IN THE HIGH COURT OF AUSTRALIA

LAWLER

V.

M.R.HORNIBROOK (PTY) LIMITED

REASONS FOR JUDGMENT

Judgment delivered at BRISBANE

on Wednesday, 24th June 1959

W. M. Houston, Govt. Print., Melb.

C.1978/55

LAWLER

v.

M. R. HORNIBROOK (PTY.) LIMITED

ORDER

Appeal dismissed with costs.

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LAWLER

v.

M. H. HORNIBROOK (PTY.) LIMITED

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
McTIERNAN J.
TAYLOR J.
WINDEYER J.

LAWLER

v.

M. R. HORNIBROOK (PTY.) LIMITED

This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland refusing a new trial of an action for personal injuries which resulted in a verdict for the defendant. The accident out of which the action arose occurred on 11th October 1955, and the trial took place three years later.

The plaintiff Lawler was employed as a builder's labourer in connexion with the construction of a building, the Gibson Island power house, which had gone some distance towards erection. Lawler was employed at the time of the accident on a floor which was called the forced draught floor, and immediately above him was the induced draught floor. These floors had been erected and were composed of reinforced concrete made in a usual manner with concrete combined with steel mesh. At the time when he was at work it had become necessary to make some holes in the concrete for the purpose of putting in cables, and there was a man named Smith at work making these holes in the induced draught floor above. Lawler himself appears to have been doing somewhat similar work below on the forced draught floor.

The injuries which he sustained were injuries to his head. His case was that Smith in the course of his work caused the fall of a piece of concrete which struck him on the head. There was no direct evidence of this, neither by the plaintiff himself nor by anybody else. His case depended upon circumstantial evidence, that is to say upon the inference from circumstances and the degree of probability supporting the inference. The alternative theory put forward by the defendant, who disclaimed any obligation to account for the accident at all, was that the plaintiff had struck his head against some

angle iron which existed at or near the place where he had fallen. It appears that at or near that place a stairway led up and at the top of the stairs there were some cross braces or struts consisting of angle irons, some 4 ft. to 4½ ft., there rising to meet at a point above; Lavler himself was about 5'8" in height.

According to statements he made shortly after the accident the plaintiff had been at work marking places on the floor at which the concrete was to be cut or pierced, and he had then taken a broom to sweep up debris. He was struck on the head by something and his knees gave way, and he had no further memory after that.

Smith in his two statements, one made in October 1955 and the other made in August of the following year, gave an account of what he was doing and said he had not dropped anything. He was doing the work with a jackhammer, that is to say, with a compressed air hammer, and, having regard to the size of the holes and the mesh of the wire mat it was not likely that any piece of concrete would fall through of such a size or nature as to inflict the injury.

At the trial, which extended over some days, the learned judge left questions to the jury. Probably very much to the plaintiff's surprise, the jury answered the first question in the negative. The first question was whether the plaintiff sustained his injuries by being struck on the head by a piece of concrete. The remaining questions, if that negative answer were correct, then became immaterial. However, the jury did answer the question which related to the assessment of damages, somewhat unnecessarily perhaps, and not very encouragingly, but nevertheless there was an appeal to the Full Court.

The appeal to the Full Court was based upon two grounds. The first was that the verdict ought not to have

been arrived at. I state that in a somewhat untechnical form because I think the case was argued rather as a matter of fact. But it was necessary for the plaintiff to shew in order to sustain the ground that the circumstantial evidence was so strong that for the jury to fail, as they did fail, to draw the inference that the accident arose from the plaintiff's being struck on the head by a piece of concrete liberated by Smith was perverse. A high degree of unreasonableness must be established on an appeal by a plaintiff who having the burden of proof upon him seeks to discharge it by reliance upon circumstantial evidence, if the jury has refused to be satisfied on the balance of probabilities that the inference is correct. I do not propose to go into the circumstances which might or might not justify the jury's view: they were canvassed in equal degree by both sides. The alternative theories of his having been struck by falling concrete and of his having suddenly risen from some posture so as to strike his head on the angle iron were fully discussed, and the general circumstances of the work on which both men were engaged were thoroughly examined. It is enough to say that on the facts of this case we are quite satisfied that it was an impossible burden which the appellant undertook to discharge when he sought to have set aside the jury's answer and verdict on a pure question of fact on the ground that the evidence was so decisive that their failure to find in his favour on the facts was perverse.

The second ground on which the appellant rested his appeal was that he had discovered fresh evidence. He appears to have been moved by the verdict against him, which was returned on 10th October 1958, to make further investigations. In the course of them or as a result of this determination, on 20th October and on 8th, 10th, 11th, 12th and 13th November he had an advertisement put in the personal

column of the daily paper, "Would any person who witnessed the accident on the F.D." (that is the forced draught floor) "at Gibson Island power house on 11th October 1955, phone" a certain number? A Mr. Dingwall responded by telephone who was prepared, according to his affidavit, to give evidence that he witnessed the fall of concrete upon the plaintiff on that occasion. I need not traverse the evidence deposed to in his affidavit. Experience in courts of law is a sufficient ground for entertaining apprehension about the results of a newspaper advertisement calling for evidence. But, of course, the veracity of Mr. Dingwall would have been a question for the Full Court to pass upon in a preliminary way if their Honours had thought that the other conditions had been fulfilled which are requisite to entitle a defeated litigant to a new trial on the ground of the discovery of fresh evidence.

Those conditions are strict, and rightly so. There can be nothing more dangerous than allowing judicial proceedings which have been solemnly conducted after full notice to the parties and with adequate opportunity of advancing all the necessary proofs to be ripped up because afterwards it is found that some further evidence could be adduced. One condition which is strictly insisted upon is that the defeated party who seeks to do this shall shew that he took every reasonable care to exhaust the possibilities of obtaining what testimony was available before he came to trial. The Full Court on the material before them were not satisfied that this occurred. That does not mean that the preparation of the case was negligently conducted, but that strict proof is required that the fullest care was taken, the fullest examination made of the resources which were available, that all the threads that might lead to evidence bearing upon the case had been followed to their conclusion. It is quite clear to us that the Full Court was right in saying that that condition was not

fulfilled and that this was not a case on which a verdict should be set aside simply because, in the circumstances I have stated, Mr. Dingwall had come forward and sworn an affidavit that he was prepared to give further testimony which touched the issue closely. We agree entirely with the Full Court and think that the appeal should be dismissed.

The appeal will be dismissed with costs.