# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

---

GRAHAM COOTE APPELLANT

AND

FORESTRY TASMANIA RESPONDENT

*Coote v Forestry Tasmania*
[2006] HCA 26
*13 June 2006*
H3/2005

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of Tasmania made on 23 March 2005.*

3. *Remit the matter to the Full Court of the Supreme Court of Tasmania for determination of the issues raised by pars 7 and 8 of the Notice of Appeal to that Court dated 28 July 2004.*

4. *The costs of the trial of the action and of the appeal to the Full Court of the Supreme Court of Tasmania should be in the discretion of the Full Court.*

On appeal from the Supreme Court of Tasmania

**Representation**

J Ruskin QC with S A O'Meara for the appellant (instructed by Hilliard and Associates)

D E Curtain QC with C M O'Neill for the respondent (instructed by Phillips Fox)

## CATCHWORDS

### Coote v Forestry Tasmania

Negligence – Breach of duty – Appellant tree feller rendered paraplegic after a branch fell from a tree and hit him – Respondent, by its forestry officer, gave the appellant a direction that he was not to fell pulp trees as he normally would – Whether respondent was negligent in giving that direction and so causing appellant to place himself in a position of danger.

Appeal – Approach to issues of negligence and contributory negligence – Trial judge finds that respondent, by its forestry officer, gave the appellant tree feller a direction that he was not to fell pulp trees as he normally would – Centrality of finding to conclusion of negligence – Full Court does not disturb that finding but finds no negligence – Whether finding of no negligence open to Full Court in the circumstances – Whether any error of judgment of the appellant a matter relevant to contributory negligence.

*Forestry Act* 1920 (Tas).
*Forest Practices Act* 1985 (Tas).

1 GLEESON CJ, KIRBY, HAYNE AND HEYDON JJ. In September 1998, the appellant was working as a tree feller in a logging coupe in a State forest at Roses Tier in northern Tasmania. He felled two sawlog trees. Both trees brushed another as they fell. After he had trimmed the sawlog trees, he walked under the tree that had been brushed. A branch fell from that tree and hit him. He was rendered paraplegic.

2 The appellant contends that but for some directions given to him by a Senior Forestry Officer (Harvesting) employed by the respondent, Forestry Tasmania, he would have felled the tree brushed by the sawlog trees before felling the two sawlog trees. He did not do that because he believed the tree he left standing was not a sawlog tree but was a pulp tree.

The appellant's claim

3 In 2001, the appellant brought action in the Supreme Court of Tasmania claiming damages for negligence from a number of parties, including Forestry Tasmania. An order was made that questions of liability be determined separately from and before questions of quantum of damages. The appellant settled his claims against the defendants other than Forestry Tasmania. Questions of contribution between defendants remained unresolved by those settlements but they may be put to one side. On the trial of the remaining questions of liability (the liability of Forestry Tasmania to the appellant and whether the appellant had been contributorily negligent) the trial judge (Blow J) determined[1] the issue of Forestry Tasmania's liability in the appellant's favour. He further determined that the damages recoverable in respect of the appellant's damage should be reduced by one-sixth due to his contributory negligence.

4 Forestry Tasmania appealed against the orders answering the separate questions tried by Blow J. The Full Court of the Supreme Court of Tasmania (Underwood CJ, Crawford and Evans JJ) allowed the appeal[2], set aside the orders made below, and entered judgment for Forestry Tasmania with costs. By special leave, the appellant now appeals to this Court.

5 The essence of the appellant's case is, and at all stages of the litigation has been, that he left standing the tree from which a branch fell and injured him because he was required to do so by the instructions given to him by the Senior

---

**1** *Coote v AG & GR Padgett Pty Ltd* [2004] Aust Torts Reports ¶81-758.

**2** *Forestry Tasmania v Coote* [2005] TASSC 17.

Forestry Officer (Mr Johnstone). Forestry Tasmania's answer is, and always has been, that the appellant could and should have felled that tree and that his failure to do so was an error of judgment on his part for which it was not responsible.

The statutory framework

6 It is as well to begin by mentioning something of the statutory framework within which the work being done by the appellant was to be undertaken. The principal element of that statutory framework was the *Forest Practices Act* 1985 (Tas) ("the Act") as it stood at the time of the appellant's injury. The harvesting operation at the coupe where the appellant was injured was the subject of a timber harvesting plan. (A coupe is a delineated area of the forest in which the felling operation takes place.) The Act gave certain powers to "forest practices officers" (and Mr Johnstone was such an officer) to ensure that "forest practices" (an expression which included[3] harvesting timber) were conducted in accordance with the timber harvesting plan[4]. Little attention was given in the courts below, or on appeal, to the content of these powers. At all stages the litigation appears to have been conducted on the basis that it sufficed to recognise that Mr Johnstone had power to give the appellant some directions about what trees he might cut down. The precise nature and extent of those powers was not explored in argument. It was accepted, however, that s 21 of the Act made it an offence for the appellant to fail to comply with the provisions of the timber harvesting plan.

7 The timber harvesting plan contained a number of specifications under the heading "FELLING". Two are of particular relevance. It was said that "the aim of this operation is [to] maximise sawlog production and minimise pulpwood", and that "[a]ll trees that are considered to be un-safe by the contractor are to be removed". The "contractor" was AG & GR Padgett Pty Ltd. That company ("Padgett") engaged the appellant as a tree feller. The appellant alleged that he was Padgett's employee or "contractor" for the purposes of s 9 of the *Workplace Health and Safety Act* 1995 (Tas). This appeal does not require any examination of that question.

---

**3** *Forest Practices Act* 1985 (Tas), s 3(1).

**4** s 40(1)(a).

The trial

8 The evidence given at trial contained various features upon which each of the parties fastened in aid of the case each sought to make. These endeavours of the parties were both assisted and hindered by the fact that the evidence given of oral communications between the appellant and Mr Johnstone did not clearly articulate the substance of what was said in any particular conversation, let alone attempt to recapture the words that had been used. Much of the evidence led, without objection, from the appellant was directed to eliciting his understanding of what Mr Johnstone communicated to him rather than what Mr Johnstone said. The evidentiary basis on which the trial judge had to act in resolving the critical issue between the parties was, therefore, both diffuse and in some respects thin. It is, however, not necessary to set out the evidence that was given. The critical findings made by the trial judge about the directions given by Mr Johnstone to the appellant were not disturbed on appeal to the Full Court.

9 The parties' (limited) exploration of what passed between the appellant and Mr Johnstone took place against a background of some undisputed matters. It was not disputed (the trial judge said it was common ground[5]) that the appellant's injury could have been prevented by him felling the tree from which the branch that struck him fell. The trial judge went on to say[6]: "[i]t is also common ground that the [appellant] had the right to fell any tree that he considered too much of a danger to leave standing, at least subject to any specific directions as to situations in which trees were not to be felled." The meaning to be given, and significance to be attached, to this proposition depends, in significant respects, upon what is meant by "too much of a danger", and upon the operation to be given to the final qualifying clause: "subject to any specific directions as to situations in which trees were not to be felled". What the trial judge meant by these expressions must be understood in the context of the whole of his reasons.

10 In particular, what the trial judge said about the appellant's right to fell "any tree" is to be understood having regard to what the trial judge found to have been the substance of the communications between Mr Johnstone and the appellant about felling pulp trees. The trial judge prefaced his finding on this subject by saying that he thought that both Mr Johnstone and the appellant

---

**5** [2004] Aust Torts Reports ¶81-758 at 65,937 [8].

**6** [2004] Aust Torts Reports ¶81-758 at 65,937 [8].

"seemed ... to be practical men, and men of reasonable intelligence"[7]. Recognising that there may have been some inaccuracies in the evidence that the appellant gave about his discussions with Mr Johnstone, the trial judge nonetheless concluded that he was

> "satisfied that Mr Johnstone did give the [appellant] a direction to the effect that he was not to fell pulp trees as he normally would; that the [appellant] rightly perceived Mr Johnstone's direction as prohibiting him from felling the pulp tree from which a branch ultimately fell and hit him; that when Mr Johnstone visited the [appellant] at the coupe from time to time, he did so for the purpose of checking that his direction was being complied with; and that the [appellant] rightly perceived that Mr Johnstone was supervising him with that purpose in mind."[8]

As the trial judge noted, this was a conclusion which was supported "to some extent by the expected sawlog and pulpwood production figures in the timber harvesting plan"[9].

11 The finding that Mr Johnstone gave the appellant a direction to the effect that he was not to fell pulp trees *as he normally would* was central to the trial judge's conclusion that the respondent had been negligent. It is a finding that was not disturbed on appeal to the Full Court. It is a finding that is critical to the disposition of the appeal to this Court.

12 The trial judge expressed his conclusion about negligence in the terms of a particular of negligence appearing in the statement of claim in the action (failing to instruct the appellant to fell first any trees that potentially posed a danger and in failing, through supervision, to ensure that he did so[10]). Although the conclusion was expressed in this way, its essential basis was that Mr Johnstone's directions were rightly understood by the appellant as precluding him from acting as he normally would.

---

**7** [2004] Aust Torts Reports ¶81-758 at 65,938 [11].

**8** [2004] Aust Torts Reports ¶81-758 at 65,938 [11].

**9** [2004] Aust Torts Reports ¶81-758 at 65,938 [11].

**10** [2004] Aust Torts Reports ¶81-758 at 65,943 [33].

The appeal to the Full Court

13 In the Full Court, Underwood CJ, who gave the principal reasons, held that the trial judge had fallen into error in concluding that Forestry Tasmania was negligent in failing to instruct the appellant "to fell first any trees that potentially posed a danger ... and in failing, through supervision, to ensure that he did so"[11]. This was held to be an error because Forestry Tasmania did not need to tell the appellant to first fell any trees that potentially posed a danger. This, in turn, was said to follow because it had been common ground at trial that the appellant had the right to fell any tree that he considered too much of a danger to leave standing. Rather, Underwood CJ concluded[12]:

> "The totality of the evidence leads to the conclusion that in the light of the instruction that this was a sawlog operation, the [appellant] assessed that the danger posed by leaving standing the tree from which the branch fell was not sufficiently high to require him to fell it first. It was an error of judgment on his part."

14 In opening the appeal to this Court, counsel for the appellant put the principal weight of his argument on the contention that the Full Court erred when it said that Forestry Tasmania did not need to tell the appellant to "first fell any trees that potentially posed a danger". This, it was submitted, was too wide a proposition. Counsel said that it failed to give due weight to the need to give content not only to the expression "too much danger" but also to the trial judge's qualification of the general proposition that it was subject to any specific directions as to situations in which trees were not to be felled.

15 In the course of oral argument, however, the focus of the appellant's argument shifted to the conclusion reached by Underwood CJ that the appellant "assessed that the danger posed by leaving standing the tree from which the branch fell was not sufficiently high to require him to fell it first" and that "[i]t was an error of judgment on his part" to leave it standing[13]. It would be wrong, however, to focus only on either of these propositions and consider their validity in isolation from the factual bases that were seen as underpinning them.

---

**11** [2005] TASSC 17 at [55]-[56].

**12** [2005] TASSC 17 at [57].

**13** [2005] TASSC 17 at [57].

The issues in this Court

16 The appellant's case in this Court, reduced to its essentials, was that the Full Court, wrongly, made the finding which it did about negligence upon an implicit assumption that the appellant had greater freedom to remove pulp trees than the trial judge found to be the consequence of the directions given by Mr Johnstone. The making of such an assumption was said to be revealed by the reference to it being common ground that the appellant had the right to fell *any* tree that he considered too much of a danger to leave standing, and the absence of immediate reference to, or taking into account of, what had been found to be the direction given by Mr Johnstone.

17 As noted earlier, the Full Court did not disturb the trial judge's finding that Mr Johnstone gave the appellant a direction to the effect that he was not to fell pulp trees as he normally would. On the contrary, as Underwood CJ said[14], this and the other findings made by the trial judge were "in accordance with the oral evidence and supported by the written evidence in the harvesting plan prescribing the proportion of sawlogs to pulp logs that were to be taken".

18 Once the conclusion was reached that the trial judge's finding about the direction given to the appellant should not be disturbed, it followed that Forestry Tasmania, by its Senior Forestry Officer, had directed the appellant to work in a manner different from his normal pattern of work. In particular, rather than take out any and *every* pulp tree which would be brushed by a falling sawlog tree, the appellant was directed to leave pulp trees standing wherever possible. The direction that he not fell pulp trees "as he normally would" necessarily entailed that he was to leave standing a tree that would only be brushed by another falling tree.

19 While it may have been an error of judgment on the part of the appellant to leave the particular tree standing, that is a matter that would bear upon questions of contributory negligence. But it remained open to the trial judge to conclude, as he did, that it was negligent to give a direction that, in effect, required the retention of pulp trees that would only be brushed by a falling sawlog tree. It was negligent because any tree that was brushed by another was a source of danger. That was why the appellant would ordinarily have felled any such tree. To require some to be left standing exposed the appellant to danger unnecessarily. There was no error in the trial judge's reasoning. The Full Court erred in disturbing the conclusion and orders that followed from it.

---

**14** [2005] TASSC 17 at [48].

Orders

20 The appeal must be allowed. The orders made by the Full Court of the Supreme Court of Tasmania on 23 March 2005 should be set aside. Because Forestry Tasmania's appeal to that Court against the findings made at trial about contributory negligence and contribution between defendants remains undetermined, the matter should be remitted to the Full Court of the Supreme Court of Tasmania for further consideration of the remaining aspects of Forestry Tasmania's appeal to that Court. The respondent should pay the appellant's costs in this Court. The costs of the trial of the action and of the appeal to the Full Court of the Supreme Court of Tasmania should be in the discretion of the Full Court.

21 GUMMOW J. The appellant, the plaintiff in the action, was born in 1960 in New Zealand where he worked from about his 18th year as a tree feller. He settled in Tasmania in 1985 where he remained, save for a four year period beginning in 1993 when he returned to New Zealand. Throughout these years the plaintiff continued to work as a tree feller. He began to work for AG & GR Padgett Pty Ltd ("Padgett") in January 1998.

22 On 14 September 1998, while working for Padgett as a tree feller at the Roses Tier coupe in a State forest in northern Tasmania, the plaintiff was struck by a branch that fell from a tree. He was rendered paraplegic. Shortly before the plaintiff sustained the injury he had felled two trees, each of which as it descended had brushed the tree from which the branch ultimately fell. The plaintiff had been aware of the possibility of felling the tree from which the branch dropped, but had refrained from doing so. This was because he believed that he was not allowed to fell that tree by reason of the requirements of the timber harvesting plan which applied to the forest coupe in which the plaintiff was working.

23 The present respondent, Forestry Tasmania, a corporation constituted by s 6(1) of the *Forestry Act* 1920 (Tas) ("the Forestry Act") was relevantly the licensor of the Roses Tier coupe. It licensed the removal of wood from that area, and received royalties in consideration thereof. Its officer, Mr Peter Johnstone had held a commercial licence as a qualified tree feller since about 1984 and had attended the Roses Tier coupe and had discussions there with the plaintiff.

24 The plaintiff brought an action in the Supreme Court of Tasmania for damages for breach of statutory duty and negligence against four defendants[15]. Forestry Tasmania was the third defendant. Before the trial, the plaintiff settled his claim against the first defendant, Padgett, and the second defendant, Wesley Vale Engineering Pty Ltd ("Wesley Vale"). Wesley Vale was the assignee of the original licensee and, at the relevant time, had held contractual rights to remove wood from certain areas of State forest; it had engaged Padgett to harvest timber from the coupe where the plaintiff was working. The fourth defendant was the State of Tasmania, but the action against the State was discontinued at an early stage.

25 In the Supreme Court, Blow J, sitting without a jury, found that the plaintiff had been injured as a result of the negligence of Forestry Tasmania but reduced the damages recoverable by one-sixth for the plaintiff's contributory negligence. His Honour further adjudged that, for the purposes of s 3(3)(e) of the *Wrongs Act* 1954 (Tas), Padgett would have been liable to make a contribution to Forestry Tasmania to the extent of two-fifths if the total claim of the plaintiff had

---

**15** *Coote v AG & GR Padgett Pty Ltd* [2004] *Aust Torts Reports* ¶81-758.

been paid by Forestry Tasmania, and that Wesley Vale would have had no liability to make contribution to Forestry Tasmania. The trial was on the issue of liability alone without assessment of the quantum of damages.

26 The Full Court of the Supreme Court (Underwood CJ, Crawford and Evans JJ) allowed an appeal by Forestry Tasmania and entered judgment for Forestry Tasmania against the plaintiff. The only parties to the Full Court appeal were Forestry Tasmania and the plaintiff. The Full Court did not determine the issue of contributory negligence raised by Forestry Tasmania. Consequently, that issue would remain outstanding should the appeal to this Court succeed.

27 The issues on the appeal by the plaintiff (whom I shall hereafter call "the appellant") to this Court stem from the Full Court's conclusion that the "totality of the evidence" led to the conclusion that the danger to which the appellant succumbed was a consequence of "an error of judgment on his part", and that, consequently, the findings that Forestry Tasmania ("the respondent") breached its duty of care by failing to give a general instruction to the appellant to fell any tree that posed a danger, and by failing to supervise him to ensure that he complied with that instruction could not stand.

28 For the reasons that follow, the appeal should be allowed and the decision of Blow J restored.

The statutory setting

29 Something first should be said respecting the statutory setting of this litigation. It received insufficient attention in the submissions to this Court, but is a matter of importance in a negligence case such as this[16]. The relevant statute is the Forestry Act, which has been amended considerably since the time of the appellant's injury[17]. In what follows, reference is made to the Forestry Act as it stood at that time.

30 The respondent was charged by s 8 of the Forestry Act with functions including the development, control and delivery of land use and sustainable forest management policy (s 8(1)(a)), and the "exclusive management and control" of "all State forest" (s 8(1)(c)(i)), "all forest products on State forest ... including the processing, removal, selling or other disposition of those forest

---

**16** See the authorities collected in *Vairy v Wyong Shire Council* (2005) 80 ALJR 1 at 19 [77]-[78]; 221 ALR 711 at 731-732.

**17** See especially the *Forestry Amendment (Miscellaneous) Act* 1999 (Tas) which commenced on 1 January 2000 and repealed many of the provisions relevant to this case.

products" (s 8(1)(c)(ii)), "the establishment and tending of forests, and all forest operations, on State forest" (s 8(1)(c)(iii)) and "the granting of all permits, licences, forest leases and other occupation rights, and the making of all contracts of sale" under the Forestry Act (s 8(1)(c)(iv)).

31 Section 12T of the Forestry Act empowered the respondent to appoint persons as forest officers. Such persons could include employees of the respondent, persons employed in an Agency within the meaning of the *Tasmanian State Service Act* 1984 (Tas) or such other persons as the respondent considered appropriate. Forest officers were among those officials empowered by s 47 of the Forestry Act to enter and inspect land held under a permit or forest lease or other timber concession, lease or agreement. The making of inspections would appear to have facilitated the enforcement of s 46 of that Act, sub-s (1) of which created an offence for occupying, clearing or breaking-up any land in State forest without lawful authority. It may be taken for the purposes of this litigation that these provisions have a comparable effect to ss 40 and 41 of the *Forest Practices Act* 1985 (Tas) ("the Practices Act") dealing with the authority of forest practices officers[18] in relation to compliance with that Act and with any applicable timber harvesting plans.

32 Section 12X(1) and (2) of the Forestry Act established as a division of the respondent the Forest Practices Board, with such constitution, objectives, functions and powers as are conferred upon it by the Practices Act. Section 4C of the Practices Act provided that the Board had functions including issuing and maintaining the Forest Practices Code (s 4C(d)); overseeing standards for timber harvesting plans (s 4C(e)); and overseeing the training of forest practices officers (s 4C(g)).

33 The Forest Practices Board was empowered by s 38(1) of the Practices Act to appoint any person employed by the respondent as an officer for the purposes of that Act. Section 39(1)(a) permitted the Board to authorise by warrant signed by the chairperson of the Board an officer appointed under s 38(1) to be a forest practices officer for the purposes of that Act. Section 39(5) provided that a forest practices officer "does not incur any personal liability for any act done or purported or omitted to be done by that officer acting as such in good faith under this Act".

34 The functions and powers of a forest practices officer are comparable to those of a forest officer appointed under the Forestry Act, though relating specifically to compliance with the Forest Practices Code and any applicable timber harvesting plan. Further consideration of these functions and powers is not called for here, although it would appear that each of a forest officer and

---

**18** Appointed pursuant to s 39(1) of the Practices Act.

forest practices officer performed similar supervisory roles in relation to all forest operations.

35 Division 1 of Pt III (ss 17-26) of the Practices Act dealt with timber harvesting plans. Section 18(1) permitted any person to "prepare, or cause to be prepared, a timber harvesting plan in relation to any land" and "make application to the Board for approval of that plan". Such a plan was to contain, among other things, specifications of forest practices to be carried out, an estimate of the period during which harvesting would be carried out, and the name of the timber processor by whom the harvested timber is expected to be processed (s 18(2)). The Board was empowered by s 19 to approve, refuse to approve, or amend the plan.

36 Persons having the immediate right to process timber harvested on Crown land, and owners of private land or their assignees[19], were forbidden by s 17(4) to "harvest timber, or cause or allow timber to be harvested, from land in respect of which there is not in existence at the time of harvesting an approved timber harvesting plan". Contravention of this provision was an offence punishable by fine. Section 20 provided:

> "An approved timber harvesting plan authorizes the carrying out or causing or permitting to be carried out of the harvesting of timber and any operations associated with the harvesting of timber on the land specified in the plan in accordance with the provisions of that plan during the period specified in the plan."

37 Of central importance was s 21(1) which stipulated:

> "(1) Where a timber harvesting plan has been approved by the Board in respect of the harvesting of timber on any land and is in force under this Act:
>
> (a) any person who in the process of harvesting timber on that land or in the process of carrying out any operations associated with the harvesting of timber on that land contravenes or fails to comply with the provisions of the plan
>
> ...

---

**19** That is, persons falling within the definition of "responsible person" in s 17(1). See also the definition of "timber processor" in s 3(1).

is guilty of an offence and is liable on summary conviction to a fine not exceeding 150 penalty units or a daily fine not exceeding 10 penalty units".

The facts

38 As indicated earlier in these reasons, by the time of his accident the appellant was a very experienced tree feller. Prior to August 1998, he felled trees for Padgett according to harvest plans requiring clear felling as well as plans requiring selective logging or "regrowth retention". The appellant was aware of the need to comply with timber harvesting plans.

39 Mr Johnstone had been the appellant's "bush boss" or logging foreman when he began to work for Padgett. Each respected the skills and abilities of the other. Mr Johnstone ceased working for Padgett some two months before the appellant's accident. He was then appointed an officer of the respondent.

40 In August 1998, Padgett engaged the appellant to fell trees in the logging coupe situated at Roses Tier in a State forest. He commenced that work in mid-August 1998. In this context, as before, he had occasion to work with Mr Johnstone. However, Mr Johnstone now exercised the respondent's statutory powers of supervision over the coupe in which the appellant was injured. Mr Johnstone visited the coupe regularly and saw it as his function to exercise the powers conferred on a forest officer by the Forestry Act and the applicable timber harvesting plan.

41 The timber harvesting plan applicable to the coupe in which the appellant was working was an approved plan under Div 1 (ss 17-26) of Pt III of the Practices Act. The plan was approved on 15 August 1998, approximately one month before the appellant was injured. It was drafted and approved by employees of the respondent and was to apply until 30 June 2000. Mr Michael J Smith, who approved the plan, appears to have been a forest practices officer. Mr Smith did not give evidence.

42 The operation prescribed by the plan was identified as an overstorey removal/shelterwood operation. These terms have a settled meaning in forestry parlance as synonymous with regrowth retention. This involves the forest overstorey, previously retained to provide protection for new regrowth from climatic extremes, being reduced by harvesting so as to allow further growth of the new crop.

43 Within the timber industry trees may be categorised as sawlog trees or pulpwood trees. Sawlog trees consist of those the logs of which are of a quality suitable to be milled, whereas pulpwood consists of wood suitable only for pulping. The evidence of the appellant was that a sawlog tree is "healthy looking", whereas a pulp tree might be "twisty" or bent or have rotten segments.

One could generally tell a sawlog tree from a pulpwood tree by looking at it. The appellant had assessed the tree from which a branch fell and hit him to be a pulpwood tree.

44 Ordinarily, an overstorey removal/shelterwood operation would permit the removal of both sawlogs and pulpwood. The appellant gave evidence that this would involve removal of the pulpwood first. However, this timber harvesting plan contained terms described by Underwood CJ as "somewhat unusual" relating to the harvesting of sawlogs and pulpwood respectively. The plan required that:

> "• This coupe is to be treated as a [sic] overstorey removal/shelterwood operation, *however sawlog production is to be maximised*. Trees in the shelterwood section are to be retained at a basal area of 12m2 or approximately one tree every two tree lengths. These trees retained are to be pulpwood quality.
>
> • Category 2 & 8 sawlogs are to be maximised if markets exist.
>
> • Remaining head logs are to be sold for pulp, *however the aim of this operation is [to] maximise sawlog production and minimise pulpwood*.
>
> • Sections that are high in pulpwood are not to be logged. These areas are to be treated at future harvesting operations." (emphasis added)

The plan specified a total volume of timber expected to be produced of 5850 cu m/t in the proportions of 2850 cu m/t of sawlog and 3000 cu m/t of pulpwood.

45 Significantly, the plan also provided that "[d]irection from a Forest Officer will be supplied to help with selection" and "[a]ll trees that are considered to be un-safe by the contractor are to be removed".

46 The appellant had seen the timber harvesting plan prior to commencing work at the coupe. It had been shown to him by Mr Johnstone, following which there was a discussion about it. When the appellant first saw the plan, he noticed the terms respecting pulpwood harvesting and thought they were unusual. He asked Mr Johnstone about the felling of pulp trees and the latter indicated that they were only there to take the saw logs, and another contractor was to take the pulpwood subsequently. The appellant "thought that was a bit strange" in that the plan said one thing and yet he was told another.

47 The appellant insisted under cross-examination that what Mr Johnstone had said to him was that he was not to remove pulpwood trees unless he was going to "barrel" them, that is, hit them directly with another falling tree and that

that was in fact what he had done. It was much more dangerous to barrel a tree than to brush it as a lot of broken material would be produced. Mr Johnstone did not at any stage during their conversations use the term "barrel", but the trial judge accepted that that was the effect of their discussions:

> "I am satisfied that Mr Johnstone did give the [appellant] a direction to the effect that he was not to fell pulp trees as he normally would".

As previously indicated, the appellant said normal practice would involve removal of the pulpwood trees before the sawlog trees. The appellant understood the direction from Mr Johnstone to mean that if he was merely going to "brush" another tree or touch the branches of that tree, he was not to remove the second tree before felling the first. These instructions by Mr Johnstone were at the core of the understanding and direction by which the appellant was to interpret and follow the harvesting plan.

48 Counsel for the appellant pointed to evidence that, prior to the accident on 14 September 1998, the appellant had adopted a systematic practice of not removing pulpwood trees he had determined would be brushed. A representative of Wesley Vale observed in a "forest operations report" that extensive limb damage was apparent "due to falling prescription", that this damage was not within acceptable limits and that some trees were "potentially dangerous". This practice was pursued despite the appellant's recognition that all pulpwood trees were potentially dangerous because "anything can happen with a pulp tree".

49 The systematic nature of the appellant's conduct was at the heart of the trial judge's findings respecting Mr Johnstone's direction, and that he was satisfied that:

> "the [appellant] rightly perceived Mr Johnstone's direction as prohibiting him from felling the pulp tree from which a branch ultimately fell and hit him; that when Mr Johnstone visited the [appellant] at the coupe from time to time, he did so for the purpose of checking that his direction was being complied with; and that the [appellant] rightly perceived that Mr Johnstone was supervising him with that purpose in mind".

Blow J found that the appellant's decision not to fell the tree by which he was injured was "consistent with obedience to Mr Johnstone's instructions".

50 It will be recalled that the pulpwood tree from which a branch dropped and hit the appellant had been brushed by two sawlog trees the appellant had recently felled. It was well known in the timber industry that if trees were brushed and damaged, there was a possibility (indeed it was by no means unusual) that branches might fall. These branches are capable of causing death or severe injury and, significantly, were known in the industry as "widow-makers".

Findings of the trial judge

51 Blow J found that the respondent owed to the appellant a duty to take reasonable care for his safety in its supervision, management and control of the timber harvesting operations in which he was engaged. His Honour, relying on *Crimmins v Stevedoring Industry Finance Committee*[20], founded this duty upon the circumstance that the respondent had or should have had knowledge of the special risks to which workers in the timber industry were subject and was in a position to exercise its statutory powers so as to minimise those risks. Officers of the respondent were well aware that harvesting operations were being undertaken in the area of forest in which the appellant was injured. The risk of injuries being caused when severed branches later fall from trees was known and was reasonably foreseeable, as was the risk of injury from falling trees. The Full Court rejected a challenge to the correctness of these findings and no further challenge is made in this Court.

52 As to breach of duty, Blow J found the respondent negligent "in failing to instruct [the appellant] to fell first any trees that potentially posed a danger" of the kind which eventuated and in failing through supervision to ensure that he did so. His Honour observed that such an instruction would have been the only reasonable response to a foreseeable risk of injury.

53 The particular injury sustained by the appellant was foreseeable because of the instructions given by Mr Johnstone and because of the obvious damage to the trees in the coupe observed by Wesley Vale's representative.

54 The trial judge found that the appellant's act in walking under the damaged pulpwood tree "only minutes" after it had been brushed "went beyond misjudgement and inadvertence, and amounted to contributory negligence". The appellant was alert to the risk that there might be a loose branch in the damaged pulpwood tree and that such a branch might fall and hit him. When seeking to walk to another sawlog tree on the far side of the pulpwood tree, he could easily have taken a less direct route. Walking under a tree in such a situation would ordinarily be considered unsafe by workers in the timber industry.

55 Blow J also found, "[l]ess significantly", that the appellant was negligent in failing to fell the pulpwood tree. The only reasonable course would have been for the appellant to have defied what he perceived to be the effect of Mr Johnstone's directions, and felled the tree for the sake of his own safety.

---

**20** (1999) 200 CLR 1.

The Full Court

56 The critical conclusion of Underwood CJ, who gave the leading judgment in the Full Court, was that the reason why the appellant failed first to fell the tree from which the branch fell was not because he had been instructed not to do so by Mr Johnstone; it was because of the appellant's assessment that the danger posed by leaving the tree standing was not sufficiently high to require him to fell it first. This was characterised as an "error of judgment on his part" not on the part of the respondent. It appeared not to be disputed by the respondent before this Court that this finding was contrary to the factual basis of the decision of the trial judge.

57 Underlying this conclusion reached by Underwood CJ was the supposition that it was "common ground" at trial that the appellant had the right "to first fell any trees that potentially posed a danger". The appellant had accepted during his cross-examination that if he considered any tree to be unsafe he could remove it and the trial judge had found that the appellant's experience suggested he should have felled the particular pulp tree that caused him injury.

Resolution of the appeal

58 The appellant's main contention is that the Full Court made a factual error by substituting the supposition that the appellant was at liberty to fell any tree that posed *a potential danger* for the finding of the trial judge, who accepted the case presented by the appellant, that he understood himself to be entitled only to fell any tree that posed *too much* of a danger. This contention should be accepted.

59 By "trees that potentially posed a danger" Blow J meant "all pulpwood trees that were likely to have limbs torn out of them by other falling trees prior to felling those other trees". There was thus some overlap between the classes of trees likely to be "brushed" and trees that "potentially" posed a danger, but trees likely to be "barrelled" were well within the latter class. Ordinarily, the appellant would have felled any trees that potentially posed a danger and this would include some, but not all, trees likely to be brushed.

60 However, on the facts as found by Blow J, the instructions given by Mr Johnstone required the appellant to restrict the class of pulpwood trees appropriate for felling on safety grounds to trees likely to be barrelled. This class of trees approximated the class of trees which it was "common ground" at trial that the appellant had the right to fell, namely, "any tree that he considered *too much* of a danger to leave standing" (emphasis added). This turned, as was submitted by counsel for the appellant, upon the appellant's practical interpretation of the degree of danger upon which he might act to fell a pulpwood tree. The reasons of Underwood CJ reveal in some places, but not throughout, a recognition of this conceptual substructure.

61 It should be observed that Underwood CJ also recognised that "[t]he operation in which the [appellant] was engaged called for a considerable degree of judgment" about a number of matters. These matters included "whether safety considerations called for the felling of a pulpwood tree or trees before felling a sawlog tree".

62 The nub of the issue is thus the exercise of judgment by the appellant which was required by the juxtaposition of the appellant's concern for his own safety with the perceived requirements of the timber harvesting plan. That exercise of judgment was necessarily informed by the "unusual" requirements that pulpwood production be maximised and that the appellant not fell pulpwood trees as he ordinarily would. The appellant was restricted by the requirement imposed upon him by Mr Johnstone and was obliged to adopt an attitude to felling of pulpwood trees less favourable to his own safety than he otherwise would have adopted.

63 The Full Court erred in failing to accord significance to the unusual requirements of the timber harvesting plan with the gloss of Mr Johnstone's instructions to the appellant. Consequently there was a failure to differentiate between the class of trees the appellant would ordinarily have been entitled to fell and the class of trees the appellant believed himself entitled to fell in this case, a belief formed by the instructions of Mr Johnstone.

64 The Full Court having held that it had been "entirely appropriate" for the trial judge to accept the appellant's evidence of what Mr Johnstone had said to him, it was not open to their Honours to treat the appellant's own conduct as in some way severing the causal connection between those instructions and the consequences of the appellant's exercise of judgment in relation to the pulp tree by which he was injured. To do so neglected critical elements of the evidence presented to, and accepted by, the trial judge. The legislative requirements respecting timber harvesting plans and the statutory powers exercised by Mr Johnstone underpinned the conclusion at which the trial judge arrived. Without the statutory authority with which Mr Johnstone's instructions were imbued the appellant would have been at liberty to fell any tree he considered potentially dangerous.

65 In this Court, the respondent failed squarely to meet the appellant's arguments respecting the instructions of Mr Johnstone and the terms of the timber harvesting plan, as well as those asserting a conceptual error on the part of the Full Court. The respondent asserted the correctness of the Full Court's conclusion. The essence of the respondent's argument was that the danger to which the appellant succumbed was so great, and consequently his contributory negligence was of such a magnitude, that there remained no room for any liability to attach to the conduct of the respondent.

66 However, this submission relies upon a selective use of the evidence and of the findings of the trial judge, resulting in a failure to keep the findings respecting the conduct of the appellant in a proper perspective. The appellant was correct to submit that the conclusion of Blow J respecting the respondent's negligence must be read in light of his Honour's acceptance that Mr Johnstone gave the appellant certain instructions and supervised their performance, and that those instructions required a variance to the system of work the appellant would otherwise have adopted.

Conclusion

67 The appeal should be allowed with costs. The orders of the Full Court made on 23 March 2005 should be set aside. The respondent should pay the appellant's costs of so much of the appeal to that Court as was determined by the orders of 23 March 2005. The matter should be remitted to the Full Court for determination of the issues raised by pars 7 and 8 of the notice of appeal to that Court dated 28 July 2004 with the question of the costs of the trial and of the further hearing of the appeal to the Full Court reserved to the Full Court.