

46/1936

*Leggett*

v.

*Commonwealth  
of Australia*

**REASONS FOR JUDGMENT.**

*(Findings of fact)*

Judgment delivered at

*Sydney*

on

*14th November 1938*

JUDGMENTMcTIERNAN J.

The pleadings in this action raised the question of ~~the~~ law whether a member of the Permanent Naval Forces has any right of action against the Commonwealth for injuries sustained on duty and whether the facts and the matters disclosed in the statement of claim gave the plaintiff any right in law to sue for damages. This question was argued before the Full Court. The Full Court was of opinion that the question as it stood upon the pleadings was in a wide and general, if not an indefinite form, and, upon an investigation of the facts, it might well appear as a particular <sup>or</sup> ~~and~~ specific question or turn out not to arise at all. The Full Court was, therefore, of opinion that the issues of fact should be tried before the questions of law arising upon the pleadings were determined, and, pursuant to Order XXIV Rule 5 of the High Court Rules, directed that the suit proceed to trial.

Upon the admissions in the pleadings and the evidence given at the trial, I make the following findings of fact. At the time of the accident, in respect of which the plaintiff sued, and for many years previously, the plaintiff was a member of the dockyard police and as such a member of the Permanent Naval Forces of the Commonwealth. He has done duty as a member of the dockyard police at Spectacle Island for as long a period as twenty years prior to the accident, and he was then of the rank of sergeant. Spectacle Island, which I visited in the course of the trial with counsel for the parties in order to view the scene of the accident, is owned and controlled by the Commonwealth. It is a small island in Sydney Harbour used for storing naval requirements, including parts of naval ordnance and other munitions. The premises are not open to the public. Persons visiting the

island are met at the wharf by dockyard police, who are always on duty at the Island. Their duty is to protect the Island and the Commonwealth property there and to maintain a close surveillance over all persons arriving at the Island. There is a police station at the wharf from which the police are controlled. The plaintiff was on duty on the Island on the night of November 28, 1935. He was the sergeant in charge. It was part of his duty and that of the constable under him to patrol the Island. Each of them was required to walk around the Island. This patrol was to be done by the plaintiff ~~xxx~~ and the constable in turn, <sup>apparently</sup> every half hour. On November 28, 1935, the plaintiff was on the night shift, which began at 10 p.m. and was to end at 7 a.m. on the next day. After patrolling the Island he had occasion to go to the wharf to inspect a lighter which was arriving there. This was done in the course of his duty. Mr Cox, an official of the Island, disembarked. He was, no doubt, the person whom the plaintiff expected to disembark. The plaintiff said that he had his police torch when he met Mr Cox. Mr Cox had a house on the Island. The plaintiff escorted him from the wharf. When they came to a ring-bolt hole, which was in the concrete area extending from the end of the wooden part of the wharf inwards towards some sheds, the plaintiff, who is a stout man, fell heavily forward on his stomach. He says that the torch fell out of his hand. There is no defined path for pedestrians over the concrete. The ring-bolt hole is round and shaped like a dish, with its walls sloping down to a flat bottom. It is made for a stout iron ring to rest in. The hole appeared to me, at the inspection, to be about a foot in diameter and about four inches deep. The ring passes through a bolt which is embedded in the floor of the hole, and the ring can be raised to project above the hole. In that position the ring is an accessory to the lifting apparatus of the Island, where heavy articles are pulled about. The bolt is at one side of the floor of the hole, and the ring can be lifted towards that side, and, when dropped into position,

the outer circumference of the ring lies against the sloping wall of the hole nearest the wharf and below the surface of the surrounding concrete. If the ring were left projecting above the surface, a person walking over the hole and not watching his step might put his foot into the loop,<sup>and,</sup> if he did, it is possible that he would fall. If the ring were lying in the hole, since its outer circumference touches the round wall of the hole, it would not be possible for any person walking over the hole from the direction of the wharf to put his foot under or through the ring. But if a person walking in that direction put the toe of his boot in the hole, he might trip, although the ring was not raised. The plaintiff gave an uncertain version of the cause of his fall, saying, first, that he got his right foot caught in the ring-bolt hole and then, that he got it caught in the ring, and afterwards, that he knew when he fell that he had got his foot caught in the ring-bolt hole. This may mean that the ring was up and he put his foot through it and was thereby tripped or that he put the toe of his foot into the ring as it was resting in the hole and stumbled. The plaintiff was not a satisfactory witness in all respects. He was somewhat confused about a number of important matters, as a perusal of his evidence shows. There is no doubt that he did fall. No evidence was given that the ring was out of the hole at the time. When not in use it was lying on the floor of the hole. I think the more probable cause of his falling was that he put his toe into the hole, but not right through the ring, the ring not being up and out of the hole at the time. The situation of the ring-bolt hole where the plaintiff fell is shown on Plan Exhibit 2 and in the photograph Exhibit 3(b), which also shows the police station. The nature of the place where the ring-bolt hole is is shown in this Exhibit. It is crossed by truck rails for which deep fissures have been made in the concrete. In the vicinity there are heaps or isolated pieces of naval stores.~~xxx~~ It would be obvious to any person walking about the Island that, if he did not watch his step, he might trip over one of the things

described.

Outside the police station there is an electric lamp about which much evidence was given. I am satisfied that the lamp shows a light over the area where the ring-bolt hole is and that any person walking from the wharf towards the ring-bolt hole could see it clearly by this light. The light is shown in Exhibit 3 (a). On the night when the plaintiff fell it had been raining. If the ring-bolt hole were filled with water, I am satisfied from the evidence that it could be seen plainly. I am satisfied from the evidence that it is no less visible and noticeable at night when the place is wet and the ring-bolt hole is full of water than when the place is dry. I have no doubt that the light outside the police office was on at the time the plaintiff fell. Indeed, it was the duty of the police to switch on the light. The finding is inescapable that the plaintiff knew the exact situation of the ring-bolt hole and knew that it contained the ring, and there can be no doubt that in the course of his long service on the Island he had passed and repassed over the place where the ring-bolt hole was and had seen the ring and knew exactly what it was like. He knew, or ought to have known, that if any ordinary man did not take care walking over the hole, he might stumble <sup>by dragging</sup> ~~and did not take care not to~~ ~~xxx~~ his toe in the hole.

Counsel for the plaintiff asked me to hold that the plaintiff was honestly mistaken in saying that he had a torch when he fell. There was a controversy as to the number of torches supplied for the use of the police and about the purpose for which they were supplied. But I find it unnecessary to make any finding on these matters because I am quite satisfied that the Commonwealth had made adequate provision to light the place where the plaintiff fell by having the light placed outside the police office, and that the ring-bolt hole could be seen in the night under that light whether it was wet or fine without the aid of a torch. The method of construction of the ring-bolt hole was proved to be old fashioned and a modern method of construction suggested in evidence is to make a ring-shaped impression just deep enough to hold the ring or, if a hole is made, to cover it with a plate. The plaintiff/ <sup>alleges</sup>

that the accident was due to a breach of the duty owed by the Commonwealth to him to exercise a proper care for his safety. Even assuming that the Commonwealth has a duty to take care for the safety of members of the Permanent Naval Forces employed on the Island who might pass and re-pass the place in question and that the standard of care arising from that duty was as high as the standard of care owed by an ordinary employer to an ordinary employee for his safety, nevertheless, I do not think that the placing of the ring-bolt hole there, the manner of its construction, or the omission to cover it, would amount to a breach of such a duty of care, and, upon the facts which I have found, it is, I think, quite impossible to hold that the Commonwealth failed in any duty, if there be one, to take care for the plaintiff's safety. He knew exactly where the ring-bolt hole was and its nature. It was visible by day, and at night it could be clearly seen in the light of the lamp outside the police office. There was ample room for any person to pass by the ring-bolt hole on any side of it without running the smallest danger of putting his foot near it or into it, or a person approaching the hole could easily step over it, for it is only about a foot in diameter. Moreover, it would seem to be a wholly unreasonable conclusion, upon all the evidence, to hold that the plaintiff could succeed when he stumbled over an obstacle, well-known to him and quite visible by day, by artificial light, at night, which was on a terrain where he was employed and with the exact details of which he was quite familiar.

The plaintiff having failed to establish any negligence on the part of the Commonwealth, the question of law which was argued before the Full Court does not arise. In my opinion, there should be judgment for the defendant with costs. I think it useful to add that, if I had thought the plaintiff entitled to succeed, wherever the medical evidence called on his part or his own evidence about his condition did not agree with the evidence called on behalf of the Commonwealth, I should have, for the purpose of assessing damages, accepted the latter, as I was more impressed by every medical witness called for the defendant than the medical witness called for the plaintiff.