ORIGINAL

(8)

IN THE HIGH COURT OF AUSTRALIA.

Eagle

v.

Sydney & Suburban Blue Metal Quarries Limited

REASONS FOR JUDGMENT.

(Copy obtained from Law Book Co.)

Delivered at Sydney

on 14th April, 1944.

40358 A. H. PETTIFER, ACTING GOVT. PRINT.

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 90 of 1943.

ON APPEAL from the Supreme Court of New South Wales No. 2009 of 1942.

BETWEEN NORMAN HAROLD EAGLE

(Defendant) Appellant

and

SYDNEY & SUBURBAN BLUE METAL QUARRIES LIMITED

(Plaintiff) Respondent.

Tuesday, 4th April, 1944.

JUDGMENT

LATHAM C.J.: This is an appeal from a Judgment of the Supreme Court of New South Wales refusing an application for a new trial.

A man named Dalloway met his death in circumstances which imposed a liability upon his employer, the Sydney and Suburban Blue Metal Quarries Ltd., under the Workers' Compensation Act. Dalloway was run over and killed by a motor lorry being driven by the appellant Eagle. The Company sued Eagle for an indemnity under the provisions of the Workers' Compensation Act, claiming that the death of Dalloway was due to the negligence of Eagle. A verdict was given for the plaintiff and application was then made for a new trial on the grounds that there was no evidence of negligence on the part of the defendant Eagle, and that, if there were evidence of negligence, there was other evidence which showed that there was an even balance of probability between the two alternatives of the accident being caused by the negligence of the defendant and, on the other hand, the accident being caused by the negligence of Dalloway.

The onus was on the plaintiff to establish negligence on the part of the defendant. Negligence is not to be presumed. But it was argued for the defendant that the facts were equally consistent with the accident having been caused by the negligence of Dalloway.

Three points relied upon by the plaintiff as supporting its claim that the death of Dalloway was due to the negligence of Eagle are:-

(1) Failure to give a warning by sounding the horn;

(2) failure of the driver Eagle to look out; and

(3) driving off what was described as a more or less well defined track which the motor truck, it was said, might reasonably have been expected to follow.

As against these contentions the defendant contended that there was no evidence of any negligence on the part of the driver, that there was no evidence of cause or connection between any alleged negligence and the injury to the deceased, and the point also which I have mentioned as to the even balance.

The evidence which is most material on this is really in a short compass. Dalloway was employed at the plaintiff's Quarry and Eagle was employed as a driver of a lorry which visited the quarry for the purpose of obtaining a load of blue metal. The lorry was driven into the place where the hoppers discharged into the lorry, and the accident happened as the lorry backed out. The evidence shows that Eagle knew that Dalloway was on and about the premises. Eagle had a conversation with a policeman after the accident and he said that Dalloway had spoken to him and Dalloway went to a shed which was on the near side of the lorry to get his bicycle. Dalloway went away from him while he was filling his radiator on the lorry. "He (Eagle) informed me (that is the Constable) he looked through the rear vision of his lorry and was backing, and backed straight out. Did he say anything about what field of vision he was getting in the rear vision mirror? A. No, I do not remember that." (Apparently the reference to looking "through" the rear vision of his lorry is a reference to looking at the rear vision mirror") "Did you ask him whether or not he was looking out or hanging out of the lorry? A. No. I said 'Did you see the man low behind the back of the lorry, would you have to hang out?' and he said 'Yes, you could not see it with the rear vision mirror'." The Constable made measurements and found Dalloway was struck about 52 feet away from the bins.

In order to determine whether there was evidence of negligence it is necessary to ask what the driver knew, or should have known, or

should have thought of if he took reasonable care, and to ask the question what should he have done if he did know or if he ought to have known or thought. First, he knew that Dalloway was there, he knew he might be about the back of the lorry. Next, he knew his vision was limited. As to two points, I think they may be discarded. As to the failure to give a warning, there is no evidence that a warning by sounding a horn was given, or that no such warning was given. I think it would be a doubtful basis upon which to base a case to say that the jury was entitled to infer that no horn was sounded merely on the ground that no evidence was given on the subject.

The evidence as to driving off a more or less defined track is not very clear. Apparently the divergence from the defined track would rather have diminished the chance of accident than otherwise.

The important element, in my opinion, is the look-out. In my opinion it was open to the jury to find that what Eagle said he did in the evidence which I have read was a fair and reasonably full account of what he did. The evidence shows that the driver knew that Dalloway might have been behind him. This was a circumstance which imposed upon him a duty to take care. It was open to the jury to hold that what he said he did showed in itself a failure to take care by looking out. If he had looked out sufficiently to ascertain whether or not there was anyone --- in particular Dalloway -- behind him, then it is a reasonable conclusion that the accident would not have happened.

There is no evidence that I can find of negligence on the part of the deceased - only conjecture or speculation. This is not a case of what the Privy Council called "a precise balance of evidence" as referred to by His Honour Mr. Justice Isaacs in Cofield v. Waterloo Case Co. Ltd. (34 C.L.R. at 375).

In my opinion there was evidence of negligence on the part of the driver and that is sufficient to support the verdict of the jury. Therefore, in my opinion, the appeal should be dismissed.

ORDER: APPEAL DISMISSED WITH COSTS.