IN THE HIGH COURT OF AUSTRALIA

A.F. LITTLE PTY. LIMITED

V.

BIRKETT

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 25th July 1962

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

C.1978/55

A. F. LITTLE PTY. LTD.

v.

BIRKETT

ORDER

Appeal dismissed with costs.

A. F. LITTLE PTY. LIMITED

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JUDGMENT DIXON C.J.

In my opinion this appeal should be dismissed. It is an appeal from a rule or order of the Supreme Court of New South Wales dismissing an appeal by the defendant from a jury's verdict for the plaintiff. By the verdict the plaintiff recovered £25,000 damages from the defendant. The verdict was founded on the first and fourth counts of a declaration complaining of personal injuries caused to the plaintiff as the defendant's servant.

In the first count the cause was alleged to be the negligence of the defendant: in the fourth count breach of statutory duty. I think that the second count may be put aside: for the facts make a somewhat stronger case in favour of the plaintiff on the first count. But at the same time not even a close scrutiny of the evidence leaves one with a satisfactory explanation of the precise manner in which the jury considered that the accident occurred. Nothing is to be gained by a renewed discussion of the evidence. I have had the advantage of reading the reasons of Owen J. with whom on this part of the case I agree. All I shall say is that the evidentiary materials do seem to have been fairly open to the view that the plaintiff was crossing from one part of the structure to another by the use of the tom heads, that he crossed a transverse beam and slipped and in an attempt to save himself clutched a profile stick, which broke. It was at all events possible for the jury to adopt some such view, and there were other views of the same sort putting the plaintiff's slip or failure in foothold further forward in his progress. It was possible for the jury to hold that inadequate protective equipment was in position and that planks and scaffolding ought to have been there and would have averted or

avoided the accident. The plaintiff's case may have been not only confused but thin. But on the whole I think there was enough to support a finding of negligence on the part of the defendant causing the injury, and a refusal to find contributory negligence on the plaintiff's part.

It was contended that the defendant appellant was entitled to a new trial on the issue of liability because of certain observations and perhaps non-directions in the charge to the jury. None of these grounds would justify an order for a new trial nor would the points taken in the first, third and fifth to ninth grounds in the notice of appeal. The second and fourth grounds were not relied upon and the tenth ground is that the verdict was excessive.

In his judgment Herron J. gives his reasons for denying this ground and I agree that it should fail. Without subscribing entirely to the approach of that learned judge to the questions of fact involved I agree that on the evidence before them the jury might reasonably adopt a very serious view indeed of the injuries sustained by the plaintiff and of the result upon his capacity to earn a living and to enjoy life as otherwise he might have done.

The amount awarded by the jury is doubtless very large. Deducting the special damages, viz. £4230 which included loss of earnings up to the trial, it amounts to £20,770. The severity of the plaintiff's immediate injuries was very considerable and the jury might regard him as having undergone a great amount of pain and suffering. But the lasting character of the consequences produced by his injuries must or at least should have been the main question on which the jury based the large estimate of general damages. This would of course have a double aspect. It must go to his prospects of earning a livelihood or gaining money. But it must also go to his future enjoyment of life as a human being. Unfortunately

it was a question at the trial how far some of the physiological and pathological defects now ascribed to him may or may not have been substantially caused, increased or exaggerated by the physical injuries he received and the stresses he underwent in or as a result of the accident. But that was a question for the jury. Reading the transcript of the evidence of himself and his surgical witnesses (none were called for the defendant) I do not see why the jury might not decide this question in favour of the plaintiff's contention. In any case whatever doubts and misgivings might arise from the printed page as to the quantification of the damages awarded, it must be borne in mind that after all the impression of the plaintiff himself which the jury gained and the advantage they had of seeing the medical witnesses are no inconsiderable factors. Our opinion about the seriousness and lasting nature of the actual injuries and the actual likelihood of the persistence of the plaintiff's disqualifications, drawbacks and difficulties is not what governs the question before us. For us it is simply a question of what conclusions or opinions the jury might reasonably have formed about that part of the case. And in that the latitude which Courts must allow to a jury is great. In my opinion it was within the province of the jury, having regard to the evidence before them, to find the verdict which they returned and the case is not one in which, under the power of controlling verdicts which the Courts exercise, the estimate of damages made by the jury should be set aside as necessarily excessive.

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JUDGMENT McTIERNAN J.

I take the same view as the Chief Justice on the questions of liability and damages.

As to the question of damages I would add this. A court of appeal should not overrule an award of damages made by a jury unless it is in the view of the Court out of all proportion to the circumstances of the case. I think that the circumstances which the Court should take into consideration are not those which the Court itself would find but rather the circumstances which it thinks that the jury could have found having regard to the evidence. I have read the evidence on the issue of damages and I think that the Full Court of the Supreme Court of New South Wales has correctly summarised it. The jury could have found that the injury sustained by the plaintiff in the accident was grave, that it resulted in extreme pain and that it would have painful effects in the future and be seriously detrimental to his enjoyment of life. In addition, the jury could have taken the view that the plaintiff was virtually incapacitated by the injury for any work which would otherwise have been within his physical or mental ability. Where a jury's assessment of damages in a personal injury action is attacked in a court of appeal the observations of Dixon C.J. in Ketley v. Roulstone 34 A.L.J.R. at p. 496 should be remembered. These

observations begin with the sentence "The cause of my hesitation is that I cannot but think that much latitude must be given to a jury in so practical a matter". The matter is the assessment of damages. See also the observations of Morris L.J. in Scott v. Musial 1959 3 A.E.R. at p. 195 on the high degree of deference and respect which a court of appeal should give to a jury's assessment of general damages in a personal injury action. I am not prepared to decide that the Full Court of the Supreme Court ought to have set aside the assessment of damages made by the jury on the ground that it is so excessive as to be beyond all reasonable limits.

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JUDGMENT KITTO J.

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I have had the advantage of reading the judgment prepared by my brother Owen. I agree in it and have nothing to add.

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JUDGMENT WINDEYER J.

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I agree that there was evidence on which the jury could find for the plaintiff on the issue of negligence. I need say no more than that on this I fully agree in what Owen J. has written. As to damages, I think we should not interfere with the decision of the Full Court that the jury's verdict should stand.

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JUDGMENT OWEN J.

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This is an appeal from the Full Court of the Supreme Court of New South Wales by the defendant in an action in which the jury found a verdict in favour of the plaintiff for £25,000. On the appeal to the Full Court the defendant sought to have the verdict set aside and in its place a verdict entered in its favour or, in the alternative, an order for a new trial either generally or on the issue of damages. Both applications were dismissed.

The plaintiff was employed by the defendant as a leading hand carpenter and was working on a reinforced concrete building which was being built by the defendant. By 27th February 1957, the date of the happening of the accident which gave rise to these proceedings, the work had reached first floor level, that being about 11 or 12 feet above the floor below. On that day the plaintiff and a number of other carpenters were working on that level preparing the timber form work into which concrete would later be poured for the concrete beams intended to carry the floor. The area or bay in which they were required to work was about 23 feet square. The form work was supported by a number of toms, each consisting of an upright timber beam carrying a cross-piece or tom head of 4 x 3 inch timber upon which was supported the form work. These tom heads projected about 2 feet from the side of the form work and were about eighteen inches apart. To build up the sides of the form work and to move from place to place the men working on the job would have to stand or move from one part of the bay to another on the projecting ends of the tom heads and no planking on which they might stand or walk was laid along the

top of the projecting tom heads, nor was any other form of scaffolding provided. The plaintiff's work included the supervision of the other carpenters working on the floor and this involved him in moving about from place to place in the bay. While he was standing near a man named Hamilton, near one end of the form work for a beam, another carpenter named Robertson, who was working near the other end of the form work about 20 feet away, called the plaintiff who thereupon made his way in Robertson's direction, stepping from tom head to tom head alongside the form work. When he had either reached the other end of it or had almost reached it, he fell to the floor below and suffered injury. So much appears reasonably clear from the evidence. One of the difficulties, however, which the appellant faces on the appeal arises from the fact that at the trial a model of the partly erected building was produced and much of the evidence given by the witnesses who were working on the job when the accident occurred was given by referring to the model and pointing out on it various positions and the movements of the plaintiff so that, in many instances, the shorthand writer was unable to do more than describe the witness as "indicating" the position about which he was speaking. No doubt the evidence so given conveyed a clear impression to those who were present at the trial but a number of the matters upon which the appellant placed reliance on the appeal cannot be ascertained with any degree of certainty from a mere reading of the transcript and a view of the model. For the same reason it is difficult to know what weight should be attached to some of the criticisms which have been directed to the summing up of the learned trial judge since his Honour was in a far better position than is an appellate court to follow and understand the evidence.

The plaintiff's declaration contained four counts and of these the first and fourth were left to the jury, who

returned a verdict for the plaintiff on each. The first count was based upon the common law duty of care owed by employer to employee, while the fourth count alleged a breach of the statutory duty created by Reg. 73(1) made under the Scaffolding & Lifts Act which requires suitable and safe scaffolding to be provided in the circumstances set out in the regulation. If the appellant is unable to show that under the first count it is entitled to have a verdict entered in its favour or, in the alternative, to an order for a new trial on the issue of liability, it would be unnecessary to consider the submissions directed to the second count. Accordingly that part of the appeal which is concerned with the first count should be first considered.

The first and second grounds in the notice of appeal are directed to the same point. The first is that "there was no evidence that the breaches of duty alleged in the count caused or materially contributed to the plaintiff's fall"; the second that "the only evidence was that the plaintiff's fall was caused by the breaking of a profile stick after he put his weight on it to hoist himself up, and this event was not causally related to any breach of duty alleged against the defendant". In support of these grounds counsel for the appellant sought to show that on the evidence the only reasonable conclusion open was that at the time when he fell the plaintiff had completed his passage along the side of the form work, stepping from tom head to tom head, and, intending to climb on to or over the top of the form work of another beam running at right angles to the first one and higher than it, had tried to pull himself up by the aid of a profile stick nailed to the timber surrounding one of the corner columns of the building. The profile stick had, so it was said, broken when the plaintiff put his weight on it with the result that he fell to the floor below. A profile

stick, it should be added, is a light piece of timber used for checking levels and there is no doubt, on the evidence, that at or about the place from which the plaintiff fell, there was a profile stick which was broken when he fell.

The first difficulty which the appellant meets on this submission is the one to which reference has been made since much of the evidence of the facts surrounding the accident was accompanied by demonstrations by the witnesses on the model and the phrases in the transcript "on this side" or "that side" or "that would be about where he fell (indicating)" convey nothing to those who were not present at the trial. But there was undoubtedly some evidence, which can be extracted from the transcript alone, that the plaintiff fell when he was still stepping along on the tom heads and when he was about two-thirds of the way across the bay. There was also evidence that, as he fell, he grasped a profile stick in an endeavour to save himself. Accordingly this submission fails.

It was then submitted that there was no evidence of negligence on the part of the defendant. This point was not taken at the trial, nor was it raised on appeal to the Full Court, nor is it to be found in the notice of appeal to this Court. It is sufficient, in the present case, to say that there was evidence on which a jury could take the view that the failure to provide a plank as a footway to enable those working in the bay to pass from one side of it to the other was a breach of the duty of care owed to its employees by the defendant. The workmen, and in particular the plaintiff in his supervising capacity, had of necessity to move about and the evidence left it open to the jury to find that a prudent employer would, in the circumstances, have provided at least one means of crossing the bay from side to side without having to step from one tom head to another.

The remaining matters which were argued in connection with the first count relate to the submission that

there should be a new trial. It was said that the learned trial judge failed sufficiently to direct the jury that it was necessary for the plaintiff to show that the defendant's negligence, if that was established, had caused or materially contributed to the plaintiff's injuries. The fact is, however, that his Honour told the jury on a number of occasions that this was one of the elements to be proved by the plaintiff. The real complaint seems to relate to the fact that after the jury had returned counsel for the defendant asked his Honour for a direction, saying:

> "On the 'causal connection', I concede Your Honor did say that, in either case, whether it be a common law duty or whether it be a statutory duty, there must be a causal connection in that the breach must either cause or materially contribute, but I would ask Your Honor to specifically deal with the matter that I put to the jury, namely, that if the jury in fact came to the conclusion that this accident happened by the plaintiff using the profile stick for the purpose of supporting himself in an attempt to get up on the beam or using it as a steadying medium for his body, it would be open to them to come to the conclusion that the presence or absence of scaffolding was not causally related to his fall at all.
>
> HIS HONOR: If I were deciding the facts, I would not have thought it would be open to the jury to take that view, but I am certainly not going to give any directions on it."

Here again, the way in which the evidence was given faces the appellant with a difficult task. His Honour had heard the evidence and seen the witnesses demonstrate on the model. He had told the jury, under a defence of contributory negligence, to consider the defendant's contention that the plaintiff had sought to use the profile stick to pull himself up on to the cross beam and, from what his Honour said, it seems probable that what he had in mind in refusing to accede to counsel's request was that even if the plaintiff had acted in the way suggested nevertheless, on the evidence as demonstrated on the model, it would not be reasonable to find that the absence of some form of scaffolding or planking was not a material factor

in causing the plaintiff's injuries. It cannot be said, on a mere reading of the printed word, that this was not correct. It is impossible, in the circumstances, for an appellate court to be satisfied that this was wrong.

It was further contended that his Honour fell into error in that part of his summing up which dealt with evidence given in cross-examination by a witness named Robertson, who was called on behalf of the plaintiff. Robertson, who was one of the men working in the bay, had said in his evidence in chief that the plaintiff had fallen when he had nearly completed his crossing of the bay on the tom heads and that "he seemed to lose his balance and slip and then grabbed hold of this 2 x 1 profile". In cross-examination he was asked a number of questions about a statement which he had given and signed not long after the happening of the accident. In it he had said that the plaintiff "was standing on the tom heads.....giving instructions just before he fell". Later these passages in the statement were put to him:

> "Q. 'The tom heads were about two feet apart and Birkett went to step up on the top of the beam which was about 30 inches above the tom heads. As he went to step up he caught hold of the profile stick which was jammed into the end of the hollow tubing of the scaffolding' - is that right?
>
> A. I am not sure of that point, where it went to - the profile. I thought it was by the side of the beam, if the beam is there.
>
> Q. 'Birkett is a big man and as he grabbed the profile stick and put his weight on it to hoist himself up, the stick broke in the middle and he fell straight back on to the concrete below' - is that right?
>
> A. Yes."

At a later stage of the case, doubtless during the addresses of counsel, the question arose whether in giving these answers the witness was merely assenting to the fact that the quotation put to him appeared in the written statement or was agreeing that those quotations stated the true facts.

In his summing up the learned judge, after pointing out that the contents of the statement could not be treated as evidence of the facts stated in it unless the witness had adopted them in the witness box as being the truth, went on to say:

> "Now, you will remember that the witness Robertson was cross-examined by Mr. Langsworth on this document and you will have to ask yourself whether it appears that Robertson did on oath here adopt that statement as to what the plaintiff is supposed to have done and to ask yourselves whether, in fact, that is what Robertson's testimony here means. Whilst the cross-examination was proceeding, it never occurred to me for one instant that Robertson was assenting to the truth of what was in the document. I thought that he was merely assenting to suggestions that this did appear in the document, not assenting to the truth of it. However, you may have got a different impression, and it is your impression that matters, not mine, because this is a question of fact."

His Honour then referred in some detail to the contents of the statement and said:

> "When he was asked: 'Is that right?', what did he understand by that question when he said 'Yes'? Did he understand that he was being asked whether that was, in fact, right? Did he understand that he was being asked whether that was the truth of the matter or, on the other hand, did he understand that he was being asked whether it was right that it appears in this document? Well, these are matters entirely for you."

No complaint can properly be made of what his Honour said and this submission fails.

It was also argued that his Honour erred in failing to direct the jury as to the proper use which it might make of evidence which was given regarding common practice in the building trade. But the argument in support of the submission was not seriously pressed. It relates to evidence which was given that it was unusual in the trade to provide planking or scaffolding to enable an employee "to make an isolated trip from one part of a working area to another part of the working area". In his summing up his Honour referred to this evidence and to the defendant's contention and proceeded then to put the opposing argument, that this was not a mere

isolated and unforeseeable journey being made by the plaintiff since his supervision of the work being done would necessarily require that he should move from place to place from time to time and that, in these circumstances, some reasonably safe means should have been provided to enable him to cross the floor otherwise than by stepping from tom head to tom head. There is nothing in this point which would justify a new trial.

So far as the first count is concerned, therefore, the appellant has failed to show that a verdict should have been entered in its favour or that a new trial generally should be had. In these circumstances it is unnecessary to consider the grounds upon which it was contended that a verdict should have been entered for the defendant on the second count or, in the alternative, that a new trial on that count should have been ordered.

Finally it was submitted that the amount of damages awarded was excessive and that a new trial on this issue should be ordered. Of the total mount of £25,000, £4,230 apparently represented loss of earnings together with medical and hospital expense up to the date of the trial and a further sum representing the estimated cost of future operative treatment to remove a stone in the plaintiff's kidney, there being some evidence that the fall and consequent immobilization of the plaintiff may have caused a pre-existing stone to move and so cause an obstruction or to increase in size. There was left then approximately £20,800 representing the award for pain and suffering, permanent disability, loss of the amenities of life and future loss of earning capacity. At the date of the trial the plaintiff was aged 37. His net weekly earnings were about £22.10.0 and there was evidence that at the date of the trial a carpenter might earn, with overtime, about £29 net per week. His most serious injuries were to his back. There was a compression fracture of the twelfth thoracic vertebra and fractures of the first,

second and third lumbar transverse processes. Three ribs were also fractured. These injuries had cleared up satisfactorily some time before the trial. He was in hospital and at home unfit for work until November 1957 when he re-entered the defendant's employ doing joinery work until July 1958. Notwithstanding the fact that the fractures had reunited satisfactorily, the plaintiff continued to suffer severe pain in his back. One of the medical witnesses called by him who gave evidence about the stone in the kidney said that it was difficult to determine how much of the pain was due to the presence of the stone and how much to a back injury, to which reference will presently be made, but said that the removal of the stone would relieve one source of the pain. The other injury causing pain related to what one of the medical witnesses described as a "developmental defect in the 5th lumbar vertebra". The vertebra had been deformed since birth but until the happening of the accident had caused no trouble. Trauma caused by the fall was thought to have caused some change in the position of the vertebra thus producing an extremely painful condition on movement of the spine. In an endeavour to immobilize this portion of the spine and so prevent the pain, two bone-grafting operations were performed, one in July 1958 and the second in April 1959, but without success and it was not considered advisable to make a further attempt. The probabilities were that the pain would continue and that the plaintiff would not be able to return to his trade as a carpenter. It was said too that he had been a keen tennis player and golfer and enjoyed surfing and could no longer enjoy these recreations. All these matters would undoubtedly justify a substantial award under the heading of general damages. In a matter of this sort it is obvious that the opinion of the Full Supreme Court must be given great weight. The amount awarded seems to me to be a very high one indeed but, having regard to the fact that the members of that Court took the view that it

was within the bounds of reason and that three members of this Court have reached the same conclusion, I am not prepared to hold that it was one which reasonable men could not have found. The appeal should be dismissed.