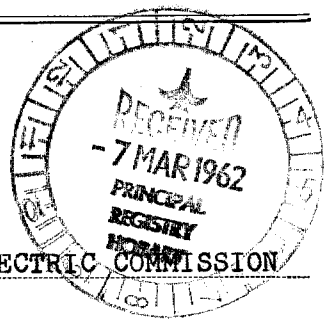
IN THE HIGH COURT OF AUSTRALIA



THE HYDRO ELECTRIC COMMISSION

V.

BLAKE

ORIGINAL

L.1.c.

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on TUESDAY, 6TH MARCH 1962

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

THE HYDRO-ELECTRIC COMMISSION

v.

BLAKE

ORDER

Appeal dismissed with costs.

THE HYDRO-ELECTRIC COMMISSION

v.

BLAKE

JUDGMENT

DIXON C.J.
McTIERNAN J.
OWEN J.

THE HYDRO-ELECTRIC COMMISSION

v.

BLAKE

The respondent to this appeal was the plaintiff in an action heard by Cox J. in which his Honour found a verdict in her favour for £8,200 and judgment was entered accordingly. The action was brought under the provisions of the Fatal Accidents Act and arose out of the death of the plaintiff's husband, one Harold Edward Blake, on 18th May 1960 while working as a transport driver in the employ of the appellant Commission. On that day Blake was driving a mobile crane belonging to the Commission along a road in mountainous country on the way to Lake Fenton. The rear part of the mobile crane consisted of a tractor on which was the driver's seat and in front of and attached to it was the crane mounted on the front axle. The vehicle was a heavy one weighing seven tons and of this weight two tons was represented by a concrete block carried at the rear of the tractor in order to provide a counter weight for the crane. A fellow employee named Kalinicki had driven on ahead of the crane in a truck with one of the Commission's engineers, and after waiting for some time at the Lake for Blake, they drove back along the road to look for him and met him driving the mobile crane up a steep part of the road. Apparently the carburettor on the tractor was causing some trouble and, as the two vehicles approached one another, both stopped and Blake asked Kalinicki for a spanner, which was given to him. He climbed out of the driver's seat to the ground on the off side of the vehicle and walked round the back of it to the near side of the engine and was there making some adjustment to the carburettor, when the

vehicle began to move backwards down the hill. The engine had been left running while the carburettor was being adjusted so that the vehicle was not in gear but the learned judge found, and the fact was not disputed, that during a period of about forty seconds it was held stationary by the brakes. When it began to run backwards Blake leaned over the side of the vehicle and grasped the steering wheel in an endeavour to guide it into a bank which ran up from the road on the side on which he was standing rather than allow it to run down the road or possibly down a slope running down from the other side of the road. While trying to manipulate the steering wheel he became caught up in some manner by the near side rear wheel and was thrown over against a rock face and instantly killed.

The case sought to be made on behalf of the plaintiff was that the braking system of the vehicle was out of proper adjustment with the result that that part of the mechanism which was designed to lock the foot brakes in the "on" position and so hold the vehicle stationary when it was stopped, frequently failed to operate effectively, that the Commission had therefore failed to provide a vehicle as safe for use as reasonable care could make it, and that this was the cause of Blake's death.

To have a proper understanding of the case, it is necessary to describe the braking system in some detail. There are no brakes operating on the front wheels and the rear wheels are braked independently by contracting bands operating on drums on the main pinion shafts running from the gear box and operating the rear wheels. There are two foot pedals side by side which operate these bands and a link is provided on one pedal which can be swung over into a slot on the other pedal thus enabling both pedals to be operated together. When foot

pressure on the pedals is released they spring back into the "off" position. When the vehicle is stopped and it is desired to hold it stationary, the pedals must be depressed until the brake drums are firmly gripped by the brake bands and held there while the driver pulls a rod which operates the brake locking mechanism. This consists of a metal extension piece at the rear of one of the brake pedals in which ratchet teeth are cut. By pulling on the rod a spring loaded pawl can be engaged with one of the teeth of the ratchet and provided the brakes are properly adjusted and this pawl can be fully engaged in the appropriate tooth, the foot brakes are held in the "on" position. The braking system also includes what was described as a "positive stop" in the form of a metal stud which prevents the brake pedals from being pressed down beyond a certain point. When the brake bands become worn an adjustment of them is necessary in order to ensure that the brake drums are firmly held by the brake bands before the further downward travel of the foot pedals is prevented by the "positive stop". If the brakes are properly adjusted the pawl on the brake locking mechanism can be fully engaged in the appropriate tooth of the ratchet by pressing hard on the foot pedals so as to ensure that the brakes are locked in the full "on" position.

The learned trial judge found that on the day in question the brakes were out of adjustment and that as a result, when Blake stopped the vehicle on the hill, the pawl of the brake locking mechanism had failed fully to engage the ratchet tooth which would, if fully engaged, have held the brakes securely in the "on" position. The pawl had only partially engaged that tooth and after holding in position for something like 40 seconds had slipped out of the tooth with the result that the brakes went into the "off" position and allowed the

vehicle to run backwards. His Honour was of opinion further that in these circumstances the Commission had been negligent in failing to maintain the brakes in an efficient condition, more particularly since the vehicle was intended to be used in hilly country. He rejected a submission that if the Commission had been guilty of a failure to exercise reasonable care, nevertheless the real cause of the accident was the action of Blake in endeavouring to steer the vehicle into the bank bordering the road rather than standing back and allowing it to run down the hill and rejected a further submission that Blake had been guilty of contributory negligence, a matter which under the law of Tasmania would go only to damages.

The first submission made to us was that there was no evidence on which it could reasonably have been found that the braking system was out of adjustment at the relevant time. It appears that on the day of the accident and after it happened, Kalinicki drove the vehicle a distance of about six miles to a place where it was placed on a low loader and taken to the yard of a police station. Kalinicki said that during the drive, which involved downhill travel, he applied the foot brakes on occasions and that they operated "safely enough". Whether he applied the brake locking mechanism at any stage did not appear. At the police station on the following two days some braking tests were made by a police officer and by two transport inspectors, neither of whom was called to give evidence. The police officer, who was called, stated that in the course of these tests, the brakes and the locking mechanism were applied and the braking efficiency tested by driving the vehicle back and forward against the brakes. He was asked "what happened when an attempt was made to move it backwards or forwards under power with the pawl operating rod applied?" and answered "Sometimes it would move - other times the motor would go -

the motor would be labouring under the strain ... . Well, sometimes the machine would move backwards or forwards, whichever the case may be." He said, in answer to a further question, that he thought that there was nothing wrong with the braking system. The vehicle apparently remained in the police yard until some time in July when it was taken to the Commission's premises at Glenorchy where it was examined on 23rd August, 1960 by a Mr Haller-Griffits, the Principal of the Hobart Technical College and a man with considerable qualifications and experience in mechanical engineering, who gave evidence which his Honour accepted. At some stage between the date of the tests at the police station and the date when Mr Haller-Griffits inspected the vehicle the clutch had been burnt out, but when and how this occurred the evidence did not disclose. In his evidence Mr Haller-Griffits said that he "found it quite easy to push the pedals down against the stop." This could be done with "an easy pressure of the foot". When this was done "the pawl would just not engage properly with the tooth. It would come on the tip of the teeth which was slightly rounded by wear but it would not go home in the majority of cases that I tried it ... . Sometimes as soon as you take your foot off the pedal, the pedal would jump up into the off position. Some other times, perhaps one in four, it would stay down but it was not secure." He was asked to what extent the pawl engaged with the ratchet tooth when the brake pedal was right up against the stop and replied "Not more than 3/32 of an inch. It was in effect just on the tip of the tooth." The full depth of the tooth was, he said, about 5/16 of an inch, or perhaps a little more. Later he said: "When the pedal is pushed down against the stop, the pawl would just come on the tip of the tooth like that. It was not possible to pull it right down to engage. The tooth

engagement is right down there, in which case the tooth and pawl lock, because pressure this way makes it impossible for this pawl to come out, but in the position in which the pedal was up against the stop it was only possible to engage the tip of the tooth like that, so there was every chance that it could fly off, because it was only just on the tip. It was not locked in. It would not come down any further because of the shape of the tooth." During his examination of the vehicle a man named Newell, an employee of the Commission who was not called as a witness, was asked by Mr Haller-Griffits to drive the vehicle and did so. He asked Newell to engage the brakes on the tractor and to pull the locking mechanism rod. The result was, the witness said, "the same as in my tests, that is to say not more than just the top edge of the pawl engaged in the tooth." Newell repeated this operation a number of times and, according to Mr Haller-Griffits, on two occasions the pawl failed to engage the teeth, and on the third attempt it engaged for "a matter of half a second or something like that" and then "flew off" the ratchet. Finally, after Newell had "kicked" and "thumped" at the brake pedal and at the handle of the ratchet the pawl engaged fully and could only be disengaged by hammering it with an iron bar. In cross-examination the witness was asked "you hold that the brakes at the time of your inspection needed taking up and were out of adjustment?" and with this the witness agreed. He said: "Yes, in my opinion the pedal should not have gone down to the stop, and because it did go down to the stop the question of engaging the pawl became difficult." Later again he said: "The pedal came to the end of its travel before the shoes were hard on and therefore it was not possible to apply the full force of the operator's foot to the pedal and through the pedal to the brakes", and "because the adjustment not having been taken up, the shoes

were not hard on the drum when the lever was stopped by the permanent fixed stop."

The argument in support of the appellant's first submission conceded that it was open to the learned trial judge to find that the brakes were out of adjustment in August 1960 when they were tested and inspected by Mr Haller-Griffits but denied that this could justify a finding that they were out of adjustment in the previous May. In support of this contention considerable reliance was placed upon the fact that some time between May and August the clutch had been burnt out, indicating, so it was said, that the vehicle had been used during that period and that as a result of such user, the brake bands may have become worn and the brakes thereby ceased to be properly adjusted. There was however no evidence to show what use of the vehicle, other than the tests carried out at the police station, had taken place between May and August or even whether the vehicle had been driven at all during that time and, since the tractor engine and the clutch provided the means of working the crane when the vehicle was stationary, its use for this purpose may have caused the burning out of the clutch. The significant fact, which impressed his Honour, was that when Blake stepped down from the vehicle to adjust the carburettor, the vehicle remained stationary on a steep hill for a short period of time thus showing that the brakes and locking mechanism had been applied. In these circumstances it was clearly open to Cox J. to find that what had then occurred was similar to what Mr Haller-Griffits had found during his tests. The pawl had only engaged the tip of the ratchet tooth and after holding there momentarily had slipped out of engagement. Counsel for the appellant submitted that it was equally consistent with the facts that Blake may not have fully applied the brakes but in that event it is most unlikely that this heavy vehicle, stopped

as it was on a steep grade, would have remained stationary for any period of time once Blake took his foot off the brake pedals. It was suggested also that the vehicle may have been held momentarily by gravel or rocks on the road but this is a most improbable hypothesis. In all the circumstances the learned trial judge was amply justified in finding that the condition of the brakes in May was similar to that described by Mr Haller-Griffits as existing in August.

It was next contended that there was no evidence on which it could have been held that the Commission had failed to provide a vehicle as safe for use as reasonable care could make it. One answer to this is to be found in an answer made by the Commission to two interrogatories in which the Commission was asked to specify "the dates and places (if any) during the twelve months prior to the 18th day of May 1960 when the said unit received maintenance servicing mechanical inspection or mechanical repair" and "the nature and extent of any such servicing, inspection or repair done in relation to the braking system or brake-locking assembly of the said unit during the said period". To these two interrogatories the Commission replied:

> "The records of the Defendant disclose servicing and inspection and various repairs to the unit during the relevant period but do not show any specific reference to the braking system or brake locking assembly."

From answers to other interrogatories it appeared further that the vehicle had been delivered to the Commission in October 1951 and had been worked for a total period of 9957½ hours. Apart from any other material, these answers justified a finding against the Commission on this issue, and in this connection it should be borne in mind that no evidence was called by the Commission to show that any inspection or servicing of the braking system had taken place, a fact peculiarly within its own knowledge.

Finally it was said that the learned trial judge should have found that there was no causal relationship between the defendant's breach of duty and Blake's death. Alternatively it was put that Blake was guilty of contributory negligence in trying to stop the vehicle's rearward movement and that for this reason the plaintiff could only recover a proportion of the total damages awarded. Neither of these propositions can be supported. The sudden failure of the brakes, due to the fact that they were out of adjustment, created a condition of emergency. In that situation Blake reasonably tried to serve his employer's interests and, as Lord Dunedin said in U. S. Shipping Board v. Laird Line Ltd (1924) A.C. 286 at p.291: "it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger".

The appeal should be dismissed with costs.