[HIGH COURT OF AUSTRALIA.]

GURNETT . . . . . APPELLANT;
PLAINTIFF,

AND

THE MACQUARIE STEVEDORING COMPANY PROPRIETARY LIMITED. } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Negligence—Stevedoring operations—Injury—Proof of negligence—Sufficiency of evidence—Misdirection—New trial.

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SYDNEY, *Nov.* 11, 28.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

The plaintiff, a stevedore's labourer, was at work upon a gantry at the side of a ship discharging cargo. Cases were being lifted from the hold to the gantry on which he was standing by means of a ship's derrick. There was a gap of eight or ten feet between the ship's side and the edge of the gantry and the level of the ship's deck was eight feet below the level of the gantry, and the concrete wharf was twenty feet below the gantry floor. It was a customary precaution to stretch a net in the gap between the ship and the gantry, to safeguard those working below. As the derrick was being swung inboard part of the gear attached to the fall, a hook, caught the plaintiff's gauntlet glove and dragged him to the edge of the gantry. He fell so that he landed on the edge of the ship's deck on his hands. Both his arms were fractured and he brought an action for personal injuries against the defendant stevedoring company. His evidence showed that as he was being dragged off the gantry he had to choose between jumping and simply letting himself fall down and that he continued to jump so that he cleared the gap. At the end of the plaintiff's case the trial judge held that as the presence or absence of the net had no real effect upon the accident there was no evidence supporting the cause of action fit to be submitted to the jury and directed the jury to find a verdict for the plaintiff. The Full Court upheld the direction.

On appeal, held that the plaintiff's evidence, if accepted, being sufficient to show that the absence of a net exposed him in the circumstances to the

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danger of falling to the floor of the wharf and that in an instinctive attempt to avoid so falling he took the not unreasonable course of making for the deck, there was evidence from which a jury might conclude that the absence of a net was the material cause of the plaintiff's injuries. Accordingly the direction of the trial judge was erroneous.

Decision of the Supreme Court of New South Wales (Full Court): *Gurnett* v. *Macquarie Stevedoring Co. Pty. Ltd.* (1955) 55 S.R. (N.S.W.) 243; 72 W.N. 261, reversed.

APPEAL from the Supreme Court of New South Wales.

On 10th June 1952 Cecil Lawrence Gurnett brought an action in the Supreme Court of New South Wales against The Macquarie Stevedoring Co. Pty. Ltd. claiming damages for personal injuries sustained by him on 23rd July 1951 as a result of the defendant company's negligence in performing certain stevedoring operations. At all material times Gurnett was in the employ of the defendant company. The particular acts of negligence relied upon by the plaintiff were the failure of the defendant company to provide safety nets at the gantry on which the plaintiff was working and its failure to ensure that the gantry flaps were in an upright position so as to render the plaintiff's employment less dangerous than it would otherwise have been.

The action came on for hearing before *Myers* J. and a jury of four, and at the close of the plaintiff's case the defendant company moved for a verdict by direction. This application proved successful and a verdict was entered for the defendant company. The plaintiff moved the Full Court of the Supreme Court for a new trial on the ground that the learned trial judge erred in directing a verdict for the defendant company, but this motion proved unsuccessful (*Street* C.J. and *Ferguson* J., *Roper* C. J. in Eq. dissenting) (1).

The plaintiff accordingly appealed from this decision to the High Court.

The relevant facts and material portions of the evidence appear in the judgments of the Court hereunder.

M. E. Pile Q.C. and *G. T. A. Sullivan*, for the appellant.

V. H. Treatt Q.C. and *R. W. Fox*, for the respondent.

Cur. adv. vult.

(1) (1955) 55 S.R. (N.S.W.) 243; 72 W.N. 261.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, WILLIAMS AND WEBB JJ. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal from a verdict for the defendant which was found by direction at the end of the plaintiff's case. It is an action for personal injuries by a stevedore's labourer against a stevedoring company. The injuries were sustained during the discharge of the cargo in Sydney of the ship *Duntroon*. The plaintiff was at work upon a gantry at the ship's side. The cargo included cases of apples which were lifted by ship's gear from the hold to the gantry. The cases were placed upon a tray secured to the fall of the ship's derrick by means of a rope from each of the four corners of the tray terminating in a hook. When the tray was loaded the four ropes were hooked to a ring attached to the fall. But when the tray was returned empty from the gantry only two of the hooks were affixed to the ring at the end of the fall so that the tray was suspended vertically with the remaining hooks hanging down. The plaintiff was at work on the floor of the gantry unhooking the tray and removing cases of apples from it. He wore gauntlet gloves. As the tray was being returned empty one of the hanging hooks was caught in a glove. According to his evidence he had given the word for the tray to be hoisted away and as it went one of the tray " legs " (i.e., hooked ropes) caught him in the glove on the right hand and dragged him to the edge of the gantry. " It went ", he says, " to such a point that I had to think twice about whether I would land on the wharf or make a dive for the ship. I went for the ship's side and I landed on my outstretched hands ". By landing on his hands he suffered the injuries complained of. He sustained Colles' fractures in the region of the wrist joints of both forearms. The plaintiff was not asked the direct question as to why he jumped or what passed through his mind when he did jump, but he was cross-examined as to the circumstances and he gave the following answers :—

" Q. Once the hook started, nobody stopped the winch ? A. We sang out to him to stop, but it takes seconds before the winch can stop.

Q. You were dragged off the gantry by the hook catching in your glove ? A. Yes.

Q. When you got to the edge of the gantry, you jumped ; or did you fall on to the ship's side ? A. I had to decide, by quick thinking, to either jump or fall straight down.

Q. At that stage, the hook had come clear of your glove ? A. No.

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Q. It was still in the glove ? A. As I was going with it ; then it came off.

Q. After you were off the gantry ? A. As I was going with it, the glove came off.

Q. You were dragged off the gantry ? A. It was not the matter of dragging ; it was the quick thinking.

Q. Quick thinking did not get you off the gantry ? A. Being caught in the glove, I did the quick thinking of making a dive for the side of the ship.

Q. Were you dragged off the gantry, still with your glove caught in the hook ? A. It was dragging me off.

Q. Did it drag you off ; or did you jump off ? A. I did not jump. I was dragged, and I decided to jump to the side of the ship.

Q. Were you dragged off the gantry, or did you jump off the gantry ? A. That is a point—I don't know whether you are trying to bamboozle me or not. It was just my quick thinking that I had to ' go with it ', and jump.

Q. Did you jump off the gantry, or were you dragged off, or don't you know ? A. If I were to jump off the gantry, it would have been deliberate—which it was not. I went with the hook, and made for the side of the ship.

Q. You were dragged off the gantry and managed to get on to the side of the ship ? A. I managed to make a dive for the side of the ship."

From this evidence, if accepted, it appears that the glove came off or gave way before the plaintiff actually fell on the ship's deck. He did not fall completely on the deck. The ship's rail was no doubt down and according to a witness the plaintiff's body fell outside the ship but so that part of his body was just hanging on to what the witness described as the lip of the side of the ship.

In the gap between such a gantry and the ship's side it is customary to stretch a net but no net was in fact stretched on that occasion. While the purpose of such a precaution may include the catching of falling goods, it is conceded that it is also to safeguard those working on the gantry. The distance between the ship's side and the gantry is stated to have been eight or ten feet and the level of the ship's deck was eight feet below the horizontal level of the gantry floor on which the plaintiff was working. The level of the concrete wharf was twenty feet below the floor of the gantry.

Myers J., before whom the action was tried, held at the end of the plaintiff's case that there was no evidence supporting the cause of action fit to be submitted to the jury and his Honour directed

the jury to find a verdict for the defendant. This decision was affirmed by the Full Court, *Street* C.J. and *Ferguson* J., *Roper* C.J. in Eq. dissenting (1).

It is not disputed that failure to place a net to bridge the gap between the ship's side and the gantry is evidence of negligence which would give rise to liability to a workman of the defendant who sustained injuries owing to its absence. The question of fact upon which the plaintiff's case depended was whether the absence of the net was a material cause of the injury he in fact sustained. It was of course incumbent upon the plaintiff to adduce evidence from which it might reasonably be concluded that a material cause of his injuries was the absence of a net. But it would be open to the jury to find that the defendant's negligence in failing to stretch a net was a material cause of the plaintiff's injuries, if the jury were reasonably satisfied upon sufficient evidence that when his glove was caught by the hook the absence of the net exposed him to the danger of falling on the concrete floor of the wharf and that in an instinctive attempt to avoid so falling he took a course which, though not unreasonable in the emergency, caused him to fall upon the deck in a manner occasioning his injuries. The plaintiff's own evidence, if accepted, would, we think, suffice to enable the jury to find that he in fact jumped and thereby gave additional impetus to his passage from the gantry to the deck of the ship and that he did so through fear of falling upon the concrete floor of the wharf twenty feet below. The manner in which he fell upon the deck afforded evidence that, had he not imparted impetus to his passage from the gantry to the deck, he would have fallen upon the concrete wharf. For the whole of his body did not reach the deck.

The further question whether the plaintiff would have jumped in the same manner had a net been stretched is one which must necessarily depend upon inference. But having regard to what the plaintiff said in evidence, the jury might reasonably infer that had the net been in position he would not have taken the same course.

For these reasons we think that the case ought not to have been withdrawn from the jury and agree with the judgment of *Roper* C.J. in Eq. Accordingly the appeal should be allowed, the order of the Full Court set aside and in lieu thereof an order made that there should be a new trial of the action.

TAYLOR J. I agree that this appeal should be allowed.

The appeal was conducted on the basis that there was abundant evidence upon which the jury could conclude not only that no

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safety net was provided between the ship's side and the gantry upon which the appellant was working immediately before his injury, but also that the omission to make such a provision constituted a breach of the respondent's duty to exercise due care with respect to the appellant. The matter in dispute between the parties was whether there was evidence upon which a jury could find that this breach of duty was a material cause of the appellant's injuries.

There is no question that if, after his glove had become caught by one of the tray " legs ", the appellant had fallen to the wharf and thereby sustained injury the respondent's omission to provide a net would have constituted a ground upon which it might have been held liable in damages. And there can be no doubt that if the appellant sustained his injuries in taking or endeavouring to take some step, which was not unreasonable, to avoid the consequence of the respondent's omission the latter would, equally, be liable. This, of course, is how the appellant's case is put. It is said that there is sufficient in the evidence to establish that the appellant was aware that the safety net was not in position, that when his glove was caught by the tray " leg " the possibility that he might be precipitated on to the wharf was present to his mind, that, with this in mind, he made an attempt to hasten his lateral movement towards the ship's deck and that this action on his part resulted in his injuries being caused in precisely the manner deposed to.

The evidence in the case is meagre but there is sufficient to establish that the appellant was aware that the net was not in position and that, at the material time, the appellant appreciated that its absence exposed him to the risk of a fall of some twenty feet on to the wharf. There is also evidence which, if believed, would enable the jury to conclude that when he realised that he would be dragged from the gantry he " went for the ship's side " or that he " managed to make a dive for the side of the ship ". To what extent he was in a position to influence or did, in fact, influence the course of events may, as a question of fact, be open to serious dispute but in my opinion there is just barely sufficient to entitle the jury, if it accepts the appellant's evidence, to say that he was able to accelerate his movement towards the ship's side and that, having regard to the manner and position in which he struck the deck, that this acceleration resulted in the injuries which he sustained. The last-mentioned point is that upon which I have felt difficulty but although the evidence is extremely thin there is, in my view,

sufficient to entitle the appellant to have the questions of fact submitted to a jury.

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the appeal to that court be allowed with costs, the verdict for the defendant be set aside and there be a new trial of the action and that the costs of the former trial abide the result.

Solicitor for the appellant, *Aidan J. Devereux.*
Solicitors for the respondent, *Norton, Smith & Co.*

R. A. H.