

DE GIOIA

V.

DARLING ISLAND STEVEDORING AND
LIGHTERAGE COMPANY LIMITED.

~~PRÆCIPERE~~

~~TO SEARCH~~

REASONS FOR JUDGMENT

DELIVERED AT SYDNEY TUESDAY THE
FOURTEENTH DAY OF APRIL, 1942.

Judgment.

This is an appeal from an order of the Supreme Court of New South Wales made in an action brought by the plaintiff for negligence against the defendant Company, which set aside the verdict for the plaintiff, and directed a verdict to be entered for the defendant. The plaintiff is a wharf labourer, who sustained the injuries complained of in the action when he was one of a gang employed by the defendant engaged in unloading cargo from the hold of the S.S. Northumberland on 27th September 1940. The injuries were caused by a watchman who was in the hold dislodging a bale of cargo which fell on the plaintiff. The crucial question in the case is whether the watchman was then in the employment of the defendant. Some slight evidence was given in the plaintiff's case to the effect that, at some undefined time not specifically connected with the date of the accident or the watchman in question, the defendant employed a head watchman to supervise the watchmen, but no details were given of the supervision or of the watchmen referred to. There was also evidence, and the defendant subsequently admitted, that it picked up the watchman. As it picked him up, and he was in the hold with their employees, keeping an eye on everything that took place there and making notes of the damaged cargo, this might provide that scintilla of evidence sufficient to make a prima facie case, where the real facts, relating to the employment of the watchman, were so peculiarly within the knowledge of the ~~watchman~~ defendant. But the defendant went into evidence and explained the circumstances under which it picked up the watchman, showing this was not done as one of their employees, and that he was in the hold, not on their behalf but in the interests of his real employers the owners of the ship, whose local agents were Birt & Co Ltd. When the whole record is examined the evidence is, I think, conclusive that the plaintiff was not employed by the defendant. The uncontraverted facts show that the wharf superintendent, an employee of Birt & Co, engaged and discharged the watchman. The defendant paid them ^{but} on behalf of the owners of the ship. The defendant rendered its account to Birt & Co on behalf of the owners of the ship, who reimbursed it and paid commission for this service. It would be strange if the defendant received commission ^{for} by engaging and paying its own employees.

The watchmen sent their reports to the wharf superintendent, and the defendant only saw them if the owners made a claim on it for damages to the cargo during the unloading. The defendant was not entitled to and did not in fact control the watchman in question. In these circumstances the Full Court were justified in concluding that upon the evidence the jury could not reasonably hold that he was an employee of the defendant, so that as a matter of law it was entitled to the verdict in the action, sec. 7 Supreme Court Procedure Act 1900, Sheppard v. Felt and Textiles of Australia Ltd. 45 C.L.R. 359, at pp 370, 371, 373, 379.

The appeal should be dismissed.

Starke J. I agree

McTiernan J. Delivered a dissenting judgment.

Williams J. I agree with the judgment of my brother Rich.

DARLING ISLAND STEVEDORING &
LIGHTERAGE COMPANY LIMITED

COPY ORAL JUDGMENT.

McTIERNAN J.

I have reached a conclusion different from that of the other members of the Court. I think that there was evidence fit to be left to the jury on the issues whether the defendant exercised control over the watchman whose negligence caused the accident and whether the watchman was working for the defendant. I cannot agree that the evidence called by the defendant was so conclusive as to justify the Court entering a verdict for the defendant.

James H. Hony
Associate