[1999–00 Gib LR 1]

ALGOL MARITIME LIMITED v. ACORI

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Nicholls of Birkenhead, Lord Steyn and Lord Clyde): July 21st, 1997

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

Tort—negligence—causation—novus actus interveniens—medical treatment exacerbating injury not new cause breaking chain of causation unless administered without reasonable care and skill

Shipping—seamen—injury at work—contractual provision for annuity if "ability to work" reduced by injury in service to be construed in context as referring to ability to work as a seaman, not to work generally—entitlement calculated against degree of "disability" accordingly

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

The respondent was employed by the appellant company as a seaman. His contract of employment incorporated the standard terms of the International Transport Workers' Federation Collective Agreement. They stipulated, *inter alia*, that 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.

The respondent slipped and fell whilst carrying timber on board the appellant's ship in icy and hazardous conditions. He suffered a serious back injury. He complained of back-pain to the captain of the ship on the same day, and reported the accident to the appellant's agent when the ship reached port two weeks later. He continued to suffer pain and underwent a laminectomy operation on the advice of the doctor employed by the appellant. The operation did not improve his condition. Experts subsequently questioned the value of the treatment and testified that the operation often itself resulted in long-term pain. However, there was no indication that the doctor had acted negligently.

The respondent applied for an annuity, based on medical evidence that he was 100% disabled from working as a seaman. Although he was estimated to be only 40% disabled generally, he was unable to find light work on

shore. The appellant refused to pay him compensation and he brought proceedings in the Supreme Court, which awarded the sums claimed.

On appeal, the Court of Appeal held that the respondent had been acting in the normal course of his employment when injured, that there was no evidence of contributory negligence, and that under the *contra proferentem* principle, his contract did not require that he be completely blameless before he could receive compensation for his accident. Applying the same principle, the phrase "ability to work" referred to work as a seaman, not work generally, and therefore the relevant degree of disability for calculating the annuity was 100%, not 40%. Furthermore, the medical treatment he had undergone had not broken the chain of causation between the accident and his injury, since the doctor treating him had acted with reasonable skill and care. He had also reported the accident and made his claim for an annuity within a reasonable time. The proceedings in the Court of Appeal are reported at 1995–96 Gib LR 146.

On further appeal to the Judicial Committee, the appellant submitted that (a) applying the test of contributory negligence, the respondent had been at fault within the meaning of his contract, since he had failed to exercise reasonable care for his own safety; (b) since his continuing pain and disability were the result of his operation, rather than the accident, this treatment constituted a *novus actus interveniens* in the chain of causation; (c) the respondent had breached his implied duty to report his injuries and make his claim for compensation within a reasonable time, by failing to report the accident in detail on the day it occurred and waiting three years before applying for an annuity; and (d) the annuity was to be calculated against the respondent's degree of unfitness for work generally, since if he found work on shore he would be placed in a better position than prior to the accident.

Held, dismissing the appeal:

(1) The Court of Appeal had properly found that the appropriate test of whether the respondent had been injured "through no fault of his own" was whether he had been guilty of contributory negligence. Notwithstanding that he had been working on an icy surface whilst encumbered with a large piece of timber, he had not been careless for his own safety, since he had acted on instructions and the only way of avoiding the risk of an accident would have been to stop working. Since his job as a seaman entailed many inherently hazardous tasks, which he could not simply refuse to carry out, he was not automatically negligent for performing them (paras. 7–8).

(2) As held by both the courts below, the chain of causation between the respondent's accident in the course of the appellant's service had not been broken by the laminectomy operation since it was part of the treatment for his injury and the medical professionals who had recommended and carried out the procedure had acted with due care and skill. The Judicial Committee would not disturb findings of fact by the lower

courts save in exceptional circumstances, and agreed that the doctors in this case had exercised due care and skill (paras. 10–11).

(3) The scope of the respondent's implied duty (if such a duty existed) to report the accident within a reasonable time could not have been greater than (i) to provide the appellant with sufficient detail to enable it to investigate the accident, and (ii) to claim compensation as soon as it became apparent that the disability was permanent. The Judicial Committee agreed with the findings below that the respondent had put the appellant on notice by reporting the accident to its agents when the ship reached port and that the claim for an annuity three years later also discharged any implied duty (paras. 12–14).

(4) Since the terms of the collective agreement were concerned solely with the employment of "seafarers," the phrase "ability to work" should *prima facie* be construed as meaning ability to work *as a seaman*, and the "degree of disability" related to that kind of work. No right to an annuity would arise at all if his ability to work on ships had not been compromised. The opportunity to obtain work on shore as well as drawing an annuity was accounted for if the collective agreement were regarded as providing exceptional protection for workers in exceptional employment. The appeal would be dismissed (paras. 18–20).

Cases cited:
(1) *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd.*, [1949] W.N. 109; [1949] 1 All E.R. 588.
(2) *Rothwell* v. *Caverswall Stone Co. Ltd.*, [1944] 2 All E.R. 350; (1944), 113 L.J.K.B. 520.

G. Aldous for the appellant;
J. Flaux, Q.C. and *P.J. Isola* for the respondent.

1 **LORD BROWNE-WILKINSON,** delivering the judgment of the Board: This is an appeal from a judgment of the Court of Appeal for Gibraltar (Fieldsend, P., Huggins and Davis, JJ.A.) which, in substance, dismissed an appeal by the appellant ("the defendant") from a judgment of the Supreme Court of Gibraltar (Pizzarello, A.J.) giving judgment against the defendant in the sum of US$68,606.42, together with interest.

2 The respondent ("the plaintiff") was employed by the defendant under a seaman's employment contract dated September 2nd, 1986. That contract incorporated the terms of a collective agreement laid down by the International Transport Workers Federation ("the ITF"). Article 18 of the collective agreement provides 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 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”

3 The plaintiff suffered an accident on board the *M.V. Meonia* on January 29th, 1987. The accident occurred whilst the plaintiff was working alone on deck and carrying a heavy plank across an icy tarpaulin. He fell, suffering injury to his back.

4 There was a large number of matters in issue at the trial and rather fewer on the appeal to the Court of Appeal. Only four matters were the subject of the appeal before their Lordships, namely:

(a) whether the accident to the plaintiff occurred “through no fault of his own” as required by art. 18;

(b) whether a laminectomy operation performed on the plaintiff after the date of the accident broke the chain of causation between the accident and the plaintiff’s disability;

(c) whether the plaintiff had reported the accident to the defendant with sufficient particularity and within a reasonable time; and

(d) whether, in computing the amount of the annuity to which the plaintiff was entitled under art. 18, the extent of his disability related to his disability to work as a seafarer or his disability to work generally.

The fault issue

5 The plaintiff’s case at trial was that the accident occurred on January 29th, 1987 in icy conditions just before the departure of the ship from Helmstad, Sweden. He had been engaged with other crew members in stacking timber as deck cargo. The timber had to be covered by a

tarpaulin which was to be held in place by chains. In order to prevent the chains chafing the tarpaulin, planks of wood had to be laid on top of the tarpaulin. At the time of the accident the plaintiff was alone, the other crew members having gone below. The accident occurred whilst the plaintiff was carrying a piece of 4 x 2 in. timber, some 16 ft. long. He was, at the time, on top of the stacked timber, which was covered by the tarpaulin. To his knowledge, the tarpaulin was icy and he was aware of the danger which such ice presented. He slipped on the icy canvas and injured his back. His evidence, apparently accepted by the judge, was that he was walking at the time "with great care."

6 The trial judge found that the accident occurred through no fault of the plaintiff's. However, it is not clear what test he was applying in reaching that conclusion. It was, and still is, the defendant's contention that the relevant test in determining whether the plaintiff was at fault is the same as that applicable in cases of contributory negligence, *i.e.* a failure by the plaintiff to use reasonable care for his own safety. The plaintiff, on the other hand, had contended that this could not be the correct test, since on that basis any carelessness, however slight, would lead to the result that the seafarer would have no claim at all under art. 18. It appears that the judge's finding of no fault may have been affected by his accepting the plaintiff's submissions on this issue.

7 In the Court of Appeal all three members of the court apparently accepted that the appropriate test of fault was the same as that applicable in the case of contributory negligence. However, they differed as to the result of applying that test. Fieldsend, P. held that the plaintiff was at fault in that he had encumbered himself with an awkward load in slippery conditions, thereby making it more likely that he would slip. The other two members of the court found the plaintiff not to be at fault. They held that he was doing the job he had been instructed to do in dangerous conditions of which he was aware. He had exercised as much care as possible in the circumstances and the only way in which he could have avoided the risk of slipping was to stop doing the job he was instructed to do. For a seaman to continue to do work which he had been instructed to do in circumstances which he knew to be dangerous did not amount to carelessness for his own well-being.

8 Their Lordships agree with the view of the majority of the Court of Appeal. A seaman's working life involves doing many dangerous tasks, and the doing of such tasks if ordered to do them is not, *per se*, negligent. Only if the judge had found (which he did not) that the plaintiff should have stopped doing the job that he was instructed to do and sought assistance could he have been found to be at fault. The plaintiff was not careless in the way he carried out an inherently dangerous task. In the circumstances, their Lordships cannot find any ground to differ from

the trial judge's finding of no fault, even though the judge reached his conclusion on a different basis.

The causation issue

9 The judge found that the injury sustained by the plaintiff was a pull-off injury to the bones of lumbar 5 vertebrae. He also made the following findings:

> "The injury was complicated by an operation which was performed on the plaintiff in Spain, whereby he underwent a laminectomy operation for the removal of L5/S1 disc.
>
> 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*. The operation, with hindsight and in the opinion of the expert medical witnesses, Mr. Wade and Mr. Brueton, ought not to have been attempted where there was no evidence of sciatic pain and so soon after the injury was sustained. However, that is not to say that the doctors treating the plaintiff were negligent in any way and they dealt with the plaintiff at the time with the advantage of having an X-ray and a CAT scan. Their intervention did not break the proximate chain of causation."

10 The Court of Appeal unanimously upheld that decision, having directed themselves in accordance with the law as laid down in *Rothwell* v. *Caverswall Stone Co. Ltd.* (2) and *Hogan* v. *Bentinck W. Hartley Collieries (Owners) Ltd*. (1), *i.e.* that even if the laminectomy aggravated the effects of the accident, the chain of causation was not broken if it was part of the treatment for the injury, but if the treatment was negligently or inefficiently undertaken or performed it might amount to a new and separate cause of the injury, in which case the chain of causation between the original accident and the damage complained of might be broken.

11 Mr. Aldous, for the defendant, accepted that this was the correct approach in law. However, he sought to demonstrate that the finding of fact that the laminectomy did not break the chain of causation was erroneous. Their Lordships do not, save in exceptional circumstances, interfere with concurrent findings of fact made by the courts below. Their Lordships can see no grounds for doing so in the present case and, indeed, agree with the conclusions reached by the courts below.

The notice issue

12 It was the defendant's case at trial that although art. 18 contains no express provision to that effect, the plaintiff was under a duty to report the accident to the defendant within a reasonable time, that he failed to do so, and in consequence was not entitled to an annuity under art. 18. The basis

for this contention was that a term to that effect was to be implied in art. 18, an implication which, to an extent, was admitted by the plaintiff in answers given to interrogatories. It is unnecessary for their Lordships to consider the exact scope of any implied term or the admissions made in the interrogatories, since, on any basis, the implied obligation cannot have been greater than to give the defendant, within a reasonable time, notice of the occurrence of the accident with sufficient particularity to enable it to investigate it, and to put forward a claim to an annuity as soon as it appeared that the disability was permanent.

13 The facts as found by the judge were that the captain of the vessel made an entry in the ship's log on the date of the accident that the plaintiff had reported a pain in his back, but that the plaintiff had not, on that occasion, informed the captain of the accident. He further held that the plaintiff had reported the accident to the defendant's agents on February 14th, 1987, when the ship reached Santander, and that, although such report did not state the date of the accident, it was sufficient to put the defendant on enquiry as to the circumstances. He found that the first occasion on which the plaintiff put forward a formal claim based on permanent disability under art. 18 was in the letter dated February 27th, 1990.

14 Again, both the trial judge and the Court of Appeal held that by these communications the plaintiff had, within a reasonable time, given notice of the accident and of his claim sufficient to satisfy the implied term referred to above. There being concurrent findings on these issues, their Lordships again would not interfere, but in any event they agree with the reasoning and decision of the Court of Appeal on this issue.

The disability issue

15 The question is to decide what is the nature of the disability referred to in art. 18. Is it disability from working as a seafarer or disability from doing any work whether afloat or on shore? The importance of the point is that the trial judge held that as a result of the accident, the plaintiff was 100% disabled from working as a seafarer (giving rise to an annuity equal to 86% of his basic pay) but only 40% disabled from work generally (giving rise to an annuity of 30% of his basic pay). Both the trial judge and the Court of Appeal held that the disability referred to in art. 18 was disability to work as a seafarer.

16 This issue is a pure question of construction of the collective agreement, which gives few indications as to the correct answer. The ITF has been concerned to safeguard the interests of those employed in ships operating under flags of convenience. The ITF entered into a common form of special agreement with the defendant as owner of the vessel, under which the defendant agreed to employ all seafarers on the vessel on the terms of the collective agreement and to incorporate its terms into

each seafarer's contract of employment. The collective agreement is a common form agreement applying to crews on flags of convenience ships. It is wholly concerned with the terms and conditions of employment of "seafarers," the term which is used throughout the agreement.

17 It is against that background that the words in art. 18, "whose ability to work is reduced," and "Degree of disability" at the head of the left-hand column, fall to be construed. The defendant submits that the words "ability to work" are general and that there is no sufficient ground for treating them as though they referred to work as a seafarer. It also pointed to the anomaly of, for example, the present case in which the plaintiff is 100% disabled from work as a seafarer (which would give rise to an annuity of 86% of his basic wage as a seafarer) but could theoretically be employed ashore, where his earning ability is only diminished by 40%. He might, therefore, be better off as a result of his accident than if no accident had occurred.

18 These are persuasive submissions but, not without hesitation, their Lordships are persuaded not to accept them. The "work" from which the seafarer is disabled at the time of the accident is work as a seafarer. It is his "ability to work" as a seafarer which is "reduced as a result thereof." Unless his ability to work as a seafarer is reduced by the accident, art. 18 does not apply at all. It is that reduction in ability which gives rise to the compensation provided by the article, and therefore the phrase "Degree of disability" must *prima facie* refer to the same reduction in ability to work. There being nothing in the collective agreement concerning anything other than employment as a seafarer, there is nothing which indicates that this *prima facie* construction is incorrect.

19 In these circumstances, their Lordships agree with the trial judge and the Court of Appeal that in the column "Degree of disability," the percentages refer to the degree of inability to work as a seafarer. The anomaly of the seafarer being able to get work ashore in addition to his disability annuity is accounted for by treating art. 18 as providing protection for those who, as seafarers, are exposed to exceptional perils of a life more dangerous than that of most ordinary employees.

20 For these reasons, which are largely the same as those given by the members of the Court of Appeal in their impressive judgments, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

21 In the courts below, the Swedish Club was ordered to pay the plaintiff's costs on the grounds that they had been conducting the defence and pursuing the appeal in their own interests; the defendant company being insolvent. For the same reasons, the Swedish Club must pay the plaintiff's costs of the appeal before their Lordships' Board.

Appeal dismissed.