No 30 of 1943

IN THE HIGH COURT OF AUSTRALIA.

THE COMMISSIONER FOR RAILWAYS

V.

McLACHLAN

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on WEDNESDAY, 29th SEPTEMBER, 1943.

H. J. Green, Govt. Print., Melb.

C.2774

THE COMMISSIONER FOR RAILWAYS.

v.

McLACHLAN.

O R D E R

Appeal dismissed with costs.

THE COMMISSIONER FOR RAILWAYS.

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REASONS FOR JUDGMENT. LATHAM C.J.

THE COMMISSIONER FOR RAILWAYS.

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REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from the Full Court of the Supreme Court of New South Wales dismissing a motion to set aside the verdict of a jury for the plaintiff and to enter a verdict for the defendant, or, alternatively, for a new trial, in an action of negligence. The action was brought by the widow of William McLachlan deceased against the Commissioner for Railways. McLachlan was killed as the result of an accident to a locomotive crane which capsized while it was moving a section of steel steps upon which McLachlan and another man named Soutar were standing. The crane operated in a position of maximum stability when the jib was working in the same longitudinal line as the mobile platform/to which the crane was attached and when the jib was in an approximately vertical position. The strain upon the crane increased and the stability decreased as the jib was swung to the side of the railway line upon which the crane was working and as it was lowered. /There was an indicator upon the crane which indicated the weight which was a safe load at the particular radius at which the crane was operating from time to time. On the occasion of the accident this indicator showed that the crane was safe for a load of 24 cwt. The crane driver (Morris) and the foreman in charge of operations (Emelhang) thought that the weight of the steel steps was 20 cwt. The weight of the load was in fact 27 cwt. and this was increased by the weight of the two men, McLachlan and Soutar, who stood upon the load, the weight of the two men amounting to about 3 cwt. Thus the crane which, according to the evidence, could safely carry 24 cwt., was used, in a position of minimum stability, to carry 30 cwt. The crane had, on the day in question, twice lifted the load without anything going wrong. But when it lifted the load with the men riding on it, it capsized and McLachlan was killed. The defendant denied negligence on

or truck

The jib was being so swung at the time of the accident.

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the part of its servants and contended that the plaintiff was guilty of contributory negligence in riding upon the load while it was being handled, and particularly in doing so in defiance of definite and express instructions. The jury found a verdict for the plaintiff for £1500. The Full Court, Jordan C.J. and Roper J., Halse Rogers J. dissenting, refused to set aside the verdict. An appeal now comes to this Court.

There was no evidence explaining in detail the respective duties of the three men - McLachlan (rigger), Soutar (subordinate to McLachlan) and Morris (crane driver) - but the evidence showed that the driver operated the crane in accordance with directions given by McLachlan. There is no evidence that it was the duty of the crane driver (who operated the crane from a cabin on the crane-truck) to ascertain the weight of a load before he obeyed signals to lift or lower or otherwise move it, the signals being given by the man or men who attached the load to the tackle. These men and others who were engaged upon the same construction job were under the control of the foreman, Emelhang, who was on and about the place where the work was going on but was not actually at the crane at the moment of the accident. It was open to the jury to find that the foreman, the servant of the defendant, had been guilty of negligence in directing the other men to handle the steel section without taking sufficient care to ascertain its weight, and to find therefore that the defendant was guilty of negligence.

The next question which arises is that of contributory negligence. It is probable that the crane (which had already lifted the same load twice) would not have capsized if the two men had not increased the weight of the load by riding upon it; but when the accident happened the crane was operating with a different radius and it was open to the jury to take the view that the crane would have tipped over without the added weight of the two men. But it is certain that, if McLachlan had not been riding upon it, he would not have been injured, even if the crane had overturned. If riding upon the load was negligence on the part of McLachlan, in my opinion it is plain that it materially contributed to the accident by which he was killed and amounted to contributory negligence. It is contended for the defendant that it was not open to the jury merely to reject the evidence which showed that McLachlan had been expressly and definitely forbidden to do the dangerous thing of riding upon any load, that therefore the verdict for the plaintiff is a verdict which no reasonable men could find, and that it should be set aside.

The evidence on this question is that of Soutar, who was working with McLachlan and who was also riding the load, of Emelhang the foreman, and of Ryan, another employee of the defendant.

Soutar's evidence is as follows:-

"Q. You knew, didn't you, that it was wrong to 'ride' the load in the fashion that you were doing - (Objected to by Mr. Miller - witness answers 'Yes').

Mr. Fuller: Q. I will put it another way. You had been forbidden to ride the load in that fashion, hadn't you? (Objected to).

His Honor: Was McLachlan there or thereabouts when you were told this? A. Yes. (Question allowed).

Mr. Fuller: Q. You had been forbidden, hadn't you? - A. Yes.

Q. And assuming that you had carried out that instruction, there would have been no danger to you or McLachlan when the crane overturned, would there - (Objected to; question allowed.) - A. No."

During his re-examination Soutar said that he was going to get on to a load which was in the air when he "got into trouble". His Honour asked: "Did you get into trouble for doing that? - A. I got roared at. Q. Who roared at you? A. Mr. Emelhang. He was the foreman in charge."

Emelhang's evidence is as follows:-

"Q. You knew the deceased McLachlan, did you? - A. Yes.

Q. Had you ever had occasion to speak to him about the working of the crane? - A. Yes, both the day before and on this particular Saturday I instructed everybody that was working round the job, on no account whatever - I instructed everybody working round the crane not to ride on any load, and not on any account to get under any load that was suspended in the air.

Q. Do you remember, apart from that altogether, any special incident in regard to McLachlan? - Yes. McLachlan, the day before, got on one of the loads and the crane started to lift it, and I stopped the crane driver, and told them to get off the load.

Q. You told McLachlan, that is? - A. I told McLachlan to get off the load.

Q. Did he obey you? - Yes.

Q. Did you tell him why or did you just tell him to get off the load? - A. I told him it was dangerous, and that they must not on any account ride on a load.

Q. And when you told him that he got off it? - Yes, he got off."

Ryan's /

Ryan's evidence is as follows:-

"The day before (i.e. the day before the accident) I had been working round the crane, not working on the crane. I remember the day before the accident at about a quarter to 12 I and McLachlan, the deceased, were doing something. We were riding on the load. That is on the load when it was being conveyed by the crane.

Q. Was anything said to you and McLachlan by anybody? - A. Yes, that we were not to ride on the load.

His Honor: Q. Who told you that? - A. Mr. Emelhang.

Mr. Fuller: Q. Mr. McLachlan was there on the load with you at the time? - A. Yes.

Q. When you were told not to ride the load whereabouts was the load? - A. It was just about to go up."

I agree that Soutar's evidence does not in itself necessarily show that McLachlan heard the direction which Emelhang gave on the occasion of which he speaks. But the other evidence, if accepted, does show that Emelhang had, on the day before the accident, told McLachlan in clear and positive terms that he was not to ride any load. The prohibition was general in its terms, and was not limited by any conditions or to any particular circumstances. It was plainly directed to securing McLachlan's safety - to protecting him against injury which might result from an accident in the working of the crane, whether caused by the negligence of some other person or happening without negligence. McLachlan's failure to observe this order was a failure to take reasonable care for his own safety. The disregard of the order was therefore negligence on McLachlan's part, and it materially contributed to his death. He would not have been injured, even if the crane had overturned, unless he had been riding the load.

None of the evidence on this matter was challenged either by cross-examination or by contrary evidence. There was no conflict of testimony. In the course of a full summing up there is no suggestion by the learned judge that any question of the credibility of the witnesses arose. There is nothing in the character of the evidence itself which would justify a refusal to accept it. I agree with Halse Rogers and Roper JJ. that in such circumstances a jury is not at liberty to reject the evidence. The evidence was all one way and should have been accepted, and, if accepted, contributory negligence on the part of the plaintiff is established. Warning which gives

knowledge /

knowledge of danger, and action in defiance of warning of danger establish negligence in the absence of good reason for such action. The verdict is, in my opinion, "utterly irreconcilable with the evidence" - a phrase used in Alcock v. Hall, 1891 1 Q.B. 444 at p. 446. In my opinion, therefore, the verdict of the jury should be set aside as being such as reasonable men could not find upon the evidence, and a new trial should be ordered, costs of the first trial and of the appeals to abide the result of the further trial.

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Judgment

Rich J.
McTiernan J.
Williams J.

We are of opinion that there was evidence on which the jury could find negligence on the part of the defendant, the Commissioner for Railways, in that the jury could have found that the crane was over-loaded at the time of the accident, without taking into account the added weight of the deceased and Soutar, and that it should have been the duty of some officer employed by the Commissioner to know the work the crane had to do to shift the load from the truck to the stairway and to see that no material was placed on the truck in excess of the weight that the crane could safely lift under these circumstances.

There was also evidence that the deceased was ordered not to ride the load and that this prohibition applied to the occasion on which he was killed. This, if accepted, was evidence of contributory negligence on the part of the deceased.

The questions whether the defendant was guilty of negligence, whether the deceased was guilty of contributory negligence, and, if he was, whether his negligence materially contributed to his death, were all questions of fact for the jury, the onus of proving contributory negligence being on the defendant: Proctor v. Johnson and Phillips Ltd 168 L.T. 343.

The learned trial Judge in his summing up directed the jury on all these questions in a full and comprehensive manner, so that it would only be proper to set aside the verdict in favour of the plaintiff if the preponderance of evidence was such as to show that the verdict was unreasonable and unjust: Mechanical and General Inventions and another v. Austin 1935 A.C. 346 at pp. 374-5.

If it was clear that the only conclusion to which the jury might have come was that the deceased must have known that he had been prohibited from riding the load and that this

prohibition included the occasion on which he met his death any other finding by the jury than that he was guilty of contributory negligence and that this negligence materially contributed to his death would be unreasonable.

Three witnesses gave evidence on this point. One, Soutar, was a witness called by the plaintiff, while the other two, Emelhang and Ryan, were witnesses called by the defendant. The evidence of all three witnesses was read to the jury by His Honour in the course of his summing up. It is not clear from Soutar's evidence that the deceased must have heard the instructions not to ride the load, or, if he did, that he should have understood that the prohibition included the occasion on which he met his death. But the evidence of Emelhang and Ryan, if accepted, is clear that the deceased must have heard the instructions and have known that they applied to this occasion, so that the crucial question is whether it was open to the jury to refuse to believe them.

It was contended that there were no reasonable grounds on which the jury could refuse to accept this evidence. It was pointed out that Ryan was not even cross-examined. His Honour after reading the evidence to the jury said:- "These are the passages

> from the evidence relating to this question of the instructions which were given, and if you think that it was made clear to those who were working in and about the crane that it was dangerous to ride the load and that it was forbidden, so far as the employer was concerned, then that is a very material fact for you to take into account when considering what was the real cause of this accident."

Later he said:- "In cases where contributory negligence is set up

> as a defence the defendant carries the same burden of satisfying you on this matter as I told you the plaintiff carries, and the defendant has to satisfy you that instructions were given and were disobeyed."

These are very clear directions.

The evidence was uncontradicted but this would not compel the jury to accept it. Where it is alleged that instructions have been given to a workman not to do an act which results in

his death, evidence of the instructions must often be uncontradicted because the only person who can contradict the evidence is dead. The jury would be entitled to take into account the opinion which they had formed of the credibility of the witnesses, that the instructions to which they deposed were verbal, and whether, if their evidence was true, it was probable that after such an emphatic warning the deceased, who was a married man with four children, would have run the risk of riding the load. Reading the cold print of the transcript it may be difficult to disbelieve the evidence, but the jury saw the witnesses and it was for them and not for a Court of Appeal to determine their credibility: see Phillips v. Martin 15 A.C. 193: Toronto Railway Co. v. King 1908 A.C. 260. On the whole we are not satisfied that a refusal to accept the evidence of Emelhang and Ryan must lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. As the jury were entitled in our opinion to reject the evidence, it was reasonably open to them to find that it was the negligence of the defendant that was the effective cause of the accident.

In these circumstances the contention of the defendant that the deceased ceased to be entitled to the rights of an employee and became a mere trespasser so long as he was riding the load in disobedience of the prohibition does not arise, but we would point out that the authorities to which we were referred: Grand Trunk Railway Co. of Canada v. Barnett 1911 A.C. 361: Hillen and Pettigrew v. I.C.I. (Alkali) Ltd 1936 A.C. 65 are distinguishable because they do not relate to some breach of duty on the part of an employee to his employer.

We are of opinion that the appeal should be dismissed.

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JUDGMENT. STARKE J.

Appeal from a judgment of the Supreme Court of New South Wales dismissing a motion that a verdict for the plaintiff - the respondent here - be set aside and a verdict entered for the defendant - the appellant here. The action was brought under the Compensation to Relatives Act, by the respondent here, in respect of the death of her husband alleged to have been caused by the negligence of the appellant or its servants.

The doctrine of common employment, it should be mentioned, is abolished in New South Wales (Workers' Compensation Act 1926-1929, sec. 65).

A crane, part of a movable truck crane, was being used to lift a steel section of an overhead bridge from a railway truck and deposit it on the ground and the deceased and a fellow workman were riding on the load. The crane capsized and the deceased was crushed and killed.

There was evidence fit for the consideration of the jury that the crane was overloaded and that the appellant's servant, the crane driver, was guilty of negligence in lifting a load which, with reasonable care, he ought to have known was beyond the safe limits of the crane without adjustment. There was also uncontroverted evidence that the workmen had been warned that riding loads was dangerous and they were not to do so.

In substance the learned trial judge directed the jury that there was evidence fit for their consideration of negligence

on the part of both the crane driver - the appellant's servant - and the deceased, and that the question for their consideration, in the circumstances of the case, was, whose negligence was the real and substantial cause of the accident? But he also explained that the real and substantial cause of the accident might be the combined negligence of both parties, in which case the plaintiff - the respondent here - could not recover. The effect of the charge was that it was not necessary to select one as the guilty party if they thought that the accident was caused by the combined negligence of both (see Swadling v. Cooper, (1931) A.C. 1; (1930) 1 K.B. at pp. 406-7: Roeder v. Commissioner for Railways 60 C.L.R., at p. 323).

According to a recent pronouncement in the House of Lords the choice of a real or efficient or substantial cause "from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business man would take to be the cause without too miscroscopic analysis but on a broad view." (Yorkshire Dale Steamship Company v. Minister of War Transport (1942) A.C. 691, at p. 706).

The question therefore was in the present case one of fact for the jury and it found a verdict in favour of the plaintiff - the respondent here. But, as Isaacs J. pointed out in Cashmore v. The Chief Commissioner for Railways & Tramways (N.S.W.), 20 C.L.R. 1, at p. 8; if "when the facts are looked at, they are found by the Court, having regard to all the circumstances of the particular case, to be such that no reasonable men could find otherwise than that the plaintiff " - (the deceased in this case) - "was negligent, and that his negligence was an effective cause of his injury, then the Court should hold as a matter of law that a verdict to the contrary cannot stand ..... because as the result of a review of the circumstances of the particular case, reviewed in their totality, it appears that the plaintiff has failed to take ordinary care, and has thereby brought the mischief upon himself".

The uncontroverted evidence in the present case is that the deceased took a risk in riding a swinging load and did so despite a warning of danger and an instruction that workmen were not to do so. The load had only to be lowered a few feet from a flat topped truck to the ground and there was no necessity to ride the load for the purpose of steadying it as the fellow-workman deposed. Indeed there is no explanation of the action of the deceased in riding the load; no apparent reason for doing so other than a desire to avoid the exertion of getting from the truck to the ground and steadying the load, if necessary, by means of guy ropes which had been attached to the load. No reasonable man in these circumstances could, in my judgment, find otherwise than that the deceased was wanting in ordinary care and caution in taking the risk he did and that his want of care and caution contributed substantially and materially to the accident and his death.

The result is that the verdict of the jury should be set aside and a new trial ordered if so desired.