HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, HAYNE, CALLINAN AND HEYDON JJ

BRETT GEORGE JERZY CZATYRKO APPELLANT

AND

EDITH COWAN UNIVERSITY RESPONDENT

Czatyrko v Edith Cowan University [2005] HCA 14
6 April 2005
P44/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia made on 9 December 2002 and in their place order that the appeal is dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

B L Nugawela with J J Stribling (instructed by Vertannes Georgiou)

B W Walker SC with J R Clyne for the respondent (instructed by Phillips Fox)

CATCHWORDS

Czatyrko v Edith Cowan University

Negligence – Duty of care – Employer and employee – Safe system of work – Suitable plant and equipment – Employee injured when attempting to stand on moveable platform while loading a truck – Platform not in position – Employee stepped backwards onto platform in belief it was raised – Absence of warning beeper – Absence of oral warning – Whether employer failed to devise and implement a safe system of work – Whether employer failed to provide suitable plant and equipment.

Negligence – Contributory negligence – Employee injured when attempting to stand on moveable platform while loading a truck – Platform not in position – Employee stepped backwards onto platform in belief it was raised – Whether employee should have looked behind him before stepping backwards.

1 GLEESON CJ, McHUGH, HAYNE, CALLINAN AND HEYDON JJ. This appeal raises no question of general principle and depends on its own facts. The only question that it poses is whether the Full Court of the Supreme Court of Western Australia was wrong in deciding that a trial judge erred in holding that an employer failed in its duty of care to an employee by not providing him with a system of work, and plant and equipment to enable him to carry out his work safely.

Facts

2 The appellant began to work for the respondent as a general assistant in February 1990. His duties included the shifting of furniture and the distribution of mail.

3 On 13 January 1997, the appellant and another employee, Mr Fendick, were required to load 30 or so boxes on to a truck for removal to another campus. The boxes contained books and documents. The truck was parked on a grassy area outside a building. It was fitted with an enclosed tray, to which was attached an unenclosed hydraulic lifting platform. The platform was about 1.5m deep and its width was approximately the same as that of the truck. The platform was powered by the battery in the truck and was operated by a switch. It emitted a loud noise when it was being raised and a "clanging" sound when it "hit the top" (to bring it level with the tray of the truck). No sound was emitted however when it was being lowered.

4 The appellant and Mr Fendick each had a trolley. Together, they collected boxes and loaded them on to the truck, both using the platform. A storeman gave them a message that their supervisor wanted them to get on with the job more quickly. Mr Fendick suggested to the appellant that the appellant should work on the truck while Mr Fendick brought the remaining boxes to him. The appellant agreed. Mr Fendick, who was operating the platform control, then collected some boxes on his trolley, took them up to the appellant on the platform, unloaded them, and went down again on the platform to collect more boxes. The appellant remained on the truck re-organizing the boxes that were already loaded in order to make the best use of the available space, which was almost three-quarters filled. Mr Fendick brought another load of boxes up on the platform. He placed them on the truck. By this time, there was little room left on the truck. Mr Fendick, without saying anything further to the appellant, went down again on the platform. When the platform was about two-thirds of the way down, and still descending, the appellant, who did not realize it had moved, and who was still re-organizing the boxes on the truck, stepped backwards. If the platform had

still been there, he would have been secure. Instead, he stepped into space, and fell heavily.

The proceedings in the District Court

5 The appellant sued the respondent in the District Court of Western Australia for damages for negligence, as well as breaches of the *Occupational Safety and Health Act* 1984 (WA) and the *Occupiers' Liability Act* 1985 (WA). The Statement of Claim alleged common law negligence in the form of failing to provide safe equipment and failing to provide a safe system of work. The case was argued in the Full Court, and in this Court, on the basis that the statutory counts added nothing material to the appellant's case. Argument was directed entirely to the common law claim. The appellant claimed that the respondent had failed to take reasonable precautions to ensure his safety in these ways: by failing to provide a warning device to indicate that the platform was in the process of being lowered; by instructing the appellant and Mr Fendick to do their work hurriedly and in a manner that "ignored safety issues"; and, by failing to have in place a system of work requiring the employee operating the platform to inform other employees of its movements at any time. The respondent denied liability and contended, among other things, that the appellant's injuries were caused or contributed to by his own negligence in failing to look behind him before stepping backwards.

6 In cross-examination of him at the trial, the appellant conceded that in the course of doing the work it was necessary for him to turn around and to continue to look behind him from time to time to see what he had to pick up and stack. It was not controverted that the platform could readily and inexpensively have been fitted with a device that would emit warning sounds. Apart from the appellant and Mr Fendick, the only other witness who gave evidence about these matters at trial was an engineer who said that he himself had designed a lifting platform similar to the one in use in this case and had "felt it was absolutely essential to have a warning beeper". He agreed, however, that "it is in the marketplace very unusual to have a beeper attached to them".

7 The trial judge (Martino DCJ) found that the respondent had exposed the appellant to an unnecessary risk of injury. His Honour said that as the loading of the truck continued, standing room would be reduced. The appellant would then be compelled to step on to the platform. As the platform could be lowered soundlessly, it was foreseeable that the appellant would not know that the platform had been lowered and would lose his step when he attempted to stand on it.

8 The trial judge formed the opinion that the risk of injury to the appellant could have been avoided if the appellant were to be given a clear warning as and when the platform was lowered. An appropriate warning could have been given, either by a device which emitted sound when the platform was being lowered, or by the respondent's insistence on a system of work requiring that the person lowering the platform inform the loader that the platform was about to be lowered.

9 As to the respondent's alternative plea of contributory negligence, the trial judge thought it relevant that the appellant believed that the platform would be in place when he stepped backwards "because he had not been told that the platform was to be lowered nor heard any sound to indicate that it was being lowered". Plainly the trial judge considered the belief was not unreasonable. Accordingly it was not negligent of the appellant to step backwards without looking to see whether the platform was in such a position or not.

10 Having found that the respondent was entirely responsible for the appellant's injuries, it was unnecessary for the trial judge to consider the appellant's alternative causes of action. He accordingly gave judgment in favour of the appellant in the sum of $379,402.

The Full Court

11 The respondent successfully appealed to the Full Court of the Supreme Court (Wallwork, Murray and Templeman JJ)[1]. Murray J, with whom Wallwork and Templeman JJ agreed, observed that a person "paying attention to where he was putting his feet would have been perfectly safe"[2]. His Honour stressed that the appellant was under an obligation to take reasonable care to avoid foreseeable risk of injury to himself: the appellant's injuries were materially caused by his own negligence. In any event, even if the respondent were in breach of its duty of care by not making provision for a warning, the appellant's negligence in failing to look where he was stepping should nonetheless be regarded as a substantial cause of his injuries. In those circumstances, his Honour would have apportioned liability to the extent of 70% against the appellant. He said this[3]:

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1 *Edith Cowan University v Czatryko* [2002] WASCA 334.

2 [2002] WASCA 334 at [11].

3 [2002] WASCA 334 at [16]-[17].

> "It seems to me that the true issue upon which the case turned was simply whether, in the circumstances, the omission to provide a warning, in either form suggested, that the lifting platform was to be or was being lowered breached the duty of care, or whether this was a case where, as Kirby J said in *Romeo v Conservation Commission (NT)*[4]:
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> > 'Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just.'
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> In that event, because the obligation of the [respondent] is to take reasonable care to avoid foreseeable risks of injury, the duty will not be breached by the failure to warn. Of course, one must be careful not to elevate that observation, which was directed to the facts of *Romeo*, into some form of definitive statement of the law, but the remark was described by Gleeson CJ in *Woods v Multi-Sport Holdings Pty Ltd*[5] as 'fair comment' 'as a generalisation'. The Court must not lose sight of the fact that, as Gleeson CJ said in *Woods*[6], 'ultimately, the question of fact is what a reasonable person, in the position of the defendant, would do by way of response to the risk'."

Murray J went on to say[7]:

> "[I]n my respectful opinion, the breach of the duty of care owed by the respondent was not established simply by the observation of the trial Judge ... that it was obvious that, 'when the loading of the truck was almost complete so that there was limited space left on the tray of the truck, the [appellant] would step on to the platform'. To my mind, the chance that he would do so without looking where he was going was, although reasonably foreseeable, remote.

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4 (1998) 192 CLR 431 at 478 [123].

5 (2002) 208 CLR 460 at 474 [45].

6 (2002) 208 CLR 460 at 472 [39].

7 [2002] WASCA 334 at [28]-[32].

In my opinion, the [respondent] was, acting reasonably, entitled to expect that the [appellant] would look where he was going rather than that he would step back, knowing that he was about to step off the back of the truck tray, without looking to see whether the hoist, which he knew was constantly on the move and which he knew he would not necessarily hear being lowered, was in fact in a position level with the tray of the truck. Further, unless he looked or heard what was happening behind him and so positively satisfied himself that it was safe to step backwards, the [appellant] could not know whether there were cartons of books on the hoist or whether, as was the case when the accident happened, [Mr] Fendick was there. There was no substitute for the [appellant] looking where he was going and, in my view, it was not negligent for the respondent to rely upon him to do so.

If, however, I am wrong on the issue of breach of duty, it is convenient in respect of the liability of both parties to have regard to the question of contributory negligence ... [The trial judge] did not find this to be a case of mere inadvertence. He found that the [appellant] stepped back without looking because he believed that the hoist would be in a position for him to do so safely. He was of that belief, his Honour found, because the [appellant] had not been told that the hoist was to be lowered and had not heard any sound to indicate that it was being lowered.

Again, in my respectful opinion, that is not to the point. The question was whether the [appellant] failed to take due care for his own safety in any of the respects pleaded; in short, by failing to look where he was going when there was no suggestion that there was anything to prevent him doing so. In my respectful opinion, the [appellant's] failure in that regard was very much the substantial cause of the receipt of the [appellant's] injuries.

If the [respondent] was negligent in failing to have a system to warn the [appellant] when the hoist was being lowered, then, in my opinion, the [appellant's] failure to take the simple precaution of looking to see that it was safe to step backwards was contributory negligence and, in my view, the proper apportionment would have been 70 per cent against the [appellant], having regard to all the circumstances of the case."

The appeal to this Court

12 The appellant relied in this Court on these basic general principles. An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury[8]. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards[9]. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work[10].

13 The appellant's reliance on these principles is well founded. This case is in our opinion a tolerably clear one. This is not simply a case of a failure to warn. It is a case of a failure to devise and implement a safe system of work, or to provide the appellant with proper and sufficient equipment to enable him to carry out his work safely. The risk that the appellant would attempt to step backwards on to the platform in the belief that it was raised, without checking whether this was the case, was plainly foreseeable. There was no system in place to guard against it. The risk could have been readily obviated by the respondent by the taking of simple measures. The measures included the fitting of a warning "beeper" or the introduction of a system for the giving of an oral warning as and when the platform was being lowered. In light of its failure to implement such or like measures, the respondent was in breach of its duty to take reasonable care to prevent the risk of injury to the appellant. The Full Court therefore erred, in our opinion, in its determination that the respondent was not in breach of its duty.

14 Compliance by the respondent, as an employer, with its duty of care to an employee was not to be measured by reference to the reasonableness of imposing on an occupier of land an obligation to warn members of the public about the obvious risks on the land. The case for the appellant was not that he should have

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8 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J.

9 *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342 per Taylor J.

10 *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342-343 per Taylor J; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 218 per Gibbs J; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 500 [128] per Kirby J.

been warned by his employer that if he fell off the truck he might suffer injury, or that if he stepped off the back of the truck into space he would fall. It was not a question of warning the appellant of a risk. It was a question of creating a risk by failing to adopt a safe system of work.

15 There should have been in place a system of work designed to avoid the risk that a person required to step backwards and forwards on and from a moveable platform might do so without first looking behind him. The system of work necessarily had also to take into account that the task was a repetitive one to be performed in a diminishing space. Proper account of these matters was not taken by the respondent. It did no more than require that the appellant and Mr Fendick load the truck. That proper account of these matters was not taken was overlooked or disregarded by the Full Court.

16 An employer has another obligation. It is to provide employees with suitable plant and equipment to enable them to carry out their work safely. This case could also be characterized as a case of a failure to do that. The simplicity and inexpensiveness of a warning device that could have been fitted, required that it be fitted here. This was another matter to which the Full Court failed to pay due regard. The respondent was negligent. The Full Court erred in holding to the contrary.

17 The respondent submits, nevertheless, that even if the Full Court erred, its provisional finding of contributory negligence of 70% on the part of the appellant should not be disturbed.

18 In the present case, the appellant did no doubt omit to take a simple precaution of looking to see whether the platform was raised before stepping on to it, and this omission was a cause of his injuries. But in acting as he did, the appellant did not disobey any direction or warning from the respondent. No directions or warnings of any kind were given by the respondent in relation to the use of the platform. Furthermore, both the appellant and Mr Fendick were under pressure from their supervisor to complete the job promptly. The work was repetitive. In all of these circumstances it presented a fertile field for inadvertence. The onus of proving contributory negligence lay upon the respondent. This it failed to do in this case. The appellant's attempt to step on to the platform in the mistaken belief that it was still raised, and in an effort to finish loading the truck, was the product of nothing more than "mere inadvertence, inattention or misjudgment"[11]. It was not a remote risk that the

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11 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 310.

appellant might step back without looking behind him. His actions were neither deliberate, intentional, nor in disregard of a direction or order from the respondent. No finding of contributory negligence should have been made. The appeal should be allowed. We would make orders as follows:

1. The appeal should be allowed with costs.

2. The orders of the Full Court of the Supreme Court of Western Australia made on 9 December 2002 should be set aside and in their place it should be ordered that the appeal is dismissed with costs.