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IN THE HIGH COURT OF AUSTRALIA

SKINNER

v.

BARAC AND ANOTHER

JOHNS AND WAYGOOD LIMITED

V.

BARAC AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 26TH JUNE 1961

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

F. SKINNER

v.

JOVO BARAC AND JOHNS AND WAYGOOD LTD.

ORDER

Appeal allowed with costs. Discharge the judgment of the Supreme Court against the appellant and enter judgment for the said appellant with costs.

JOHNS AND WAYGOOD LTD.

v.

JOVO BARAC AND F. SKINNER

ORDER

Appeal allowed with costs. Discharge the judgment of the Supreme Court against the appellant and enter judgment for the said appellant with costs.

SKINNER

v.

BARAC AND ANOTHER

JOHNS & WAYGOOD LTD.

v.

BARAC AND ANOTHER

JUDGMENT

DIXON C.J.
FULLAGAR J.

SKINNER

v.

BARAC AND ANOTHER

JOHNS & WAYGOOD LTD.

v.

BARAC AND ANOTHER

We have to consider two appeals against a judgment of the Supreme Court of Victoria given in an action tried by Monahan J. without a jury. In that action Jovo Barac sued two defendants, F. Skinner and Johns & Waygood Ltd., for damages for personal injuries alleged to have been sustained by him through the negligence of servants of one or both of the defendants. The defences denied negligence and alleged contributory negligence. Monahan J. found both issues in favour of the plaintiff, and assessed damages at £7043. He apportioned responsibility as between the two defendants in the ratio of 80% to Skinner, and 20% to Johns & Waygood. Both defendants appeal as of right to this Court. Each attacks the learned judge's finding of negligence, and the defendant Skinner attacks the apportionment of the damages.

The accident which caused the plaintiff's injuries occurred early in the afternoon of 23rd December 1956 at premises occupied by the defendant company at Sandringham. The plaintiff was employed by the company as a labourer, and he was at the time engaged, with another employee named Higgins, in unloading by means of a crane a truck, which had brought from a wharf in Melbourne a load consisting of certain steel girders or joists and certain channel iron. The plaintiff was up on top of the load, when a girder on which he was standing shifted and another girder became dislodged. The plaintiff and the

two girders fell to the ground, and one of the girders fell on the plaintiff's leg, crushing it so seriously that it had to be amputated below the knee. This broad statement of what happened may be accepted without doubt, but (as is so often the case when much happens in a second or two) it is difficult, if not impossible, to reconstruct with exactness from the evidence the actual movements of the plaintiff and the girders, or to trace with any degree of certainty the exact succession of events.

In the particulars of negligence given in his statement of claim the plaintiff alleged a number of acts and omissions as constituting negligence on the part of each defendant. In substance, however, the negligence alleged against the defendant Skinner was that his servants had improperly and unsafely loaded the iron and steel on the truck at the wharf, and had not conveyed any warning to the plaintiff that the truck was improperly and unsafely loaded. And the negligence alleged against the defendant company was, in substance, that it had failed to provide a "safe system of working", and that its foreman, a man named Stevens, had not given a sufficient warning to the plaintiff that the truck was loaded in a dangerous manner, or had not supervised the unloading as he ought to have done. In order to consider these allegations, it is necessary briefly to trace the course of events so far as it can be gathered from the evidence, and it is convenient to begin with the loading at the wharf.

The truck, which consisted of a prime mover drawing a lorry or tray, was loaded at the wharf by a wharf foreman named Matthews with the assistance of a man named Whybrow, who was the driver of the truck, and another man employed by Skinner. The girders were H-shaped in section, their dimensions being approximately 30 feet by 5 inches by 3 inches. Each weighed

about 8 cwt. The channel iron is not clearly described, but it appears to have played no direct part in the story. Matthews said that the load was the last load from a particular ship - he spoke of it as a clean-up load, a small load of rather less than half the capacity of the truck. He said that the material was scattered about over the wharf, and that the girders and the channel iron were picked up and loaded not separately but "all mixed up together", the whole resting on wooden bearers of 4 in. x 2 in. hardwood. The load was secured in the usual manner by means of chains. He said that the load was no different from any other load when it left the wharf. He agreed that it was possible that a girder standing on edge might have been "tucked away" under a girder placed on the flat, because "everything was mixed on the load."

The driver of the truck, Whybrow, gave evidence, but does not seem to have said anything that sheds any light on the case. With regard to the unloading of the truck, his evidence differed in some details from that of the plaintiff and Higgins, but he admitted that he was not paying any particular attention to the unloading, which was not his business.

When the truck arrived in the defendant company's yard, the foreman, Stevens, noticed, he said, that the right hand side of the load "did not look quite healthy" in that the joists were standing on edge, and there were no pins. He called out to Barac to "be careful" or to "watch it." So far as the left hand side of the load was concerned, he said that the materials were "interlocked, one on top of the other, that made them look like a compact mass that were joined and lapped over." This, of course accords with the evidence of Matthews as to the loading of the truck. The plaintiff's account of what then happened, which is substantially in accord with the account given by Higgins, may be shortly stated as follows.

The plaintiff climbed up on top of the load on the left hand side, Higgins remaining on the ground. The crane was brought over the top of the load, and the plaintiff passed a chain down to Higgins, who then passed it under the section of the load to be lifted and passed it back up to the plaintiff, who connected it to the crane hook. As the crane started to lift that section of the load, it was being steered or guided by the plaintiff, and he moved across onto the right hand side of the load and towards the front of the tray. He said he was watching that side, which was the side that had not looked "healthy." He then stepped over towards the left hand side again, and trod on a girder which was near the edge of the tray. That girder "tipped over" and fell to the ground, and he fell with it, and another girder followed. One of the girders - he did not know whether it was the first that fell or the second - fell on his leg. With regard to the girder on which he stepped, he said that he placed his foot in the middle of the connecting piece of the H, which would mean, of course, that the girder was lying on the flat.

There were certain matters of detail, which do not appear to be of importance, as to which Monahan J. said that he did not accept the evidence of Matthews or Whybrow. So far as the defendant Skinner was concerned, his Honour said that he was satisfied that his servants, Matthews and Whybrow and the third unnamed man who assisted in the loading at the wharf, were "negligent in making up the load in that they allowed a length of steel H joist to rest on its flat side on top of a similar joist standing on edge at the extreme left hand side of the load, and the load was made up in such a way, having regard to the construction of the truck and the outward visible appearance of the load on the left hand side, that that state of affairs was something in the nature of a trap, which could not have been known to the plaintiff without an express warning of the fact."

His Honour was also satisfied that both Matthews and Whybrow "ought reasonably to have suspected the existence of the state of affairs which did in fact exist, and to have realised that that state of affairs amounted to something in the nature of a trap for those who would unload the truck." No warning as to that state of affairs, he said, was given to the plaintiff by Matthews or Whybrow.

So far as the defendant company was concerned, his Honour seems to have rejected the allegation of failure to provide a "safe system of working", but he found that the company's servant, the foreman Stevens, "ought to have given additional directions to guard, so far as was possible, against what happened." The circumstances, he said, were such as to have required Stevens, in the reasonable exercise of his discretion, to have given a direction requiring the plaintiff to secure the bottom half of the load by means of timber and/or chains before commencing to lift the top half of the load; or by requiring the plaintiff to operate the crane for the lifting of the top half of the load from a position of safety on the floor of the shop, or both.

Dealing first with the case of Skinner, we do not think that even the primary finding of the learned trial judge can be supported. That primary finding is that the accident was caused by the placing of a girder lying on the flat on top of a girder lying on edge. The evidence does not appear to us to establish this. Here, of course, we are faced with a difficulty of a familiar nature - the difficulty of drawing the line which separates legitimate inference from mere conjecture. His Honour's finding was no doubt based on the admission of Matthews in cross-examination that a girder lying on the edge might have been underneath a girder lying on the flat. But it is one thing to say that this might have happened, and another thing altogether to say that it did happen. And, even if it did happen, it does not appear to us to afford any clear

explanation of the accident. It is at least equally likely, perhaps more likely, that the true explanation is to be found in some displacement of the contents of the load, which was of a mixed character, when the first portion of it was lifted by the crane. But the plain truth of the matter seems to be that we know that the plaintiff and two girders fell off the truck, and we do not know anything more.

But, even if his Honour's primary finding were accepted, it could not, in our opinion, justify a finding of negligence against Matthews and Whybrow.

The language in which his Honour's finding of negligence is expressed - his use of the word "trap" and his view that the real breach of duty lay in a failure to give a warning - suggests that he regarded the defendant Skinner as an occupier of premises and the plaintiff as his licensee. It is possible, but perhaps it should not be assumed, that his Honour regarded the case as one of licensor and licensee, and was misled by that view. He may even have regarded it as one of invitor and invitee (see in this connexion para. 8 of the statement of claim), for he holds Matthews and Whybrow responsible for what he thinks that they ought to have known, and not merely for what they actually knew. But this matter need not be pursued, for the case does not, in our opinion, depend on any special relationship between Skinner on the one hand and the plaintiff on the other hand. It would be altogether artificial and misleading to regard the truck as premises occupied by Skinner or by Matthews and Whybrow, and the plaintiff as entering thereon either at the invitation or with the permission of Skinner or of Matthews and Whybrow. Such a view seems indeed untenable. The case depends on the general law of negligence, and not on any special relationship.

Applying that general law, we do not think that the evidence discloses any breach of any duty by Matthews or Whybrow.

It would not, of course, be false to say that they were subject to a duty to use reasonable care in and about the loading of the truck. But, as Lord Russell of Killowen pointed out in Bourhill v. Young (1943) A.C. 92, at pp. 101-102, "a man is not liable for negligence in the air." A little earlier his Lordship (at p.101) had said:- "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man." And a little later (at p.102) he said:- "In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach." That is, in our opinion, the principle which, so far as Skinner is concerned, governs the present case. Reasonable men in the position of Matthews and Whybrow would anticipate that, if they did not secure the load adequately by chains or other means for its journey to Sandringham, damage might be caused to the person or property of some user of the highways. And reasonable men would take precautions accordingly. But it is impossible to point to any act or omission in the loading of the truck, and to say of it that reasonable men would anticipate that it was likely to cause injury to someone engaged in unloading the truck. Matthews and Whybrow loaded the truck in what seemed to them to be a normal and ordinary way. They would not naturally think of the future unloading operation, which was no concern of theirs. If they did, it would be natural and by no means unreasonable for them to think that the persons doing the unloading could see the load and would be able to deal with it in an appropriate way. To hold Matthews and Whybrow liable in this case - and Skinner's liability depends on their being liable - would involve treating them as subject to a duty very much more strict than the common law duty of reasonable care.

The case against the defendant company may be dealt with very briefly. It rests on the alleged failure of the company's foreman, Stevens, to warn the plaintiff of an alleged unsafe condition of the load, and "properly" to supervise the unloading of the truck by the plaintiff. It seems to us that it is a complete and clear answer to this claim that the plaintiff, who had had five or six years' experience in unloading similar loads, was in just as good a position as Stevens to judge the proper way of unloading any load and to recognise the precautions that ought to be taken in any particular case. Stevens warned the plaintiff to "watch it" or to "be careful." We cannot see that he left undone anything that a reasonable man in his position would have done.

Both appeals should, in our opinion, be allowed, and judgment should be entered for each defendant.

SKINNER

v.

BARAC AND ANOTHER

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JOHNS & WAYGOOD LTD.

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JUDGMENT — McTIERNAN J.

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In Skinner's appeal, the primary question is whether there was a relationship between the appellant and the respondent by reason of which the appellant owed a duty of care towards the respondent in respect of the loading of his truck. In my opinion it should be inferred from the evidence of the course of business between the appellant and Johns & Waygood Limited that Skinner knew or ought to have known that the truck from which the respondent fell would be unloaded by employees of Johns & Waygood Limited and that one of these employees would stand on the load for the purpose of carrying out his part in removing it from the truck. The respondent was the employee of Johns & Waygood Limited who did so.

Further facts which the appellant knew or should have known are that it would be dangerous for a man to stand on the load if it were unstable, in view of the weight of the joists and girders making up the load and their potentiality of causing serious injury to an employee standing on the load if they moved; also that it would not be practical to ascertain before unloading operations began whether each girder in the interior of the load had been securely placed. It would follow that the relationship between the appellant Skinner and the respondent Barac fell within the principle of Donoghue v Stevenson (1932) A.C. 562. Accordingly, I think the finding of negligence against ~~against~~ Skinner was

right if the falling of Barac and of the girders from the truck was the result of careless loading by Skinner's employees. Monahan J. found that in making up the load certain of these employees placed the flat side of a rolled steel H joist on top of a similar joist standing on its edge. I think that it is a probable conclusion from the evidence which the learned judge accepted, and indeed the only satisfactory explanation of the accident, that the heap of girders remaining on the truck after the first lift partially collapsed when Barac moved across it and this movement was due to the defect in the making up of the load which the learned judge found. As this defect was in the interior of the load, it was not practicable to discover it before Barac began to perform his duties in connection with the unloading. I would not, therefore, interfere with the finding of negligence made by Monahan J. against the appellant.

An alternative ground put in argument for holding Skinner liable for the injury is that Barac was, in respect of the truck, either an invitee or a licencee of the appellant, and the duty of care owed to him was not observed. This argument was supported by decisions extending the rule relating to the duty of the occupier to certain types of movable structure. As I think that the appellant is liable, for reasons which I have already stated, I do not find it necessary to express any opinion on this alternative ground.

In the appeal of Johns & Waygood, I also think that the finding of the learned trial judge should not be disturbed. My understanding of the argument of the appellant in this appeal is that the finding of negligence was attacked only faintly, if at all, and that the concern of the appellant was that the apportionment

of responsibility made by the trial judge should stand. Monahan J. found that the appellant's foreman should have given a direction to the respondent, either not to stand on the load or not to do so until the load was braced, because a defect in the packing was apparent at the right hand side of the load. It should be observed that the load collapsed on the left side and that there was no such defect visible there. I think that the finding of the learned judge was correct and it follows from it that the appellant was guilty of negligence because its foreman failed to save the respondent from unnecessary risk.

I would not disturb the learned judge's apportionment in respect of damages because I think it is reasonable, having regard to the criteria upon which responsibility should be shared.

An allegation of contributory negligence was made at the trial by both appellants against the respondent but in my opinion the evidence cannot possibly sustain this allegation because the respondent in mounting the load was following a normal practice, and there is no evidence that, while on the load, he acted rashly or otherwise failed to observe reasonable care for his own safety.

I would dismiss both appeals with costs.