IN THE HIGH COURT OF AUSTRALIA

BAILEY

V.

FERNDELL ENGINEERING PTY. LTD.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on MONDAY 9th APRIL 1973

RM.72/20133

271

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

ORDER

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

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

JUDGMENT BARWICK C.J.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

In this case the appellant, a workman, some 5'9" in height was engaged with other workmen in setting up in fixed position a mobile crane. The work involved the placement in the earth of feet or pads and the jacking up of the crane so as to place its weight in those feet or pads rather than on the wheels of the vehicle which enabled its movement. The pneumatic jack for this purpose was activated by a handle, called in the evidence a "podger bar" which consisted of approximately three feet of iron some $\frac{5}{8}$" in thickness with what is described as a dull point. Another workman was on the other side of the vehicle similarly engaged in assisting to place the crane in a fixed position. An iron tray, about 4'6" above ground level separated the working positions of the two men. The appellant asked his fellow workman on the other side of the tray to pass him the podger bar. That fellow workman took up the bar and set it in

motion. The appellant saw the bar in that workman's hands but remembers no more than that. He was immediately thereafter struck by the bar, as a consequence of which he fell to the ground, unconscious. We do not know by evidence what precise path the bar followed, that is to say whether it slid along the surface of the tray (which had no ledge or barrier on that surface) or passed through the air without touching the surface of the tray or bounced on the tray. However, as there is no evidence that the bar touched the tray at all and as the only evidence of the appellant's position when struck is that he was standing upright or practically so, it may be concluded that the bar "passed" through the air from the fellow workman's hand.

The bar struck the appellant on the cheek bone, breaking it with resultant loss of his eye. He was of course expecting to receive the bar; he had asked for it. But so far as the evidence goes, although expecting it, he did not see it in the air. It is clear that the bar travelled beyond the margins of the tray with such force that it knocked the appellant unconscious. It may be concluded it had gathered very considerable momentum from the fellow workman's handling of the bar.

It was clearly sufficient to satisfy the appellant's request for the bar, that it should have been placed upon or slid across the surface of the tray which was only 8 feet 2 inches in width. The purpose of passing it was that the appellant should be able to grasp it in his hand for use as a jackhandle.

In my opinion, it can be inferred from these facts that the bar was "passed" with unnecessary force and in a careless

manner. Indeed, I can find no explanation and in my opinion counsel was unable to suggest any explanation of the occurrence which the evidence would suggest and which is consistent with an absence of negligence on the part of the fellow workman. I would therefore set aside the order of the Supreme Court.

It then becomes necessary to consider whether the jury's finding of contributory negligence can be sustained. In my opinion it cannot. There was no evidence that the appellant was inattentive or not watching for the movement of the bar for which he had asked. Rather as I have said the evidence supported the inferences that he was looking in the direction of his fellow workman and that the bar was "passed" so swiftly and so unexpectedly high that the appellant, though looking, had no such opportunity of observation as would enable him to avoid being struck by the bar. Consequently I would set aside the jury's finding of contributory negligence and restore the jury's verdict for the full amount of the damages suffered by the appellant.

In my opinion, the appeal should be allowed and the verdict of the jury restored for the full amount.

BAILEY

v.

FERNDELL ENGINEERING PTY.LTD.

JUDGMENT MENZIES J.

I agree with the judgment of Gibbs J.

There is to be found in the evidence of the appellant some matter which a jury could regard as providing evidence that the bar which injured him was propelled dangerously from one side of the table top to the other by an employee of the defendant. At the same time there is evidence upon which the jury could find that the plaintiff, having called for the bar, carelessly disregarded the fact that it could be delivered to him quite properly in a manner that might result in it not coming to rest upon the table top. The plaintiff himself gave evidence as follows:

"Q. You were expecting him to send it across to you?
A. That is right.
Q. And you were waiting to receive it?
A. I was waiting.
.....
Q. You say you didn't see how it came across the table top?
A. No. It could have been slid, it could have been thrown.
Q. But it either had to be slid or thrown?
A. Right."

I am aware that there may be some inconsistency between the two findings of the jury, but, of course, it is possible that in making its findings the jury made some error.

This Court is not concerned with that possibility. Our concern is whether there was evidence to support the findings. To say there was some evidence to support the findings of negligence is in no way inconsistent with the view that there was different evidence--perhaps contradictory evidence--to support the finding of contributory negligence.

I would, therefore, allow the appeal and dismiss the cross-appeal.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

JUDGMENT GIBBS J.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

The appellant brought an action in the Supreme Court of New South Wales for damages for personal injuries allegedly caused by the negligence of a servant or agent of the respondent. At the trial the respondent moved for a verdict by direction but this motion was denied by the learned trial judge who left the case against the respondent to the jury which returned a verdict for the appellant. However, the jury found the appellant guilty of contributory negligence and reduced the amount of the damages awarded by ten per cent. From this judgment the respondent appealed to the Court of Appeal, and the appellant cross-appealed. The Court of Appeal, by a majority, allowed the appeal and dismissed the cross-appeal and ordered that a verdict be entered for the respondent. This appeal is brought from that decision.

On the day when the injuries were sustained the appellant and two other men, Coupland and Sheather, both of whom were employees of the respondent, were engaged in fixing a crane in position ready for use. To do this it was necessary to adjust the height of the jacks fixed at the ends of the outriggers which keep the crane stable when it is stationary. This was done by means of a metal bar which was about three or four feet long and five-eighths of an inch in diameter and which had a small head and a dull point. The appellant and Coupland were on one side of the crane and Sheather was on the other.

There was only one bar available to operate the jacks, and it happened to be on Sheather's side of the crane. Either the appellant, or Coupland, asked Sheather to "pass the bar", or to "hand the bar over". At this time the appellant was standing three or four feet back from the metal tray which connected the cabin of the crane with the crane itself. Since the tray was eight feet two inches in width, the appellant must have been more than eleven feet from Sheather. The tray was about four feet six inches above the ground, and the appellant said that it was probably at about the level of his chest; he was five feet nine inches in height. The appellant's account of what then occurred was as follows. Sheather took some time in finding the bar and the appellant commented on his delay by saying, "Watch out; if it was a snake it would bite you". The appellant then saw that Sheather had the bar in his hand and the next minute he felt it hit him. He quite frankly said that he did not see how the bar came across the tray of the crane; he did not in fact see it come across the tray. He was struck in the face by the bar with sufficient force to cause him to black out and fall to the ground. It proved necessary to insert six or eight stitches in his cheek and as a result of his injuries he sustained the loss of an eye. The appellant swore that at the relevant time he was standing upright. He denied that he slipped forward but admitted that he might not have been directly upright and might have been stooped a little. He was cross-examined to suggest that at the time when he was hit he was bending down to about the level of the steel tray. He did not accede to this suggestion but did not explicitly deny it.

Of the other two persons present, Coupland said that he was bent down packing the wood under the jack and did not see what happened. Sheather gave evidence that when asked for the bar he slid it across the tray of the crane in a normal manner and saw the appellant move forward to get it, but said that he then bent down to continue his own work and saw nothing more. The jury was quite entitled to disbelieve Sheather's evidence and to regard the appellant as a truthful witness.

The majority of the learned judges who constituted the Court of Appeal considered that there was no evidence to go to the jury of any want of care on the part of Sheather and that a finding of negligence could rest only on conjecture. It is true that the appellant was unable to give direct evidence of how Sheather put the bar in motion. He could not say whether the bar was slid or thrown across the tray and, if thrown, whether it hit the appellant directly or bounced up from the tray. However, in my opinion the jury could have concluded that the appellant was standing upright when he was struck. He swore that he was standing and it is difficult to see why, while waiting for the bar, he should have bent down so that his face was on a level with the tray. The jury had evidence that this metal bar of substantial dimensions was moved over a distance of at least eleven feet in such a manner as to strike the appellant in the face while he was standing and as to cause the consequences to which I have already referred. From this the jury could have inferred that the bar had not been slid across the tray but had been thrown with considerable force in the direction of the appellant. In my opinion it was

legitimate to use the evidence of the derisory remark made by the appellant to Sheather in support of such a conclusion and to infer that Sheather, goaded by the remark, was prompted, not — by any desire to hurt (for the evidence excludes any suggestion of maliciousness) but by a spirit of playful retaliation, to throw the bar in the direction of the appellant. It was not mere conjecture to hold that the bar had been forcibly thrown and that Sheather had failed to take reasonable care for the safety of the appellant. I therefore consider, with respect, that the Court of Appeal was wrong in setting aside the verdict in favour of the appellant.

There remains, however, the question whether the jury was justified in finding the appellant guilty of contributory negligence. The appellant had said that he was expecting Sheather to send the bar across to him and was waiting to receive it. He was asked whether at any time after seeing the bar in Sheather's hands and before it struck him in the face he changed the way he was turned, by which I assume was meant the way he was facing, and said that he could not say. The only evidence available to support the finding of contributory negligence apart from that statement was the appellant's further evidence that he did not in fact see the bar between the time when it left Sheather's hands and the time when it struck him in the face. It would have been open to the jury to consider that the appellant's failure to see the bar could be explained by reasons other than his inattention, and a finding negativing contributory negligence could not have been assailed. However, it does seem to me that it was also open to the jury to take the view that the reason why the

appellant did not see the bar after it left Sheather's hand was that he had been guilty of some inattention. If the jury had taken this view, it could further have held that although the appellant could not reasonably have expected that the bar would be forcibly thrown, he was nevertheless guilty of a want of care for his own safety in failing to watch while his fellow-workman passed or sent over the bar, because even if it had been slid across the surface of the tray it might have done him some harm, minor perhaps, if he had not been ready to receive it. Not without hesitation, I have concluded that a finding of contributory negligence was open to the jury and that the verdict should be restored in the form in which the jury gave it.

I would allow the appeal.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

JUDGMENT STEPHEN J.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

For the reasons stated by my brother Gibbs I would allow this appeal and restore the jury's verdict in favour of the plaintiff, leaving standing its verdict as to contributory negligence and its apportionment of responsibility.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

JUDGMENT MASON J.

BAILEY

v.

FERNDELL ENGINEERING PTY. LTD.

I have had the advantage of reading the reasons for judgment prepared by Gibbs J., with which I agree.

In my opinion the appeal should be allowed.