[HIGH COURT OF AUSTRALIA.]

O'CONNOR . . . . . APPELLANT;
PLAINTIFF,

AND

COMMISSIONER FOR GOVERNMENT TRANSPORT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Apr.* 2, 13.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Negligence—Master and servant—Duty of care—Reasonable care for safety of employee by providing proper and adequate means of performing work without unnecessary risk—Duty to warn of unusual or unexpected risks—Duty to instruct in performance of work—Experienced plumber—Engaged to shorten corrugated iron sheeting comprising awning—Adequately provided with tools and equipment—Plumber going on to awning—Awning giving way under weight—Plumber fatally injured—Whether duty of employer fulfilled—Action by widow for compensation.

An employer is under a duty, either himself or by his servants or agents, to take reasonable care for the safety of his employee by providing him with proper and adequate means for carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury.

O., an experienced plumber, was directed by his employer to accompany certain fellow-employees to the site of a tramway starter's box for the purpose of reducing the length by which an awning over the box extended over the footpath. The party took with them trestles, a plank and wedges to assist them in performing the work. The work involved the removal, cutting and replacement of certain corrugated iron sheets forming the roof of the awning and also a certain amount of carpentry. O. went on to the awning for the purpose of removing the iron sheets and whilst so engaged fell when portion of the awning gave way under him due to the presence of dry rot. He sustained fatal injuries. In an action by O.'s widow to recover damages from his employer she alleged negligence in the construction, maintenance and repair of the structure. in allowing it to fall into an unsafe and dangerous condition, in failing to ensure that it was safe and suitable for the work to be performed thereon and in failing to warn O. of its dangerous condition.

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Held: (1) that the case was not one of a defect in premises provided by the employer as those in which the employer was to do his work, the awning being the very thing to be worked at; and

(2) that the employer had not failed in his duty to O., the question of how O. should perform the work being an ordinary one for an experienced man to decide.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

On 12th March 1951 Elsie Mary O'Connor on her own behalf and on behalf of her infant son commenced proceedings in the Supreme Court of New South Wales against the Commissioner for Government Transport to recover damages pursuant to the *Compensation to Relatives Act* 1897 (N.S.W.) by reason of the death of her husband James Michael O'Connor whilst working as a plumber in the employ of the defendant. At the time of his death the deceased had been working on the awning of a tramway starter's box in Erskine Street, Sydney, removing certain corrugated iron sheets therefrom when portion of the awning gave way under him due to the presence of dry rot and he fell to the ground sustaining fatal injuries. The plaintiff by her declaration alleged that the defendant was guilty of negligence in the construction, maintenance and repair of the awning, in the control, management and inspection thereof, in allowing it to get into a dangerous and unsafe condition, in failing to ensure that it was safe and suitable for the work which the defendant was required to perform thereon and in failing to warn him of its dangerous condition. The defendant denied negligence.

At the trial of the action before *Brereton* J. and a jury of four a verdict was returned for the plaintiff in the sum of £4,000, apportioned as to £3,300 for the plaintiff personally and as to £700 for her infant son.

On appeal by the defendant to the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) the verdict and judgment for the plaintiff was set aside and judgment entered for the defendant.

From this decision the plaintiff appealed to the High Court.

The relevant facts are fully set out in the judgment of the Court hereunder.

G. Wallace Q.C. and *C. Langsworth*, for the appellant.

B. C. Fuller Q.C. and *C. Wall*, for the respondent.

Cur. adv. vult.

April 13.

THE COURT delivered the following written judgment :—

This is a plaintiff's appeal from an order of the Supreme Court of New South Wales setting aside a verdict obtained by the plaintiff and entering judgment for the defendant. The action was brought under the *Compensation to Relatives Act* 1897 by the widow of James Michael O'Connor who was killed on 8th December 1950. The deceased was an employee of the Commissioner for Government Transport into whose service he had entered earlier in that year. The commissioner is the defendant in the action. The deceased was employed as a plumber. He was forty years of age and an experienced tradesman. His death was caused by his falling to the ground from the corrugated iron roof of an awning portion of which gave way while he was at work upon it. The awning was attached to the front of the tramway starter's box at the foot of Erskine Street, Sydney. Its purpose was to provide shelter for intending passengers. The commissioner had decided to commence a bus service from this point and, in order to make it less likely that the buses would come in contact with the awning, orders had been given to reduce the length by which it extended from the starter's box over the footpath by eighteen inches. This meant the removal, cutting and replacement of the corrugated iron sheets and of course it involved some carpentry. On the morning of 8th December 1950 a party of workmen was sent down for the purpose. They came in a truck and all told the party consisted of two carpenters, a labourer, a plumber, a plumber's apprentice or assistant and a truck driver. With them were despatched two trestles, a plank and some fox wedges to place under the legs of the trestles where the camber of the road might require. The trestles opened out and had cross bars or rungs so that the board could be used at different heights to stand upon. The deceased commenced the work by mounting by means of one of the trestles and taking up his position on the roof of the awning in order to remove the screws and nails holding down the corrugated iron. The awning was supported by two cast-iron brackets one at each end. Over the iron brackets were rafters and across the rafters ran a batten at the top and another half way down. The function of a third batten at the lower end of the sloping awning was performed by a fascia board which was nailed to the ends of the rafters. The corrugated iron covering was attached by screws and nails to the rafters and the battens and by nails but apparently not by screws to the fascia board. At the lower end of the iron roof and beyond the fascia there was a guttering borne by the fascia board. Mounted on the awning the deceased proceeded to extract the screws and nails from the iron. Meanwhile

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the carpenters and others stood by. The deceased seems to have taken out the nails holding the iron to the top of the fascia and to have extracted nails or screws attaching the sheets, or some of the sheets, to a rafter and to the middle batten. Two sheets of iron at one end were removed completely. As he was working towards the other end, the fascia board broke away from the rafter, the corrugated iron buckled and the deceased fell to the ground, sustaining the injuries from which he died. The nails had come away from the end of the rafter which was affected by dry rot. Possibly taking the nails from the iron had removed a factor tending to hold the fascia against the end of the rafter, a factor explaining why the nails had held so long under the strain of the deceased's weight. The case which the plaintiff pleaded in her declaration was that the defendant was possessed of and had the care and management of the structure and employed the deceased to work there and was guilty of negligence in its construction, maintenance and repair, in the control, management and inspection thereof, in allowing it to get into a dangerous and unsafe condition, in failing to ensure that it was safe and suitable for the work the deceased was required to perform thereon and in failing to warn him of its dangerous condition. It appeared that on the day before the accident the survey engineer accompanied by a foreman plumber and a leading plumber had gone down to Erskine Street to look at the awning and it had then been decided that it must be cut back for the buses. Instructions had been given accordingly with the result that the party already described had been sent down to do the work. The leading plumber, whose name was Blyton, had given the deceased his orders to go down. In evidence he said ; " I told him to get down to Erskine Street and take the iron off the roof and cut it back so that the buses that were to take that route on the Sunday would not knock the awning down." And in another place ; " I instructed Mr. O'Connor to go down on to the roof and take the iron off—on to the roof—I do not think that necessarily means you have to get your body on the roof, otherwise I would have only sent a ladder down with him." Notwithstanding the last statement, this witness, at the coroner's inquest, had deposed, in answer to questions, that he knew that the deceased would have to go on to the roof of the awning ; he instructed him to go there ; that he thought it safe enough to hold his weight ; that he thought someone would have to go on to it to take the iron off. His deposition was put in evidence as a prior inconsistent statement, but it was explained to the jury that it could not be used as evidence of the fact stated.

The weakness of the attachment of the fascia to the rafter end could not be seen readily because of the guttering but a close inspection would have revealed the dry rot. Anybody of experience, particularly a carpenter, would have seen it.

The manner in which the question of liability was left to the jury will be gathered sufficiently from the following passages from the summing up of *Brereton* J., who presided: "The first question I said you have to ask yourselves was this—Was the defendant employed on the roof? You see, if he was not required by his employer to go on the roof that is an end of the matter and there would be a verdict for the defendant. If a reasonably prudent employer had foreseen that an employee acting in a normal manner would go on the roof then he would be in the same position as if he were actually required to go there, because the employer's duty of care extends not only to the places in which it is vitally necessary for the man to go, but to places into which a reasonably prudent employer would expect a normal acting employee to go. The second question, if you come to the conclusion that he would be expected to be likely to go on to the roof, is this—did the employer fail to exercise towards him, in allowing him to go on the roof, and in relation to this particular defect in the roof only, such care as a reasonably prudent employer would show to a man of his skill and experience?" The jury found a verdict for the plaintiff for £4,000, but the Full Court (*Street* C.J., *Owen* and *Herron* JJ.) set it aside on the ground that there was no evidence that the defendant by his servants or agent had been guilty of negligence.

This conclusion seems inevitable. The defendant as employer was of course under a duty, by his servants and agents, to take reasonable care for the safety of the deceased by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury.

But the party was provided with trestles and plank and nothing was wanting in tools or equipment. The deceased was experienced in his work. It was obvious that a question must exist whether the awning would bear his weight. The party sent down was as "expert" or competent to judge of that simple subject as anybody that could reasonably be sent. Doubtless Blyton, who told the deceased to go, thought that he would work on the roof, but it was left to the deceased and the rest of the party to do the job as they thought fit. Blyton was only the leading plumber and when he

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sent the deceased as the next man he was not directing him how he must perform the work. It simply meant that it was what he himself would do, and without further thought he spoke accordingly. In such a simple matter who else should be left to judge ? Does the reasonable care demanded of the employer require him to cause a scientific or other elaborate examination to be made of the strength of the structure lest the working plumber may decide to trust himself to it rather than work from a plank or trestles ? If, as the jury may be taken to have found, the dry rot was the cause of the awning failing under the deceased's weight, the presence of the dry rot was as easily ascertained by the deceased as by anybody however skilled. The standard of care for an employee's safety is not a low one, but in a case such as this the question must be whether any suggested course that was omitted could really be regarded as reasonable. The case is not one of a defect in premises provided by the employer as the place where the employee is to do his work. The awning was the very thing to be worked at. There were the means at hand of doing the work required without mounting the structure. It was an ordinary question for a plumber to decide for himself how he would do the work. Obviously any experienced plumber would see that there must be a question whether a structure like the awning supported not by posts but by brackets was strong enough to bear his weight as he dismantled it. It was not made for that purpose and neither the deceased nor any of his companions can be supposed to have thought that it had been specially tested to see if it was strong enough. It seems fanciful to treat the question as one to be gone into and decided by some superior officer, as distinguished from the workmen on the spot, and still more fanciful to suppose that a warning or special instruction was demanded about so simple and obvious a matter requiring neither special skill or knowledge to decide and ordinarily treated as a matter for the man doing the job.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *M. A. Simon & White.*

Solicitor for the respondent, *R. W. Scotter*, Solicitor for Government Transport.

R. A. H.