[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PLAINTIFF,

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Apr.* 12, 15; MELBOURNE, *June* 3.

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

Negligence—Duty of care—Employer—System of work—Duty to provide safe system—Direction as to performance of work—Duty to direct—Various modes of performance—Propriety of direction given—Risk of injury to employee—Reasonable foreseeability.

S., a labourer employed by B.H.P., was directed together with one W., a fellow employee, to go to the roof of a battery of coke ovens to collect scrap iron and other debris and clear it from the roof. The roof was a large flat area sufficiently high to render it dangerous if anyone should fall from it. There was an iron-rail fence three-and-a-half feet high, all around the roof. The rail was hinged at one point so that it could be lifted up against a post and an opening made therein. At this point a winch was available for raising or lowering material, to which point was to be brought the scrap iron and other debris for discharge to a heap lying below in the yard. S. and W. collected a considerable quantity of rubbish. A barrow load was lowered by means of the winch and to do this the gate was opened by lifting the rail. The foreman considered this method too slow and directed S. and W. to throw the scrap iron over from the top of the battery to the ground below. The gate was closed by lowering the rail and the scrap iron thrown over. There remained on the roof a wooden packing case weighing about one hundred pounds with some hoop iron and nails projecting from it which had been noticed by S. The foreman told the two men to throw the box over the side. To do this they opened the gate, swung the box two or three times and then let go in order to throw it through the gap made by lifting the rail. Some projection on the box caught in a glove worn by S. as the box was thrown and he was dragged from the roof to the ground below sustaining severe injuries in

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respect of which he brought an action for damages against the employer company. At the hearing a verdict was directed in favour of the company and from this decision S. appealed.

Held, that there was no evidence of a breach by the company of its duty to S.

Decision of the Supreme Court of New South Wales (Full Court): *Smith* v. *The Broken Hill Proprietary Co. Ltd.* (1956) 74 W.N. (N.S.W.) 195, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 19th November 1954 Claude Vivian Reay Smith, a labourer employed by The Broken Hill Proprietary Co. Limited, brought proceedings against that company in the Supreme Court of New South Wales to recover damages for injuries sustained by him on 1st October 1954 whilst engaged with another employee of the company in clearing certain scrap iron and debris from the roof of a coke-oven at the defendant's works at Newcastle. The plaintiff alleged that the defendant company had been negligent in the care control and management of its premises and the operations carried on therein and in and about its failure to provide supervise and maintain a safe system of working and in and about its failure to provide safe and suitable equipment for the conduct of its operations so to reduce the risk of injury to the plaintiff and in and about the failure so to conduct its operations as not to subject its employees including the plaintiff to unnecessary risk and in and about the failure to warn the plaintiff of the risk of injury to which he was exposed by reason of the aforesaid failures.

At the trial of the action before *Manning* A.J. and a jury of four the defendant company at the close of the plaintiff's case sought a verdict by direction upon the ground that there was no evidence of negligence on the part of the defendant company its servants or agents. To this application his Honour acceded and a verdict by direction was accordingly entered.

From this decision the plaintiff appealed to the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Walsh* JJ.), which on 12th December 1956 dismissed the appeal: *Smith* v. *The Broken Hill Proprietary Co. Ltd.* (1).

From this judgment the plaintiff appealed to the High Court.

The material facts are fully set out in the judgment of *Taylor* J. hereunder.

J. R. Kerr Q.C. and *H. H. Glass*, for the appellant.

J. E. Cassidy Q.C. and *P. H. Allen*, for the respondent.

Cur. adv. vult.

(1) (1956) 74 W.N. (N.S.W.) 195.

The following written judgments were delivered :—

DIXON C.J. I have had the privilege of reading the judgment prepared by *Taylor* J. in which the facts are very fully set out. I take the same view of the case as his Honour has done but I regard it as one in which the facts disclose no ground for questioning the correctness of the course taken by the judge at the trial and confirmed in the Full Court of the Supreme Court.

I do not desire to qualify in any way the statement made by *Kitto* J. and myself in *Hamilton* v. *Nuroof (W.A.) Pty. Ltd.* (1), of the duty of care of an employer for his employee's safety from risks involved in the work. But I cannot see the slightest evidence of a breach of that duty on the part of any of the defendant's servants or agents.

I think the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed.

There is no evidence that the appellant was exposed to the risk of falling from the top of the coke ovens by doing his part in throwing the box over the side. That he would fall over the side with the box was too unlikely an occurrence to be foreseen by an ordinary careful employer. There is no evidence that it was foreseen by the respondent's leading hand who gave the order to throw the box over the side. I am of opinion that it is not a reasonable proposition that he ought to have foreseen that the occurrence was possible ; or that it was a breach of any duty on his part not to tell the workmen how to perform the simple task of throwing the box over the side without incurring the danger of falling over with it. I am of opinion that on the issue of negligence there was no evidence fit to be left to the jury.

FULLAGAR J. My view of this case is in accord with that of the Chief Justice. I agree that the appeal should be dismissed.

KITTO J. I agree in the observations of the Chief Justice.

TAYLOR J. On 1st October 1954 the appellant was in the employ of the respondent as a labourer at its Newcastle Steel Works and his particular duties were carried out as a member of the coke ovens yarding gang. He commenced work at 7.30 a.m. that day and about ten minutes later he and one, Woods, were instructed by a foreman to " go up and clear the scrap iron off the top of No. 3 battery ",

(1) (1956) 96 C.L.R. 18, at pp. 25, 26.

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that being a section of the coke ovens. The roof of the battery is flat and is said to be approximately two hundred feet long by fifty feet wide and it is surrounded by a steel fence about three eet high. The fence is rigidly fixed in position with the exception of a small section on the south-western corner of the building. At this corner the fence, at the time, consisted of a top rail only between two stanchions and this section of rail was hinged so that it could be thrown back to facilitate the movement of material to and from the roof top. The evidence contains no precise information concerning the width of the break or gate which could be so made but it seems to have been comparatively narrow. From photographs tendered in evidence it appears to have been somewhere about five feet wide.

When the appellant and Woods went to the top of the battery they commenced to clear up the scrap iron which they found there. It consisted mainly of "angle iron, flat iron and broken lids" and it was "mostly on the top of the ovens at the northern end". The clearing up process was accomplished with the aid of a wheelbarrow and the scrap iron—about three barrow loads—was deposited at the south-western corner in the vicinity of the break in the rail. Thereupon one barrow load was lowered to the ground by means of a nearby winch, the barrow being attached to the line from the winch by means of three falls. The process of affixing and lowering the barrow was slow and, no doubt, cumbersome and the foreman who was then present is alleged by the appellant to have said: "This is going to take too long . . . . You had better throw the scrap iron over from the top of the battery down to the ground". This the appellant and Woods then proceeded to do after taking care, in accordance with their instructions, to ensure that the ground below remained clear during the operation. They completed this task about 10.15 a.m. without mishap. But there still then remained on the roof of the battery an empty wooden case which the appellant and Woods had been instructed to dispose of also. In his evidence-in-chief the appellant described the case as being about five feet six inches long by three feet deep and about two feet six inches wide. He said it weighed about one hundred pounds but in cross-examination he agreed that it may have been somewhat smaller. Nevertheless, the suggestion is apparent upon the evidence that the case was bulky and awkward to handle.

After having disposed of the scrap iron the appellant and Woods brought the case from the northern end of the roof to the south-western corner. This was done by means of the wheelbarrow which Woods propelled whilst the appellant steadied the case during

its journey. When they arrived at the break in the rail they lifted the case off the barrow and " threw it over ". In cross-examination the appellant agreed that a statement previously made by him accurately described the manner in which this operation was carried out. Having removed the box from the barrow to the roof in the vicinity of the break in the rail they lifted it and threw it over. " The box " he had said " not being heavy, we picked it up and slung it over the side. We swung the box about three times and we both said ' right ' and let go." But there were some projecting nails on the box and one of these is said to have caught in a glove worn by the appellant with the result that " he was carried over with the box ". He was severely injured and subsequently sued the respondent for damages alleging negligence on the part of the latter in the most general terms. The learned trial judge was of the opinion that the evidence did not support the appellant's claim and directed the jury to return a verdict for the respondent. A subsequent appeal to the Full Court was dismissed and this appeal is brought from the order of that court.

So far it has been said that the appellant and Woods were told to dispose of the case but in view of the appellant's submissions it is necessary to refer with a little more particularity to the instructions which were said to have been given by the foreman. The appellant said in his evidence-in-chief that the foreman had noticed the case and said " that is only rubbish. Throw it over the side so it can be taken away." According to Woods the foreman merely told them to get rid of the case, whilst, in cross-examination, the appellant agreed that the foreman had told them " to send the box down below to ground level ". The appellant says that he was aware from the outset that there were some nails projecting from the box and it is not suggested that the foreman was present, either, when the box was moved from the northern end of the roof or when it was " thrown over ".

Upon these facts it is said that the foreman was negligent in a number of particulars. But the gist of the appellant's complaint really is that he was negligent in instructing the two men " to throw the box over ". There were, it was said, other and safer means of despatching the box to the ground; it could have been lowered by means of the winch or it could have been pushed over the side of the building and it was quite wrong to leave the two men to perform this simple task without giving them precise instructions as to how the case could be handled with safety.

There is, one might think, an element of risk in the performance of the most simple of operations in an industrial establishment;

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sometimes the risk is both grave and apparent whilst in others it may be said to be trivial and remote. Between these two extremes the degree of risk may vary infinitely. But if the risk is real and not merely fanciful reasonable care must be taken by the employer to avoid it and this duty may be performed either by devising a method of operation which does not involve such a risk or by the provision of appropriate safeguards. The general principles which define the responsibility of an employer in such cases are well settled and it is unnecessary to re-state them. But it is of some importance to notice that they operate to impose liability upon an employer whether the risk is consequent, solely, upon the physical operations which the performance of any particular task requires or whether, in the ultimate analysis, it is possible to see that the risk really results from the fact that the performance of those operations have been committed to a fallible human agent. This does not mean, of course, that where an injury has been caused to an employee by his own negligence he may seek to hold his employer liable but, rather, that the duty of the latter is not fully discharged unless, in the provision of safeguards, he has taken into account, not only that particular tasks necessarily involve particular risks, but also that inadvertence and inattention, short of positive negligence, are common concomitants of everyday work. The latter factors may be of considerable cogency in cases where the work of an employee exposes him constantly to the risk of injury unless there is unremitting care on his part but, in the nature of things, it cannot be of importance in the case of casual or isolated tasks of a simple character and which do not involve any real risk if ordinary care is used. Indeed, after referring to the observation of *Lawrence* J. " that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence " (*Flower* v. *Ebbw Vale Steel, Iron & Coal Co. Ltd.* (1)), Lord *Tucker* in *Staveley Iron & Chemical Co. Ltd.* v. *Jones* (2) expressed considerable doubt whether that and other *dicta* to the same effect, " were ever intended or could properly be applied to a simple case of common law negligence . . . where there was no evidence of work-people performing repetitive work under strain or for long hours at dangerous machines " (3). The doubt, it may be observed, was shared by all of their Lordships who took part in the case with the exception of Lord *Reid* who did not discuss the point. Their Lordships did not, however, attempt to formulate any rigid

(1) (1934) 2 K.B. 132, at p. 140.
(2) (1956) A.C. 627.
(3) (1956) A.C., at p. 647.

rule which would exclude the necessity for contemplating the possibility of thoughtlessness or inadvertence—or to use what is, perhaps, a stronger word, carelessness—in circumstances other than those specified and as at present advised, I am content to conclude that, in considering whether a particular set of circumstances is sufficient to fasten liability on an employer, the relevant test involves a simple inquiry concerning just what precautions or safeguards the exercise of reasonable care requires and that, in making such an inquiry, the consequence of inadvertence or thoughtlessness is a variable factor which should be taken into account.

I have dwelt at some little length on these matters because of the peculiar circumstances of this case. As already appears the appellant complains that it was negligent on the part of the foreman to tell him and his companion to throw the box over the side of the building. This was, it is no doubt intended to suggest, an operation which involved a real risk of injury to the appellant and there were other methods by which the box might have been despatched from the roof of the building to the ground. But it does not follow from the fact that there were, or may have been, other methods available that it was negligent of the foreman to direct the two men "to throw" the case over even if it is permissible upon the evidence to conclude that instructions were given by the foreman in the precise terms deposed to in the appellant's evidence-in-chief. Nor, is there any other reason for concluding that the task was attended with any real risk of injury. It may be that the particular manner in which the appellant and Woods chose to throw the box over did involve some risk of injury but their choice was not the result of mere inadvertence or thoughtlessness; it was a choice deliberately made by the men concerned.

Upon the evidence the explanation of the mishap is to be found in the fact that, with full knowledge that there were nails protuding from the surface of the box, the appellant and Woods proceeded to launch the case into space after preliminaries that were quite unnecessary but which were calculated to give to the case considerable impetus and, at the same time, to introduce some degree of risk. I confess that I am unable to see that any such risk was involved in the task which they were asked to perform provided that it was performed, as it should have been, in a reasonably sensible and careful manner. There was not the slightest reason for employing the extraordinary procedure which was employed nor, it should be said, why the foreman should for a moment have contemplated that it would be employed. In effect it may, therefore, be concluded that the task assigned to the appellant and

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Woods did not involve any real risk of injury even if carried out with some reasonably foreseeable degree of inadvertence or thoughtlessness; the accident occurred because of the quite extraordinary and unnecessary method in which the two employees proceeded to carry out a perfectly simple task. In my opinion no other conclusion was open on the evidence and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *J. R. McClelland & Co.*

Solicitors for the respondent, *A. Nathan*, Newcastle, by *Purves Moodie & Storey.*

R. A. H.