No. 1 of 1958 19/-

IN THE HIGH COURT OF AUSTRALIA

WALTER H. WRIGHT PTY. LTD.

V.

NAUBURAS AND THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on TUESDAY, 4TH MARCH, 1958.

W. M. HOUSTON, Govt. Print., Melb.

C.1078/55

WALTER H. WRIGHT PTY. LTD.

v.

NAUBURAS AND THE COMMONWEALTH OF AUSTRALIA

'ORDER

Appeal dismissed with costs.

WALTER H. WRIGHT PTY. LTD.

v.

NAUBURAS AND THE COMMONWEALTH OF AUSTRALIA

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
WILLIAMS J.
WEBB J.
FULLAGAR J.
TAYLOR J.

WALTER H. WRIGHT PTY. LTD.

v.

NAUBURAS AND THE COMMONWEALTH OF AUSTRALIA

We have all reached the conclusion that this appeal should be dismissed and I shall state our reasons very shortly. The case for the appellant has been fully argued and no advantage would be obtained by making a detailed statement of the facts. The question at issue comes before us in what is, perhaps, an unusual way. The plaintiff, who is not a party to the appeal, sued two defendants, one being the Commonwealth and the other the appellant company. Part of the business of the latter is the using of mobile cranes for the lifting of heavy weights. The plaintiff is the administratrix of Martin Nauburas who was killed as he was attempting to lift a heavy weight with the aid of his employer's crane. The accident took place on land belonging to, or at all events occupied by, the Commonwealth. As administratrix of her deceased husband's estate the plaintiff sued under Lord Campbell's Act both Walter H. Wright Proprietary Limited and the Commonwealth as defendants, the cause of action being, stated broadly, in negligence.

A verdict was found for the plaintiff against both defendants, the damages awarded as apportioned being £4000 against the defendant appellant, Walter H. Wright Proprietary Limited, and £2000 against the defendant respondent, the Commonwealth.

The presiding judge, Dean J., however, had reserved leave to the Commonwealth to apply to him for judgment after verdict if he considered that no cause of action against the Commonwealth had been disclosed by the evidence. The Commonwealth did so apply and his Honour arrived at the conclusion that there was not sufficient evidence to support a case against the Commonwealth. He therefore entered judgment in favour of

the Commonwealth notwithstanding the verdict and at the same time entered judgment for the plaintiff against the defendant appellant Walter H. Wright Pty. Ltd. for the entire sum of damages, £6000. The action of the learned judge of course deprived that defendant of the advantage of the apportionment. The defendant company appealed to the Full Court of the Supreme Court naming the plaintiff as a respondent as well as the Commonwealth. The plaintiff did not appeal against the decision of the learned judge in favour of the Commonwealth and the Full Court speedily discharged her from the appeal against that decision by the defendant Walter H. Wright Pty. Ltd., treating that appeal as affecting only the liability of the Commonwealth to bear part of the damages in an apportionment between the two defendants. In the result the Full Court affirmed the decision of the learned primary judge. From the order of the Full Court dismissing the defendant company's appeal that defendant now appeals to this Court. The appeal is based upon the ground that the jury's verdict should have been allowed to stand and as between the two defendants the damages should have been apportioned as the jury found. It will thus be seen that the question comes to us simply as a question of contribution between two defendants, one of them claiming and the other denying that they were properly found to be jointly liable and that an apportionment of the damages made by a jury should stand. It is in that form that the appeal comes before us.

For some years before the accident - how long we are not told - the Commonwealth had maintained a series of stores for the purposes of the Department of Supply in an area of land off Flemington Road or Racecourse Road called by the name of Debney's Paddock. The material and articles stored seem to have been of widely differing descriptions and some things were apparently held in the open. A roadway leads off the public

road and it was described in terms that suggest that it was capable of bearing heavy loads. The area itself was land that had been filled; the filling was complete as early at least as 1940. In April 1956 at some point in that area there lay a large metal boom with a grab attached and it was necessary to remove it. The boom and grab were lying on a semi-trailer and their removal involved the lifting of a very heavy weight. One, Johnson, a foreman in the Stores and Transport Branch of the Supply Department, acting under instructions, as it appears, requested Walter H. Wright Pty. Ltd. to remove it.

Walter H. Wright Pty. Ltd. apparently knew that the land had been filled, whatever the significance of that knowledge may be. There is no evidence that Martin Nauburas, their employee, did. Under the directions of Walter H. Wright Pty. Ltd. he took the mobile crane for the purpose to the place. He was unaccompanied and would work the crane alone. He consulted with Johnson when he arrived with his crane and Johnson appears to have asked him whether a particular place would do, that is as a site for it while it operated. Johnson also knew that the land had been filled, but he did not communicate that fact to Nauburas. Nauburas is dead and, of course, it cannot positively be known whether anybody had communicated the fact to him or whether he had any private knowledge of the fact. It has, however, been assumed that he was unaware, in judging what he would do, that the land had been filled.

In the course of the operations, the crane overturned and he was killed. He was at the time in the cabin. The crane was very heavy; it had a long reach; the possible radius of the jib and fall was great. To support the crane in position it was provided with four sliding extensions, as they may be described, called outriggers; under these could be placed blocks or other devices to support the vehicle and keep the weight from

being only upon the tyres. Such supports would, of course, extend the length over which the weight was borne as well as give a vertical support. Blocks were not provided by the employer in this case, but what are called pyramids, which were tapering supports constructed so that they had a base fourteen inches square and an apex ten and a half inches square; between the base and the apex were latticed wooden laths of considerable substance. These were placed under the two end extensions called outriggers and chocked-up, to use a descriptive expression, so as to take the weight.

The jib of the crane was extended over the back of the mobile vehicle, and Nauburas attempted to lift the boom and grab. In this he was successful, but at a point when the boom and grab were being lowered, or there was another movement, the whole thing collapsed. The cause of collapse was a matter submitted to the jury and was a question depending on the sufficiency of evidence.

The plaintiff put her case as one of invitation to premises which proved unsafe and it was upon that basis that the case went to the jury. The plaintiff's case was that because the land was filled it was incapable of supporting the necessary weight and that the pyramids should not have been placed upon that soil bare, so to speak, and that the connexion between the soil and the vehicle was inappropriate. The case made was that under the weight of the outriggers the pyramids were liable to sink in the insufficiently compacted soil.

Scientific evidence was called; whether appropriately or not may be doubted, but the question raised by the case was a jury question. The whole case was put on the ground that here were premises to which the plaintiff's husband, the deceased, was invited, and that they contained an unexpected danger of which it was the duty of the two defendants to take heed and to warn him.

We are, of course, not concerned with the basis of the verdict against Walter H. Wright Pty. Ltd. who were his employers. Their duty was that of employer to employee. They do not now contest their liability to the plaintiff.

What we are concerned with is the duty of the Commonwealth. A verdict was found against the Commonwealth as a joint tort feasor, that is to say as one of two parties whose negligent acts or omissions combined in causing damage, as has been described in the opening of this judgment.

The appeal has been considered and argued very largely on the basis of duty to invitees. For myself I would prefer to treat the case against the Commonwealth under a more general category of negligence. The accident arose in the course of a skilled operation which the deceased was performing. I would observe first of all, that the object to be lifted was there, fixed to a site, so to speak. There was no question of the choice of the place where the work should be done; that was pre-determined by the character of the work itself.

I would observe next that the defendant, Walter H. Wright Pty. Ltd., the employer of the deceased, was called in by the Commonwealth as an expert or skilled contractor to perform the required operation with the gear which that company would provide operated by its employee or employees.

In those circumstances, where is to be found a breach of duty on the part of the servants of the Commonwealth? Johnson, and no doubt others of its servants, knew that the land was filled. But it is not shewn, and there is no material from which it can be inferred, that they had any special knowledge that the land had been so filled that it was insufficiently compact. It was, in fact, many years since it had been filled. There is, perhaps, a general assumption that filled land would be less safe for the purpose of supporting the crane than unfilled land. That, no doubt, in some degree, would be a matter for the jury. But it is difficult to suppose that the mere fact that it

had been filled many years ago threw a greater duty upon the officers of the Commonwealth unless they knew or had reason to know that the site was in fact unsafe for the use to be made of it by the deceased. There is no ground for imputing to any one for whom the Commonwealth was responsible any technical knowledge upon the subject, or any information based on experience of how the soil withstood vehicles or other pressures.

Knowledge of how the work should be carried out cannot be imputed to Johnson. Why should he or any other officer have regarded the matter otherwise than as one in which a skilled operation was to be performed by some one called in as an expert who would exercise his own judgment on all matters affecting the use of the machine he brought? Was it not a case in which, to employ a marine metaphor, one would suppose the navigator would proceed by his own soundings if any were called for? In substance the operation was one which Walter H. Wright Pty. Ltd. was left to perform by its servant or servants as, according to their judgment, might appear proper, having regard to the nature and capacity of their plant and the circumstances. As things turned out it is unfortunate that the company delegated the whole task to the deceased but that cannot place a different measure of obligation upon the Commonwealth.

The hazard which resulted in the deceased's death was that in the use of the mobile crane the combination of weight to be lifted, radius employed, and placing of the pyramids might result in the crane capsizing. Into this combination the resistance of the soil might, and in the result possibly did, enter. But the antecedent existence of this hazard, though it might call for greater care on the part of the deceased's employers than was exhibited, could not place on the servants of the Commonwealth a duty of care extensive enough to require them to know the character or capacity of the soil and to advise the

deceased thereon. Doubtless Johnson would have told him had he thought that the fact that it was filled land was significant or material. But in fact he never thought of it. Neither did the deceased's employers, who knew the fact.

To turn, however, to the precise way in which the case was put, namely, as a matter of invitee and occupier. On that footing it becomes a question of unusual danger against which there is an obligation to warn or guard. For it may at once be conceded that the deceased Nauburas was an invitee; he had a material interest in going upon the premises. It must necessarily be conceded, too, that the Commonwealth was an occupier. If you turn from those two facts to the question of unusual danger, the form the question must take is "unusual danger for what?" The answer of the appellant must be "unusual danger for the operation of a heavy-lift mobile crane". What is an unusual danger for the operation of a heavy-lift crane must depend on those skilled in their operation. It can scarcely be contested that the stability of the ground on which it stands when it operates is an obvious consideration to be taken into account by the operator. That must be so whether the ground is filled or unfilled. It appears from the evidence that all were alive to the fact that a mobile crane must be properly placed and properly supported.

The "unusual danger" must be found by the appellant in the fact that more than sixteen years earlier the land had been filled. Let it be assumed that the accident is traceable to that fact. On that hypothesis we do not see any sufficient evidence that Johnson or any other officer of the Commonwealth knew or ought to have known that for that reason there was a danger to the deceased or one that would be unexpected or unusual to him in operating the crane.

So far little has been said about the actual cause of the accident. It may well be the jury was entitled to find

that the actual cause of the accident was the sinking of one of the pyramids into the soil because its compactness was insufficient to support the weight at a particular juncture. But to say the least of it there is doubt about the question. The evidence is by no means clear and definite. No doubt it is for the jury to resolve ambiguities of meaning in judging the effect of evidence. But a point may be reached where it is not possible for a jury to prefer one view rather than another. In the present case the uncertainty is as to the order of events. There is a good deal to suggest that possibly one of the pyramids first gave way under the strain and then, with the increased strain placed upon it by the tilting of the whole vehicle, sank somewhat into the ground. The depth to which it sank into the ground is also not very clearly specified. But we think it better to pass these considerations by and to assume that they would be for the jury to decide.

We think, however, that the defendant, Walter H. Wright Pty. Ltd., as appellant, has not made out a case against the Commonwealth for contribution or for restoring the verdict so far as it relates to contribution. That is the view which Dean J. took and which was taken in the Full Court of the Supreme Court, and we in our turn affirm their judgment. The order will be appeal dismissed with costs.