ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

TODD

V.

JULEFF'S (PTY.) LIMITED

ORIGINAL

REASONS FOR JUDGMENT

10/-

Judgment delivered at SYDNEY

on MONDAY, 1st MAY 1961

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

TODD

v.

JULEFF'S (PTY.) LIMITED

ORDER

Appeal dismissed with costs.

1st May, 1961.

ORAL JUDGMENT DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
KITTO J.
TAYLOR J.
MENZIES J.
WINDEYER J.

TODD

v.

JULEFF'S (PTY.) LIMITED

This is an appeal by the plaintiff from a decision of the Full Court of the Supreme Court of New South Wales. By the order appealed from that Court entered judgment for the defendant, notwithstanding the verdict of the jury in favour of the plaintiff. The action was one of negligence for personal injuries; the accident giving rise to the personal injuries occurred in a foundry where heavy work was habitual. The accident occurred to an employee, Todd, who was the plaintiff; he suffered injuries to his back, to the character of which I shall refer.

At the trial the case was presented in a very simple form. It appears that on the 25th July 1956 there were delivered at the factory by a lorry, three moulding machines which weighed about 6 to 8 cwt. each. They were removed from the lorry and they were eventually to be placed on a concrete bedding but it was not then opportune to place them in that position. They were therefore to be put at the back of the foundry and up-ended there, to remain pending the occasion when they should be put in their ultimate positions.

Their shape is described, but it is not very material to the accident. They were about six feet high. They were placed, from the lorry, upon a pallet under which there could be slipped a trolley and they were taken to the back of the factory by the trolley. It rested with the foreman, one Cosgrove, to give instructions as to their handling. He called upon two workmen, Todd, the plaintiff, and a workman named Fowler, to handle one machine and he instructed them to take it to the back of the factory and up-end it in the position which I have described. They took it there, rolled it off the

pallet and it had to be up-ended from that position.

The workman Fowler took one side. And as they raised it towards a vertical position his hand slipped and the weight, it is said, of the machine then rested with, or had to be accepted by the plaintiff Todd. He gives this account of it: "We got it more or less on our shoulders, that is, in up-ending it, and Fowler's hand slipped. I had to take the whole of the weight of the machine." That, of course, means not the weight of the whole machine, for one end of it was on the ground, but the weight of the other end in putting it up. How far it had got is not clear, but obviously as the machine was put end up the weight would diminish as the top completed the quarter circle it would describe from its horizontal position on the ground. "Did it come on to you gradually or suddenly?" he was asked: "Suddenly. Other than that it would have fallen down and broken our legs. What did you experience?---A terrific pain. And where was this pain?---The lower right of the back. Did Fowler get another grip?---Yes. I told him to keep it going. Between you you got it back?---Yes." That pain developed into injuries which, on the medical evidence, satisfied the jury that the plaintiff should receive £3000, which was awarded.

The Full Court, by a majority, Owen and Maguire J.J., Jacobs J. dissenting, were of the opinion that there was no evidence of any negligence on the part of the employer.

It is clear enough, I think, that if there is a case of negligence against the employer, it rests on the negligence of the foreman, Cosgrove, in his action in choosing these men to do this particular job, in the instructions he gave to the men about it and the absence of detail in them. It was an ordinary sort of job, but of course it was not in the routine of the day to day operations of the factory, because these three machines had come in as part of further plant.

There was tackle available that could have been used for lifting up this particular object but it is not proved by definite evidence that the men knew of the existence or availability of the tackle, nor, on the other hand is it proved that they did not.

It is not a job which ordinarily would require tackle. If they felt they needed it they could call for it. It appears that Fowler had, some three years before the accident, or perhaps more, sustained an injury to his hand. He had sustained some burns and there had been skin grafting. The account which the plaintiff gives of the accident is that Fowler's hand slipped, as I have already read, and Fowler's account is the same. After saying that the piece of machinery was like a machine moulding apparatus, the bottom was square and it came up like a lady's waist and then went out again and had a sort of radial arm over the top, he gave the following answers: "How high was it?---It would be round about six feet or more I should think. How round was the top part of it; how big was the bottom part of it?---Fairly big and round." Then he says they grasped it to up-end it in that form. Then he is asked: "I would like you to tell us in your own words just what happened as you were lifting it up?---As we were lifting this thing I could get it up to about shoulder height and my right hand sort of slipped. Like, my right hand is a bit weak and it was aching a bit and I sort of, you know, lost my grip. You have got some trouble with your right hand have you?---Yes. And it slipped?---Yes. And what happened as it slipped?---Well as it slipped, the plaintiff, like, you know, sort of got all or most of the weight. And did you get a grip again?---I got another bit of a grip, yes. How long had you had this weak right hand?---Oh since 1953."

The condition of his hand was a matter for the jury who saw it. Of course, we have not that advantage, but it is plain that it was a long-standing injury, and it was known to the

foreman. On that subject Fowler was asked: "You say that this foreman had kept you off loading heavy stuff on other occasions?---As a rule, yes." It seems too that if Fowler thought any task was likely to be too much for him, and made this known, he would not be required to undertake it.

That appears to me to summarize the whole of the relevant material on which it is necessary to form a decision as to whether there was evidence to go to the jury. We are not concerned ourselves to form any judgment of the facts; it is entirely a question of what the jury might make of the material contained in the evidence, what inferences they might draw, however erroneous a court might think the inferences to be.

In favour of the plaintiff, it must I think be conceded that it was open to the jury to find that the accident occurred through Fowler's hand slipping, and it must further be conceded that it was open to the jury to find that his hand slipped through the injury because he says "it sort of ached", and slight as the basis may be it is suggested by his evidence that the slip was occasioned by the aching hand and the jury might act upon it and find that it was owing to the condition of his hand that it slipped at that moment.

You come back then to the supposed negligence of the foreman. He saw three moulding blocks or pieces of apparatus, he had two ordinary workmen, and he formed the judgment that those workmen were sufficient to do the job. Was he to instruct them how to do it, to give them further detailed instructions? Was he to instruct them that they might need tackle and if so that they could call for it? Was he wrong in picking Fowler, or ought he, as a matter of due care, have said "Well here is Fowler who three years ago or more sustained an injury to one hand, that might imperil either of them in carrying out the job."

These were the matters which it appears to me the jury had to take into consideration if and when the case was submitted to them, and the plaintiff was entitled, I should add,

to say that they must be considered cumulatively. Conceding all that to the plaintiff's case the question remains whether, in the ordinary course of conducting the factory's business, a want of due care can be imputed to the foreman. We are dealing here with that initial duty - if I may so call it - of an employer in dealing with the work of his servants. We have said in other cases that the employer is under a duty by his servants and agents to take reasonable care for the safety of an employee by providing proper and adequate means for him to carry out his work without unnecessary risk, by warning him of unusual or unexpected risks and by instructing him in the performance of his work, where instructions might reasonably be thought to be required to protect him from the danger of injury.

The ultimate question for us is whether, on those facts, we consider the jury might reasonably say that the employer, through his foreman, made default in any of those duties. The default must of course amount to negligence. Having had some opportunity to consider the matter we have formed the opinion that our answer ought to be in the negative. The whole case against the foreman is extremely slight; it was an ordinary operation which any men used to dealing with heavy material or heavy work might undertake; there was no particular reason to think in advance that Fowler's hand would slip at an inappropriate moment. It is not a question of the muscular power of either of the men, it is a question of whether the choice was inappropriate because of the injury Fowler had suffered three years before; added, of course it may be said, to the fact that the foreman did not give any precise instructions either about the existence of the tackle or their ability to call for it, or otherwise as to the handling of the job. These latter matters, however, appear to us to be obvious, and whatever the jury might have thought about the total situation, we are unable to see that they were justified in thinking that the

foreman exhibited any lack of reasonable care for the safety of the men, or either of them. We therefore agree with the majority of the Full Court in thinking that judgment should be entered for the defendant, and we dismiss the appeal with costs.