IN THE HIGH COURT OF AUSTRALIA

DIXON

V.

THE COMMONWEALTH OF AUSTRALIA

18/6

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 5th May 1959

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

C.1978/55

DIXON

v.

THE COMMONWEALTH OF AUSTRALIA

ORDER

Judgment for the plaintiff in the sum of £2,792.14. 5, with costs.

DIXON

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THE COMMONWEALTH OF AUSTRALIA

JUDGMENT MENZIES J.

DIXON

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THE COMMONWEALTH OF AUSTRALIA

This is an action for damages for breach of statutory duty and negligence which stems from an accident which happened at the defendant's brick works near Canberra on the 9th July 1955, when the plaintiff's left hand was severely mutilated by being caught under the press of a brick-making machine which started working when he did not expect it to do so.

The plant unit with which this action is concerned comprises the brick-making machine itself and the electric motor that operates it. The electric motor is started first by a button and then, to bring the machine into operation a lever is pulled which is so situated that persons in front of the machine are not visible from it, although it is only some few feet away.

The plaintiff, on the morning in question, was to work at the front of the machine, his job, together with a fellow employee named Smith, being to take away from a tray which was part of the machine and put in a barrow for removal, bricks made by the machine by pressing dirt, water and oil by means of a press with plates heated to prevent adhesion. The machine deposited the bricks on the tray. Men doing the plaintiff's job are called "machine men taking off". The other members of the crew of the machine, on the morning in question, were Watt, the machine man in charge, and Somerfield, the mixing man. After the machine had compressed the bricks,

they came out two at a time on to the tray through an aperture which gave entrance to a circulating table fitted with clot boxes which received dirt from the bottom of a pug mill where it was mixed, and to the press which compressed the bricks in the clot boxes. The plaintiff had his hand and arm in this aperture when he was injured.

The statutory instruments which were alleged to have been breached were the Machinery Ordinance 1949 of the Australian Capital Territory and regulations made thereunder called the Inspection of Machinery Regulations (No. 7 of 1950). This Ordinance and these Regulations bind the Crown except where the contrary intention appears. Regulation 23(2) is as follows:- "A contravention of, or failure to comply with, these Regulations does not give rise to any civil right, remedy or liability which would not exist if these Regulations had not been made." This provision, it seems to me, is a complete answer to the claim for breach of statutory duty and leaves the plaintiff to his action for negligence. In deciding whether or not there was negligence, however, regard must be had to the Regulations, and the most material provision for present purposes is Regulation 13(1) which is in these terms:- "The occupier of premises shall securely fence all dangerous parts of machinery which is in or upon the premises."

The negligence alleged was, in the first place, a failure by the defendant to fence securely the parts of the brick-making machine which crushed the plaintiff's hand and which were clearly dangerous and, in the second place, the starting of the machine unexpectedly and without proper warning.

The machine in question was installed about six months before the accident occurred, and at the time when the accident occurred there was no fence or guard whatever in front of the aperture to which I have referred. There had been a fence there some time earlier but that had been taken away because, it seems, it interfered with the movement of bricks along the inclined shute which led from the place where the bricks were made in the machine to the tray. After the accident, a similar, but narrower, fence was provided, under which the bricks could move without touching it. These fences would not stop a person from deliberately putting his hand into the aperture but they would prevent his doing so inadvertently, particularly as the tray itself protruded about two feet from the opening. I am in no doubt that it was negligent to use the machine without any fence at all and I am far from satisfied that, with the fences referred to, the dangerous parts of the machine were securely fenced ; see Smith v. Chesterfield & District Co-operative Society Ltd. (1953) 1 W.L.R. 370. For the plaintiff, however, it was sought to go further and say that, to comply with the Regulations, it was necessary for the defendant to install a guard to prevent the machine from operating at any time when it would admit of entrance to the aperture. Mr. Ranch, who is the retired Chief Inspector for Factories and Shops of the New South Wales Department of Labour and Industry, gave evidence that there were such guards in use on similar brick-making machines in New South Wales, but I am not prepared to accept this evidence and think that Mr. Ranch may well be

mistaken. The evidence of Mr. Binns satisfies me that Mr. Ranch was mistaken about the Austral Brickworks and, having regard to the evidence of Mr. Bretnall, I am by no means satisfied that at Clark Kilns at Moorebank there is an Anderson brick-making machine and that it is guarded. There is, of course, some uncertainty about the meaning of the phrase "securely fenced" in statutory instruments : see Carroll v. Andrew Barclay & Sons Ltd. (1948) A.C. 477 and Burns v. Joseph Terry & Sons Ltd. (1951) 1 K.B. 454. Having regard to the authorities as they stand, it seems to me that the machine in question would be securely fenced if the presence of the fence took away any foreseeable risk to the person using it (John Summers & Sons v. Frost (1955) A.C. 740), and that this could probably be achieved without the device that Mr. Ranch favours. It is, however, not necessary to proceed further with this enquiry because I find that the dangerous parts of the brick-making machine, on the day of the accident, were not fenced at all and that to have operated the machine without any fence was clearly negligent.

I find, too, that there was negligence in starting the machine without the starter being in a position to see that there was no danger to other members of the crew and without giving them proper notification or warning of what he was about to do. Watt, as I have said, started the machine by operating the lever at a place where the front was not visible to him, and I have four versions of what warnings were given. The plaintiff says there was no warning; Watt says he told the plaintiff and Smith that he was about to start the machine and then he went to the starting clutch and called out "Right"

and then, after a pause, pulled the clutch and so started the machine; Smith says that Watt sang out simultaneously with starting the machine but gave no other warning; Somerfield says Watt called out "Watch your hands" and then pulled the clutch into gear slowly and started the machine. On the whole, I find that Watt did not make the plaintiff aware that he was about to start the machine when he did and, as he started it, he called out but gave the plaintiff no other warning.

Although there may be some question whether the failure to fence the machine securely had anything to do with the plaintiff's injury, though I think it did, there is no doubt that the failure to give an adequate warning caused, or at least contributed to, his injury and so the plaintiff is therefore entitled to his full damage, unless this should be reduced by reason of his contributory negligence. I turn, therefore, to the question of contributory negligence.

The accounts given by the plaintiff and by Smith about what the plaintiff was doing with his arm and hand in the pressing section of the machine are not without differences; indeed, the evidence of each is not of one consistent piece. The probability is that the plaintiff put his hand into the machine to feel the temperature of the plates and then began to remove some dirt from the aperture and, while he was doing so, Watt started the machine. The plaintiff says that a minute or two before he put his hand in the machine, Watt had told him that the machine would not start for ten to fifteen minutes. I do not accept this as an accurate account of what took place and think it more probable that Watt did say

something to the effect that because the plates were not hot enough to make bricks, there would be some time to wait and during that time he would fill up the boxes. It is not necessary, in explanation of this, to say more than that it was part of Watt's duty to operate the machine at the start of the day's work to fill up boxes with dirt, and that this was done by starting the machine with the lever and then stopping it as each set of boxes was filled. There were twenty-two boxes and it takes about three minutes to fill all of them. Watt said he told Dixon and Smith that he was about to start the machine to fill up the boxes, but I do not think that he was as precise as that. The truth probably is as I have stated the matter earlier and that Dixon, not contemplating that Watt would start to fill up the boxes straight away, put his hand into the machine and then Watt started the machine to fill up the boxes without any warning beyond a shout as he pulled the lever.

The reason why the plaintiff put so little emphasis upon his testing the heat of the plate with his hand, which was quite outside the scope of his duties, and put so much emphasis upon his cleaning dirt out of the aperture was because it was the practice at that time to clean dirt out of the aperture with the hand and, although to do this cleaning was the job of the machine man in charge, it was from time to time done by the machine man taking away, and this with the tacit approval of the foreman; furthermore, in the absence of the machine man in charge, it was treated as part of the duty of the taking away man to clear away any dirt that stuck to the plates or lodged in the aperture. The plaintiff said,

indeed, that when he began clearing away the dirt, Watt had left the machine, but I am not prepared to accept this. My conclusion is that the plaintiff took it upon himself to test the heat of the plates and, becoming aware of dirt in the aperture, he was in the process of clearing it out when Watt started the machine to fill up the boxes. In doing what he did, I think the plaintiff carelessly took a risk and did so without adverting to the possibility of the machine starting straight away to fill up the boxes.

I consider, therefore, that the accident was the result of the combined negligence of the defendant and the plaintiff. I think, however, that the defendant's fault was substantially greater than that of the plaintiff, particularly by reason of the fact that the defendant did give some countenance to the dangerous practice of the men putting their hands into the aperture. My conclusion is that by reason of the fact that the damage which the plaintiff suffered was the result partly of his own fault, his damages should be reduced by twenty per cent in accordance with the Law Reform (Miscellaneous Provisions) Ordinance 1955 of the Australian Capital Territory, sec. 15.

I turn now to assess damages. The plaintiff was, at the time of the accident, twenty-one years of age. His left hand has been severely mutilated. It has, in effect, been cut in half from the top joint of the middle finger to the wrist on the ulnar side, with the loss of two fingers, part of the middle finger, and part of the bottom of the hand. He has had to undergo surgical treatment and spend time in hospital, and his left

hand is now only about one-third effective and will not become any more effective. He still suffers pain and is likely to continue to do so, particularly when the bony protruberances that have been formed at his wrist are knocked. Since returning to work, he has had many absences because of severe pain in the hand and wrist, usually following such a knock, and it cannot be said that this sort of trouble is over. He has gone back to work at the defendant's brickworks, usually as a mix man and in that job he is satisfied, but, if he ever has to seek another job, he will be at a substantial disadvantage because of his disability. This is the most serious aspect of his injury, although his injuries do interfere in a number of ways with his enjoyment of life; for instance, they prevent him from playing cricket and football, at which he excelled in a modest way, and the disfigurement of his hand is a disadvantage to him and, to some extent, a source of embarrassment.

Taking all these things into account, I assess his general damages at £3,000. 0. 0. Special damages have been agreed at £490.18. 0, so that the total is £3,490.18. 0. This must, for the reason I have previously given, be reduced by twenty per cent to £2,792.14. 5. There will be judgment for the plaintiff for that amount, with costs.