No. 40 of 1960 (11

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

COSTIN

V.

KAURI TIMBER COMPANY LIMITED

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 25th AUGUST 1961

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

C.1878/55

COSTIN

v.

KAURI TIMBER COMPANY LIMITED

ORDER

Allow appeal with costs. Discharge the order of the Full Court of the Supreme Court. In lieu thereof order that the appeal to the said Full Court be dismissed with costs and order that the verdict of the jury and the judgment of Adam J. be restored.

COSTIN

v.

KAURI TIMBER COMPANY LIMITED

JUDGMENT

DIXON C.J.
KITTO J.
MENZIES J.

COSTIN

v.

KAURI TIMBER COMPANY LIMITED

This appeal arises out of an incident at a country saw-mill, in which an employee who was taking part in the rolling of logs was crushed by a log and injured. He sued his employer for damages, alleging that the accident was due to a failure by the employer to take reasonable care for the safety of his employees. The alleged failure was related by means of particulars to unsafety in the place of work. The defendant denied negligence and alleged contributory negligence on the part of the plaintiff.

The action, which was brought in the Supreme Court of Victoria, was tried before Adam J. and a jury. The jury returned a verdict for the plaintiff for £5,753. In answer to specific questions left to them by the presiding judge, they found that the defendant was guilty of negligence which caused or contributed to the plaintiff's injuries, and that the plaintiff's injuries were not in part caused by his own negligence. The learned judge, rejecting a motion that judgment be entered for the defendant on the ground that the verdict was not supportable on the evidence, ordered judgment to be entered for the plaintiff. An appeal was taken to the Full Court of the Supreme Court, in respect both of liability and of damages. Herring C.J. and Dean J. considered that the appeal as to liability should succeed on the ground that on the evidence it was not open to the jury to find the defendant guilty of any breach of the duty of care which it owed to its employees. Hudson J. dissented. All their Honours regarded the amount of damages awarded as high, but not as one with which a court of appeal should interfere on the ground of excessiveness. In accordance with the opinion of the majority of the Court, the judgment

of Adam J. was set aside, and it was ordered that judgment be entered for the defendant. The plaintiff appeals to this Court.

The saw-mill is near Noojee, in Victoria. The premises, or the portion of them which it is material to consider, consisted of two adjacent areas of open ground, one being about four feet higher than the other, separated by a sharply sloping bank some thirty or thirty-five feet in length. The custom was to bring logs from the bush, still with their bark on them, to the rear of the higher area, which was known as the barking yard. There they were stripped of bark. Most of the bark was removed to an adjacent hole where it was burned, but the barking yard was always covered with scraps of bark. The logs, after having been barked, were rolled to the bank and down it to the lower area, where they were cut into lengths suitable for milling. They were heavy logs, five tons or so in weight, about 3' 6" in diameter. To facilitate their progress along the surface of the barking yard, skids were provided consisting of three stout saplings laid parallel to one another in the ground to the depth of their diameters. For the purpose of this judgment it may be assumed in favour of the respondent (the defendant) that the skids ended at the edge of the bank, though the appellant said in evidence that they projected some eighteen inches beyond. But if the jury accepted this view, it would afford a strong additional factor in support of their conclusion. The method of work was simple enough. A worker - on the occasion in question it was the appellant - would attach to the rear of a log where it lay in the barking yard a sharp hook from which a steel rope led over the log to a steam winch situated on the lower ground. The pull of the winch on the rope would cause the log to rotate towards the bank until the hook was at the top, when it would either pull out or be extracted

by the worker. When the log came to rest, the hook would be attached to it again, and the process would be repeated. When the log reached the edge of the bank, there was an advantage to be gained by the worker pulling the hook out, and keeping hold of it, the winch-operator assisting him by causing the rope to slacken; for if this were not done the rope would go down the bank with the log, and the log, whether the hook were still fast in it or not, would tend to roll over the rope and make its extraction for the next pulling operation difficult. According to the winch-driver, who gave evidence in the case, it was the normal custom for the man on the bank to take out the hook before the log rolled over.

The accident to the appellant occurred in the handling in this manner of a log which presented no unusual features. It happened through the concurrence of two events. One was that the appellant unintentionally slid down the bank, feet first, after the log. The other was that the log encountered a depression at the foot of the bank, and after rolling part of the way up the farther slope of the depression, it rolled back against the bank before the appellant had time to get out of its way, and crushed one of his knees. As to the cause of the appellant's sliding down the bank there was a conflict of evidence. The appellant's own explanation was that as the log was about to go over the edge of the bank he extracted the hook, that he held it to prevent the log from entangling the rope, and that at that moment the soil on top of the bank gave way beneath him. He firmly denied that either his efforts to extract the hook or his keeping hold of it had anything to do with his descent of the bank. The foreman, who did not see the incident but inspected the bank shortly afterwards, said that he found no trace of the bank having given way. The winch-driver, who alone saw what happened, said that the appellant was trying to extract the

hook as the log went over the edge, but that he could not get it out and lost his balance. At the trial a good deal of attention was given to the point, and there was evidence, though strenuously denied, that the appellant had been instructed by the foreman not to hold on to the hook lest he be pulled over the bank. But it does not matter, for the decision of this appeal, which of the proffered explanations is correct. There was ample ground for the jury to conclude that the involuntary precipitation down the bank of a worker who was doing what the appellant was doing on the occasion in question, that is to say his precipitation from some cause or other, was readily foreseeable. He might hold on to the hook, whether contrary to instructions or not, and be pulled over the edge in consequence of a failure of the winchman to slacken the rope. In struggling to get out a hook that was too firmly embedded, he might overlook the proximity of the edge and go too far forward either voluntarily or through losing his balance. He might slip on the loose pieces of bark which covered the surface of the logging yard, for some of it was of a slippery texture, and the soil, though the foreman described it as solid and hard, was clay, which is even more likely to be wet in the Noojee district than in most parts of Victoria. And even apart from the special features of the place and of the appellant's activities there, the very fact that a man's work takes him repeatedly within inches of a declivity is ground enough to suggest as a readily foreseeable event that he may somehow happen to fall or slip over the edge. Of course, if the jury believed the foreman's evidence as to his having warned the appellant of the danger involved in holding on to the hook when the log rolled down the bank, they would have had additional reason for concluding that it was well within the limits of reasonable foresight to take account of the possibility of an employee's finding himself suddenly at the bottom of the

slope.

As to the second of the two events which combined to produce the appellant's injury, there was no great disagreement among the witnesses who gave evidence. The length of the depression was variously described as four to five feet and fifteen to eighteen feet, but the discrepancy is unimportant. The depression was about three feet in width and about eighteen inches to two feet in depth at the right-hand end of the bank as one looks down from the barking yard. Its depth diminished as it extended to the left. It had been formed by the impact of the butt end of logs which had come down the bank, for they were usually laid with their butt ends to the right flank of the yard. According to the foreman, there was at times a sapling, laid from a third of the way up the bank to the ground on the far side of the depression, acting as a sloping skid to prevent the logs from getting into the depression. But this skid sometimes broke, and in any case it had the disadvantage that it slewed the logs around to the left so that they had to be straightened by additional hauling. It was certainly not always in position, and the jury had ample ground to suppose that it was absent on the occasion in question. For the most part, logs made to fall over the bank fell with their butt ends in the depression and stopped there. But it was common enough for a log to roll partly up the far wall of the depression by force of the momentum it had gathered in its career down the bank, and then to slip back to the foot of the bank. The possibility that any log might so behave did not strike the foreman as too remote to be reasonably foreseen. "It would not require very much foresight to see that that could happen, would it?" he was asked; and he answered "Definitely not". Again he was asked, this time by the learned trial judge: "You see, the trough itself provided something of a bank .....and if a log coming

down got up the bank....that is provided by the trough, then it might roll back again if it had not enough momentum on it?" and he answered "It definitely would, yes". Even without this evidence the jury might well have taken the same view, upon consideration of the physical conditions themselves; but with it they were undoubtedly entitled to conclude that the possibility was one which reasonable foresight would lead an employer to take into account when considering the possible mischances against which he should guard his employees.

What weighed decisively with the learned judges who formed the majority in the Supreme Court was the improbability that both events that have been discussed would concur. Their Honours considered that only a superlatively cautious employer would have foreseen what may be called the composite event. To some extent their view was influenced by the fact that the appellant, a man not inexperienced in saw-mill work, admitted in the witness box that he himself had not anticipated that he might slip down the bank and get hurt by a log. Apparently no-one at the mill had met with injury in just that way before. The "extraordinary coincidence of timing" which the occurrence involved had been stressed in the cross-examination; and it impressed the learned judges as the feature of the case which made it unreasonable for the jury to regard the appellant's injury as due to a failure by the respondent to take that degree of care which it owed to its employees for their safety.

The contrary opinion, expressed by Adam J. at the trial and by Hudson J. in his dissenting judgment in the Full Court, is, we think, to be preferred. It may be expressed by saying that since the jury might properly regard as having been reasonably foreseeable that a man working on the top of the bank might happen in some way to fall or slide down it, they might properly have taken the

further step of concluding that reasonable care for the safety of a man exposed to that chance extended to taking all reasonable steps to ensure that there was nothing to cause a log which had gone down the bank and away from its foot to roll back again to the place where the man would be if the chance eventuated. There were in fact easy and obvious steps which might have been taken to that end. A number of sloping skids might have been put in to carry the logs over the depression and let them meet the ground smoothly. Or the depression might have been filled in with earth, reinforced perhaps by saplings, so as to create a continuous slope away from the bank. There seems to us, therefore, to be quite sufficient ground for a finding of negligence against the respondent.

No separate discussion is necessary with respect to the plea of contributory negligence. Though apparently not relied upon by counsel for the plaintiff in his final address to the jury, this plea was properly explained by the trial judge in his charge, and was expressly rejected by the jury. There is no ground for disturbing the finding.

There remains the question whether the damages awarded were so excessive that a re-assessment should be ordered. The judgment of Hudson J. contains a detailed discussion of the evidence as to damages, in which Herring C.J. and Dean J. agreed. We have reached the same conclusion as their Honours, and for substantially the same reasons. Over and above special damages, the amount awarded came to £5,660. The accident happened in 1957, when the appellant was thirty-three years of age. The injury was to his right knee. There was no bone damage, but according to the medical evidence the cruciate ligaments inside the knee joint were completely ruptured. The function of these ligaments

is to lock the knee joint in place and keep it stable, stopping what is called the anterior-posterior rock of the tibia on the femur. No re-uniting ever takes place after such a rupture, and surgical treatment does not improve matters. The result is that the appellant suffers from a permanent instability of the knee joint. It is likely to flop suddenly, so that he may fall over. It may become dislocated; and there is a likelihood of tearing the cartilages. The practical disadvantages of the condition are great, and they extend into many departments of life. The appellant has and will have great difficulty in getting up and down stairs. Ascending or descending a ladder is impracticable, or at least dangerous. Even walking up and down hill is difficult, and running is impossible. According to the appellant's own evidence, his knee aches all the time; he cannot put pressure on the knee while it is bent, without causing it to jump out of joint and suffering great pain. He cannot kneel on the right knee or crouch. Some arthritic changes due to the instability of the joint have already occurred, and they indicate, as Mr. Toyne, an orthopaedic surgeon, expressed it, that the appellant "is starting to wear his knee-joint out very quickly". The osteo-arthritis, according to the same witness, will become a lot worse; indeed it will become "quite severe", with increasing pain and stiffness; and the knee will become practically useless in a period which the witness estimated at about seven or eight years from the date of the trial, which was held in May 1960. In general, Mr. Toyne's evidence was corroborated by another orthopaedic surgeon, Mr. Swaney. He considered that at some time, which might be as little as eight or nine years ahead but might be fifteen to twenty years ahead, the appellant would be unable to carry on any fairly active occupation. His view was, in effect, that the rate of progress of the osteo-arthritis would depend on the

degree of activity required by his occupation.

In the circumstances it was a very difficult task for the jury to put a money figure on past and future pain, suffering, inconvenience and general diminution of enjoyment of life; but it was no less difficult to put a figure on future loss of earning power. The appellant had had some training and experience in several forms of employment. He had done some cabinet-making; he had spent a little time in an engineering workshop; by means of a correspondence course he had qualified in tractor driving and maintenance and had had experience in this occupation; and in the timber industry he had spent eleven years. For the first six weeks after the accident he had been off work, but thereafter he had been able to work at a job which was lighter but brought him in about £3 a week more than his pre-accident wages. And the evidence did not warrant a positive view that even when he finds it necessary, in seven years' time or whenever it may be, to follow a less active life, to take employment as a garage mechanic or even in a completely sedentary occupation; his earnings will necessarily be reduced. But the one clear fact is that the avenues of employment that are open to him will become progressively reduced; and that is no light matter.

The argument for the respondent sought to test the reasonableness of the damages by allocating £1,000 to pain and suffering and similar matters, and by considering what income would be produced by investment of the amount to which the remaining £4,600 with accumulated interest at seven per cent would amount at the end of seven years. The learned judges of the Supreme Court considered that the test would be sounder if the £1,000 were raised to £1,600 and the interest rate were reduced to six per cent. Thus they arrived at more than £6,000 as the amount available in seven years' time to produce an income of £7 a week to

supplement the appellant's wages, the capital remaining intact. Looking at the matter in this way, their Honours considered that the award was too high, though not so high that a court of appeal could be justified in setting it aside.

That the amount is higher than might have been expected, and high enough to invite scrutiny in a court of appeal, is indeed obvious. To anyone comparing the importance of an injury to a knee joint with that of some of the other injuries with which in these times courts are unhappily too familiar, the amount may be thought generous. Indeed to some it might seem so generous that if it had been awarded by a judge a court of appeal might have felt authorized to interfere and substitute a smaller amount. But it was awarded by a jury, and the question is therefore whether it is completely out of proportion to the circumstances of the case and, for that reason, one which could not be awarded in the reasonable performance of the jury's function. To say, in words which Hudson J. quoted from English authority, that a jury's award of damages must stand unless it is outrageous and so extravagant that no other jury would repeat it is, if we may say so, to overstate the test which has long been recognized by courts of appeal, including this Court. Applying the true test to the facts of the present case, it seems to us that the verdict in the present case must be allowed to stand. In respect of the elements other than loss of earning power, especially the prospect of persistent and increasing pain and of lifelong curtailment of activity in many directions, it would be difficult to brand as completely out of proportion an award of £2,000. And in respect of diminished and diminishing fitness for the full range of employment which but for the injury would have been open to the appellant during the long period of working life which may well remain to him, it is extremely difficult to see why an amount as high as £3,660 should be condemned as beyond the

pale of reasonableness. It is true, as counsel for the respondent properly insisted, that there is no certainty that the appellant ever will be any worse off financially by reason of his injury, and that at least he is not very likely to be much worse off, if at all, for some years yet. But there is no denying that his injury casts a serious shadow over his economic prospects, and one which calls for substantial compensation. If calculations are to be resorted to - and while calculations in a matter of this kind must not be treated as decisive, they help, no doubt, to keep things in proportion - and if the doubtful assumption be made that over the next seven years there will be no loss to be compensated for, a jury might well have made a calculation which treated interest on the £3,660 as accumulating on the basis of a six per cent return, but subject to income tax. This might produce at the end of seven years a total sum of not much more than £5,000. And the jury might perhaps have made some reduction in the total sum to which the £3,660 might grow, in order to allow for the possibility that successive appeals might postpone the time when the amount of the verdict would be available for investment by the appellant. There could be no certainty that the portion of the verdict which might reasonably be taken as representing prospective economic loss is more than might be relied upon to produce in seven years' time an income of £5 or £6 a week to supplement the appellant's earnings. Although such figures as these can hardly fail to emphasize the generosity of the verdict, there is so much room for difference of opinion or assumption at each point in the calculation that one can hardly go through the process without being impressed by the wide divergences that might well occur between assessments made by reasonable minds. In the end the amount awarded must be looked at as a whole, and weighed in the scale of

experience against the circumstances as a whole, the fact being constantly borne in mind that the jury was obliged to fix once for all a fair compensation for damage which was almost wholly a matter of prophecy. Our conclusion, coinciding with the conclusion of the Supreme Court, is that there is no sufficient ground for ordering a re-assessment.

For these reasons the appeal should be allowed, the order of the Full Court of the Supreme Court set aside, and the judgment entered pursuant to the order of Adam J. restored.