16. ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

SHAW

V.

PEANUT MARKETING BOARD

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on THURSDAY, 30th JULY 1964

A. C. Brooks, Government Printer, Melbourne
C.7639/60

SHAW

v.

THE PEANUT MARKETING BOARD

ORDER

Appeal allowed with costs.

Set aside order of Supreme Court disallowing plaintiff's appeal and in lieu thereof order that plaintiff's appeal be allowed with costs.

Direct that verdict and judgment for the plaintiff be varied by substituting the sum of £12,409.15.3 for the sum of £9,307.7.6.

SHAW

v.

THE PEANUT MARKETING BOARD

JUDGMENT BARWICK C.J.

SHAW

v.

THE PEANUT MARKETING BOARD

The plaintiff who at the time of the events the subject of this action had been employed by the defendant as a labourer for some four or five months, sued it for damages for its negligence in the handling of bags of peanuts whilst being stacked, each bag weighing between 50 lbs. and 70 lbs. At the hearing of the action before the Supreme Court in Maryborough, Queensland, the trial judge found for the plaintiff, assessed total damages in the sum of £12,409.15.3, found the plaintiff to have contributed to the result by his own negligence and, having apportioned twenty-five per cent of the responsibility for the result to the plaintiff, found a verdict for the plaintiff for £9307.7.6 and entered judgment accordingly. This verdict and judgment were appealed by the plaintiff to the Full Court of the Supreme Court of Queensland on the grounds (i) that there was no evidence of negligence on the part of the plaintiff contributing to the occurrence, (ii) that, if there were, it was not such as to warrant the trial judge's finding in this respect, and (iii) that, failing acceptance of either of these grounds, the amount apportioned to the plaintiff's responsibility for that consequence was too high.

The plaintiff also complained that the general damages had been assessed on an improper basis and that they were inadequate.

The Full Court dismissed the appeal on all grounds and the plaintiff now appeals to this Court upon the same grounds.

On the morning of 5th April 1960, the employees of the defendant were stacking bags of peanuts in the open and progressively roofing the sections of the stack as these sections were completed. Each section of the stack when it

reached a height of thirty feet was "peaked" by bags being formed into a gable over which timber rafters were placed to bear sheets of iron, thus roofing the section against the weather with a ridged roof. Each section of the stack was rectangular, being twenty-one feet wide by twenty-seven feet deep, and separated from each other by six or eight feet. The faces of the sections were in line and ran east and west.

At the time of the occurrence in which the plaintiff was injured three sections of a stack had been completed and the fourth section, the easternmost, having reached its height of thirty feet, was in course of being "peaked" preparatory to being roofed. Bags of peanuts were being moved by a conveyor from the vehicle which had carried them to the Board's premises to an elevator which was placed about midway along the face of the unfinished section of the stack and approximately at right angles to it. The elevator was covered so that bags could not fall out sideways whilst being elevated. When a bag reached the mouth of the elevator at its upper end workmen already on the top of the unfinished section took it in hand and stacked it, in this instance, no doubt, in ascending tiers to form the "peak" of the section. If the workmen did not remove a bag quickly enough upon its emerging from the mouth of the elevator the next succeeding bag could push it upwards whence it might travel down the cover of the conveyor which had a flat surface. It seems that in that event it was likely that the bag would travel only a few feet before falling off the cover to the side. If it did not thus fall off but slid further down the cover, the chances of its doing any harm grew less as it descended. Consequently it was said that the danger area from bags falling off the elevator was forward of a pair of wheels of the elevator towards the stack. This distance was not specified in the evidence but the position of the plaintiff at a material time was expressed in relation to these wheels.

Whilst the incomplete section was being "peaked" a gang of workmen were preparing to roof it, a decision having been made to cover it before nightfall lest the peanuts became wet from rain. The method of preparing the roof was to make rafters some twenty-one feet long by bolting together pieces of 3" x 3" timber which were themselves of varying lengths although mostly about fifteen feet in length.

The plaintiff was one of the roofing gang preparing to roof the incomplete section. He was acting as labourer to a carpenter who was making the rafters. The lengths of timber out of which these were to be made were stacked at the side of a roadway which was said to be some eight to ten feet east of the easternmost end of the incomplete section of the stack. Three carpenters' trestles had been set up between this stack of timber and the elevator so that timber placed along these trestles would be at an angle to the line of the elevator, the angle being apparently somewhat less than an angle of forty-five degrees. When rafters were complete they were thrown in a heap or stack on the floor between the trestles and the elevator.

The plaintiff's part in this operation was to lift lengths of timber (apparently sometimes on his own) from the stack of timber and place them on the trestles, to assist the carpenter in lining them up for boring and bolting and, at least sometimes, to assist to throw the rafters when finished from the trestles on to the heap of rafters to await the time when they would be lifted into position in the formation of the roof.

The plaintiff was struck on the back of the neck and shoulder by a bag of peanuts whilst standing facing in the general direction of the work the carpenter was completing on the trestles. He fell backwards to the ground.

If the evidence of the only eye witness of the bag striking the plaintiff is accepted, the bag which struck the

plaintiff did not come from the elevator but came from the unfinished section of the stack, travelled as if in falling it had struck something which might have been the head of the elevator and tumbled through the air, coming out from the stack some considerable distance, said by the witness to be fifteen feet. If the evidence of this witness is not accepted, there was no evidence as to where in particular the bag came from, whether it came from the elevator or the unfinished section, and in any event there is no evidence as to how it came to fall.

The trial judge found the Board guilty of negligence in "permitting a bag of peanuts either to fall from the stack or whilst it was being handled when the agents of the company knew or should have known that persons working below were likely to be injured thereby". His Honour thought that it was a case for the application of the doctrine of res ipsa loquitur because he thought that had things been properly attended to by the servants of the Board at the top of the stack and/or by the people who were operating the elevator and/or if the system of work provided had been adequate, the bag of peanuts would not have fallen. These findings of His Honour are not challenged.

The questions raised before this Court affecting liability are whether or not there was any evidence of contributory negligence on the part of the plaintiff in failing to take reasonable care for his own safety, and if there was any such evidence, whether we should disturb the trial judge's finding of contributory negligence.

It seems to me that the answer to these questions depends upon a clear understanding of the relative positions of the trestles, the timber upon them, the elevator, the unfinished section of the stack, the position of the plaintiff when he was struck and the source of the bag which struck him.

The trial judge has indicated his acceptance of the evidence of the witness Campbell that the plaintiff when struck by the bag was in a place in which his work did not require him to be and that the plaintiff had been warned on that day and apparently on other occasions not to go "too close" to the elevator. Beyond this we are not told whom the trial judge believed nor what view of the basic facts had been formed by him.

It is therefore necessary that I take the somewhat unsatisfactory course of working out from the evidence that credible view of the facts which would most tend to support the verdict and assume that the trial judge would have accepted the witnesses of these facts as both credible and accurate.

On that footing and after a close examination of the evidence the following, together with what I have already described, appears to me to be the account most favourable to the defendant which he could have accepted.

The plaintiff was working in fairly close proximity to the stacking operation which was in progress and which was taking place to the side of where he was standing or moving about at his task. Allowing that all the measurements given by the witnesses were estimates, really little better than rough approximations, it does appear fairly clearly that the area in which the plaintiff was performing his work was approximately within 9-10 feet from the nearest point of the elevator and within some 16 feet from the nearest point of the unfinished section of the stack.

The plaintiff's work at the relevant time would require him to be adjacent to that end of the timber laid on the trestles which was nearest to the unfinished section of the stack. The timber was said not to project very much beyond the trestle though obviously it must do so to some extent. At the time he was struck the plaintiff was not required to be

doing anything positive, beyond holding himself in readiness to assist the removal of the rafters, said to be six in number, which were then on the trestles, when the carpenter had finished fabricating the last of them, an operation in which he was engaged when the plaintiff was struck.

The plaintiff was last seen standing at the end of these timbers within a matter of seconds before the accident. It must be taken that the plaintiff in a very short space of time prior to the accident moved from this point to the place where he was when struck by the bag of peanuts. This spot was certainly not less than ten feet six inches from the face of the stack, taking the most direct line, and probably not closer than twelve feet six inches. His movement had involved him in taking at most three or four paces and probably not more than two paces in a backwards direction from the point at which he was last seen adjacent to the trestle nearest the incomplete section of the stack. The point to which he moved would not be within the area of danger from bags falling from the elevator and although he was standing at a spot where he "could" be hit and in that sense be in a position of danger, there was really no evidence that this was a place where he was likely to be hit. Whilst there was evidence that bags fell from time to time from the elevator in the manner I have described, there was no evidence that bags otherwise fell from the stack, nor was there any evidence that the bag which struck the plaintiff fell from the elevator. There was no evidence that the plaintiff had seen a bag fall either from the stack or from a covered elevator such as that then in use.

Both the trial judge and the Full Court set store by the fact that at the time the plaintiff was struck he was in a place where his work did not require him to be and that therefore he had gone to that place unnecessarily, a place described both by the trial judge and by the Full Court as a

place of danger. But, granting these conclusions, it does not follow that in whatever he did the plaintiff acted unreasonably in disregard of his own safety. Had his work required him to stand where he did when struck, it would have afforded the plaintiff an answer to a charge of contributory negligence, but to be where his work did not require him to be does not mean that his presence there is necessarily evidence of contributory negligence. The question is whether the deliberate taking of these several paces towards the incomplete stack and the elevator whilst awaiting further positive duties in his employment but whilst apparently remaining attentive to it, was in the circumstances unreasonable, rash, in disregard of personal safety. I say the deliberate taking of these steps because of the basis on which I must approach the facts after verdict, not feeling at liberty in these circumstances to postulate the possibility of mere inadvertence on the part of the workman.

The Full Court in deciding to affirm the trial judge's conclusion, referred to the fact that he had seen the witnesses and was therefore in a position of advantage denied to an appellate court. In this connection the Full Court made reference to the judgment of Lord Reid in Benmax v. Austin Motor Co. Ltd. 1955 A.C. 370 at p. 375.

One should not minimise the importance to be attached to a trial judge's findings where they may have been influenced by the opportunity he had for observing and weighing the oral testimony of the witnesses, and if the trial judge in this case had given the appellate courts the benefit of his view on the credit to be given to any of the witnesses other than the witness Campbell, part of whose evidence he adopted, or his estimate as to their accuracy in making the various estimates of the somewhat critical relationships, his views ought not to have been differed from except in compelling

circumstances. But where, as here, the Court has not the benefit of the trial judge's views and, perforce, takes that view of the evidence which tends most to support the trial judge's findings, it goes further than merely accepting the trial judge's views. It attributes to him and respects his credence of that view of the facts most favourable to his own conclusion. When the facts are examined in this fashion, as I have endeavoured to do in close detail, though expressing the result in summarised form, the appellate court, it seems to me, is not at any disadvantage in relation to the trial judge. What remains are questions which can be answered by the appellate court where, as here, there is an appeal both on questions of fact and upon questions of law. Of course, even so, the trial judge's conclusion of contributory negligence should not be disturbed unless in the view of the appellate court it is demonstrably wrong in a case where it is supported by evidence. The presence of contributory negligence is peculiarly one of fact - peculiarly so because of the extent to which it is a matter of degree. The question of whether or not there is evidence on which a finding of contributory negligence can be made and the question of whether on that material that finding ought to be made are shaded very close to each other in many cases, of which this is an example. If there was evidence believed by the judge that the plaintiff moved deliberately and unreasonably into an area of danger with respect to which he had been warned, it seems to me there would have been both evidence on which the finding of contributory negligence could have been made and, if made, a finding which ought not to be disturbed. But here the evidence does not seem to me to show that the plaintiff did enter that area of danger with respect to which he had been warned, even assuming that the injunction not to go "too close to the elevator" had sufficient precision in the circumstances to amount to an effective direction.

Apart from the evidence of this warning there was nothing to show that the plaintiff was aware of any particular danger of bags falling from an elevator of the kind then in use or from an incomplete stack. Indeed, whether or not one accepts the evidence of the eye witness as to the course of the bag which struck the plaintiff, there is still no evidence which I can find to show that there was a danger of bags falling from the stack, as distinct from coming from the mouth of the elevator. Further, having in mind the confined area in which the plaintiff was required to work in fairly close proximity to the stacking operation, the taking of the few paces which on the evidence would be involved in his movement from a position adjacent to the trestle to the place where he was when struck could not be said, in my opinion, in the circumstances to be in unreasonable disregard for his own safety. I have therefore come to the conclusion that, accepting such of the express findings as the trial judge made, there was no material on which he could find this plaintiff guilty of contributory negligence.

It was also submitted on behalf of the plaintiff that the trial judge erred in his assessment of the damages and that his award was inadequate. It was said that His Honour had based his assessment of the plaintiff's economic loss on too low an estimate of his pre-accident earning capacity and prospect. But I am not satisfied that His Honour did so. His Honour fixed a global sum for general damages to cover his future economic loss, his past and future pain and suffering, discomfort and inconvenience, and the loss of amenities of life. If His Honour did make any calculations of the plaintiff's loss of future earnings their basis cannot be discovered in His Honour's reasons for judgment and I cannot find anything more than the merest speculation on which to base a reconstruction of His Honour's processes in arriving at the global sum which he awarded. Accordingly, I am not satisfied that His Honour

proceeded on any erroneous basis in arriving at the amount of damages. Nor do I think that the amount which His Honour did award was inadequate to cover the plaintiff's loss.

In my opinion the appeal should be allowed and a verdict and judgment entered for the plaintiff for the total amount of damages assessed by the trial judge, viz. the sum of £12, 409.15.3.

SHAW

v.

PEANUT MARKETING BOARD

JUDGMENT KITTO J.

In my opinion the appeal should be allowed. There is nothing I can usefully add to the judgment of the Chief Justice.

SHAW

v.

THE PEANUT MARKETING BOARD

JUDGMENT TAYLOR J.

his award of damages for loss of earnings in the future upon a pre-accident earning rate of £14.6.3 per week. A higher figure such as the appellant had earlier earned as a butcher should have been taken as the basis for assessment and, in failing to do so, his Honour had fallen into error. In the Full Court the view was taken that the damages had been assessed on the basis of the lower figure, but I think it is by no means clear that this was so. It is at least possible that his Honour took a higher figure into account and discounted it for various reasons - on the ground, for example, that before the accident a degree of cervical spondylosis had already developed in the appellant's spine. But even if it is correct to say that his Honour's calculations were based upon the lower figure there is, in my opinion, no reason to think that he proceeded upon any wrong principle. It was his task to estimate the extent to which the appellant's earning capacity had been affected by his injuries and I am not satisfied that in making his estimate his Honour acted upon a wrong principle or that the amount awarded was so inadequate as to justify the interference of an appellate court.

I would dismiss the appeal.

considered that in these circumstances seventy-five per cent of the total damages awarded should be borne by the respondent. He assessed the total damages at £12,409.15.3, of which £9,000 represented general damages, and gave judgment for the appellant for £9,307.7.6. From that decision the appellant appealed to the Full Supreme Court which dismissed the appeal and from that order of dismissal he now appeals to this Court on a number of grounds.

In the first place it was submitted that there was no evidence upon which it could be found that the appellant had been guilty of any lack of care for his own safety. Alternatively it was submitted that if there was such evidence, a finding of contributory negligence should not have been made. I agree with their Honours in the Full Court that if Campbell's evidence be accepted, as it was by the learned trial judge, it provided material on which it could properly have been found that when the accident occurred the appellant was in a place where his work did not require him to be and that, in the light of the warning which had been given to him not to go close to the elevator or to the stack, he had failed to take reasonable care for his own safety. Their Honours also thought that there was no reason why the learned trial judge should not have accepted Campbell's evidence and that, having accepted it, no justification had been shown for interfering with his findings of fact. I agree with these conclusions. It was next submitted that the learned trial judge had adopted a wrong principle in assessing the general damages which he awarded. Alternatively it was argued that the amount awarded was inadequate. If I understood these submissions correctly, they were based upon the fact that although the appellant was, at the date of the accident, working as a labourer at a weekly wage of £14.6.3, he was in fact a butcher by trade and in that capacity had earned in the past a weekly wage of £23. The learned trial judge had, it was said, based

position in which the appellant was when he was injured and the estimates of distances varied, but the learned trial judge accepted the evidence of a witness named Campbell who was the yard foreman. He said that just before the accident occurred he saw the appellant standing close to the trestles about fifteen feet from the elevator and about the same distance from the stack, waiting for the carpenter to finish his work on the timber. He was then in a position where he was reasonably required to be for the purposes of his work. Campbell began to move away and had gone about thirty or forty feet when he heard that a sack had fallen and struck the appellant. He went back at once and saw the appellant lying on the floor, about twelve to fourteen feet from where he had earlier been standing, with his head close to the inclined elevator and about six feet from the foot of the stack. Campbell said that had the appellant remained in his earlier position near the trestle he could not possibly have been struck by a falling sack and that he had earlier warned the appellant and others working at or near the trestles to keep away from the elevator and the stack lest they be struck by a falling sack. It should be added that there was some evidence, which the learned trial judge does not appear to have accepted, that the sack had fallen or been thrown out from the top of the stack by someone working there. It seems probable, however, that it was "spewed out" from the elevator on to the top of the canopy and fell from there after sliding or rolling down it for some little distance.

The learned trial judge made a finding of negligence against the respondent Board but held also that the appellant had failed to take reasonable care for his own safety in that he had left the area in which his work assisting the carpenter required him to be and, despite the warning that had been given to him not to go close to the elevator and the stack, had moved close to the elevator and into the danger area. His Honour

SHAW

v.

THE PEANUT MARKETING BOARD

The appellant was employed by the respondent Board as a labourer and on 5th April 1960 he suffered injuries to his spine while on the respondent's premises at a place where sacks of peanuts were being stacked. The injuries were caused when one of these sacks weighing between forty and fifty pounds fell on him. To build the stack as it increased in height an elevator was in use which carried the sacks on a conveyor belt up to the top of the stack where they were received and laid in place by men working there. At the time of the accident the stack had been built up to a height of about thirty feet and the elevator which stood at a right angle to the stack ran up to the top of it at an angle of about forty-five degrees. Above the conveyor belt of the elevator there was a hood or canopy intended to prevent the sacks from falling out while travelling up the elevator but it frequently happened that if a sack reached the top of the elevator and was not immediately taken by one of the men doing the stacking, "the bag behind that bag pushes it out, spews it out, and it topples over backwards down the elevator. It can go down, half way down or just about one roll and then fall off on the side". On the day of the accident the appellant was working with a carpenter who was bolting together lengths of timber to be used as rafters for roofing the stacks when they were finished. The work of bolting together the lengths of timber was being done on three trestles, the closest to the stack and to the elevator being about sixteen feet from the foot of the stack and about fifteen feet from the nearest side of the elevator. Differing accounts were given of the way in which the accident happened and of the

SHAW

v.

THE PEANUT MARKETING BOARD

JUDGMENT OWEN J.

other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common": Grant v. Sun Shipping Co. Ltd., (1948) A.C. at p. 567. But in this case it seems to me that a finding that the plaintiff was injured in part by his own fault was not justified by the evidence. He was not hurt because he negligently went too close to the elevator; rather, it seems to me, because he was required to work so close to it that a few steps brought him into danger. A very cautious man might not have gone where he did, but it seems to me that his actions in the circumstances cannot be said to have fallen short of the conduct of a reasonable man, taking proper care for his own safety.

I would allow the appeal and direct that judgment be entered for the plaintiff in the action for £12,409.15.3.

paces from where he had to stand during the actual manual performance of his work. His task was to assist a carpenter by moving timber to and from trestles where the carpenter was working. The trestles were set up near the elevator and the stack of bags that was being built. Having finished the handling of a particular piece of timber, the plaintiff apparently had stepped, backwards or forwards, away from the trestles when he was hit. It is said that in doing that he was negligent, that his injury was in the words of the Act "the result partly of his own fault". This, it is said, was because he had been told "not to go too close to the elevator" because of the risk of bags falling. But, if there was a known risk of that happening, then it seems to me he had been set to work too close to the place of danger. That a manual worker, required to do work such as he was doing in the open air, cannot straighten up and move a little way to or fro without running into danger shews only I think that his employer had put him to work under unsafe conditions.

The view that the plaintiff was negligent because he did not heed a warning, given it was said because it was not unusual for bags to fall from the elevator or the stack, does not stand very easily with the finding that the falling of a bag was of itself an event evidencing negligence on the part of someone engaged in building the stack. And that finding was not challenged: there was no cross-appeal to the Full Court. This, of course, does not mean that the plaintiff would not be negligent if he, doing something that a reasonable and prudent man would not do, subjected himself to a known risk of injury by another's negligence. To quote Lord du Parcq: "Almost every workman constantly, and justifiably, takes risks in the sense that he relies on others to do their duty, and trusts that they have done it. I am far from saying that everyone is entitled to assume, in all circumstances, that

the course of his employment". But this was not the issue for trial. The circumstances in which the plaintiff was injured, the place where he was and what he was doing there might all be very relevant on the issue of negligence and contributory negligence, but only as evidence from which an inference could be drawn, not as definitive of liability. The defendant could not avoid liability simply by establishing that the plaintiff was where he had no need to be for the purposes of the work he had immediately in hand. Unfortunately however, the allegations in the above paragraph of the defence assumed a misleading importance at the trial; and much evidence based on estimates of distances was given designed apparently to delimit the place where the plaintiff's work required him to be and to shew that he was outside its limits when hit by the bag. From this some factitious arguments flowed.

His Honour the trial judge in giving his reasons for finding the plaintiff guilty of negligence said:

> "I accept the evidence given by the last witness for the defence in particular - and there is other evidence - as indicating that the plaintiff, when he was struck by the bag, was in a place in which he was not required to be by reason of his work, and, further, that he had been warned on that day and apparently on other occasions not to go too close to the elevator. He is a man who had been working there for perhaps three or four weeks. I am not suggesting that there should have been a kind of magic ring or circle drawn around where he was actually engaged or where his work in assisting the carpenter put him, but I do feel that it is a case, and I so find, that the place where he was when he was struck by the peanuts was not a place in which his work required him to be at that time and I find him guilty of negligence in that he failed to take reasonable care of his own safety in that he unnecessarily entered into an area of danger in which he was exposed to danger from falling bags of peanuts."

From his Honour's findings, expressed in that way, one would not realize that the difference between the "place" where the plaintiff was when he was struck, the "area of danger" into which he "unnecessarily entered", was not, on any version of the facts, more than three, or perhaps four,

where similar statutory provisions are in force. The doctrine of last opportunity, with all its troublesome qualifications and refinements, has there disappeared. Lord Porter said of the abolition of the rule that any contributory negligence on the part of a plaintiff defeated his claim: "It enables the court (be it judge or jury) to seek less strenuously to find some ground for holding the plaintiff free from blame or for reaching the conclusion that his negligence played no part in the ensuing accident inasmuch as owing to the change in the law the blame can now be apportioned equitably between the two parties": Stapley v. Gypsum Mines Ltd., (1953) A.C. at p. 677. But there is no room for an apportionment unless the plaintiff really was negligent. A negligent defendant can only rely upon the Act to cut down the amount of damages for which he is liable where the plaintiff "suffers damage as the result partly of his own fault". And fault here means negligence, a failure by the plaintiff to take reasonable care for his own safety - and whether that was so is to be determined in the light of all the circumstances of the particular case.

In this case the defendant by its defence admitted that the plaintiff was struck by a bag of peanuts but denied negligence, and alleged contributory negligence. The defence contained a paragraph as follows:

> "The defendant says that at the time of the said bag striking the plaintiff, the plaintiff was not engaged in the work for which he had been employed, such last-mentioned work not requiring that he be in the immediate vicinity of the position where the said bag fell."

This allegation would have been directly relevant if the issue for trial had been whether the accident arose out of or in the course of the plaintiff's employment: and it was perhaps framed in the way it was because in the statement of claim it had been alleged that the plaintiff was injured while "doing work in

I can see no ground for this Court interfering with the assessment of the damages suffered by the plaintiff that the learned trial judge made and the Full Court of the Supreme Court upheld. But whether the finding of contributory negligence on the part of the plaintiff and the reduction of the assessed damages by twenty-five per cent should be allowed to stand is a different matter.

I do not question the validity of the general statements contained in the judgment which Jeffries J. delivered for the Full Court as to the advantages that a trial judge has in coming to a decision on a question of fact and as to the great weight to be given to his apportionment of damages when he finds contributory negligence proved. But it seems to me that in this case the learned trial judge was led, by the way in which the case was presented and argued, into error in thinking that a fault on the part of the plaintiff was established which required him to apportion the damages in accordance with the Law Reform (Tort-feasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952 (Qd.) s. 10. This enactment is derived from the English Law Reform (Contributory Negligence) Act, 1945, s. 1(1). Of it Mr. Heuston in his (the 13th, 1961) edition of Salmond on Torts has said, at p. 467: "Although the Act was intended to do no more than alter the legal consequences of negligence by both parties causing or contributing to the damage complained of and does not affect the rules for determining whether negligence has been established, the power to apportion the loss equitably between the parties has led in practice to a broader approach". This result has been manifest in those States of Australia

SHAW

v.

THE PEANUT MARKETING BOARD

JUDGMENT

WINDEYER J.

to it when he was struck and fell backwards so that when lying on the ground his head was two feet from the elevator. It seems that the timber on the trestles projected for some little distance beyond the end trestles and it may be, if the appellant was standing more or less about six feet from the elevator when he was struck, he was standing perhaps half way between the end of the projecting timber and the elevator. This was but a pace, or two, backwards from the position which he must have occupied when he had placed his end of a piece of timber on the trestles and I would not regard the fact that he had so stepped backwards as constituting contributory negligence in the circumstances of the case. It is, however, more important to observe that the conclusion which the learned trial judge reached assumed that the bag had fallen from the head of the elevator into an area of known danger. But it is not possible to say, upon the evidence, from which part of the stack the bag fell or whether it fell into that area. That being so it is impossible to say that the appellant was partly responsible for his injuries by stepping into the area of known danger and this circumstance alone, in my view, requires us to say that the finding of the learned trial judge on the issue of contributory negligence should be set aside.

On the other ground taken upon the appeal I am content to say that I am by no means satisfied that the learned trial judge proceeded upon any erroneous principle in assessing damages and after consideration of the evidence I do not think it can be said that the amount awarded was manifestly inadequate. In these circumstances I am of the opinion that the appeal should be allowed and the order of the Full Court set aside. In lieu thereof there should be an order allowing the appeal and directing judgment for the total amount of damages assessed, that is to say, £12,409. 15. 3.

The only witness who actually saw the bag falling was one, Pomerenke, who was called by the plaintiff. He said that he saw a bag "coming back off the stack". "It was", he said,"partly down when I saw the bag coming, and Mr. Shaw was stooping down to pick something up ... and as he straightened up the bag hit him on the head". The bag fell, according to this witness, "about fifteen feet away from the stack". It remains to be said in order to complete this brief summary that Campbell gave evidence that he had told the appellant "to keep away from the elevator". He knew that bags could fall and in spite of the fact that the danger was, he said, known to the workmen, he had given this warning to the appellant that very morning.

For my part I think that the evidence in the case is too insubstantial to warrant a finding of contributory negligence on the part of the appellant. But the learned trial judge based his finding on the conclusion that the appellant was at the time of the accident "not in a place in which his work required him to be at that time" and that that place was, as he knew by reason of the warning he had received, a place of some danger. With respect to his Honour I do not think these findings were justified upon the evidence. In the first place it may be observed that the appellant's duties required him to work about the trestles and on either side of them and that this very circumstance required him, on any view, to work almost on the fringe of a dangerous area. So much was realized and so a warning was given. How far the appellant knew this area was dangerous from his own knowledge does not appear but it does appear that the warning "to keep away from the elevator" was by no means given in such a way as to indicate precisely the area of danger. Upon the facts it is not unreasonable to conclude that the appellant was not closer than six or seven feet

which enables it to be said from which part of the stack the bag fell and the evidence as to where the appellant was then standing is by no means precise. The respondent called four witnesses none of whom saw the bag fall. The works manager heard a shout "man hurt" and, having walked outside his office, he saw the appellant "lying near the elevator". He was lying on the flat of his back with his head close to the elevator and his feet in a position south-easterly from his head. "The line his body made would be nearly parallel to the line the trestles made". The carpenter whom the appellant was assisting did not see the bag fall; he heard a thud and saw the appellant falling backwards on to the ground. He was then "about ten or twelve feet out from the stack" and "fairly close to the elevator". The witness put the appellant "within a couple of feet of it". This was borne out by the evidence of a leading hand who said he was standing only a few feet from the elevator when he fell backwards. Campbell, who was yard foreman, said that when he last saw the appellant before the accident he was standing about fifteen feet from the elevator and that at that time he was standing "very close to the trestles". "He was just standing there" waiting for the carpenter to "finish his end of the trestles". Campbell walked away about thirty or forty feet and did not again see the appellant until after he had been struck and was lying on the ground. He was then about twelve feet from where Campbell had last seen him standing but whether Campbell was estimating this distance from the appellant's head or from his feet does not appear. He does, however, say that the appellant's head as he lay on the ground was about two feet out from the elevator and it seems reasonable to assume that before he fell backwards he had been standing some distance further away from the elevator.

not to go too close to the elevator". The elevator referred to was a mechanical contrivance which was then being employed by the respondents in the stacking of bags of peanuts to a height of some thirty feet and the evidence shows that it was not uncommon for a bag to fall from the stack in the vicinity of the head of the elevator if it was not promptly removed after its arrival at this point by those working on top of the stack. This particular stack of bags of peanuts was some twenty-one feet long and the elevator was in position at right-angles to the stack and about the centre of the southern side. There is sufficient in the evidence to show that the appellant's duties required him to work in the general vicinity of the elevator but there is some disagreement on the precise distances involved. That being so I propose to deal with the case upon the evidence which his Honour seems to have accepted.

The appellant's work at the time was that of assisting a carpenter to place timber on a set of three trestles and then holding it in place while lengths of timber so placed were bolted together to form twenty-one feet lengths. These lengths were to be used in roofing the stack when the stacking was completed. The trestles, it seems, were about fifteen feet from the elevator on the eastern side and the timber which, from time to time, had to be lifted on to the trestles was a little further to the east. After the requisite lengths had been prepared the carpenter and the appellant would lift them off the trestles and place them on the ground between the trestles and the elevator. According to the appellant he had just helped to lift a length of timber on to the trestles and he stood back and he remembers nothing beyond this point. That he was strcuk by a falling bag of peanuts is clear from the evidence. But there is no evidence

SHAW

v.

THE PEANUT MARKETING BOARD

On 5th April 1960 the appellant was injured when in the course of his employment with the respondent he was struck by a falling bag of peanuts which weighed some forty or fifty pounds. In an action subsequently brought against the respondent he was successful in establishing negligence for which the Board was vicariously responsible but judgment was entered for a reduced amount of damages because the learned trial judge considered that he had been guilty of contributory negligence. His damages were assessed at £12,409. 15. 3 and judgment was entered for 75% of that sum, that is £9,307. 7. 6. From this judgment the appellant appealed to the Full Court of the Supreme Court of Queensland on the ground that his Honour had erred in finding negligence on his part and also on the ground that the damages awarded were inadequate. That appeal was dismissed and this appeal is now brought to this Court upon the same grounds. There is no cross-appeal by the respondent.

The evidence of the witnesses in the case varied on not unimportant matters to a substantial degree and, unfortunately, we have not the advantage of knowing precisely what facts the trial judge accepted as the basis of his finding of contributory negligence. He did, however, say that he accepted the evidence of one, Campbell, a witness called for the defendant and that there was other evidence which indicated that when the appellant was struck by the falling bag, he "was in a place in which he was not required to be by reason of his work and, further, that he had been warned on that day and apparently on other occasions