SUPREME COURT OF QUEENSLAND

CITATION:	*S J Sanders Pty Ltd v Schmidt* [2012] QCA 358
PARTIES:	**S J SANDERS PTY LTD** ACN 074 002 163 (appellant) **v** **HEINZ JOHANN SCHMIDT** (respondent)
FILE NO/S:	Appeal No 6370 of 2012 DC No 2802 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2012
JUDGES:	Margaret McMurdo P, Gotterson JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. The appeal be dismissed, with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the respondent suffered personal injuries when he fell whilst exiting from a prime mover in the course of his employment with the appellant – where the respondent claimed his personal injuries were caused by the negligence and/or breach of contract of the appellant, its servants or agents – where the trial judge found the respondent's personal injuries were caused by the negligence of the appellant – where the appellant appeals the trial judge's findings on the grounds that they were not supported by the evidence, were contrary to expert evidence, and were not reasonably open on the evidence – whether the appeal should be allowed TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS – where the trial judge found the appellant was negligent in failing to implement increased slip resistance to a step configuration of the prime mover – where the appellant contended that even if

the step configuration was defective such a defect was not readily ascertainable by the appellant upon any reasonable inspection or reasonable use of the prime mover – where the prime mover had a reputation for safety – where the appellant's employees had used the prime mover without raising complaints about its safety – whether the appellant discharged its obligation to provide proper plant and equipment to its employees

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – INSTRUCTIONS AND WARNINGS – where the trial judge found the appellant was negligent in failing to implement and maintain a safe system of work by failing to instruct drivers on a safe method of exiting the prime mover – where the appellant contends there was no evidence that any instruction by the appellant to its employees would have made any difference – where the appellant contends the proposed safe method of exiting the prime mover would, at best, only have reduced the likelihood of the fall – whether the trial judge's finding was supported by the evidence

Workplace Health and Safety Act 1995 (Qld), s 28(1)

Bus v Sydney County Council (1989) 167 CLR 78; [1989] HCA 29, considered
Davie v New Merton Board Mills Ltd [1959] AC 604, followed
McLean v Tedman (1984) 155 CLR 306; [1984] HCA 60, considered
Reck v Queensland Rail [2005] QCA 228, considered
Williams v Mt Isa Mines Ltd [2000] QSC 161, considered
Williams v Mt Isa Mines Ltd [2001] QCA 101, considered

COUNSEL: W Sofronoff QC, with G O'Driscoll, for the appellant
S Williams QC, with J Kimmins, for the respondent

SOLICITORS: MVM Legal for the appellant
Shine Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree that this appeal should be dismissed with costs for the reasons given by Boddice J.

[2] **GOTTERSON JA**: I agree with the orders proposed by Boddice J and his Honour's reasons for them.

[3] I wish to add that in relation to the issue considered at paragraphs [37]-[42] thereof, this appeal affords the opportunity for this Court to affirm the application in Queensland of the statement of principle by Lord Reid in *Davie v New Merton Board Mills Ltd*[1] to which his Honour referred at paragraph [37] of his reasons and

[1] [1959] AC 604 at 645-6.

which has been adopted by the Court of Appeal of New South Wales in *Dib Group Pty Ltd Trading as Hill & Co v Cole*[2] and applied by Chesterman J, as his Honour then was, in the Supreme Court of Queensland in *Bourk v Power & Serve Pty Ltd & Ors*.[3]

[4] **BODDICE J:** On 15 January 2008, the respondent suffered personal injuries when he fell whilst exiting from the cabin of a Volvo prime mover in the course of his employment with the appellant. He had been employed by the appellant as a truck driver for approximately three and a half months. Throughout that time he had operated the same Volvo prime mover.

[5] The respondent instituted proceedings in the District Court of Queensland claiming his personal injuries were caused by the negligence and/or breach of contract of the appellant, its servants or agents. On 22 June 2012, the trial judge found the respondent's personal injuries were caused by the negligence of the appellant in failing to implement "an adequate system of risk assessment, devising a method to safely exit its prime mover cabins, training employees in its use (including documenting it), instructing them to use it and taking reasonable steps to ensure the instruction was implemented".[4] The trial judge also found the appellant had been negligent in failing to modify the prime mover "by implementing increased slip resistance at the nosing edge of the tread" of the steps provided for accessing and exiting from the cabin of the prime mover.

[6] The appellant appeals against the trial judge's findings on the grounds that such findings were not supported by the evidence, were contrary to expert evidence, and were not reasonably open on the evidence.

Background

[7] The respondent, who is 64 years old, has been a truck driver for almost 20 years. He has previously owned and operated his own vehicles. He had not operated that type of prime mover prior to his employment with the appellant.

[8] The prime mover being operated by the respondent was manufactured by Volvo. It was chosen by the appellant for its serviceability. The cabin had two handles to assist a driver in getting up and down. Its steps, which were shielded from the weather by the door closing around the outside of the steps, were made of aluminium. Each step contained holes with raised edges on the tread. However, the area where the tread rolled over to the underside of the step was smooth.

Claim

[9] Relevantly, the respondent claimed the appellant owed him a duty to take reasonable care to avoid exposing him to an unnecessary risk of injury in the course of his employment. That duty included an obligation to establish and maintain a safe system of work, and to enforce that system of work. The respondent also claimed the appellant owed him a duty pursuant to s 28(1) of the *Workplace Health & Safety Act* 1995 (Qld) to ensure his workplace health and safety was not affected by the conduct of the appellant's business or undertaking.

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2 [2009] NSWCA 210 per Basten JA (Beazley and McCol JJA concurring) at [32].
3 [2008] QSC 29 at [42].
4 AB 460 at [197].

[10] Whilst the precise mechanism of the respondent's fall was in issue at trial, it was not in dispute that the respondent fell whilst alighting from the cabin of the prime mover during heavy rain in the early morning of 15 January 2008. It was also not in dispute that the respondent had successfully exited and re-entered the cabin on several occasions that evening before the fall, and that, as a consequence, the steps used by him were wet.

[11] The respondent contended that the risk of falling from the cabin of the prime mover was a foreseeable risk of injury, and that in order to satisfy its duty of care, the appellant was required to carry out risk assessments. Had the appellant done so, it would have identified that the respondent was not adopting a safe means of egress, and would have instructed the respondent on the safe means of exiting the prime mover. It would also have identified the risk of slipping on the edge of the tread and taken steps to ensure the rounded edge of the step tread was slip resistant.

[12] The appellant accepted that a slip from the prime mover was a foreseeable risk of injury, but contended the respondent had not proven it had failed to discharge its duty of care in all of the circumstances. The appellant engaged the respondent as an experienced truck driver, purchased appropriate plant and equipment with a high level of safety features, and had employed at least 60 drivers with no complaints concerning access to, or egress from, its prime movers.

[13] The appellant contended the respondent had a very thorough knowledge of the need to maintain three points of contact at all times when exiting the cabin of the prime mover, and had successfully done so in adverse wet conditions, utilising the internal steps within the prime mover. There were no further instructions or supervision the appellant could have provided to inform the respondent of the dangers which he did not already know or possess.

[14] The appellant also contended the step configuration within the prime mover was not defective, and even if it was, such a defect was not readily ascertainable by the appellant upon any reasonable inspection or reasonable use of the prime mover, having regard to the manufacturer's reputation for safety, the demonstrated safety features within the prime mover, the appellant's experience of 60 drivers using such prime movers without complaint, and there having been no complaint made by the respondent.

Decision

[15] The trial judge found the respondent fell as he twisted his body to exit the vehicle. The mechanism for the fall was that as the respondent exited the prime mover, he twisted his right foot so that it came into contact with the wet rounded edge of the top step, with the result the respondent lost his grip and fell.

[16] The trial judge found there was a safe method of exiting the cabin. This method, identified in expert reports as a "true backwards descent", involved turning within the cabin before stepping down out of the cabin, while maintaining three points of contact at all times. This method ensured the driver's feet were facing into the step as the driver alighted from the cabin of the prime mover.

[17] The trial judge found this safe method was not the method adopted by the respondent, and that the respondent had never been trained in the use of this method. The expert evidence, accepted by the trial judge, was that this method

could be properly implemented by the appellant through administrative control, and had been adopted in other situations in the trucking industry.

[18] Having regard to those findings, and the risks, the trial judge concluded a reasonable employer would have provided a safe system of work by implementing an adequate system of risk assessment, devising a method to safely exit its prime mover cabins, training employees in its use (including documenting it), instructing them to use it, and taking reasonable steps to ensure the instruction was implemented. No such system had been implemented by the appellant.

[19] The trial judge also found that, as the appellant's representative was aware the prime mover had a top step with a rounded edge which may become slippery in wet conditions, there was a risk the plaintiff would suffer an injury by slipping on that tread. A reasonable employer would have responded to that risk by implementing increased slip resistance at the nosing edge of the tread. Again, the appellant did not do so.

Submissions

[20] The appellant submits the first finding of negligence was not supported by the evidence. The respondent was aware of the risks of exiting the cabin, and of the need to maintain at all times three points of contact. The respondent did not ever explain how the fall occurred when he knew to maintain three points of contact. In those circumstances, there was no evidence that any instruction by the appellant to its employees would have made any difference.

[21] The appellant further submits that the proposed safe method of exiting the cabin, namely, the true backwards descent, would not have prevented the fall. At best, it could have reduced the likelihood of the fall.

[22] As to the second finding of negligence, the appellant submits that the principle expressed in *Davie v New Merton Board Mills Ltd*[5] meant there was no basis upon which the trial judge could conclude that the appellant was negligent in failing to implement increased slip resistance on the tread of the step. Volvo manufactured extremely safe prime movers, and the appellant purchased the prime mover knowing of its reputation. Its purchase discharged the appellant's obligation to provide proper plant and equipment to its employees.

[23] The respondent submits there was ample evidence to support both findings of negligence. As to the first, an employer has an obligation to implement and maintain a safe system of work, and the system of work established by the appellant was not safe. It allowed drivers to adopt an ad hoc approach to exiting the cabins of their prime mover, with no instruction being given in respect of a safe method of undertaking that task. As to the second, whilst the step as manufactured was safe, it became unsafe when used in the unsafe system of work adopted by the appellant.

Consideration

The fall

[24] It was common ground at trial that the risk of falling when alighting from a prime mover was well known, and that, as a consequence, it was important for a driver to

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5 [1959] AC 604 at 646.

maintain three points of contact at all times. The respondent accepted he knew there was a risk of falling, and that to safely exit the prime mover it was necessary to maintain three points of contact at all times.

[25] The respondent gave evidence that on the night in question he was wearing appropriate work boots with a good tread, and sought to exit the prime mover in the manner usually adopted by him. That method was to slide towards the open door, place one foot on the first step, whilst placing his right hand onto a handle at the door and leaving his left hand holding the steering wheel. Once his right foot had found contact with the first step, he would move his left hand from the steering wheel to a handle on the left side of the door and then move his left foot.

[26] The respondent accepted the fall occurred when his foot slipped off the metal tread of the step located within the door area. It was likely his foot slipped because the step was wet, as he was pivoting his body around to exit the prime mover.

[27] The trial judge found that the respondent fell as the method adopted by him meant he lost one of his three points of contact whilst twisting his body to exit the vehicle. In reaching this finding, the trial judge considered, in great detail, the various descriptions given by the respondent as to the circumstances of the fall.

[28] A determination of how the respondent fell was properly a matter for the trial judge. The conclusion that the respondent had established the means by which he slipped was amply supported by the evidence accepted by the trial judge. That conclusion did not involve guesswork or conjecture.[6]

The system

[29] An employer's duty of care requires that it establish, maintain and enforce a safe system of work.[7] That obligation requires the undertaking of appropriate risk assessments, the devising of a proper method, training in its use, instruction to use that method, and the taking of reasonable steps to ensure its implementation.[8] It includes the giving of such instructions, and the supervision of their enforcement, to experienced workers, having regard to the fact that an experienced worker may inadvertently or negligently injure themselves.[9]

[30] The respondent's method of exiting the prime mover was found to be inappropriate as it resulted in the respondent losing one of the three points of contact.[10] The risk of injury from falling meant that the only safe means of exiting the vehicle was to turn his body whilst inside the vehicle before exiting in what was referred to as a true backwards descent.

[31] The respondent gave evidence that he had adopted the same method of access to, and egress from, the prime mover since his employment. He also gave evidence that he had not received any instructions as to a safe method of exiting that vehicle.

[32] The director of the appellant gave evidence that he had not personally instructed the respondent on how to access or exit the cabin of the prime mover, and was unaware

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6 Cf *Williams v Mt Isa Mines Ltd* [2000] QSC 161; on appeal [2001] QCA 101.
7 *McLean v Tedman* (1984) 155 CLR 306 at 313.
8 *Reck v Queensland Rail* [2005] QCA 228 at [16].
9 *Bus v Sydney County Council* (1989) 167 CLR 78 at 90.
10 AB 434 at [115].

of any other person doing so on behalf of the appellant. He also gave evidence there was, at the relevant time, no documented training policy specifically dealing with such instruction, and he did not believe there was any formal induction system in place at that time.

[33] Expert evidence was given that, had the appellant undertaken a risk assessment of the means adopted by its employees of accessing and exiting its prime movers, it would have become aware of shortcomings in its system, and of the fact the plaintiff was adopting an inappropriate way of exiting the prime mover.

[34] In finding that the appellant failed to implement and maintain a safe system of work, in that it failed to instruct the plaintiff as to the safe method of accessing and exiting the prime mover, and failed to ensure compliance with that method, the trial judge accepted the evidence of the respondent, and of the appellant, as to there being no system of training or instruction of truck drivers as to the safe method of exiting the cabin of the appellant's prime movers. The trial judge also accepted the opinions expressed by the expert witnesses called at trial. There was ample evidence to support the trial judge's finding in this respect.

[35] Further, there was ample evidence to support the trial judge's finding that such a system of instruction could easily have been implemented, and that it was negligent and in breach of the appellant's duty of care not to implement such a system of instruction. There was evidence that such a system existed elsewhere in the industry, including evidence from one of the experts that he had, in his earlier employment, undertaken such instruction with truck drivers under his control.

[36] The trial judge's conclusions as to the first finding of negligence were in accord with the evidence accepted at trial. This ground of appeal fails.

The step

[37] An employer has an obligation to provide safe and proper plant and equipment. However, that obligation is discharged where the employer purchases appropriate equipment from a reputable manufacturer or supplier and makes any inspection which a reasonable employer would make.[11]

[38] The trial judge's finding of negligence on this ground depended on a finding that the step, as designed, was defective, and that the appellant had an obligation to inspect the plant and equipment provided for use by its employees.

[39] However, the respondent's case at trial was not that the design of the step was defective. Instead, it was that the ad hoc system of accessing and exiting the cabin of the prime movers adopted by the appellant's employees meant there was a risk that an employee would exit the cabin in an unsafe manner, which could result in the employee's foot being placed in the area of the smooth outer edge of the tread, thereby increasing the risk of a fall. Expert evidence given at trial was that a boot placed at a particular angle on this outer edge may slip.

[40] The evidence accepted at trial was that the prime mover had one of the safest systems of design in the industry. Further, the appellant had never received a complaint from its extensive workforce of truck drivers (including the plaintiff) as to any slip or fall from using these steps.

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[11] *Davie v New Merton Board Mills Ltd* [1959] AC 604 at 646.

[41] Against that background, there was no basis for the trial judge to find that the obligation imposed on the appellant included a requirement for it to assess the slippage capabilities of the step system of a prime mover purchased specifically for its recognised safety features. Such a requirement involved undertaking an inspection beyond that which was reasonable for an employer to undertake in the circumstances.

[42] The appellant has established that the second finding of negligence was contrary to the evidence. It ought to be set aside.

Conclusion

[43] The appellant has established that the second finding of negligence was not supported by the evidence. However, the appellant has failed to establish that the first finding of negligence was contrary to the evidence.

[44] In those circumstances, the order made by the trial judge that the applicant pay the respondent damages for personal injuries arising out of the negligence of the appellant cannot be set aside.

[45] I would dismiss the appeal, with costs.