IN THE HIGH COURT OF AUSTRALIA

CROSSLE & CAMERON INDUSTRIES LTD.

V.

HODBY

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday 3rd August 1971

CROSSLE & CAMERON INDUSTRIES LIMITED

v.

HODBY

ORDER

Appeal allowed with costs. Order of the Supreme Court of Queensland set aside and in lieu thereof order that the appeal to that Court be dismissed with costs.

CROSSLE & CAMERON INDUSTRIES LIMITED

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JUDGMENT BARWICK C.J.

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In this appeal I have had the advantage of reading the reasons for judgment prepared by brother Menzies. I agree entirely with the reasons he gives for allowing the appeal and restoring the judgment of the primary judge.

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JUDGMENT McTIERNAN J.

I am of the opinion that there is sufficient evidence to support a finding of negligence against the defendant and that the judgment of the Full Court for the plaintiff should stand. For my part, the inference of negligence is of a compelling character and the Full Court offended no rule protecting the finding of a trial judge from interference by a court of appeal: Benmax v. Austin Motor Co. Ld. [1955] A.C. 370, per Viscount Simonds at pp. 373, 374.

The negligence which the plaintiff alleges is breach of the duty of care owed by the defendant to the plaintiff, then a servant of the defendant. The particulars of the negligence are alleged breaches of the duty, so far as it extends to the provision of a safe system of work, a safe place of work and effective supervision. The defendant alleges contributory negligence, the particulars of which relate to the plaintiff's method of working. No one was called to give evidence on the defendant's side. The plaintiff gave evidence and he called three persons to give evidence. The credibility of the plaintiff or of any witness is not attacked.

The facts which appear from the evidence are that the defendant had brought from its works to a railway siding, for transport by rail, a substantial quantity of fabricated steel and had it put into stacks through which passages were left or cleared for driving a mobile crane which was to be used

to carry bars of steel from the stacks to trucks standing on the permanent way.

The plaintiff had been for some months an employee of the defendant and during that time had acquired by instruction and practice at the defendant's works sufficient proficiency in the occupation of dogman to qualify for an official certificate. The siding was not a normal place of employment in his case and he had never acted as dogman in relation to the mobile crane obtained by the defendant for the work. The owners of the crane hired it out with a crane driver. The plaintiff had no experience of acting as dogman when that driver was driving the crane. The foreman of the defendant's works sent the plaintiff to carry on as dogman at the siding. The work of a dogman with a mobile crane includes slinging each load to be carried by the crane, leaving it suspended waist high from the jib at the horizontal, and walking with the load while the crane is travelling with the load in order to control, by hand, the motion of the load. No one gave the plaintiff any instructions about the method of performing his work in the special circumstances of the case and there was no one at the job responsible for the supervision of his work as dogman. The trial judge found that: "The area where the plaintiff was working was comprised of stacks of steel of varying heights, with pathways cleared through them or left between them. In parts these pathways were wide and in parts they were relatively narrow". It is to be inferred from the evidence of L. G. Gill, a fellow workman of the plaintiff and the man in charge of selecting the load to be carried and the truck on to which it was to be let down by the crane, that the arrangement of the

stacks and the leaving and clearing of paths between them had been done for the defendant by workmen. The trial judge continued: "I find as a fact that at the place where the plaintiff was injured there was sufficient room as to width for the driving of the crane, but little more than sufficient". His Honour spoke of the testimony of Gill as establishing that the surface of the pathways was uneven and containing corrugations and tyre marks.

As regards the activity of the plaintiff when he was injured and his method of work, the learned judge made this finding: "The plaintiff at the time of his accident was controlling the movement of a piece of 6 x 4 inches angle iron variously estimated at from 18 to 25 feet in length, and described as being reasonably long. The angle iron was slung from the jib of the crane by means of a hook and chain connected to a hole in a central gusset plate welded to it. To this intent he was walking in front of the mobile crane, looking forwards, and holding the piece of angle iron at the end of it closest to the crane, and about 2 feet from the end. He estimated that this placed him 4 feet in front of the crane". His Honour continued: "I use the plaintiff's own words to describe what he alleges happened:

'What happened then? -- Well, it started to sway. It went over some rough ground and it swayed forwards.

What swayed? -- The steel. It swayed forward and came back. As it was coming back I rode it past my side.

What do you mean, you rode it past your side? -- Instead of getting it in the front of me, I took it past me.

Just what did that do to you and what did you do to it? -- It took me forward first, and then I must have either come back a little, which I don't - I couldn't say that I came back or not.

What happened next, and what were you doing when it happened? -- When I tried to ride it past me, the crane - the wheel of the crane hit me on the ankle and thre me downwards.

Which ankle did it hit? -- The right ankle.

Which way did it throw you downwards? -- I went down on my front, face downwards!".

In cross-examination the plaintiff said that he was thrust forward and backward by the momentum of the load, and his heel was clipped by a wheel of the crane.

The learned judge quotes a passage in the evidence of the driver of the crane. The questions and answers are as follows:

"Just go on and describe in your own language the movement of the crane onwards to the place of the accident? -- Owing to the nature of the steel as it was lying on the ground and the unevenness of the ground that we were travelling over, I had to keep looking from one side of the crane to the other to watch the wheels and to try and watch the dogman as well.

How would you look from one side to the other? Could you demonstrate? -- You would have to lean over to watch where the wheels were going to see that nothing was in front and have a look on the other side and look past the end of the crane as best you could.

Was this because of the obstructions directly ahead of you that you would have to lean to the left and to the right? -- There was steel protruding at different angles from the steel and you had to dodge around it. You would also go around some sleepers and over others, and work your way along through the passageway. Sometimes it would be just wide enough for the crane to go through. Other times it would widen out to possibly 10 or 12 feet.

What is the width of this crane? -- Eight feet.

That is measured where? -- That is from outside to outside of the front wheels.

You remember going along in this fashion looking to your left and looking to the right. What is the next thing you recall happening? -- It had not travelled very far and I think I was looking to one side to see what was ahead and I felt the wheel hit what I thought was a sleeper, and as I had previously been over sleepers

> from time to time I did not at first take any notice, and when the wheel continued to rise I thought, 'That is not a sleeper.' I thought I was on part of the steel stack and I stopped and reversed, and I stopped the crane and got off - stood up and climbed off the crane and saw Mr. Hodby lying on the ground in front of it".

The crane driver testified that the crane was moving at "slow walking speed". He was the servant of the owners of the crane not of the defendant. The learned judge made a criticism of the crane which reads: "On the evidence, and on my own observations, the view forward of the driver of the crane was extremely limited by superstructure built in front of his driving position. I was shown other cranes on the inspection, which allowed a much better view ahead".

The learned judge made these inferences: "The plaintiff, on the evidence, was carrying out correct procedure by walking in the position in which he was walking. Had he been able to, he should have guided the length of angle iron on an angle so that he was walking outside the track of the crane's wheels. If he was unable to do this, it was necessary for him to walk in front of the crane". As stated above, the plaintiff was walking immediately in front of the wheels and at a distance of four feet from them. It was put to the plaintiff in his cross-examination that the normal method of guiding a piece of steel of the type being carried by the crane at the particular time is to guide it on an angle and to walk outside the crane's wheels. The plaintiff said there was no room to walk at the side of the track. It is stated above that the judge found that there was "sufficient room as to width for the driving of the crane, but little more than sufficient".

The final and decisive inference made by the trial

judge is expressed in these words: "So far as the first defendant is concerned, the evidence generally indicates that the best method of handling the type of load which the plaintiff was handling was that which he adopted. It also indicates that the method that the plaintiff used was very much a matter of his own choice in the sense that he was employed as having a particular skill and knowledge, so far as the work he was doing was concerned. It was open to him to adopt an alternative method, if there was one. Again, within the scope of the particulars alleged, I cannot find the first defendant negligent. In my view the plaintiff was engaged in a type of work which was inherently dangerous. If he establishes this, he must also establish that the person he sues was negligent. I find that the plaintiff has not established negligence against the first defendant, either". The plaintiff's method of handling the load was not, on the evidence, a safe method of controlling it. The relevant consideration is one of safety. There was questioning of the plaintiff and of his witnesses, in cross-examination, about ways in which a dogman might have handled the load. The plaintiff was questioned about an "alternative method". What he was asked and what he said is as follows:

> "Do you tell me you have never seen men leading such a load by holding on to the leading end of the load? That you have never ever seen that? -- I have seen odd ones doing it.
>
> And, of course, that is an alternative to standing right back at the trailing end which would place you very close to the wheels? -- I don't like it.
>
> It is a matter of choice? -- Well, I like to see where I am going.
>
> You can see where you are going equally as well from somewhere further along the load than the very trailing end? Is that not so? -- Could do.

> Even if you did not get right up to the leading end of the load you could get part of the way along, could you not? Say halfway between the hook and the trailing end? -- Yes.
>
> You would be able to control the piece of angle iron very well from there? -- Yes.
>
> And you would be much further away from the wheels? Is that not so? -- Yes.
>
> There would be no possibility of the wheels clipping your heels in that position, would there? -- Hardly.
>
> And you would be in a much better position for the crane driver to see you, would you not? -- I don't know".

The method of holding the bar of steel at the end next to the wheels and walking immediately in front of them was not a good demonstration of "particular skill and knowledge". But in controlling the load in this way the plaintiff was not disobeying instructions of the defendant nor failing to conform with any system which the defendant provided for the dogman to follow in relation to the operation which the defendant was carrying on at the siding. The evidence shows that no system was provided and no precautions were taken, relative to discharge by the plaintiff of his duties. The fact that he held a certificate of competency rendered lawful his employment as a dogman. It was only in that sense that the plaintiff was employed "as having a particular skill and knowledge". Nevertheless the defendant was under the obligation of an employer, at common law, to take reasonable care for the safety of the plaintiff in the course of his employment. The duty owed to the plaintiff extended to the provision of a reasonably safe system of working, to the provision of effective supervision of his method of working and to protecting him from danger arising from the limited vision of the crane driver, the defects

in the track available for driving the crane, and the insufficient width of the pathway on which the track ran, the latter resulting in the plaintiff being under the necessity of walking in the track as he was doing when the accident happened. The duty was the personal duty of the defendant, as employer, to be performed through its servants and agents. The defendant did not perform that duty by leaving to the plaintiff, without any instructions relative to the conditions under which the operation of loading the steel would be carried on, the improvisation of his own system or method of dogging. This was in my opinion a default in the duty of care owed to the plaintiff. The fact that the plaintiff held a certificate legally qualifying him to work as a dogman does not result in the discharge of the liability of the defendant for the default. The evidence does not admit a finding that, having regard to the conditions obtaining at the siding under which the plaintiff was working, his method of dogging the load by holding it at a place so close to the wheels and immediately in front of them was a reasonably safe method. In my opinion, the evidence does not support the inference that the contractual relationship between the defendant and the plaintiff contained any condition or implication that the plaintiff would accept all risks of the employment. The duty of the defendant, as employer, was not to eliminate entirely the risk inherent in the employment. But there was a duty to take reasonable care to reduce the risk inherent in the employment as far as possible. On the evidence the defendant does not seem to have seen to the safety of the plaintiff at all. In order to succeed in the action it is not necessary for the plaintiff to prove exactly what the

defendant should have done to avoid the accident which happened: General Cleaning Contractors Ld. v. Christmas [1953] A.C. 180. The particulars of negligence specify practical measures any one of which could probably have reduced the risk inherent in the employment if the defendant had taken it.

The question of contributory negligence was dealt with by the State Full Court. The learned judges decided that the allegation should not be held to be proved by the evidence. I agree with that conclusion. The reasons given are, in my opinion, correct.

I would dismiss the appeal.

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JUDGMENT MENZIES J.

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The respondent sued the appellant, his employer, for damages for injury suffered by him while acting as a dogman for a mobile crane mounted upon a tractor which was transporting a length of angle iron at the Tennyson Railway Siding. The equipment and the driver were supplied by a company, Brisbane Pallet Hirers Pty. Limited, which was also sued. The only negligence alleged against this company was negligence on the part of the driver. His Honour found that the driver kept as good a lookout as it was possible for him to keep and that he was driving as carefully as the structure of the crane allowed him. He, therefore, found in favour of the defendant.

At the trial Douglas J., giving judgment for the defendant appellant, said:

> "... the evidence generally indicates that the best method of handling the type of load which the plaintiff was handling was that which he adopted. It also indicates that the method that the plaintiff used was very much a matter of his own choice in the sense that he was employed as having a particular skill and knowledge, so far as the work he was doing was concerned. It was open to him to adopt an alternative method, if there was one. Again, within the scope of the particulars alleged, I cannot find the first defendant negligent. In my view the plaintiff was engaged in a type of work which was inherently dangerous. If he establishes this, he must also establish that the person he sues was negligent. I find that the plaintiff has not established negligence against the first defendant."

The judgment for the defendant appellant was, upon appeal to the Full Court, reversed. In allowing the appeal Wanstall J., giving the judgment of the Court, said that having been supplied with "a machine which, by reason of its defective driver sight-line, exposed the dogman to unnecessary risk, in the sense that it was greater than the risk which would have attended working in the same circumstances with a crane having an unobstructed sight-line, the respondent's obligation to devise and implement a reasonably safe system became more emphatic. Instead of leaving the appellant and the driver to their own devices in carrying out dangerous work it should have organised the job by co-ordinating the work of driver and dogman, and by instructing both in ways and means of making the performance of their work less dangerous, as by warning the appellant of the fact that the driver's sight-line was defective and forbidding him to work in the usual position, and by instructing the driver to stop the crane as soon as he lost sight of the dogman. The respondent's neglect of its duty in these particulars was clearly pleaded, and in my opinion was proved, so that it should have been held liable to the appellant."

The plaintiff, although not in charge of the operations that were in progress when the accident happened, had the responsibility for deciding how to carry out the task of carrying each length of steel from a stack in the yard to a truck and to load it upon the truck. What he was doing just prior to the accident is thus described by the learned trial judge:

> "The plaintiff at the time of his accident was controlling the movement of a piece of 6 x 4 inches angle iron variously estimated at from 18 to 25 feet in length, and described as being reasonably long. The angle iron was slung from the jib of the crane by means of a hook and chain connected to a hole in a central gusset plate welded to it. To this intent he was walking in front of the mobile crane, looking forwards, and holding the piece of angle iron at the end of it closest to the crane, and about 2 feet from the end. He estimated that this placed him 4 feet in front of the crane."

While walking in front of the tractor the distance between himself and the tractor was certainly diminished in some way, not satisfactorily explained, but having nothing to do with any change in pace of the tractor, and the plaintiff was struck by the wheel of the tractor on the right ankle, knocked to the ground and injured.

I have no doubt that, upon the evidence, the finding that the procedure being followed was standard practice was correct. Indeed, it was common ground, and both the plaintiff himself and a witness called for the plaintiff as an expert agreed that the procedure being followed was the correct procedure. The Full Court's finding of negligence depended upon the circumstance that the tractor driver had a poor field of vision by reason of the structure of the tractor and the associated equipment. His Honour the learned trial judge so found, but neither the trial judge nor the Full Court felt at liberty to find for the plaintiff on the ground that unsuitable plant was being used by the defendant appellant.

Notwithstanding his limited field of vision, the tractor driver could see the plaintiff by looking towards him.

It is true that he did not see the plaintiff immediately prior to the tractor striking him but that was because he was carefully picking his course between stacks of steel lying on the ground in a passage-way that was, in places, narrow. Moreover, any limitation upon the driver's vision had nothing to do with the accident. In some way or other the plaintiff, having been 4 feet in front of the tractor, was struck by it by reason of something that he himself did. Had he stepped back, which seems the most probable explanation, the driver could have done nothing in time to prevent the tractor from hitting him. The accepted standard practice for doing his job required the plaintiff to keep out of the way of the tractor. Most jobs entail risks. Every man who climbs a ladder is at risk of falling down and most take care not to do so. Similarly a man whose job is to walk in front of a tractor must keep out of its way, provided, of course, that the tractor is driven with proper care.

The Full Court, as I have said, did not find negligence in the use of plant unsuitable for the job. That case was not made. With respect to the Full Court, I cannot agree that, because the driver of the tractor had a restricted field of vision, the evidence to which I have already referred, that the procedure being followed was standard practice, could or should no longer be relied upon by the learned trial judge and that, despite that evidence, he should have found that reasonable care on the part of the defendant appellant required the assistance of a co-ordinator between the driver and the dogman. I am

disposed to think that the presence of a co-ordinator would have done nothing to prevent the accident happening as it did.

In my opinion the decision of the learned trial judge, that negligence has not been proved to his satisfaction, was fully warranted by the evidence at the trial. Accordingly, I do not think that the Full Court should have decided that he was guilty of error in finding as he did.

In my opinion the appeal should be allowed and the judgment for the appellant restored.

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JUDGMENT

WINDEYER J.

I do not think that the decision of the learned trial judge was shewn to be wrong. Therefore in my view the Full Court ought not to have disturbed it. It was not shewn that his Honour had not correctly understood the relevant facts. It was for him to assess their effect judged by the standard of a reasonable employer concerned to take reasonable care for the safety of his workman. For this evaluation there is no objectively determinable and indisputable criterion. The relevant facts are set out in the judgment of Menzies J. I need not repeat them. Even if I thought that I might myself have taken a different view of them from that which the trial judge took, I would not think that his conclusion ought to have been disturbed. Moreover there seems to me to have been no convincing evidence of negligence. The case for the plaintiff was built upon the fact that an accident happened, not that one was foreseeable and avoidable in the way suggested. I would therefore allow the appeal.

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JUDGMENT OWEN J.

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For the reasons given by Menzies J. I agree that the appeal should be allowed and the judgment of the learned trial judge restored.