OF 1951 3

IN THE HIGH COURT OF AUSTRALIA

MILICK

V.

DOHNT

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Melbourne.
on Tuesday, 16th October, 1951.

MILICK v. DOHNT

ORDER

Appeal dismissed with costs.

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MILICK

V.

DOHNT

JUDGMENT

DIXON J.
WILLIAMS J.
FULLAGAR J.

MILICK

V

DOHNT

JUDGMENT

DIXON J.
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FULLAGAR J.

This is an appeal by the plaintiff from a judgment of the Supreme Court of South Australia (Ligertwood J.) dismissing with costs an action brought by him claiming damages for injuries which he suffered in an accident which occurred while he was employed by the defendant loading logs on to the defendant's lorry for transport to the timber mills. The plaintiff claims that the injuries were due to the negligence of another employee of the defendant, his son Nathan Dohnt, or alternatively to the personal negligence of the defendant in failing to provide a safe system of working, safe equipment, effective supervision of the loading and an experienced and skilled workman to operate the crane erected on the lorry and used to lift the logs from the ground on to the lorry.

The means employed to load the logs were partly manual and partly mechanical. Three workmen were engaged, a hooker-on, a loader (the plaintiff) and the driver of the lorry (Nathan Dohnt). The mechanical means consisted of a winch-driven crane fixed to the floor of the lorry. The crane had an overhead jib which swung free and carried a cable running through two pulleys (one) at the near end and the other at the far end of the jib. The end of the cable was fitted with scissors which the hooker-on inserted in the log about its centre of gravity. The cable was wound on a revolving drum fitted in the floor of the cabin of the lorry. The drum was connected by means of a clutch to the power take-off of the engine of the lorry. The clutch was controlled by a wheel turned by the driver's hand. When the clutch was engaged the drum revolved to wind up the cable attached to the log and raise

it from the ground. When the clutch was disengaged the weight of the log would cause the drum to run free in the opposite direction and unwind the cable. If no log was attached to the cable the drum could be made to revolve and the cable to unwind by pulling the cable.

To lift a log on to the lorry the clutch was disengaged and the cable paid out until its length was sufficient to allow the scissors to be inserted approximately in the centre of the log lying parallel to the lorry. The clutch was then engaged and the log lifted above the lorry, the butt end to the front. The loader guided the log above the position it was to occupy in the load by standing behind it and exerting pressure on its small end. When the log was properly poised the loader called "Right", or some corresponding signal, to the driver who disengaged the clutch, allowing the log to drop into position.

The loader then climbed over the load to the log and unhooked the scissors. During the loading he had been standing on a platform at the rear of the lorry formed by the ends of the lower logs. The cable was then paid out again to begin the lifting of the next log. The two bottom layers of logs were kept in position by four upright steel pins about 20" long erected at the front and rear ends of the platform on each side of the lorry respectively. The subsequent layers were kept in position by being placed in the V's formed by the logs underneath, the width of each layer being reduced until finally the load came to an apex with a single log resting in the V formed by the penultimate layer of two logs. After a load was complete the cable was placed around the load to keep it steady whilst the lorry was proceeding to the mill. This was done by passing the end of the cable under the lorry and attaching it to itself immediately below the jib. The driver left his seat and descended to the ground to help the hooker-on pass the cable under the lorry and hand its end up to the loader for attachment. Wnen a log

was being hoisted into position on the lorry it could be kept suspended above the load whilst the loader was guiding it into position, either by the driver slipping the clutch so that the friction of the clutch counteracted the force of gravity or by his applying the brake. His Honour found that the general practice was to control the log by slipping the clutch and Nathan Dohnt said that this was his practice and that he only used the brake to keep the cable taut after it had been finally placed around the load preparatory to transit.

On the facts as found by His Honour the accident to the plaintiff occurred immediately after the top log had been lowered into position. The plaintiff had walked along the logs and had put his left hand on the cable, and was just stooping down to unhook the scissors when he felt the load shift and some of the logs including the top log began to fall off the lorry. The plaintiff fell off the lorry on to some of the logs already on the ground and was seriously injured when another log fell on top of him. When the logs began to shift the plaintiff called out to Nathan Dohnt "Hold her" meaning thereby to keep the cable taut by engaging the clutch or putting on the brake. But at that moment Nathan Dohnt was leaving his seat preparatory to descending to the ground to help the hooker-on pass the cable round the load and he did not hear the plaintiff. The clutch was disengaged and the brake was off so that when the load began to fall the drum was free to unwind and there was nothing to prevent the cable paying out and allowing the top log to fall off the lorry.

It was contended for the plaintiff that Nathan Dohnt should not have commenced to leave his seat on the lorry until the plaintiff had removed the scissors from the log, but should have kept a watch on the load to detect any movement and remained on the alert to obey any direction from the plaintiff with regard to the cable, and/if he had done so he would have

heard the plaintiff call out "Hold her" and would have been able to make the cable taut either by slipping the clutch or applying the brake. The plaintiff claims that if Nathan Dohnt had made the cable taut when he called "Hold her" he would have been able to/save himself from falling from the lorry. The plaintiff hold on to the cable, keep a foothold on the top log and relies on Nathan Dohnt's own evidence that if he had seen any log move and put his brake on, that log would not have fallen on to the ground and if the plaintiff was there and holding on to the cable he could hold himself up. In South Australia the doctrine of common employment was abolished by the Wrongs Act 1944, so that an employer in South Australia is liable for injuries caused to an employee by the negligence of another employee acting within the scope of his employment. The defendant would therefore be vicariously liable if the injury to the plaintiff was caused by the negligence of Nathan Dohnt. He would be liable for personal negligence if he failed to provide a safe system of working etc. It was contended that the system of working was not safe because to operate the clutch and brake the driver had to face the front of the lorry whereas he should have been facing the load. It was also contended that the equipment was defective because it was dangerous to load above the level of the pins and that either the height of the load should have been reduced or higher pins provided.

His Honour dealt with these two contentions in the following terms and nothing has been said in argument which would justify an appellate Court in interfering with these findings. "It was shown by the evidence that the loading of lorries with equipment similar to that of the defendant's, had been in operation in the south-east for about 12 years. Both the equipment and the system of loading used by the defendant were standard, and had been accompanied by very few accidents. The complaints made at the trial against the equipment and the system of working were two. First it was said that the pins were not high enough, and that it was dangerous to load above the level of the pins. The

defendant's answers, which I accept, were that the pins were of standard height, and that a properly constructed load was quite safe even when it rose above the level of the pins. There were practical difficulties in the way of using higher pins. They would interfere with the smooth working both of the loading in the forests and the unloading at the mills. I find that the equipment was not defective by reason of the height of the pins. The second complaint was that the position of the driver of the crane was such that he was unable properly to co-operate with the loader. It was said that at all times his position with his back to the load and with his head slewed to the right, was awkward, and might lead to him not properly observing the logs, and that when the load rose above his head his vision of the logs was confined to their butt ends. The defendant's answer again was that the driver's position was standard and experience had shown that it occasioned no difficulty in the performance of his work. Even when the load was above his head his view of the butt end was sufficient, because the loader controlled the small end and through it the lie of the log. The driver's concern was to see that the log was lowered gently, and for this purpose his view of the butt end was quite sufficient. I accordingly find that the system was not defective by reason of the position of the driver."

The argument on the appeal in the end centred around the question whether it was negligence on the part of Nathan Dohnt to leave his seat before the plaintiff had removed the scissors from the top log and around the question, which is really the same question, whether it was personal negligence of the defendant not to provide a system of working which required the driver to remain in his seat ready to control the cable in case the log slipped in the interval between the lowering of a log into position and the unhooking of the scissors. Evidence was given that some loads have a tendency to shift. But loads are of two kinds - loads of board logs, as in the present case, which are regular in length and shape and are cut at the mill into

floor boards, and case logs which are of varying size and irregular in shape and which are used for making boxes. This evidence related to loads of case logs and there was no evidence that loads of board logs have such a tendency.

In Glasgow Corporation v. Muir, 1943 A.C. 448 at pp. 456, 457, Lord MacMillan pointed out "that the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved". "Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation". The duty is "to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

In the present case no reasonable probability existed that the load would shift after a log had been safely lowered into position or that there would be any risk of danger to the loader from this source whilst he was unhooking the scissors. At this stage the load should be stationary and any friction caused by the loader climbing on to the logs and unhooking the scissors was not likely to affect its stability. The only probable danger to the loader from the movement of a log was whilst it was in motion during loading. In this period the loader remained behind the log and stood on the platform already mentioned. The driver remained on the qui vive ready to carry out his directions. The loader was responsible for the formation of the load on the lorry, and his skill and experience should have been sufficient to enable him to judge whether the load was securely stacked or not. After a log had been safely placed in position the only risk to the loader that could be reasonably anticipated was the risk that he might

injure himself by slipping when climbing over the load or by some mishap in the course of unhooking the scissors. Nothing that the driver could do could afford any protection against these risks. In the circumstances it was not reasonable to expect the defendant or Nathan Dohnt to contemplate that the load would shift or that the plaintiff would be injured by any movement of the logs except whilst a log was being elevated from the ground to above the load and thence lowered into position. In the present case the last log had been loaded into position, the driver's part in the loading had been completed, and Nathan Dohnt was not guilty of any lack of care for the plaintiff's safety in preparing to descend to the ground to fulfil his next duty whilst the plaintiff was disengaging the scissors. He was not guilty of negligence because he had not done or omitted to do anything the doing or omitting to do which might have as its reasonable and probable consequence injury to others.

Further, as damage is the gist of the action, the plaintiff must prove not only that the defendant was negligent but also that the negligence was the cause of his injury. If Nathan Dohnt had heard the plaintiff call "Hold her" and had acted immediately he might, as he said, have been able to secure the cable and prevent the top log falling from the lorry but he could not have prevented the other logs falling to the ground, and we are not prepared to disturb His Honour's finding, reached after a careful examination of the evidence, that once a log had been lowered into position and the loader had mounted the load to unhook the scissors there was nothing the driver could do to save the situation arising from the collapse of the load. As he said, on the probabilities, particularly having regard to the sudden collapse of the load, the application of the brake and the abrupt arrest of the last log may well have added to the danger of injury to the plaintiff.

The appeal should be dismissed with costs.