IN THE HIGH COURT OF AUSTRALIA

CAHILL

*V.*

PEKO MINES NO LIABILITY

# REASONS FOR JUDGMENT

*Judgment delivered at* SYDNEY

*on* WEDNESDAY, 23rd DECEMBER 1970

CAHILL

v.

PEKO MINES NO LIABILITY

ORDER

Appeal allowed with costs. Judgment of the Supreme Court of the Northern Territory set aside and in lieu thereof order that judgment be entered for the plaintiff in the action for the sum of $9,612.50 with costs.

CAHILL

v.

PEKO MINES NO LIABILITY

JUDGMENT BARWICK C.J.

CAHILL

v.

PEKO MINES NO LIABILITY

The facts of this case including a description of the appellant's place of work and of his duties as a popperman in the respondent's employ are set out in the reasons for judgment prepared in this appeal by my brother Windeyer which I have had the advantage of reading.

I agree that the learned trial judge misunderstood the evidence in an important aspect, which in his approach to the problem before him, was a vital aspect. He thought that the gradient of the compacted earth and rock constituting the rill up which the appellant, as His Honour found, climbed "carefully", testing his foothold as he went, was some 75% from the horizontal. But the evidence was that the end wall of the footwall of the slope against which the rill had built up was 15% off vertical. There was no evidence as to the gradient of the "rill" expressed in terms of degrees. It could be inferred from the evidence that the appellant by walking some seventeen feet along the slope reached a point where his feet would be some twelve feet higher than the ground level of the draw-point. By stretching his arms to the full whilst standing at that point he could with difficulty place the bundle of explosive in a suitable position in a crevice in the ore which was jammed in the bell. It was principally because

of this error of fact that the trial judge thought that to attempt to climb the rill, having regard to the material forming its surface, was so extraordinary and such an unreasonable thing to do that the respondent could not be expected to have foreseen the possibility of a workman so behaving. His Honour did regard the risk of material falling from the bell as an additional reason for the conclusion he thus drew. But there was evidence other than that of the appellant that it was part of the regular duty of the popperman on occasions to work beneath the mouth of the bell, as for example, where it was necessary to place the explosive charge at a point within the reach of a man standing at the draw-point, the ore having jammed at the mouth or not higher than the mouth of the bell, itself about 7 feet from the level of the floor at the draw-point. So that it would not be extraordinary for a workman to take up a position beneath the bell whilst the ore was hung up in it.

If his Honour had accepted the view, as in my opinion, he ought to have done that the gradient of the rill was not so steep that it would be folly on the part of a workman to attempt to climb and to stand upon it, I doubt that he would have found the possibility of injury to a workman who was not provided with a firing-stick beyond the range of what a reasonable employer in the position of the respondent ought to have foreseen. On the evidence that in my opinion was the proper construction.

Whilst I agree with my brother Windeyer that his Honour's expressions in his judgment when dealing with the issue

of the respondent's negligence indicate too narrow a view of an employer's responsibility, I feel bound to say that the misconception of the facts to which I have referred, in my opinion, undoubtedly contributed to the expression of what I agree was an erroneous view. I therefore share the conclusion of my brother Windeyer that the appeal must be allowed and a verdict entered against the respondent.

There remains the question of the amount of the verdict. His Honour took the course, convenient in this case, of assessing the amount of damages which he thought would be appropriate to compensate the appellant for his injuries if he had been entitled to a verdict. I agree with my brother Windeyer that no criticism can properly be levelled at the amount of that assessment. However, the question arises whether this amount should be reduced because of the partial responsibility of the appellant for the injuries he suffered. I have found this a troublesome question. The absence of a firing-stick undoubtedly was, in my opinion, the major cause of those injuries. Was the workman lacking in care for his own safety in attempting to do his job in an improvised way in the absence of a necessary tool which the employer ought to have provided? The respondent could have waited till firing-sticks were available. There was no particular urgency requiring immediate action to relieve the holding up of the ore in the bell. Though there was not, in my opinion, upon the evidence the degree of danger in "climbing" the rill and coming below the mouth of the bell which the trial judge held to exist, I think there was a significant risk to the appellant in taking the course which he did. It was a risk

unnecessarily taken. In doing so he failed in my opinion to take adequate care for his own safety. On the other hand, it must be remembered that though it was not necessary that he should proceed to fire the bell at the time he attempted to do so, the appellant was at that time attempting to perform his duty to the respondent in the situation which the respondent had created. Considering all the circumstances, I think that it would be just and equitable between these parties that the appellant bear 20% of the damages which are appropriate to the injuries he suffered. The amount for which judgment should be entered for him is therefore the sum of $9,612.50.

CAHILL

v.

PEKO MINES NO LIABILITY

JUDGMENT McTIERNAN J.

CAHILL

v.

PEKO MINES NO LIABILITY

I agree that the appeal should be allowed and that the appellant should be awarded damages in the sum of $9612.50, with the result that he bears twenty per cent of the loss himself.

CAHILL

v.

PEKO MINES NO LIABILITY

JUDGMENT WINDEYER J.

CAHILL

v.

PEKO MINES NO LIABILITY

This case is for me the third of a trilogy this year of appeals in negligence actions against employers. Behind its particular facts are two questions which recently came up in other cases. One is as to the way in which a court of appeal should approach the conclusion of a judge sitting without a jury in a negligence action. The other is the scope of the concept of foreseeability as a criterion of liability in an action brought by a workman against his employer. I had occasion to consider and state my views on these topics in Da Costa v. Cockburn Salvage & Trading Pty. Ltd. and Mount Isa Mines Limited v. Pusey. I therefore simply refer to those cases to avoid discussing basic doctrines at any length in this judgment.

On 30th August 1966 the appellant was hurt while working underground in the respondent's copper mine. He became entitled to, and has received, workmen's compensation. Then, in May 1969, he commenced this action in the Supreme Court of the Northern Territory. In it he alleged by the now common phrase a failure by the respondent "to provide and maintain a safe and proper system of work". This was wrapped up with further phrases drawn from the law reports amounting to general allegations of negligence. These were followed in the statement of claim by a detailed description of the events on which the appellant relied.

The action came on for trial before Blackburn J.,

who, in a reserved judgment, found in favour of the defendant, the respondent. His Honour set out fully, and very clearly, the facts as he found them, and his reasons for his conclusion. In substance these were that the appellant was the sole author of his own misfortune: that his conduct was in a high degree foolish: that it was not something that a reasonable employer should have reasonably foreseen as a possibility. These are conclusions that I would hesitate to set aside. It is true that the appeal to this Court is an appeal on facts as well as on law, and that this Court is the only court of appeal from the judge in the Northern Territory. Nevertheless we must give due weight to the trial judge's findings of fact: and especially I think to his view of what a reasonable man would do. However, despite my reluctance to interfere with the judgment of a trial judge in any action for negligence, I have come to the conclusion that in this case there are reasons why we should do so.

I accept unreservedly his Honour's view of the credibility of various witnesses who gave evidence before him. He saw and heard them, and could assess the value and reliability of the testimony of each of them. He found the appellant was on some matters untruthful. Nevertheless he said, "I am satisfied on the balance of probabilities that the plaintiff's accident did occur substantially in the manner in which he described it, namely by reason of a fall from a point high up on the rill". His Honour in his judgment describes the place where the accident occurred and the work which the appellant had to do there. I do not need to repeat all of that. If suffices to extract, and state in summary form, only such matters as are relevant to explain my conclusion. For a full understanding

of the events that happened the more detailed account that his Honour gives is invaluable.

The appellant was an experienced mine worker. At the time of the accident he was what is called a popperman. His task as a popperman was to break into fragments large pieces of ore lying in the mine. Pieces of ore had been by earlier operations separated from the main ore body, but some were too large to be removed from the mine. The necessary fragmentation was effected by explosives. The popperman placed a charge in a crack or at some other suitable part of the mass to be broken: he then fired it from a distance by electricity. Sometimes an overhead cavity, or "bell", in the mine was "hung up", as it was expressed. That occurred if pieces of ore had become stuck in the mouth of the bell because they were too large to fall easily through it to the passage below called the draw-point. It was part of the ordinary tasks of a popperman to dislodge, by means of explosives, material that was thus stuck, thus clearing the bell mouth and enabling the hung-up ore to fall to the draw-point to be thence taken away. The places which became hung up might be above the head of a man working in the draw-point and beyond his reach. The popperman was therefore ordinarily supplied with firing-sticks. These were pieces of wood some fifteen or twenty feet in length. The popperman would first attach an explosive charge to one end of the stick. He would then prop the stick up in such a way that the explosive end was against the hung-up ore, retreat to a safe position and from there detonate the charge. On the day in question it fell to the appellant, working as a popperman, to deal with a hung-up bell. He had no firing-stick. None had been provided for him;

and apparently there were not any in the part of the mine where he was. Instead of waiting until he could have had one brought to him from the surface, he set about his task without one. Standing at the draw-point he could not reach to where he must put the explosive. It was well above him. He therefore sought to get close enough to place the charge by hand by climbing up a rill. A rill is a sloping mass rising from the floor of the draw-point to the mouth of the bell. It is formed by fine dirt, mud and water falling from the bell and becoming compacted. The rill, being at the end of a draw-point, serves a useful purpose in the mine by scattering ore falling from the bell and throwing it along the floor at the draw-point away from the bell mouth, thus enabling it to be the more easily and safely recovered by means of a mechanical shovel. His Honour said that the angle of slope of this rill was estimated by the appellant at about seventy-five degrees from the horizontal. In this his Honour seems to me to have misapprehended the appellant's evidence. What he had said was that the end wall against which the rill was formed was about fifteen degrees off vertical. He also said in effect that he fell from a point on the rill that was about seventeen feet up the slope and about ten or twelve feet above the floor of the draw-point. I think therefore that the rill was not so steep as his Honour supposed, and not so obviously hazardous to climb. The appellant climbed up it carefully, using as footholds various pieces of rock in it. He had reached a point which was certainly more than seven feet above the floor of the draw-point and part of his body was actually in the bell mouth when his foothold proved insecure: he lost his balance and fell to the floor of the draw-point. His left leg was caught

as he fell. His knee was twisted. After a brief period in hospital he was able to resume work, but he suffers some permanent loss of function of his leg and the possibility of further deterioration of it.

His Honour expressed his essential findings as follows: "To climb the rill in order to fire the bell without using a firing-stick, not being required to do so, was in my opinion so unreasonable that the defendant cannot be found negligent in not foreseeing that the plaintiff would do such a thing". And: "In my opinion the defendant could not, as a reasonable person, be expected to foresee that, if the plaintiff found himself without a firing-stick, he would do such an extra-ordinary thing as attempt to apply the explosive by hand by climbing the rill". And: "It would be as unreasonable to expect the defendant to foresee that an employee might try to scale a vertical wall of rock, by using projections and crevices. It follows, therefore, that the mere absence of firing-sticks on the occasion of the accident is, of itself, insufficient ground for the liability of the defendant".

I doubt whether his Honour really meant to liken what the appellant did to a scaling of a wall. The rill, as I envisage it, was far from vertical. The appellant seems to have got up it without much difficulty. But it is not simply my impression that his Honour, mistaking the effect of the evidence, had formed a wrong picture of the place that makes me question his conclusion. I think that, taking the words he used, he did not propound to himself quite the right question in the circumstances. It may well be that his view of the facts, rather than any misapprehension of legal principles led him to express

himself as he did. Nevertheless what he said is, I think, a ground for the intervention of this Court on an appeal. His opinion that the appellant's action in climbing the rill was "unreasonable and unforeseeable" was, he said, central to his decision. "The defendant", he said, "could not reasonably be expected to have foreseen that a person in the position of the plaintiff would climb the rill to a point from which a fall could be significant". Reasonable foreseeability of harmful consequences is now the fashionable phrase as a criterion of negligence. But it does not mean that the precise consequences which actually occurred or the actual manner of their occurrence must have been foreseeable. It means that the risk that some harmful happening, such as occurred, might occur would have been apparent to a reasonable man; and that it was a risk that a reasonable man in the position of the defendant, foreseeing, should guard against. In the present case the question is not whether the respondent's officers ought to have foreseen, or would have foreseen, that the appellant would go up this particular rill: or that, if he did so, a stone might give way; and that if that happened he might be hurt. The question is whether the appellant, going about his tasks as a popperman, might come to harm because he had no firing-stick. It is true that a firing-stick is not primarily a safety device. It is primarily a tool for reaching a place that is beyond arm's reach. But its use can no doubt on occasions enable a man to avoid not only difficulty but also danger. The use of a firing-stick was, as his Honour found, "the normal and proper method of affixing explosive to ore hung up in the bell"; and this accident occurred because there was no firing-stick immediately

available to the appellant. That is not to say that he did not act imprudently in trying to do without one. He did. He said that he was told to do the work without waiting for firing-sticks, and that he had on earlier days asked for them without getting any. His Honour disbelieved him on these matters. He thought that firing-sticks had ordinarily been provided in the mine, but he held positively that none had been provided for the appellant's shift. The appellant's evidence that he acted on instructions, untruthful as his Honour held, was offered as an explanation for his acting as he did without waiting for a firing-stick. In thus seeking to excuse himself, he accused himself of failing to take proper care for his own safety. I do not question his Honour's finding that he acted foolishly. Whether his conduct deserved sweeping condemnations it is not necessary to say. Doubtless if it were still the law that any contributory negligence on the part of a plaintiff would exonerate a negligent defendant, the appellant's claim must have failed. But that is no longer the law in the Northern Territory. The Law Reform (Miscellaneous Provisions) Ordinance 1956, s. 16, provides for that. It is in common form with the result that when a plaintiff and a defendant are both at fault, damages recoverable are reduced to the extent that the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage. An employer in the discharge of his duty of care for his employees must now have in mind that some of them may in some situations act carelessly. If by negligence he creates such a situation then their doing so does not necessarily exonerate him.

It was said that the appellant went on to fire the

bell, without waiting for and insisting on having a firing-stick, because he wanted to create a good impression as he was hopeful of promotion to a higher grade than popperman. That may have been so. But what of it? A master has a duty of care for his zealous, ambitious and dutiful servants certainly no less than for the indolent, the cautious and the complacent. It is not beyond the range of reasonable foresight that a servant may be zealous, ambitious, and dutiful and perhaps at the same time, and simply on that account, be careless of his own safety. In the result I consider that, applying these considerations to the proved facts, the respondent should have been held to have been negligent in its failure to provide the appellant with equipment which was normal and necessary for the performance of the tasks given him. I think too that the appellant did fail in care for his own safety. The learned trial judge, although he found for the defendant, went on to assess the damages that the appellant had suffered. After careful consideration he arrived at a total sum of $12,015.46. No sound criticism can be made of this computation. How the plaintiff's share of responsibility for the damage that befell him should be measured must be much a matter of opinion. The Chief Justice considers that the damages recoverable should be reduced by twenty per cent of the total. I am content to accept this.

I would therefore allow the appeal. I agree in the order that the Chief Justice proposes.