitled, and shall not by any agreement abandon his right to wages in case of the loss of the ship, or abandon any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Ordinance shall be void."

That provision relates to the recovery of wages. Thus the receipt was ineffective to deprive the respondent of his remedy for the recovery of the further six days' pay, but it has not been suggested that the word "wages" has been so defined that it includes compensation under Article 18. However, by Article 27 of the Collective Agreement, the appellant undertook not to request any seafarer to "enter into any document" whereby by way of waiver the seafarer promised to accept a variation of the terms of the Agreement. It seems to me that the document signed by the respondent, if when properly construed it did purport to waive a claim to compensation under Article 18, was to that extent of no legal effect.

As to the construction point, the receipt itself does not in my view clearly constitute a discharge of all claims as distinct from claims to wages. The argument on behalf of the appellant is firmly based on the respondent's own evidence in the Spanish proceedings, which the respondent brought against one of the doctors who had treated him, as to his understanding of what he was agreeing to. That evidence is itself not as clear as it might have been, for it was that he was asked to sign a discharge in settlement of his rights "as a person who has sustained an accident." Be that as it may, the receipt was for wages; it purported to be in final settlement of 84 days' wages and it expressed satisfaction as to the amount of wages: "therefore," it said, the respondent would have no further claim. Satisfaction as to the amount of wages would be no reason for waiving other claims which the respondent might have. There is nothing to show that any other claims were contemplated at the time. In my view, there is no ambiguity which could let in parol evidence and there has been no compromise of the claim under Article 18.

Conclusion

I would allow the appeal only to the extent that I would limit the damages to eight instalments of the annuity, with interest at 10% from May 1st, 1990 until March 20th, 1995. As already indicated, I would add a declaration that the respondent is entitled to receive future instalments of the annuity on January 29th each year on the basis of a 100% disability.

DAVIS, J.A.: This is an appeal from the judgment of Pizzarello, A.J. given on March 20th, 1995 in an action in the Supreme Court for breach of contract brought by the present respondent against the appellant company. The facts giving rise to this action were as follows.

The respondent, a Chilean seaman resident at Santander in Spain, was employed by the appellant company as a seaman on its cargo vessel *M.V. Meonia* under a seaman's contract of employment dated September 2nd, 1986. It was a term of this contract that the International Transport Workers' Federation Collective Agreement ("the ITWF Agreement"), to which by a Special Agreement with the ITWF the appellant, as owner of the *M.V. Meonia*, was bound, be considered to be incorporated into and to form part of the contract.

[The learned Judge of Appeal then set out the provisions of Article 18 of the ITWF Agreement, which may be found in the judgment of Huggins, J.A., and continued:]

On January 29th, 1987, at about 6 p.m. at the Swedish port of Helmstad, the respondent, while engaged in making fast a deck cargo of timber in icy conditions, slipped and fell when carrying a long plank of wood and injured his back. He reported to the Captain and the First Officer and the *Meonia*'s log book shows that the respondent complained about pain in his back. As the ship was about to sail for the Mediterranean, the respondent was told that he would have to wait to see a doctor when the ship arrived at her next port of call. On reaching Mahon on February 10th, the respondent was sent to a doctor who told him he had kidney trouble and gave him some pills. The respondent was not satisfied with this diagnosis and asked to be sent to another doctor on the ship's arrival at Barcelona. This was arranged through the appellant's Barcelona agent, and on February 12th the respondent saw a doctor at the Policlinica Montaner, who diagnosed strain of the back and recommended electrotherapy when the respondent reached his home at Santander. Accordingly the respondent was signed off, the ship's agents arranged for his journey to Santander and he was paid his wages up to February 12th.

On February 18th, the respondent was seen by Dr. Carillo Mateos who reported to Tradimar Ltd., the appellant's agent in Santander, that the respondent, having met with an accident ("accidentado" in the heading to the letter omitted in the English translation), was suffering from lumbar

pain and inability to move. Clinical and X-ray examination showed a pull-off injury to the fifth lumbar vertebra. He recommended eight weeks off work with appropriate treatment. In spite of physiotherapy and electrotherapy, the respondent's back was no better by the end of March and in a report of March 25th, Dr. Carillo recommended a CAT scan. On April 13th, Dr. Carillo reported that further X-ray examination showed a discal hernia in the lumbar sacral region and that he had explained this to the respondent, who had agreed to an operation.

This is more fully set out in a further report dated April 14th, in which Dr. Carillo expressed the hope that once the operation had been carried out, the respondent should recover over a period of five or six weeks. On May 11th, Dr. Carillo wrote to Tradimar Ltd. to report that on April 28th, the respondent had undergone a laminectomy and removal of the fifth lumbar-first sacrum disc, that he had been discharged from hospital on May 5th and that as from that date he appeared to be recovering normally. On May 20th, Dr. Carillo submitted to Tradimar Ltd. a bill for Pta. 225,000 in respect of doctors' fees, physiotherapy, electrotherapy, X-ray and CAT scan, surgery, *etc*. On June 6th, the respondent was paid by Tradimar Ltd. on behalf of the appellant US$2,545.20, being payment of 84 days' sick pay under Article 14 of the ITWF Agreement. In a document dated June 6th, 1987, the respondent acknowledged receipt of US$2,545.20 "as final settlement of 84 days of sick wages finding them to my entire satisfaction therefore I will have no further claim against the *M.V. Meonia*, the owners, operators, managers, agents, *etc*."

Unfortunately, however, the respondent did not recover. He found that the pain in his back was no better. On August 29th, 1987, he saw a Dr. Cobo Fernandez, who found that the respondent was suffering from lumbar-sacral pain radiating to the groin. On September 8th, he saw Dr. Carillo again. In his report of that date, Dr. Carillo described the respondent's previous symptoms and the treatment he had received. He said that the respondent now complained of lumbar pain when he made an effort but that it had not been possible to establish the presence of any organic process. In October and again in November and December, the respondent was seen at the Valdecilla Hospital, Santander for treatment for pain in the lumbar region. By March 5th, 1988 there was no improvement and continued physiotherapy was prescribed.

In November 1987, on a complaint made by the respondent, proceedings were started against Dr. Carillo for issuing a medical certificate declaring the respondent fit when he was not. In November 1989, the respondent was medically examined for the purpose of these proceedings. He was found to have chronic residual lumbar pain and tenderness over the spine at the fifth lumbar vertebrae and upper part of the sacrum and to be unable to carry out his normal work, either as a seafarer or any other work that involved the lumbar part of his spine. The proceedings against Dr. Carillo took place in November 1990 and were

unsuccessful, both at first instance and on appeal by the respondent in December 1990.

It appears, however, that pending these proceedings, the respondent had contacted the ITWF, for on February 27th, 1990, a letter from the Special Seafarers' Department of the ITWF in London was sent to the manager of Algomar Shipping Services Ltd., 75 Moorland Road, Croydon, as agent of the appellant. This letter referred to the respondent's discharge from the *Meonia* in February 1987 with a back injury. It reported that his condition had not improved, that he was unable to pursue his chosen career as a seafarer and that he was unlikely to be able to carry out any type of work in future. A claim for compensation under the ITWF Agreement was therefore submitted in the sum of US$194,330.70. Algomar replied on March 5th to say that it had no recollection of the matter other than that the appellant had made a final "sick payment" in 1987, but that it would refer the matter to the appellant's "P & I club"—the Swedish Club—as the *Meonia* was "covered with them re marine personnel." The Swedish Club's "letter of remittance" to Algomar dated June 30th, 1987 is relevant in this connection as showing that the Swedish Club reimbursed the appellant its costs in relation to the respondent's signing-off at Barcelona, including sick pay for the 84-day period from February 13th to May 7th, 1987.

On October 19th, 1990, the Swedish Club wrote to the ITWF to say that they had now discussed the respondent's case with their "member" (the appellant), who was unable to accept the respondent's claim because (a) it was time-barred; and (b) the evidence submitted did not support a claim on the merits. On October 15th, 1990, in a report on the respondent, Dr. de la Sierra said that the respondent was 100% unfit for work as a seafarer because of lack of function and pain.

An extract from the Register of British Ships, Gibraltar shows that the *M.V. Meonia* ceased to be registered as a British ship on May 3rd, 1990 on her sale to a foreign company, Robust Shipping Ltd. of Limassol, Cyprus.

On January 29th, 1993, the respondent's lawyers, Isola & Isola, instituted proceedings against the appellant claiming damages for "breach of the contract of employment made on September 2nd, 1986 with the respondent following injuries suffered by him as a result of an accident on January 31st, 1987 [*sic*] on board the *M.V. Meonia*."

In a letter dated March 22nd, 1993, Sorek Services Ltd. wrote to the respondent's lawyers acknowledging receipt of a letter dated February 18th, 1993 enclosing a writ of summons against their client company, Algol Maritime Ltd., the present appellant. The letter continued:

> "As per our telephone conversation this morning, we have to advise you that we have requested the Register [*sic*] of Companies to strike off Algol Maritime Ltd. No. 5944 as this company is no longer trading and has no assets."

The respondent's statement of claim was filed on March 12th, 1993. The appellant applied for the respondent's claim to be struck out as being a personal injury action and therefore out of time. Judgment was given in favour of the appellant on July 5th, 1993, but this was reversed by the Court of Appeal on September 27th, 1993. The trial of the action took place in early March 1995 and judgment was delivered on March 20th, 1995.

As stated by Mr. Aldous for the appellant, the main issue at the trial was the claim by the respondent (the plaintiff) to special damages for breach by the appellant (the defendant) of Article 18 of the ITWF Agreement, comprising the amount payable by way of an annuity under that Article from the date of the accident to judgment.

The learned judge made, *inter alia*, the following findings of fact on the evidence before him: (a) that the plaintiff, being in the employment of the defendant, suffered an injury as a result of an accident aboard the *M.V. Meonia* at Halmstad on January 29th, 1987 and that he made a report to the Captain; (b) that in the context of Article 18 of the ITWF Agreement and in the circumstances of the case, the plaintiff was not at fault; (c) that the injury was a pull-off injury to the fifth lumbar vertebra; (d) that the injury was complicated by a laminectomy performed in Santander on April 28th, 1987, but that this did not constitute a *novus actus interveniens* so as to break the proximate chain of causation; and (e) that the result of the accident was that the plaintiff suffers pain and is 100% disabled as a seaman, but that his economic or general disability should be assessed at about 40%. Accordingly, the learned judge found that the respondent was entitled by way of special damages to an amount comprising an annuity from February 13th, 1987 to the date of judgment, assessed under Article 18 of the ITWF Agreement at 100% disability, giving a rate of compensation of 86% of the respondent's wages, calculated at US$8,472.72 *per* year and giving a total figure of US$68,616.42. To that he added interest from May 1st, 1990 at the rate of 10%.

In addition, the learned judge awarded the respondent the sum of US$45,000 by way of special damages for his prospective loss, as I understand it. The calculation is set out in his judgment and takes into account a discount of 6% for immediate payment of a lump sum instead of an annuity spread over a period of years, and a further discount of roughly 25% for "contingencies of life," bringing the resulting amount to a round figure. The appellant now appeals against the judgment of the learned judge on six grounds, with which I shall deal in turn.

Ground 1: that the learned judge erred in purporting to find that within the context of Article 18 of the ITWF Agreement and in the circumstances of this case, the plaintiff was not at fault; and that on the only facts available to the learned judge, the only proper finding was that the plaintiff was in some part at fault.

The only evidence as to his accident is the respondent's own: there were no witnesses to it. From the respondent's evidence, it appears that he and some other members of the crew of the *Meonia* were working on stacking a deck cargo of timber. This then had to be covered with canvas and made fast with chains, under which planks of wood were to be placed to protect the canvas from damage by the chains. They had been working from about midday and his accident occurred at about 6 p.m. The weather was very cold (he estimated −20°C, whereas the Captain estimated −3° to −6°C) and the deck was covered with ice. Salt had been put down on the walkways, but not on the deck, nor on the canvas covering the cargo of timber. At the time of his accident, the respondent was on the canvas on top of the cargo of stacked timber. All but one of the planks had been placed in position by the respondent and his mates. The latter had gone in to get out of the cold, leaving the respondent to place the last plank in position. The planks were 5m. long, 10 cm. wide and 5 cm. thick. The respondent had special shoes on but he said that he walked with great care because he kept on slipping and knew how slippery it was on the canvas. He said that it was always dangerous to walk on canvas in those conditions, but that he had always been careful. He said that he picked up the last plank, which was lying on the canvas on top of the timber, to put it in a place where it was needed. He carried the plank in his arms against his chest. He slipped while doing so, his torso jerked forwards, he felt a sharp pain in his back, he threw the plank forward and fell face downwards. After a little time he was able to get up and he walked over to the first officer and reported the accident to him.

Mr. Aldous submits that the respondent was under a duty in his own interest to use reasonable care for his own safety (see *Nance* v. *British Columbia Elec. Ry. Co. Ltd.* (7)), and that for an experienced seaman, as the respondent was, fully aware that the conditions in which he was working were dangerous, to slip and fall as he did clearly shows that he failed to take reasonable care for his own safety. Had the respondent brought an action against the appellant for damages for negligence, Mr. Aldous submits that he would clearly have been found to have been contributorily negligent. To this extent the respondent was at fault, whether his action be in tort or in contract and accordingly he falls outside Article 18 of the ITWF Agreement, because it cannot be said that he suffered an accident "through no fault of his own." The very use of the word "fault" in Article 18, as opposed to an expression such as "wilful misconduct," must show, Mr. Aldous suggests, that the word "fault" was to be given its ordinary meaning in law and he submitted that it should be construed in the same way as in the Law Reform (Contributory Negligence) Act 1945.

Accordingly, Mr. Aldous submits, an experienced seaman, properly equipped and aware of the dangers, should not, if he slipped, have fallen as he did if he had been taking proper care of himself: he was under a

duty to himself to keep his balance, even when burdened with an awkward plank, not to be hasty and, if he did lose his balance, to fall properly so as not to injure himself. Mr. Aldous said he was not suggesting that the respondent should have stopped work, but that he should have assessed whether he could carry on safely and, if not, he should have got assistance.

I find it impossible to accept Mr. Aldous's argument. The respondent and his mates were carrying out the job they had been given to do. The conditions being what they were, clearly the job was fraught with danger but this was nothing out of the ordinary in the course of their employment as seamen. The respondent was aware of the dangers, as no doubt were his mates. In so far as the laying of the planks on the canvas prior to fastening the chains on to the cargo is concerned and bearing in mind the length and weight of a plank of the dimensions given, the job of laying them in position while standing on an icy canvas to cover a load of stacked timber was clearly difficult and dangerous. But the respondent was aware of the dangers and he knew what he was about in laying the final plank in position. He was doing no more than what he and his mates had been doing in the conditions described shortly before the latter had gone inside to get out of the cold and have some coffee. He was doing what he was required to do in his employment as a seaman by the appellant. In the course of his employment as a seaman on a cargo ship, there clearly might be a number of occasions on which the respondent would be required to carry out jobs which were in themselves dangerous or which were rendered dangerous by severe weather. This was just such a job.

It appears to me that in the conditions obtaining that evening, the officer on duty should have given instructions that salt be put on the deck and on the canvas where the men were working as well as on the walkways, where it seems it had been put. But as that had not been done, it does not appear to me that it can be said that the respondent was in any way at fault in not asking that salt be put on the canvas when he was just laying the last of a number of planks which he and his mates had been putting in place without, thus far, any mishap. Nor does it seem to me that in those circumstances, the respondent can be held to be in any way at fault in not asking for assistance in the laying of the last plank.

It appears to me that this case is very similar to that of *Pead* v. *Furness, Withy & Co. Ltd.* (10), an action for damages for negligence. In that case, the plaintiff, a stevedore employed by the defendants, suffered injuries from a fall caused by his slipping on spillage from a cargo of meal (known as pollards) on the deck of the defendants' ship. He was aware that the surface of the deck was dangerous. The defendants denied the claim that they had been negligent in not removing the pollards and contended that the accident had been due to the plaintiff's own negligence. Slade, J. held that the defendants had been negligent in that

they had failed to take reasonable precautions for the safety of their servants and had therefore exposed the plaintiff to "unnecessary risk." He went on to say ([1956] 2 Lloyd's Rep. at 155–156) that in those circumstances—

> ". . . a Court ought not to be too astute to find contributory negligence merely because the employee does not, every time he comes across a situation of extra hazard caused to him by his employer, say: 'I down tools, I do no more work, I will not touch those hatch covers until someone has come along here and removed all source of hazard to me.' In some cases it is very, very difficult indeed to infer contributory negligence, because an employee who behaved in that manner every time he thought he saw some cause for complaint about his employer I am satisfied would soon lose his job."

In the event, Slade, J. found no contributory negligence on the part of the plaintiff and found as a fact that the plaintiff was not guilty of any negligence.

In the present case, the learned judge gave careful consideration to the appellant's submission that the question as to whether the respondent was at fault should be considered on a tortious basis. The circumstances leading up to the accident are fully set out in his judgment, including the facts that the respondent was standing on an icy tarpaulin on top of a cargo of unlashed timber, that he was carrying a large piece of timber and that he was alone, being the last man to be left working. The learned judge made no finding on the facts and inferences set out as to whether he considered the respondent to be guilty of any negligence, because he then went on to deal with the submissions of Mr. Isola that the question of fault should be considered not in tort but in contract and specifically in the context of the ITWF Agreement and Article 18. He agreed with the submissions made by Mr. Isola and found that in the context of Article 18 and in the circumstances of the case, the respondent was not at fault.

One cannot say what finding as to negligence on the part of the respondent the learned judge would have come to had he considered it necessary to do so, but it appears to me that on the facts of this case, it is quite possible that the learned judge would have found—as did Slade, J. in *Pead* v. *Furness, Withy & Co. Ltd.*—that the respondent was in no way contributorily negligent. I have little doubt that this is the finding I myself would have made in this case.

Mr. Aldous referred us to the case of *Marsh* v. *Kerwin* (6). This was a case in which the plaintiff, a Hoover service engineer, who had arranged with Mrs. Kerwin to come to repair one of her Hoover appliances, slipped on an icy step leading to the house, fell and injured his back. At the time, the plaintiff had his hands full with his tool kit and a data file manual. He said that as he put his foot on the step he thought it was slippery, but he had by then committed himself to going on, his feet then went from under

him and he fell on his back. In an action against the defendants in negligence, it was held by Buckley, J. that the plaintiff had been contributorily negligent to the extent of 20% in walking straight on to a step which he thought might be slippery on a frosty morning without in any way testing to see if the step was or was not slippery. In so finding, Buckley, J. said: "I think it is relevant to bear in mind that this was not a factory or workplace but a private residence. Clearly visitors themselves have a duty to look out for their own safety."

In the present case, the respondent was working in conditions which he knew to be icy and dangerous on board the ship on which he was employed and, while taking every care consonant with the job he was required to do, slipped, fell and injured his back. As I have said, it cannot in my view be said that he was contributorily negligent. Accordingly, I find myself in agreement with the conclusion arrived at by the learned judge that in the context of Article 18 of the ITWF Agreement and in the circumstances of this case, it cannot be said that the respondent was in any way at fault. I therefore find that Ground 1 of this appeal fails.

Ground 2: that the learned judge erred in finding that a laminectomy operation performed on the plaintiff did not break the proximate chain of causation when, on the only evidence available to him, the operation was one which ought not to have been attempted.

In his judgment, Pizzarello, A.J. said: "In my view, the operation was an integral and ongoing part of his treatment as perceived by the doctors in Spain who were treating the plaintiff and does not constitute a *novus actus interveniens*." Mr. Aldous submits that the laminectomy carried out on the respondent on April 28th, 1987 constituted a *novus actus* in that it was an ill-advised operation which has given rise to the respondent's present lumbar pain. He contends that the respondent must prove that he would be amongst the very small percentage of people (according to the medical evidence of the two consultant surgeons called as witnesses) who did not make a full recovery from a pull-off injury such as that suffered by the respondent after treatment (other than the laminectomy) received by the respondent.

In *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd.* (3), a case dealing with the words "where . . . incapacity for work results from the injury" in s.9(1) of the Workmen's Compensation Act 1925, a workman who had suffered at work an injury to a deformed thumb was operated on to cure the deformity as well as his injury, and suffered pain and incapacity to work thereafter. It was held that it was for the arbitrator to determine whether or not the incapacity existing at the date of the arbitration resulted from the original accident or from the operation, and, as there was evidence on which he could properly find that the incapacity resulted from the operation, there was no ground for interfering with the award. Lord Simonds said ([1949] 1 All E.R. at 593):

> "The question whether a present state of incapacity is substantially the result of an original accident or of the later negligent act of a doctor is to ask, in other words, whether the present incapacity is due to the original accident or to the intervention of a *novus actus* which breaks 'the chain of causation,' and the question can only be answered on a consideration of all the circumstances and, in particular, of the quality of that later act or event."

It is clear from the opinion of Lord Simonds and also that of Lord Normand (*ibid*., at 597) that whether or not the laminectomy in the present case broke the chain of causation for the respondent's incapacity from his accident and constituted a new cause for that incapacity is a question of fact for the trial judge, to be reached on the evidence before him.

Dr. Carillo's reports from mid-February to mid-April 1987 show that he considered that a laminectomy was a final resort for curing the respondent's lumbar pain, in view of the fact that normal treatment by physio- and electrotherapy carried out over the period of two months had not proved successful. X-ray examination and a CAT scan were carried out and the laminectomy was finally carried out on April 28th, 1987. On the continuance of pain after his operation and the respondent's continued treatment over the next two years, it does not appear from the reports made during that time that the doctors who examined him considered that his pain had been caused by the laminectomy.

Mr. Brueton, the Consultant Orthopaedic Surgeon at Guy's and St. Thomas's Hospital, who examined the respondent in May 1993—over six years after the laminectomy—said at the conclusion of his report that the respondent's low back pain "is no doubt the result of the original injury together with discomfort related to the laminectomy." In evidence, he said that a person who had had a laminectomy "will always have pain," and he is recorded as having said at the end of his examination-in-chief: "I wonder if laminectomy was necessary." In cross-examination, he is recorded as having said: "I do not understand the laminectomy, but there was a CAT scan" and that he agreed with Mr. Wade (the consultant orthopaedic surgeon from Coventry Hospital, who was also called as a witness) that he (Brueton) would not have carried out a laminectomy.

Mr. Wade, who saw the respondent in November 1994—$7\frac{1}{2}$ years after the laminectomy—said in his report: "It is not modern orthopaedic or neurosurgical practice to excise lumbar discs unless there is some sciatic component to the pain and certainly not within a few months of the symptoms." In this connection, I observe that in his report on the respondent of September 8th, 1987, Dr. Carillo, in describing his original examination of the respondent in February 1987, said (in the English translation): "When trying to stretch the sciatic nerve by medical manipulation, the patient suffers acute lumbar pain." Both consultant surgeons agreed that not all the pain suffered by the respondent when they saw him was attributable to his original accident.

In his report, Mr. Wade said that the bulk of the symptoms reported by the respondent were "either not as bad as he reports or possibly to be related to subsequent surgery." In examination-in-chief, he attributed the respondent's present trouble to the laminectomy, but slightly earlier in his evidence he was recorded as saying: "Although the laminectomy may have been proper, I would not know."

The two consultant surgeons giving evidence as to their examination of the respondent several years after his laminectomy say that it is not modern practice to carry out a laminectomy so soon and without clear sciatic nerve trouble. The respondent, however, was in the hands of Dr. Carillo, the doctor employed by Tradimar Ltd., the appellant's agent in Santander, and it is clear that it was Dr. Carillo's opinion after carrying out what Mr. Wade referred to as "conservative treatment" for two months without noticeable improvement, and after X-ray and CAT scan examination, that laminectomy was necessary. In none of the medical reports made by the Spanish doctors on the respondent, including that made in November 1989 for the purposes of the proceedings against Dr. Carillo, does it appear that Dr. Carillo's decision to have a laminectomy performed was ever questioned.

In my view, the learned trial judge's findings were entirely consistent with the evidence before him, notwithstanding the reservations as to the performance of a laminectomy of the two consultant orthopaedic surgeons Brueton and Wade.

In *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd.* (3), Lord Normand said (*ibid*., at 596):

> "I start from the proposition, which seems to me to be axiomatic, that if a surgeon, by lack of skill or failure in reasonable care, causes additional injury or aggravates an existing injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury or the aggravation of the existing injury should be attributed to it and not to the original accident. On the other hand, an operation prudently advised and skilfully and carefully carried out should not be treated as a new cause, whatever its consequences may be. A Court of Appeal would, therefore, be entitled to hold that an arbitrator had misdirected himself if he had made an award in favour of a workman in respect of an incapacity which he had found to be attributable to the surgeon's actionable negligence, or if he had refused to make an award where the injury by accident still subsisted, though in an aggravated form, after an operation prudently advised and properly carried out."

There was no conclusive evidence before the learned judge that the respondent's present pain was wholly attributable to the laminectomy carried out in April 1987 or that in the circumstances then obtaining, the laminectomy was not "prudently advised and properly carried out."

In my view it is not necessary, as Mr. Aldous maintains, for the respondent to show that he is among the small percentage of people who, with normal treatment for a pull-off injury and without a laminectomy, would still suffer permanent disability after an accident of the sort suffered by him. Both Mr. Brueton and Mr. Wade agreed that anyone who had undergone a laminectomy would suffer some subsequent pain. Provided, however, that the operation was "prudently advised and properly carried out"—and there is no evidence in this case that it was not—such an operation cannot be said in this case to be a *novus actus interveniens*.

In my view, it is clear that the respondent's present disability results from his accident, even though it may have been aggravated to some extent by the laminectomy, and that he is therefore entitled to base his claim against the appellant on his accident.

Ground 3: that the learned judge held that the plaintiff had a duty to report the accident to the defendant within a reasonable time on the basis admitted by the plaintiff in his interrogatories, but that the learned judge failed to find facts indicating that the plaintiff's duty had been satisfied; accordingly the learned judge erred in finding for the plaintiff.

In his judgment, Pizzarello, A.J. said:

> "I do not accept that the plaintiff reported the accident to the Captain at the time, but I accept the plaintiff's account that he told Tradimar, the defendant's representative at Santander, on his arrival there shortly after discharge from the vessel and that I believe is sufficient to put the defendant on notice that there had been an accident."

He went on to say that what the plaintiff had failed to do was to give the date of his accident and that this may have led the defendant to give little credence to the plaintiff's claim (but he added that this was only an inference as there was no evidence as to this from the defendant). He found that the first formal indication of a claim based on an accident under Article 18 of the ITWF Agreement was the letter from the ITWF dated February 27th, 1990—more than three years after the accident—and that letter, the appellant submits, cannot be said to be a report within a reasonable time and consequently the respondent's claim must fail.

The *Meonia*'s log book for 1987 shows that on January 29th at Helmstad, the respondent complained about pain in his back. Captain St. Cyr in evidence said that he remembered making that entry and that the respondent had not made any mention of an accident. The next entry in the log book showed that at Mahon on February 10th, the respondent had visited a doctor, had been told he suffered from gravel in the kidneys and had received medicine. The captain in evidence said that he remembered this; he remembered that the respondent had not been happy with the diagnosis of the doctor in Mahon and had asked to see another doctor, and

that a visit to a doctor at Barcelona had therefore been arranged through the appellant's agent. The next entry in the log book of February 12th at Barcelona confirms the captain's recollection that the respondent insisted on seeing another doctor. It notes the Barcelona doctor's diagnosis as being strain of the back ("lumbalgia de esfuerzo") and recommended treatment as electrotherapy on his arrival at Santander ("se recomienda electroterapia a su llegada a Santander"). And it closes with a note of the respondent's being signed off and, through the ship's agent, being sent home to Santander, his wages having been paid up to date. The captain remembered paying the respondent his wages and thought he must have seen the doctor's report.

The respondent said in evidence that he set off for Santander on February 13th and that on arrival the following day he went to Tradimar, showed them the doctor's report from the Barcelona clinic and "told them what had happened." He was told that arrangements would be made for him to see a doctor, and on the next day, February 15th, he was told by Tradimar that they recommended his seeing the company doctor, Dr. Carillo, at Santander. The respondent said that on seeing Dr. Carillo he told him what had happened.

It appears from Dr Carillo's report to Tradimar Ltd. of February 18th, 1987 that he saw the respondent on that date. The heading to that report is: "Informe de accidentado d'Antonio Galleguillos Acori." It would appear therefore that the respondent, Tradimar or both had told Dr. Carillo that the respondent had had an accident and one must, I think, assume that as a preliminary to his examination, the respondent told Dr. Carillo how he came to hurt his back.

From Dr. Carillo's report on the respondent of February 18th to Tradimar Ltd., there is therefore a clear connection back to the entry in the log book of January 29th at Halmstad in which the respondent is recorded as having complained of pain in the back. Even if the respondent did not give the date of his accident or name the place where it had occurred either to Tradimar or to Dr. Carillo, it appears to me that the respondent had clearly fulfilled his duty to report to his employers that he had had an accident at work resulting in injury and that this report was made within a reasonable time of that accident. It does not appear to me that more was to be expected in the circumstances from a discharged able seaman. In my view, it was for the appellant, on receiving Dr. Carillo's report following on the report by the respondent to its agent Tradimar Ltd. of February 14th to make further inquiries from the captain of the *Meonia* and if necessary to come back to the respondent for further information as to the place, date and circumstances of his accident.

On May 11th, 1987, Dr. Carillo reported to Tradimar that a laminectomy operation had been performed on the respondent and that he was recovering normally and on May 20th, Dr. Carillo sent Tradimar a bill for the treatment of the respondent amounting to Pta. 225,000. Then

there is the document dated June 6th, 1987 in English and Spanish, in which the respondent acknowledged having received from Tradimar on behalf of the appellant an amount equivalent to US$2,545.20 "as final settlement of 84 days of sick-wages." This was followed by the "letter of remittance" dated June 30th, 1987 from the Swedish Club to the appellant's Croydon agent, Algomar Shipping Services Ltd., referring to Algomar's claim in respect of the respondent's signing-off "due to sickness" and remitting the sum of US$6,716. All these communications and documents would, or should, have kept the appellant in mind of the respondent's original report of February 14th and have caused it to make further inquiries into it if this was considered necessary.

Notwithstanding that the first formal report of the respondent's injury and claim against the appellant may not have been received until it received the ITWF's letter of February 27th, 1990, I am satisfied that the respondent had made a sufficient report of his accident to the appellant within a reasonable time, that is to say by February 14th, 1987, and in my view that was also the finding of the learned judge below. Furthermore, it is in my view implicit from his judgment that he considered the ITWF's letter of February 27th, 1990 to be a report within a reasonable time of the respondent's permanent disability. It does not appear to me that in all the circumstances, such a finding was in any way unreasonable.

Ground 4: that the learned judge erred in construing the words "whose ability to work" as meaning "whose ability to work as a seafarer."

The medical evidence, which, as I understand it, was not disputed, was that the respondent was 100% disabled as a seafarer. At the end of his evidence, Mr. Wade, FRCS is recorded as having said that the respondent was "100% disabled to go to sea." The learned judge so found in his judgment and he went on to find that the respondent's "economic or general disability should be assessed at about 40%."

Mr. Aldous submits that it cannot have been intended by the framers of Article 18 of the ITWF Agreement, *i.e.*, the International Transport Workers' Federation, that a seafarer 100% disabled as a seafarer but only 40% generally disabled should be able to claim 86% of his basic pay in compensation and then be able to start a new life in some other employment open to him with a disability of only 40%. Mr. Aldous submits that the word "disability" in the heading to the table in Article 18 must mean general disability—in this case 40%, as found by the learned judge—and that the words "whose ability to work" in the first part of the Article must mean general ability to work and should not be read as if the words "as a seafarer" were added after "work."

In my view, the ITWF Agreement is a contract relating entirely to seafarers. This is clear from a perusal in particular of Articles 1 and 2 and, in connection with the reference to basic pay in the table in Article 18, Annex 1 to the Agreement giving the ITWF Wage Scale. All the posts

referred to in that Wage Scale are those of seafarers. Article 18 itself deals with compensation payable to a seafarer injured in an accident "whose ability to work is reduced" as a result. It appears to me that the words "ability to work" in this context must mean "ability to work as a seafarer": the Article is not concerned with ability to work in any other capacity or, as Mr. Aldous submits, with mere general ability to work. Similarly, the word "disability" in the heading "Degree of Disability" in the table in Article 18 must be read as meaning "Degree of Disability as a Seafarer" and not, as Mr. Aldous suggests, just disability generally.

Mr. Isola for the respondent drew our attention to the old case of *The Nonpareil* (8)**,** which is still cited as good law in Meeson, *Admiralty Jurisdiction & Practice* (1993). This was an action by a seaman for wages specified in his contract in US dollars. It was held that where as a result of depreciation it was unclear from the contract at what rate the wages should be paid, the court would construe the contract in favour of the seaman and awarded him his wages at the fullest rate. Dr. Lushington said (33 L.J.P.M. & A. at 201):

> "It is a well-known principle that, where there is any doubt upon a contract of this description, the owner of the vessel who enters into it is bound to take care that the terms of it are clear, and where there is any doubt in the terms of a contract it must be construed against the person who had the power to make it clear."

It appears to me that the principle enunciated by Dr. Lushington applies to such ambiguity as there may be in Article 18 as a result of the incorporation of the ITWF Agreement into the respondent's contract with the appellant, even though the ITWF Agreement was framed not by the shipowner-employer but by the International Transport Workers' Federation on behalf of seamen. In my view, the learned judge below was correct in the construction he gave to Article 18.

Ground 5: that the learned judge erred in awarding the plaintiff accrued annuity to date and in addition thereto a lump sum or future annuity.

Article 18 of the ITWF Agreement provides for the payment of an annuity at the rates specified in the table set out in the Article to a seafarer whose ability to work is reduced as a result of an accident. The Article provides that such annuity "may be converted into a lump sum if the injured party so agrees."

Paragraph 26 of the amended statement of claim, under the heading "Particulars of Special Damage," sets out the calculations for an annuity at 86% of the respondent's basic pay, what an annuity so calculated would amount to from the date of accident to January 31st, 1993 and in the final two lines provides for the continuance of the annuity at the rate calculated until retirement age. And in the concluding claim, the plaintiff (the respondent) claimed the amount set

out in para. 26 as the annuity from the date of accident to January 31st, 1993 and an annuity of US$8,472.72 thereafter, *i.e.* until retirement, under para. 26. In his judgment, the learned judge calculated that the annuity, to be due as from February 13th, 1987 (which I take to be the date he found that the respondent had reported to the appellant's agent, Tradimar Ltd., in Santander) to March 20th, 1995, the date of judgment, was US$68,616.42. He then came to the figure of US$45,000 as a lump sum payment in respect of the annuity payable from the date of judgment to the date the respondent would be due to retire on attaining the age of 65. This figure is arrived at after calculating discounts of 6% and 25% as explained earlier and then arriving at the round figure of US$45,000.

Mr. Isola referred us to 1 *Chitty on Contracts*, 26th ed., para. 1778, at 1121–1122 (1989), under the sub-heading "Prospective Loss and Continuing Breaches." This reads as follows:

> **"Prospective loss.** The general rule, in contract as well as in tort, is that damages for all prospective loss flowing from a single cause of action must be recovered once and for all in one action: the plaintiff cannot recover damages for one part of his loss in one action, and then recover further damages for another part of his loss in a subsequent action. Hence the plaintiff should claim at the same time damages for all his loss resulting or likely to result from the defendant's breach of contract, whether the loss is past or is reasonably anticipated in the future. Damages for prospective loss should take into account the contingencies of life and other uncertainties affecting the future."

In the present case the learned judge, in arriving at the above amounts, was making an award in damages as he was asked to do in the respondent's amended statement of claim. The provisions of Article 18 of the ITWF Agreement only enter into this to the extent that that Article provides for the annuity on which the respondent's claim in special damages is based, and this arises from the appellant's failure to pay that annuity in breach of Article 18.

By his judgment, the learned judge clearly found that the respondent was entitled to the annuity he claimed under Article 18 of the ITWF Agreement and, implicitly, that the appellant was in breach of its contract with the respondent in failing to pay that annuity. The loss resulting from that breach was (a) as to past loss: the consolidated amount of the annuity calculated from February 13th, 1987 to the date of judgment, March 20th, 1995 (plus interest); and (b) as to future loss: the annuity from the date of judgment until the respondent attained the age of 65—a period of 10 years and 256 days.

In 1 *Chitty on Contracts*, 26th ed., para. 1775, at 1119–1120 (1989), a distinction is made between a claim for payment of a debt and a claim for damages for breach of contract:

"A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt. . . . The distinction may also be relevant where a contract provides for payment to be made by instalments; thus under a hire-purchase agreement, a claim for arrears of instalments already due is a claim in debt quite distinct from a claim for damages for breach of the contract as a whole. Under a contract for payment by instalments, no claim in respect of instalments due in future may be brought as a claim for a debt, but if the party due to pay the instalments has committed a breach of his obligations which entitles the other party to terminate the contract, then, subject to the general rules on damages, an award of damages may be made in respect of the prospective loss of the future instalments . . . ."

Reference was made in this context to the case of *Overstone Ltd.* v. *Shipway* (9), a hire-purchase case.

With some reluctance, I have come to the conclusion that the respondent's claim is a claim for payment of a debt. The appellant's failure to accede to the respondent's claim for compensation under Article 18 of the ITWF Agreement, as conveyed to the appellant's agent, Algomar Shipping Ltd., by the ITWF in its letter of February 27th, 1990, does not in my view constitute a breach of contract incurring damages, but amounts merely to failure to pay a debt, the reason for such non-payment being that the appellant disputed that it owed any compensation to the respondent under Article 18.

The figure of US$68,616.42 awarded by Pizzarello, A.J. by way of special damages, *i.e.* a lump sum comprising an annuity at the rate of US$8472.72 from February 13th, 1987 to the date of judgment, March 20th, 1995, plus interest thereon at the rate of 10% per annum to the date of judgment, is not disputed and should accordingly stand, although I would myself have given the date of commencement of the annuity as January 29th, 1987, that being the date now established as the date on which the respondent sustained the injury giving rise to his present disability. I find, however, that the respondent is not entitled to any lump sum payment in respect of future loss—namely, an amount comprising future annuities of US$8,472.72 until he attains the age of 65—because the appellant has not, in my view, committed a breach of contract entitling the respondent to damages for prospective loss flowing from a breach of contract. Accordingly, the respondent is not in my view entitled to the sum of US$45,000 awarded by Pizzarello, A.J. by way of damages for prospective loss.

In my view, the respondent is entitled to a declaration that the appellant is under an obligation to pay to the respondent an annuity at the rate of

US$8,472.72 until the respondent attains the age of 65, although this may be of little use to him in view of the fact that the appellant company is no longer in business, the *M.V. Meonia* has been sold and the appellant was, it appears, not insured in respect of Article 18.

Ground 6: that the learned judge erred in holding that the plaintiff had not compromised his claim against the defendant by failing to take into account the plaintiff's evidence in Spanish proceedings as to the intention of the receipt that the plaintiff had signed.

On June 6th, 1987, the respondent signed a document in English and Spanish in which he acknowledged having received from Tradimar Ltd. on behalf of the appellant an amount equivalent to US$2,545.20 "as final settlement of 84 days of sick wages finding them to my entire satisfaction therefore I will have no further claim against *M.V. Meonia*, her owners, operators, managers, agents, *etc*." According to the Swedish Club's "letter of remittance" of June 30th, 1987 to the appellant's agents in Croydon, Algomar Shipping Services Ltd., the period of 84 days is worked out from February 13th, 1987, the day following the respondent's signing-off from the *M.V. Meonia*, to May 7th, 1987, inclusive.

Article 14 of the ITWF Agreement provides that a seafarer shall be entitled to sick pay at a rate equivalent to his basic wages while he remains sick or injured up to a maximum of 90 days. It also provides that at the time the seafarer leaves his ship, he shall be paid an advance of his sick pay for the estimated number of days certified by a doctor for which he is expected to be sick or injured. In his report to Tradimar Ltd. of February 18th, 1987 on first seeing the respondent, Dr. Carillo estimated that the respondent would be off for about eight weeks. It does not appear, however, that any advance payment of sick pay for this period was made to the respondent.

It appears from the papers before us that at some time in May 1987, Dr. Carillo made out a certificate of fitness in relation to the respondent. On May 11th, 1987, he wrote to Tradimar Ltd. to say that the respondent had had a laminectomy operation on April 28th, that the recovery period after the operation had been normal, that he had been released from hospital on May 5th and concluded, in the English translation: "At present he is recovering normally" or, more literally, "he is proceeding on a normal post-operational course". It seems, however, that this is not the actual certificate of fitness referred to at the trial, which appears to have been dated May 7th, 1987.

In evidence, the respondent said that he was not paid anything from February 13th, 1987 to the date of his operation and that he went to Tradimar to see if there was any money for him as a result of his accident. He said that his accident was questioned, that he was told that the owners had done him a favour in having him operated upon and that they had spent a lot of money on him. He was told he would be sent some money

and was sent to see Dr. Carillo again. It seems probable that it was at this stage that Dr. Carillo made out his certificate of fitness in respect of the respondent. In any event, the respondent says that in June he received 84 days' pay and this is confirmed by the receipt of June 6th. It seems that at this stage the respondent was told by Tradimar that Dr. Carillo had declared him to be medically fit. The respondent clearly could not accept that this was the case and he says he went to see Dr. Carillo, who confirmed what Tradimar had told him and said that he could give the respondent no further treatment, as the company would not pay for it. The respondent said that he then went back to Tradimar and told them that he was still not well, but to no avail. He said that on receiving the payment of sick pay for 84 days, he was not aware that under the ITWF Agreement he was entitled to payment for 90 days. He is recorded as saying:

> "I thought the sum they paid me was probably right. I read the receipt. The money was right as to 84 days so I did not see any harm in signing the receipt. I thought that only covered 84 days and it was fine. Of course I could not make any claim in respect of those 84 days. I was being paid them. I asked them [*i.e.*, Tradimar Ltd.], I demanded further medical attention and they responded that after 84 days nothing more and they had done me the favour."

In cross-examination, the respondent was referred to the proceedings he had brought against Dr. Carillo for making out a false certificate of fitness. He denied that in signing the receipt of June 6th, 1987 he had given up his rights against the appellants or that the receipt said that he gave up those rights. He said: "I never renounced my rights. I signed for the money actually received."

The position on June 6th, 1987 would therefore appear to have been as follows. The appellant had received from Dr. Carillo a certificate of fitness in respect of the respondent and had paid him sick pay under Article 14 for 84 days up to May 7th. The appellant must be deemed to have been aware that in addition, the respondent was entitled to leave pay at the rate prescribed in Article 15 up to the date of termination of his employment and under Article 21 to subsistence allowance for the period of paid leave. The respondent, on the other hand, did not accept that he was fit as the pain in his back appeared to be no better, but he did not then know that he was permanently disabled so as to qualify him to claim an annuity under Article 18.

With Dr. Carillo's certificate of fitness before them, it may well be that the staff of Tradimar Ltd. who were dealing with the respondent formed the impression that he was exaggerating his injury. Nevertheless, it appears to me in the circumstances to have been unconscionable on the part of Tradimar, as agent of the appellant, or the appellant itself through Tradimar, to have worded the receipt for 84 days' sick pay which the respondent was required to sign as a waiver of all the respondent's claims against the appellant. Furthermore, apart from being unconscionable, it

appears to me that the appellant was contravening Article 27 of the ITWF Agreement in requiring the respondent to sign a receipt waiving all his claims against it. Article 27, headed "Waivers and Assignments," provides as follows:

> "The Owners undertake not to demand or request any Seafarer to enter into any document whereby, by way of waiver or assignment or otherwise, the Seafarer agrees or promises to accept variations to the terms of this Agreement or return to the Owners, their servants or agents any wages (including any backwages) or other emoluments due or to become due under this Agreement; and the Owners agree that any such document already in existence shall be null and void and of no legal effect."

In my view, in so far as it purports to be a waiver by the respondent of all his claims against the appellant, the receipt of June 6th was obtained in breach of Article 27 and is therefore voidable.

Mr. Isola has also drawn our attention to s.44(1) of the Merchant Shipping Ordinance, which provides, in so far as is relevant, as follows:

> "A seaman shall not by any agreement . . . be deprived of any remedy for the recovery of his wages, to which in the absence of the agreement he would be entitled . . . and every stipulation in any agreement inconsistent with any provision of this Ordinance shall be void."

Again, in my view, in so far as the receipt of June 6th purported to be an agreement between the respondent and the appellant whereby the respondent waived his rights to his entitlement to his wages, it was a contravention of the provisions of s.44(1) and is therefore void.

It appears from Meeson, *Admiralty Jurisdiction & Practice*, at 43 (1993) that "wages" in s.44(1) would clearly include sick pay and leave pay under Articles 14 and 15 of the ITWF Agreement and, it would seem, subsistence allowance under Article 21. "Wages" would not appear, however, to include the annuity for disability provided for in Article 18.

Mr. Aldous agrees that while it was not open to the appellant to contract out of a term of employment of the respondent, it was open to the respondent to compromise any claim he might have against the appellant on receipt of payment—in this case, payment of sick pay for 84 days. Mr. Aldous concedes that standing on its own, it cannot be said conclusively that the terms in which the receipt of June 6th, 1987 is worded constitute a compromise of all the claims the respondent might have against the appellant, but he submits that when the terms of the receipt are considered in conjunction with the terms of the respondent's accusation against Dr. Carillo, dated November 3rd, 1987, in Penal Court No. 2, Santander, it is clear that the respondent himself believed that he had compromised all claims he had against the appellant in signing the receipt of June 6th. The respondent, Mr. Aldous says, cannot say one thing in the court in Santander and the opposite in the court in Gibraltar.

As I have already said, in my view, the purported waiver of the respondent's claim against the appellant contained in the receipt of June 6th contravened Article 27 of the ITWF Agreement and s.44(1) of the Merchant Shipping Ordinance and is of no effect, and it is therefore unnecessary to consider what the respondent's understanding of the receipt was. But in any event, it appears to me to be quite clear, as far as the respondent's rights under Article 18 of the ITWF Agreement are concerned, that neither on June 6th, 1987, when the respondent signed the receipt of 84 days' sick pay, nor on November 3rd, 1987, when he preferred his accusation against Dr. Carillo in Penal Court No. 2 at Santander, were his rights under Article 18 in his contemplation.

It appears that the hearing of the respondent's accusation against Dr. Carillo took place on October 29th, 1990 and that just under a year prior to that hearing, on November 15th, 1989, evidence had been taken by the Santander court for the purposes of these proceedings from the Court Medical Officer. He gave evidence as to the respondent's medical history up to the time of his examination of the respondent some weeks earlier and as to his findings on examination of the respondent. He concluded his evidence by saying that the respondent was "unable to carry out his normal work or any other work which involves the lumbar part of his spine." It therefore appears that it was two years after the respondent had preferred his accusation against Dr. Carillo that he was diagnosed for the first time as permanently incapacitated as a result of the injury he had sustained in early 1987.

In his accusation against Dr. Carillo, the respondent dealt with his accident and with subsequent events leading to his seeing Dr. Carillo on February 18th, 1987 and his operation on April 28th. He went on (in the English translation):

> "Since then I remained on rehabilitation without the said doctor [Carillo] examining me again, resulting in a great surprise when I went to the Tradimar office with the object of collecting the sums that correspondended to me for being on sick leave, I found that in the said office there was the medical certificate declaring a person fit after having been ill, issued by the said doctor. . . . Tradimar at that moment with the doctor's medical certificate declaring a person fit after having been ill in their hands, demanded me to sign a discharge in settlement of my rights as a person who has sustained an accident, which I had to do as I had no income at all with which I could sustain myself, in view of my situation as a sick man in a foreign country."

It seems clear from this passage that by November 3rd, 1987, the respondent was aware from his own knowledge or because it had been pointed out to him that he had compromised his claims against the appellant, and he explained why he was obliged to accede to Tradimar's demand that he do so. But while he may at that date (November 3rd,

1987) have believed that he had forgone his claim to the extra six days of sick pay due to him under Article 14 of the ITWF Agreement, and he may perhaps have believed that he had forgone his claim to leave pay and subsistence under Articles 15 and 21 respectively, he would not at that date have considered that he had forgone any claim he might have had against the appellant under Article 18, because at that date he still had no reason to believe that his injury was not susceptible of a complete cure or that his injury would cause him to be permanently disabled from work as a seaman. As the respondent said repeatedly in evidence, in signing the receipt of June 6th, 1987, he was acknowledging receipt of sick pay due to him under Article 14 as at that date. On November 3rd, 1987, in his accusation against Dr. Carillo, in referring to his signing of the receipt as "a discharge in settlement of my rights as a person who has sustained an accident," the respondent was clearly referring only to the discharge of his rights to six days' additional sick pay under Article 14 and perhaps to his rights to leave pay and subsistence under Articles 15 and 21.

In these circumstances, it appears to me that the learned judge below was justified in his view of the receipt of June 6th, 1987, when he said: "I do not read that document to be a compromise and a full discharge by the plaintiff of his claim [under Article 18] against the defendant. It is my view that it is a discharge for the moneys due for the 90 days under Article 14 and is limited to that." In my view, Ground 6 of this appeal also fails.

Conclusion

I would allow this appeal only to the extent that I would set aside the sum of US$45,000 awarded by way of damages for prospective loss but, as stated earlier in relation to Ground 5 of this appeal, I would add a declaration that the respondent is entitled to receive payment of an annuity of US$8,472.72 on January 29th of every year until he attains the age of 65.

FIELDSEND, P.: This is an appeal by Algol Maritime Ltd. ("the appellant") against a judgment in favour of a seaman, Acori ("the respondent"), in respect of injuries sustained by him aboard the appellant's ship on January 29th, 1987. The claim was based on a contract of employment in which were incorporated the terms of the International Transport Workers' Federation Collective Agreement. It was alleged that the respondent injured his back when he slipped and fell whilst working on the appellant's ship and that the appellant had failed to pay him the compensation due under Article 18 of the Collective Agreement. The terms of the agreement and the facts are fully set out in the judgment of Huggins, J.A., which I have had an opportunity of seeing in draft.

It was not contested on appeal that the respondent suffered some injury from his accident, but it was argued (a) that he could not succeed because

the accident he suffered was due to some fault on his part; (b) that his injury which now persists was caused by an operation he underwent and not by the accident; (c) that he failed to report the accident and his injuries within a reasonable time; (d) that his degree of disability should not have been assessed as a seafarer, and that a 40% general disability was all that was justified; (e) that in any event the award should have been only for the annuity due and not for a lump sum as well; and (f) that his claim had been compromised by a disclaimer on June 6th, 1987. I am in respectful agreement with the conclusions reached by Huggins, J.A. and Davis, J.A. on items (b) to (f) above. But unfortunately I do not agree with their conclusion on item (a). My reasons follow.

Item (a): Fault

Article 18, upon which the seaman relies, provides for the case where he suffers an accident through no fault of his own. Mr. Aldous submits that "fault" must have the same meaning as it bears in the context of the Law Reform (Contributory Negligence) Act 1945. There it is not judged on the basis of whether the person injured was in breach of a duty to a defendant proved to have been negligent, but on the basis of whether in acting as he did, the person injured failed to take reasonable care for his own safety. The conclusion Mr. Aldous contends for is that if the seaman failed in any respect to care for his own safety, which amounts to what would be categorized as contributory negligence in a tort case, he cannot recover.

Mr. Isola for the seaman accepts that fault must mean negligence, but contends that it means substantial fault or negligence. This is a proposition I have great difficulty in accepting as a matter of interpretation. Article 18 imposes a very wide burden on a ship owner in respect of any accident, including accidents occurring whilst travelling to or from the ship, without any fault whatsoever on the part of the ship owner. In my view, it is not unreasonable to require a person claiming under Article 18 to show that he was not at fault in the same sense as fault is categorized in assessing whether he was contributorily negligent.

Whether or not the person claiming was at fault has to be determined in all the circumstances of the particular case. It is not every inadvertence of the person claiming that will preclude his claim: if, for example, a seaman making his way along a quay to his ship were through inattention to fail to see a hazard such as a slippery railway line, he would in my view be at fault and be debarred from a successful claim against the ship owner. The result may well be different if a seaman is walking along a steel walkway aboard his ship which has, unbeknown to him, become slippery or icy. The case of *Marsh* v. *Kerwin* (6) shows that special considerations militating in favour of a workman apply to a workman in his workplace. As Lord Tucker said in *Staveley Iron & Chemical Co. Ltd.* v. *Jones* (12) ([1956] A.C. at 648):

> ". . . [T]he purpose of imposing the absolute obligation [under the Factory Act] is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

It may well be, therefore, that in assessing whether or not there has been fault within the meaning of Article 18, an approach somewhat weighted in a seaman's favour may be adopted where the accident relied upon occurred on the ship that was the seaman's workplace.

On the other hand, one must not lose sight of the fact that this case differs from the type of case in which contributory negligence is relied on to defeat or to minimize a claim. Here it is an essential ingredient of the respondent's case that he was without fault and there is an onus upon him to prove a negative—an onus that is notoriously difficult to discharge.

The circumstances of the accident were fully canvassed in the evidence, both in evidence-in-chief and in cross-examination, and the respondent being the only witness, the primary facts were not in dispute. The respondent was doing work that he was required to do and had been working from about midday until 6 p.m. when the accident occurred. He and others had been working together putting canvas over a load of timber to protect it from the weather and the sea. The final stage of this work was to put pieces of timber over the canvas before wires were fastened over the whole to hold down the cargo. The temperature was below freezing and both the deck and the canvas were icy and slippery. The respondent was aware of the ice and the cold and said in cross-examination that he kept slipping. He was an experienced seaman and was clearly aware of the hazards of the work he was doing, saying that he walked with great care. Although the light was poor, he said that he could see what he was doing.

At the time of the accident, his fellow workers had retired to have coffee but he remained alone to finish the task by putting the last piece of timber on the canvas, although there was no evidence that he had been instructed to continue alone. He was apparently on top of the canvas that was covering the cargo when he picked up his last piece of timber, which was 5m. long, 10 cm. wide and 5 cm. thick. He carried it across his chest with his arms cupped below it. As he moved forward, his feet slipped backwards and he felt a sharp pain in his back as he threw the timber forwards, presumably to keep his balance. In fact he fell face downwards and was unable to move for some while because of the pain.

Mr. Aldous submitted that it was up to the respondent to assess how he could perform his work safely, particularly after he was left on his own and that in any event, he should have taken sufficient care of himself to ensure that he did not slip or that if he did slip, to ensure that he did not fall so as to injure himself. There was no evidence to show how the group had been working before the respondent was left on his own and no

evidence that anyone was supervising the way the work was being or should be done. It was, Mr. Aldous submitted, up to the respondent, as an experienced and careful seaman, not to put himself in a situation on a slippery surface where, if he did slip, as well he might, he could not properly control his fall.

The respondent encumbered himself on an uneven surface with an awkward piece of timber of considerable size, which he had to carry in both arms, thus making it the more difficult to control his balance, and even more difficult to control any fall if he did slip. He did not attempt to show in his evidence that the only way in which he could perform his task was to pick up his timber and carry it as he did. He has not shown that he could not just as easily—and clearly, more safely—have pulled the piece of timber into position without picking it up.

The learned trial judge dealt very briefly with this issue. He said that the respondent had been doing his job and that it was not suggested that he had been doing it carelessly, although this was the very fact in issue; he said that the respondent had slipped whilst carrying a heavy weight, a natural hazard of the work he was doing, adding that he could not conceive that the accident had been the respondent's fault. With respect to the learned judge, he has overlooked the importance of the fact that in encumbering himself with an awkward load in what he knew were difficult conditions, he must have altered his normal centre of gravity and so impaired his balance making it more likely he might slip and less easy to control his fall if he did slip.

This is not a case in which the trial judge was in any better position than is this court to draw inferences from the facts which were not in dispute: see *Benmax* v. *Austin Motor Co. Ltd.* (2). In my view, the inference to be drawn from the admitted facts is that the respondent did not act as a prudent person taking care of his own safety would have acted. He has certainly not shown, as he had to do to succeed, that the accident occurred through no fault of his own. I have come to the conclusion that for these reasons, the respondent cannot succeed.

The learned judge awarded the respondent $68,616.42 as the amount of his annuity not paid at the date of judgment. There was no appeal on this award. He also awarded $45,000 in respect of future loss and it is against this additional award that the appellant appeals.

In my view, the appellant's contention is correct, although not for precisely the reasons it advanced. On analysis, despite the way in which his claim was framed, the respondent's remedy lay not in damages for breach of contract, but for payment of what was due under the contract, *i.e.*, for payment of a debt owing. This distinction is drawn in 1 *Chitty on Contracts*, 26th ed., para. 1775, at 1119–1120 (1989) and is exactly in point here.

The respondent did not plead—and on the facts could not maintain—that there had been a material breach of the contract entitling him to

rescind. He succeeds on the basis that the appellant did not comply with its obligation to pay his annuity and that he is entitled to recover what was due at the latest on the date of judgment.

For these reasons, I would allow the appeal on this aspect of the case to the extent that the award of $45,000 for prospective loss should be set aside, but I would order that the respondent is entitled to receive, as claimed, future instalments of the annuity as they fall due. The majority of the court having found that the respondent was not at fault, that will be the order of the court.

Appeal allowed in part.
