OF 1947 No 3

IN THE HIGH COURT OF AUSTRALIA

ASBESTOS CEMENT PTY.LTD.

V.

WHELAN

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 14th November 1947.

H. E. Daw, Gov. Print., Melb.

C.12280/45

ASBESTOS CEMENT PROPRIETARY LIMITED.

v.

WHELAN

ORDER.

Appeal dismissed with costs.

ASBESTOS CEMENT PROPRIETARY LIMITED

v.

WHELAN.

REASONS FOR JUDGMENT. LATHAM C.J.

ASBESTOS CEMENT PROPRIETARY LIMITED

v.

WHELAN.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a judgment of the Supreme Court of South Australia (Ligertwood J.) in an action under sec. 23 of the Wrongs Act 1936-44 (Lord Campbell's Act). The plaintiff in the action was Mavis Mary Davis Whelan, the widow of Ronald Matthew Whelan. Whelan was killed in an accident at the establishment of the South Australian Salvage Company Limited on 23rd April 1946. He was assisting in the unloading of a wooden tray carrying 35 cwt. of corrugated asbestos sheets. The tray was the property of the defendant company, Asbestos Cement Pty. Ltd. The asbestos had been purchased by the Salvage Company from a merchant and arrangements had been made under which the asbestos was sent direct by the Asbestos Company to the Salvage Company. While the asbestos was being unloaded something went wrong, the tray fell, and Whelan was killed. The plaintiff sued the Asbestos Company, alleging negligence in that the tray was constructed of defective timber and was in a defective condition, and that the defective condition of the tray was the cause of the accident. The defendant, on the other hand, contended that the tray, though the wood in it had been affected by borers, was strong and efficient, and that most probably the accident was caused by the method adopted by the defendant of attaching a sling to the tray for the purpose of lifting it from the trailer by which it was conveyed to the Salvage Company's works. The learned trial judge accepted the plaintiff's case and gave judgment for the plaintiff for £1970. The learned judge held that the sole cause of the accident was a defect in the tray.

The /

The tray was produced upon the hearing of the appeal. It is strongly built of wood. It consists of three longitudinal members 9 feet long across the top of which slats are nailed. the tray there were nailed 3 x 2 bearers running across underneath There are end pieces which finish off the tray, and underneath/the longitudinal members and projecting at each side. After the accident the tray was found to be broken at what was called the southern end (which hit the ground first), and one of the slats was broken, but otherwise it was unbroken. The western longitudinal member was infected by borers and part of it had rotted away. tray The/had been used for a number of years without accident.

The defendant company handled asbestos sheets by placing them on a tray and then putting four ropes with loops in their ends on the projecting ends of the bearers and lifting the load as required by a crane. This method had been used on very many occasions for many years without any accident happening. Evidence was given to show that the weight of the load was really taken by the bearers, and that the tray only served the purpose of preventing the brittle edges of the asbestos sheets being broken by the slings. The asbestos sheets are stiff and, if the breaking of the edges of the sheets were disregarded, could have been safely lifted on bearers without a tray, or with a tray of very weak construction. Thus it was argued for the defendant company that the construction and condition of the tray really had no bearing upon the accident, that the only important thing was the strength of the bearers, that the bearers were not broken and, accordingly, that the tray could not be blamed for the accident.

The Salvage Company adopted another method of handling trays containing asbestos sheets. The company used a single sling with a loop at each end. One loop was placed on the projecting end of one of the bearers. It was then taken over (not under) the load to the outside of the other end of the bearer, taken round that bearer on the outside and led horizontally to the outside of the other bearer and then up and over the load to the other end of the last-mentioned bearer, where the second loop was slipped over the protruding end. This method of slinging would leave the

sling /

sling slack in two bights on the top of the load. These were then attached by a short sling to the hook of the crane. With any method of slinging where ropes taking a weight descend from a central point at an angle to separate points of the load there will be an inward pull at the point where the rope takes the weight of the load. The inward pull will diminish as the rope approaches the vertical and increase as it approaches the horizontal. There appears to be no doubt on the evidence that the method of slinging used by the Salvage Company imposed a very considerable additional inward pull upon the bearers. On the side of the tray on which the sling passed under the bearers there would plainly be a very strong inward pull. The method of slinging adopted by the Salvage Company was used only at one other place (Clarksons) in Adelaide, and a great deal of evidence was given to show that it was a dangerous method of dealing with heavy weights.

For the plaintiff, on the other hand, it was contended that the wood of the tray was partly rotten (as was obvious upon inspection), owing to the action of borers, and it was said that the nails attaching the bearers to the longitudinal members pulled out owing to the fact that there was an inward pull exercised on the bearers. His Honour adopted this view, holding that the defect was in the western longitudinal member, and gave judgment for the plaintiff.

The evidence as to the happening of the accident was given by an employee of the carrier who drove a trailer with the sheets to the Salvage Company's factory, and by employees of the Salvage Company who assisted in the unloading. The evidence was that the trailer was driven into the defendant's premises in the ordinary way. Men on the western side of the load placed a loop of the sling on a bearer at the western side of the tray. The sling was passed over to the eastern side. One of the men on the western side put the other loop of the sling on the other bearer. These men were told that everything was all right on the eastern side, that is, the side on

which /

which the ropes passed horizontally between the bearers. One of the men stood on the load and the crane then took the strain and the load was raised a few inches above the trailer. It was swung eastwards away from the truck to get it free of the vehicle, so that while suspended from the crane it could be pushed into the position in which it was desired to deposit it. The evidence was that the load was raised until it was seen that it was square and swinging level. Two of the men who gave evidence were standing on the trailer and the hands of one of them were resting on the asbestos sheets. Whelan was on the ground. Suddenly there was a crack and a crash and the load smashed down on to the ground and Whelan was killed, the northern end of the load having fallen upon him.

The sling was not broken; the tray was not broken, except that it was slightly smashed at what has been called the southern end; the bearers were not broken, but one of them was apparently pulled right off the tray and the other was loosened from the tray. The western longitudinal member of the tray was much eaten by borers, but was still strong and had not broken. Accordingly, the accident was not brought about by any breaking of the tray. It is plain that owing to some cause or other the sling slipped and the tray with its load crashed to the ground. His Honour found that what happened was that the bearers pulled together on the western side, that is to say, the side on which the looped ends of the slings were, and that this pulling of the bearers together on that side resulted in the sling slipping off the bearers, ------ ------that is, in a loop slipping off the bearers on that side. His Honour said that he found that the "sole cause of the accident was the defect in the northern half of the western longitudinal member. It is clear that under the weight of the load, the western longitudinal member, on account of its rotten condition, gave way. It is impossible to say exactly what happened, but the theory I adopt is that the member gave way at the point where the bearer joined it, that there was no holding power in the nails on account

of /

of the action of the borers, that the bearer was pulled towards the south, shearing away the affected part of the longidutinal member as it went and forcing off the loop of the sling and thereby allowing the whole load to collapse." His Honour found that the defendant ought to have examined the tray, and that if an examination had been made the defect was readily discoverable. No such examination was made. There was no reason to anticipate an examination of the tray by persons using the tray in the manner intended, and, accordingly, the principle of Donohue v. Stevenson, 1932 A.C. 562, applied, and the defendant was liable for damages for negligence.

His Honour did not accept evidence which was relied upon to show that Whelan was guilty of contributory negligence in walking under the load. It appears to me that Whelan must have walked under the load, because it is not suggested that the load fell in any other than a vertical direction. But in my opinion it is not necessary to consider the question of contributory negligence in order to decide the case.

The onus is on the plaintiff to establish negligence on the part of the defendant. The negligence found by the learned trial judge is negligence in sending out for use a defective tray, and His Honour found that the cause of the accident was that the defective western longitudinal member of the tray gave way.

The western longitudinal member did not "give way" in the ordinary sense of breaking. Part of it hasdisappeared owing to the action of borers, but what remains is quite strong and not even cracked. There was no collapse of the member and the condition of the surface of the wood shows only the action of borers, and not any scraping effect which one would have expected if the bearer had been dragged along its surface. The bearers became detached - it is only in this sense that the member "gave way", i.e. the nails pulled out. The men who were standing on the western side of the tray at the time when the accident happened gave evidence. They did not suggest that the bearers were pulled together or that the ropes on that side shifted. They were unable to give any explanation of how the tray came to fall. The learned judge accepted as the basis of his judgment the evidence of Mr. W.H. Schneider. Mr. Schneider said,

first, that the bearers were not strong enough to carry a weight of 35 cwt. But in fact the bearers did carry the weight without breaking or cracking. Secondly, he said that it was apparent that one bearer had pulled away from a longitudinal member at the point of attachment with a nail. His opinion was "that the pulling away of a bearer at the point where the borer infestation had made holding power of bearer on the long member negligible" was the cause of the accident. Though Mr. Schneider gave this evidence, when he was asked in cross-examination whether he had any evidence that the nail which had attached the bearer to the tray did not come out in the crash on the ground, his answer was "No". When he was asked "When you say the accident was due to its coming out, you do not know whether it came out before or after tray crashed on ground", his answer was "Yes".

The important point appears to me to be that the evidence does not show whether the detachment (whether it was partial or complete) of the bearers was a cause or a result of the accident. The crash of 35 cwt. from a height of over 5 feet might be expected to produce some results upon the wooden tray, but, except for knocking off an end piece (which was not a significant part of the structure, but was simply nailed on to finish it off) the only effect upon the tray appeared to be the displacement of the bearers, which would be almost inevitable if the sling slipped, so as to subject the bearers to a sudden irregular strain. It is consistent with the evidence that the smash caused the pulling away of the bearers and not vice versa.

Tests of various methods of slinging were made. The evidence showed that a load of 35 cwt. could be safely lifted by the method of slinging adopted by the Asbestos Company even where the bearers were loose. The bearers did not pull together and, indeed, could hardly be moved with a sledge hammer. With the method adopted by the Salvage Company, however, and with the bearers loose it was impossible to lift the load with safety - the bearers pulled together and the load would have fallen if the operation had continued. These experiments show that the method of slinging adopted by the Salvage Company was a dangerous method.

If /

If the sling on the eastern side of the tray was not fitted snugly into the tray and it slipped off the projecting end of one of the bearers, all the facts of the accident would be explained. This hypothesis is quite as open as that adopted by the learned trial judge. In my opinion there is no evidence upon which it can fairly be found affirmatively that the cause of the accident was the defective condition of the tray.

I fully recognise that great weight should be attached to a finding of fact made by a trial judge who has seen the witnesses. In the present case, however, there is practically no conflict of evidence as to the facts, though varying opinions were expressed. In order that the plaintiff should succeed it is necessary for the plaintiff to establish by evidence the existence of negligence which was the cause of the death of the plaintiff's husband. Even if there were negligence in sending out the tray in a defective condition, there is, in my opinion, no evidence that the defect in the condition of the tray caused by the borers had anything to do with the accident. The substantial fact is that the tray, though weakened from its original condition by borers, was strong enough to come through the accident without being broken. In my opinion the appeal should be allowed, the judgment of the Supreme Court set aside, and judgment entered for the defendant.

ASBESTOS CEMENT PROPRIETARY LIMITED

v.

WHELAN AND ANOTHER

JUDGMENT STARKE J.

Appeal from a judgment of the Supreme Court of South Australia whereby the respondent, Whelan, recovered judgment against the appellant for the sum of £1970 and her costs of action.

The action arose out of the death of Ronald Matthew Whelan who was a workman in the employ of the South Australian Salvage Coy. Ltd. The action was brought by his widow, the respondent, pursuant to SS. 20 & 23 of the Wrongs Act 1936-1944 of South Australia against the appellant alleging that the death of the deceased was due to the negligence of the appellant which was a manufacturing company. Its principal business was the production of asbestos sheets for use in the building trade.

The South Australian Salvage Coy. Ltd., which employed the deceased, carried on the business of a timber, hardware and machinery merchant. It placed an order for asbestos sheets with a firm called Wunderlich Ltd. which acted as a merchant distributor. But there was no privity of contract between the appellant and the South Australian Salvage Coy. Ltd. Wunderlich Ltd. placed an order either directly or through another body with the appellant.

But the place of delivery of the asbestos sheets was, according to the practice of the appellant, at its factory and the South Australian Salvage Coy. Ltd. was there directed by Wunderlich Ltd. when the sheets were ready for delivery. Asbestos cement sheeting is a heavy material. The practice was to stack the sheets for delivery upon a tray. The tray

in question in this case was constructed of three longitudinal members held in place by two transverse members nailed to the ~~underneath~~ Each of the longitudinal members. Two bearers were placed under the longitudinal members at a distance from each other and fixed by nails to the longitudinal members. The ends of these bearers protruded beyond the longitudinal members some two to three inches.

The asbestos sheets which weighed some 35 cwts were placed upon this tray.

Trays were loaded by means of a sling and a crane. The sling consisted of four wire ropes attached independently at one end of the rope to an iron ring, with a loop at the other end of the rope for attachment to the protruding ends of the bearers. The South Australian Salvage Coy. Ltd. despatched its carriers to the appellant's factory with a lorry and trailer for the asbestos sheets. Three trays were loaded by the method already described on to the trailer. Two of the trays were placed upon the floor of the trailer and the third, in question here, was placed upon the top of the other two.

The carriers took the lorry and trailer loaded with the three trays to the South Australian Salvage Coy. Ltd. premises ~~and~~ where proceeded to unload the trays by means of a sling and crane. The sling consisted of a steel rope some 25 feet long having a loop at each end and another rope about four feet long. The sling has been described as a single rope sling. The method of attaching the ropes is thus described by the learned trial judge "One loop of the long steel rope was placed over the protruding end of one of the bearers" and "was then taken across and over the top of the load and down under the other protruding end of the same bearer. It was then carried horizontally along the longitudinal member until the other bearer was reached. It passed under the protruding end of that bearer and was then taken up and across the

top of the load again and then down to affix the other loop of the long rope to the protruding bearer on that side. When the portions of the long rope left on top of the load were drawn taut they formed two triangles above the load which had to be attached to the hook of the crane. The shorter wire rope was used for this purpose".

The tray in question here was lifted by means of this single rope sling from the trailer and pushed clear of it by the deceased and other workmen of the South Australian Salvage Coy. Ltd.

Suddenly there was a crash and a crack and the load, tray and all, fell to the ground and crushed and killed the deceased workman who was beneath it.

The appellant insists that the evidence affords no safe basis for concluding that it was guilty of any negligence in connection with the fall of the tray and that the method of unloading the tray adopted by the South Australian Salvage Coy. Ltd. brought about and caused the accident. But it must be said that the method used by the South Australian Salvage Coy. Ltd. had been in use by it for some five years and never before had any accident occurred in using this method for unloading trays. Further, it must be said that the appellant never suggested to the South Australian Salvage Coy. Ltd. that the appellant's method of loading trays was the only safe method for unloading them.

And there are other facts very material to the determination of this case.

The bearers on the tray were so spaced that when in position with the sling attached, whether the four rope sling or the single rope sling was used, and the load was lifted, there was a considerable pressure or pull tending to draw the bearers inwards.

Further, one of the longitudinal members under which one of the bearers was positioned was riddled with borers and the under surface of that member had been eaten away. The feel of the surface of the wood of this member, the presence of borer holes in it and the issuing of a white powder from those holes all indicated the presence of borers and the rotten state of the longitudinal member. A proper examination of the tray would have disclosed the defect.

All this affords ample evidence for concluding that the pressure tending to draw the bearers inwards had pulled them inwards, drawn the nails fastening the bearer to the longitudinal member riddled with borers, thereby affecting the distribution of the load and allowed the sling ropes to slip from the protruding ends of the bearers to which they had been attached. If so the loaded tray had nothing to support it and so fell to the ground. And the learned trial judge so found upon evidence which, to my mind, strongly supports his finding. And that finding necessarily results in a finding of carelessness on the part of the appellant.

But it is contended that the appellant owed no duty to the deceased workman. It is true that no privity of contract existed between the South Australian Salvage Coy. Ltd., the deceased workman and the appellant but this action is based upon tort - upon negligence - and "liability in tort is fixed by the law irrespective of any contract between the parties" (See Winfield Text-Book of the Law of Tort 2 Edn., p. 719). Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do (Blyth v. Birmingham Waterworks Co. 11 Ex. 781). "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"

(Donoghue v. Stevenson 1932 A.C. 562, at p. 580; Herschtal v. Stewart & Ardern Ltd. 1940 1 K.B. 155).

And in this case the workman was doing the very kind of thing which the appellant contemplated, namely, unloading the tray and which, if care were not used in its examination might become unsafe and likely to result in injury to any person loading or unloading it. The duty to the deceased workman and its breach is thus established.

And it should be observed that the appellant disclaimed on the hearing of this appeal any allegation of contributory negligence on the part of the workman.

The appeal should be dismissed.

ASBESTOS CEMENT PROPRIETARY LTD. v W H E L A N

JUDGMENT DIXON J.

ASBESTOS CEMENT PROPRIETARY LTD. v WHELAN

Since the argument of this appeal I have read through the evidence given at the trial and I have examined the broken tray, which was brought into Court. I think it is likely that, if it had been my lot as a judge of first instance to decide what was the cause of the fall of the tray of asbestos upon the unfortunate man whose life was lost, I should have found myself unable to say with sufficient confidence that it arose from any specific cause implying negligence on the part of the defendants appellants.

But the learned primary Judge, who tried the action and had the advantage of seeing the witnesses, came to a very clear conclusion as to the way the accident happened and our duty, as an appellate Court, is to say whether upon the evidence it affirmatively appears that in any essential respect his finding upon that question is wrong. Upon the whole record of the

proceedings I think the view adopted by the learned Judge as to the cause of the accident was fairly open to him and that the Court of appeal ought not to interfere with his finding with reference to this pure question of fact. All the difficulties were canvassed before him and were dealt with by the expert witnesses called on either side. It was conceded on all hands that the witnesses were right in saying that the looped ends of the single rope sling were slipped upon the horns of the bearers under the tray of asbestos sheets on the western or off side of the load and that the running wire was passed under the horns of the bearers on the eastern or near side. It is conceivable that the fall of the loaded tray might have been occasioned,not in the way found by His Honour, but in one or other of the two following ways,namely by the running wire rope drawing the ends of the bearers together on the eastern side and so slipping off or overbalancing the load; or by the two slack loops of the single running rope at the top

of the load being of unequal length and not drawing even through the wire snotter attached to the hook of the crane ; or by the slipping of one of the loops or of the running wire from one of the horns of the bearers owing to the shortness of their length (2 ¾ ") and to some failure on the part of the men to ensure that when the sling grew taut the loops and the running wire were well under the horns. But the learned Judge considered that the accident was due to none of these causes but to the shifting of one of the bearers on the western side to which the loops were attached. His Honour was of opinion that it shifted under the influence of the inward drag of the wires looped over the horns of the bearers and running up to the hook because the attachment of the bearer to the longitudinal member under the tray had been weakened.

It had been weakened by the destruction of some of the wood by borer,so that the nails,which His Honour thought had been three in number,had lost their hold.

It is clear that the wood of the longitudinal member above the bearer and for a considerable distance on either side of it had been destroyed for some depth into the beam and that the nails could have had little,if any,hold. But the construction of the tray appears to be based upon the notion that the angle with the perpendicular at which the sling descends from the hook to the bearers will not be so wide as to exert upon the bearers a horizontal force sufficient to overcome the frictional resitance which the great pressure of the load would create. The nails, though calculated to increase the frictional resistance,were evidently used for the primary purpose of keeping the bearers in position while the tray is off the slings or is not in use.

My reading of the evidence and inspection of the remains of the tray have not removed altogether a serious doubt whether the theory upon which the tray appears to have been constructed is not true,and borer or no borer,nails or no nails,at the ends carrying the loops as opposed to the running wire,the bearers would not have remained in position once the load was lifted.

But this was a question gone into at the trial with some thoroughness and there was ample evidence upon which the Judge was entitled to act in rejecting the suggested impossibility. Moreover,it must be remembered that,if and when the rotten portion of the member caved in,the tray would be let down perhaps a couple of inches at that end, a thing which would make it easier for the bearer to slide or slip.

The accident must,in this view, be taken to have occurred, not through the unsafe or undesirable method of slinging used at the store of the South Australian Salvage Company Ltd.,but because of the condition of the wood of the longitudinal member of the tray where an end of one of the bearers was fastened to it. The appeal comes thus to depend upon the questions whether in the circumstances the appellant company was under a duty of care for the safety of those in the position of the deceased who might use the tray and,if so,whether in allowing the tray to go out with

the wood partly destroyed or rotted by borer, the appellant failed in that duty.

The facts material to these questions can be very briefly stated. The appellants manufacture asbestos cement sheets and deliver them laid in trays to the carriers, who transport them to the users. The marketing is done through a succession of merchants, but the delivery is made to the ultimate buyer on instructions received through the intermediate merchants. The trays containing the sheets are placed upon the lorries of the carriers by means of the appellants' slings and gear. At their destination they are removed from the lorries by the gear of the purchasers taking delivery. The latter use their own slings and attach them to the trays, or doubtless sometimes pass them round the tray with its load. They remove the laden trays by means of their own cranes or hoists. What gear the purchasers use and what kind of slings and how they are attached are not

matters known to the appellants ; but they do know that the trays are used to unload the asbestos sheets from the lorries by means of gear involving the use of slings.

The trays are regularly sent back to the appellants after the sheets of asbestos have been removed from them. The appellants employ a foreman cooper whose work includes the maintenance and repair of the trays.

In the circumstances stated I think that the appellants did incur a duty of care towards persons in the situation of the deceased to safeguard them from injury through defects in the trays. The duty arises from the fact that one of the purposes for which the defendants provided the trays was in order that, when the lorries carrying the trays laden with asbestos sheets arrived at the premises of the ultimate purchasers, the trays so laden might be removed by means of slings AND hoists. Employees and others on the premises of the ultimate purchasers, therefore,

occupied a position with reference to the trays which the defendants necessarily contemplated in putting the trays into employment.

Defects in a tray of a kind likely to cause its collapse or its fall from the slings exposed persons in that position to danger as a consequence of the intended use of the tray in the course of the appellants' business in the same way as persons employed by the appellants at the appellants' own premises.

The argument that the trays left the control of the appellants and were under the control of strangers who might have examined them is, I think, misconceived. The possibility of examining the trays after they arrived on the lorries and before they were slung and lifted is a logical rather than a practical or business possibility. Passages in the opinions delivered in Donoghue v Stevenson 1932 A.C. 562 have, I know, been sometimes understood as excluding from the application of the

principles adopted by the majority to cases where before the injurious articles reach the consumer there is any opportunity of intermediate examination. But the true view is that the duty remains unless the making of an intermediate examination or inspection might reasonably be anticipated. This had been shewn by Professor Goodhart 1938 54 L.Q.R. 59 and probably is now sufficiently established by the judgment of Tucker J. in Herschtal v Stewart and Arden Ltd 1940 I K.B. 155 and the approval in Haseldine v Daw & Son Ltd 1941 2 K.B. 343 at p. 363 by Scott L.J. of the decision and at p.376-7 by Goddard L.J. of the doctrine.

The facts of the present case are such that it may be supposed that,before the decision in Donoghue v Stevenson 1932 AC 562, the appellants would have been held to be under a duty of care with reference to the tray for the safety of persons in the situation of the deceased. There is no case precisely the same,

but the tendency of Elliott v Hall 1885 15 Q.B.D. 315, of the statement in Mowbray v Merryweather 1895 2 Q.B. 640 at p. 644 by Kay L.J. as to the remedies of the workman, of Hawkins v Smith 1896 12 T.L.R. 532, and of Oliver v Saddler 1929 A.C. 584 is strongly in that direction.

The question whether from the condition of the wood a neglect of the duty of care should be inferred is one of fact. The learned Judge drew the inference and there is no sufficient ground for disturbing his conclusion. The consequences of a tray collapsing obviously might be very serious, as they proved in the present case. The trays are not constructed in a manner which would make it reasonable to rely upon their strength and stability without constant inspection. The kind of wood used is liable to the attacks of borer. Whatever divergence of opinion there may be among experienced persons about the stresses upon the bearers and the likelihood of the bearers drawing

together, it must be taken that the accident did happen in that way ; and as infestation by borer means a weakness in wood likely rapidly to increase and manifesting itself in all kinds of failures, the particular failure falls within a general description of danger which might have been prevented by the exercise of due care in the inspection and examination of the trays.

For these reasons I am of opinion that the appeal should be dismissed with costs.

ASBESTOS CEMENT PROPRIETARY LIMITED

v.

WHELAN

JUDGMENT.

McTIERNAN J.

ASBESTOS CEMENT PROPRIETARY LIMITED

v.

WHELAN

JUDGMENT. McTIERNAN J.

I am of opinion that this appeal should be dismissed.

The evidence is lengthy and detailed, but I think that the substance of the case can be briefly stated.

The tray which fell, laden with asbestos sheets, upon the respondent's husband was made by the appellant and was its property. The only practicable way of handling the tray when laden with asbestos was by a sling for which the bearers underneath the tray were made with projecting ends. The deceased and his fellow workmen were handling the tray with the load in this way when it fell upon him. There was no opportunity of examining the tray while the asbestos was on it. The tray with the load collapsed while it was being lifted from the trailer to the premises of the deceased's employer. The type of sling, described as the "single sling" used by the appellant's workmen was different from the type of sling used by the appellant to lift the tray with the asbestos on to the trailer. The deceased's employer had used the former type of sling for a number of years and no accident had hitherto occurred. The same type of sling was used at another works to handle loads of a similar kind. The sling was not commonly used; but it was not unreasonable for the deceased's employer to use this type of sling to get the tray with the asbestos into his store. The appellant did not give any instructions about the type of sling to be used by any person handling the tray. The hoisting of the tray with the asbestos on it by means of the sling in order to remove it from the trailer to the deceased's employer premises was an operation which was likely to cause injury to the workmen if the tray collapsed with the load on it while in the air. It was the duty of the appellant to take due and reasonable care that there was no defect in the tray which would cause it to fall while the

tray /

tray with the asbestos on it was being lifted by any safe and efficient type of sling. The sling used by the deceased's employer was of that type. The crucial issue of fact in the case is whether the fall of the tray was caused by any defect in it which the appellant knew or ought to have known. The evidence established that one of the longitudinal members of the tray had been infested with borer and was rotten for a considerable length and depth, and that in consequence of this condition the holding power of the nails fastening one of the bearers was reduced. The evidence demonstrated that the tray will collapse when lifted with a load by the single sling unless the bearers are securely fastened to the longitudinal members or struts are put between the bearers, because there is an inward pull on the bearers which results in the sling coming off the tray. It was proved that the loops of the sling had been securely put on the projecting ends of the bearers on one side and under the projecting ends of the bearers on the other side before the tray was hoisted with the load by the deceased's fellow workmen; and the load was lifted and handled with care and skill until it collapsed. I am of opinion that these facts justify the inference that the fall of the tray with the load of asbestos was the consequence of the rotten condition of the longitudinal member which had been infested with borer; and I am of opinion that this inference is the most probable one.

There is evidence that if a sling similar to that used by the appellant to load the tray with the asbestos on to the trailer had been used by the deceased's employer the bearers would not have moved, even if they had not been fastened, because that type of sling does not exert an inward pull on the bearers of the same force as that exerted by the "single sling". According to this evidence the condition of the longidutinal member did not affect the stability of the bearers and the purpose of nailing them was not to strengthen the tray, but to maintain the spaces which it was desired to have between the bearers. It may be that if the appellant's type of sling had been used the tray with the load upon it would not have collapsed. But the tray was constructed with projecting bearers

at either side to be handled with a sling: it was designed to be lifted with a load upon it by a sling. The appellant gave no direction that any particular type of sling was to be used or not to be used. Neither the deceased man's employer nor he nor any of his fellow workmen knew that the bearers were so insecurely fastened that it would be dangerous to hoist the tray with the load of asbestos upon it. The appellant knew or ought to have known of the rotten condition of the longitudinal member and that the condition reduced the holding power of the nails driven into the bearer. The appellant was guilty of a breach of duty to take due care for the deceased man's personal safety by sending out this load of asbestos for delivery by this defective tray. There is no evidence to support the allegation of contributory negligence. The decision of the learned trial judge is in my opinion right.