J.C.
1893.
April 24, 25.

LORD HERSCHELL, L.C.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
HON. G. DENMAN.

CAMERON AND ANOTHER - APPELLANTS
DEFENDANTS

AND

NYSTROM - - - - RESPONDENT
PLAINTIFF.

Negligence—Master and Servant—Employers' Liability—Defence of Common Employment—When available.

Where a person is sued in respect of an injury caused by the negligence of one of his servants, the defence of common employment is only available to him where he can show that the person suing was also his servant at the time of the occurrence of the injury.

Johnson v. *W. H. Lindsay and Co.*(1) approved and applied.

Judgment of the majority of the Court of Appeal (*Williams* and *Denniston*, JJ., *Prendergast*, C.J., and *Edwards*, J., dissenting, the latter, as junior member of the Court withdrawing his judgment), (1891) 9 N.Z.L.R. 413, affirmed.

(1) [1891] A.C. 371; rev. (1889) 23 Q.B.D. 508.

APPEAL from the judgment of the majority of the Court of Appeal (*Williams* and *Denniston*, JJ., *Prendergast*, C.J., and *Edwards*, J., dissenting, the latter as junior member of the Court withdrawing his judgment), (1891) 9 N.Z.L.R. 413, on cross-motions for judgment removed into the Court of Appeal by consent, it being agreed that that Court should have power to decide any issues of facts which had not been submitted to the jury in the Court below, and findings upon which it might be necessary to enable the Court to give judgment.

Bigham, Q.C., and *Sharpe*, for the appellants.

Ollivier (of the New Zealand Bar), for the respondent, was not called upon.

Cur. adv. vult.

The judgment of their Lordships was delivered by

LORD HERSCHELL, L.C. The respondent, the plaintiff in this action, was a seaman employed on board the vessel *Brahmin*. He was at work upon that vessel at the time

when he received the injury in respect of which the action was brought. The injury was caused by the fall of some coils of wire, owing to the breaking of part of the gear which was being used in the discharging of the cargo. The discharging gear was, as the jury have found, fixed in an improper and negligent manner, and its being so fixed was the cause of the injury to the plaintiff.

The defendants were a firm of stevedores employed in discharging the vessel. They were engaged as stevedores by the master of the vessel to discharge her at the rate of so much a ton. The vessel was to find the gear, but the stevedores brought their own men, foreman and workmen, to effect the discharge. The person guilty of the negligence was the foreman of the defendants, a man named Gellatly, who rigged up the gear.

The question raised in the action was whether, in those circumstances, the defendants were responsible to the plaintiff for the injury he received.

At the trial, apart from a subsidiary question of contributory negligence, to which their Lordships will call attention presently, the only defence raised, beyond the defence that there was no negligence—a defence which has been negatived by the jury—was that the plaintiff could not maintain an action against the defendants, even assuming that the foreman was their servant and that it was by his negligence the injury was occasioned, because the plaintiff was engaged in a common employment with the stevedores' men, and that their being thus engaged in a common employment precluded the plaintiff in point of law from any right of action.

At the time when the question was argued before the Court below the case of *Johnson* v. *Lindsay*, in which there was a difference of opinion in the Court of Appeal, had been decided in the Court of Appeal(1), but not in the House of Lords, *sub. nom. Johnson* v. *W. H. Lindsay and Co.*(2). The majority of the Court of Appeal had held, *Fry*, L.J., dissenting, that it was not necessary to the defence of common employment that the plaintiff should be in the employment of the master whose servant's negligence caused him injury. The majority of the Court came to the conclusion that the subcontractor and his servants might all be regarded as in

(1) (1889) 23 Q.B.D. 508. (2) [1891] A.C. 371.

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the employment of the contractor, whose servant the plaintiff was, and that this sufficed to establish the defence of common employment. In the House of Lords the decision was reversed, and it was held that in order to make this defence available there must not only be common employment but common employment under the master whose servant was guilty of negligence.

It is to be observed that the question of common employment only arises as a defence, on the assumption that the person who did the injury was the servant of the person sued. Unless this be the case the person sued is under no liability, because he is sued in respect of an injury not caused by himself or by anyone for whom he is responsible. And therefore common employment only becomes necessary as a defence, and is only relevant when the person doing the injury is a servant of the person sued. In their Lordships' opinion, the House of Lords has determined that where the person sued has committed negligence by one of his servants the defence of common employment is only available to him where he can show that the person suing was also his servant at the time of the occurrence of the injury. In the judgment delivered by one of their Lordships(3) in the case of *Johnson* v. *W. H. Lindsay and Co.*, the law was thus stated: "These "authorities are sufficient to establish the proposition that "unless the person sought to be rendered liable for the "negligence of his servant can show that the person so "seeking to make him liable was himself in his service, the "defence of common employment is not open to him"(4). It is clear, therefore, that in the present case the defence of common employment can only arise and be successful if the defendants can show, admitting that the negligence of their foreman Gellatly caused the injury, that the plaintiff was in their service. Otherwise the doctrine of common employment has no application. When that was once found to be the law, and the learned counsel who appeared for the defendants was pressed with it, he admitted that it was impossible for him, after the decision of the House of Lords in *Johnson* v. *W. H. Lindsay and Co.*, to maintain that the defendants were free from liability by reason of the doctrine of common employment.

(3) Lord Herschell. (4) [1891] A.C. 371, 377.

But he then contended that the defendants were not liable, inasmuch as the person who caused the injury was not at the time really acting in the service of the defendants, but as the servant of the shipowner. No doubt, if that could be established, it would afford a defence to the action. This appears to be the only question open on this appeal, after the decision in *Johnson* v. *W. H. Lindsay and Co.*

When the evidence is examined the contention appears to their Lordships to be utterly untenable. Gellatly was employed and paid by the stevedores. At the time when he was doing the work in question he was doing it for the stevedores, inasmuch as the stevedores were to be paid a lump sum for discharging the vessel; and it was to enable them to earn the sum so contracted to be paid to them that Gellatly was working at the time he did the act complained of. There was thus present every element necessary to establish that he was the servant of the stevedores. The case for the defendants must go this length that the stevedores would not have been liable, but that the shipowner would, to any person injured by the negligence of one of the stevedores' men. It seems to their Lordships only necessary to state the length to which the proposition of the defendants must go to show that it cannot be sustained.

Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedores' servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores, and not the servants of the shipowner. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other

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relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work.

For these reasons their Lordships think that the main question raised in this action must be decided in favour of the plaintiff.

Another question was raised at the trial: Whether the defendants are exempt from responsibility, because the plaintiff was in a position in which he would be likely to be injured if any accident happened to the discharging gear? The jury found that placing the plaintiff where he was working at the time of the accident was in the circumstances an act of negligence. It was admitted by the learned counsel for the defendants that unless that involved, and it clearly does not involve, a finding of personal negligence on the part of the plaintiff, it was impossible to argue that it was a defence to the action.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Lee, Bolton, and Lee* (London), agents for *H. N. Nalder* (Lyttelton).

Solicitors for the respondent: *A. R. and H. Steele* (London), agents for *Stringer and Cresswell* (Christchurch).

CASE ANNOTATION.

Mentd. *Solomon* v. *The King*, [1933] N.Z.L.R. 373, 383.

For further Case Annotation, see current Supplement to *34 E. and E. Digest*, title *Master and Servant*, Case No. 61.

STATUTE ANNOTATION.

The defence of common employment was abolished by s. 18 of the Law Reform Act, 1936.