SUPREME COURT OF QUEENSLAND

CITATION:	*Jackson v Coal Resources of Qld Ltd* [2000] QCA 82
PARTIES:	**MARK KEVIN JACKSON** (plaintiff/appellant) v **COAL RESOURCES OF QUEENSLAND LIMITED** ACN 010 443 599 (defendant/respondent)
FILE NO/S:	Appeal No 3262 of 1999 SC No 114 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Personal injury – liability only
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	21 March 2000
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2000
JUDGES:	Davies, Pincus and McPherson JJA Joint reasons for judgment of Davies and Pincus JJA; separate reasons of McPherson JA concurring as to the orders made.
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – appellant was employed as a cable man in a coal mine – appellant was required to assist the other members of his team to ensure the distribution of coal that was gouged, caught and conveyed to shuttle cars – appellant was injured in the course of his employment when a mechanical underground miner slewed – whether respondent owed a duty of care to appellant – whether respondent failed to warn appellant of risks involved – whether respondent failed to instruct appellant of the acceptable distance to be maintained from the machinery.
COUNSEL:	Mr J S Douglas QC for appellant Mr R J Douglas SC, with him Mr R C Morton, for respondent
SOLICITORS:	Taylors Solicitors for appellant Bain Gasteen for respondent

[1] **DAVIES AND PINCUS JJA:** This is an appeal from a judgment in the Trial Division of the Supreme Court on 17 March 1999 dismissing an action against the respondent who was the appellant's employer. The action was one for damages for personal injuries caused to the appellant during the course of his employment with the respondent by the negligence of the respondent. In giving judgment for the respondent the learned trial judge also assessed damages at $216,801.54 after deduction of Workers' Compensation refund. The appeal also contends that that assessment was too low.

[2] The appellant was injured in the course of his employment with the respondent when on 24 January 1992 a mechanical underground miner slewed and crushed his right elbow and forearm against the wall of an underground pillar. The appellant was, at the time, working as a cable man for the miner, his job being to ensure that cables which supplied power, water and compressed air to the miner and which joined the miner at its right rear, remained clear of the miner's rearward movements and of the wheels of shuttle cars approaching the rear of the miner.

[3] The following statement of facts, taken from his Honour's reasons for judgment, was not disputed by either of the parties before this Court.

> " The driver of the miner was seated at the right rear of the machine. When the miner was operating the cutting heads gouged out coal which was caught and conveyed back to shuttle cars. These cars received the coal from the rear of the miner. Apart from Mr Jackson, the team operating the miner consisted of Errol Hawkins, the deputy in charge, John Russell, the driver, two unnamed shuttle-car drivers and two drill men who were responsible for roof bolting. The width of the pillar was about twice the width of the miner. The floor of the pillar was not level, but fell away to the right. As the work progressed, the cable was hung from the roof, but to the rear of the miner it lay on the ground. The cable man had to ensure that it was not damaged by the miner or the shuttle cars.
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> Shortly before Mr Jackson was injured, the miner had stopped cutting coal and was waiting for a shuttle car. The miner was close to the right hand rib of the pillar. Mr Jackson was standing in an indentation in the rib, called a saw-tooth. He says that he was about half a metre to the rear and half a metre to the right of the miner. He was standing with his hands on his hips so that his right elbow extended out of the saw-tooth and across the rib.
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> Mr Russell, the driver of the miner, told him to signal up the shuttle car, which he did. As he watched the shuttle car approach, the miner commenced cutting coal. As it did so, it slewed sideways and the canopy over the driver's seat crushed Mr Jackson's right elbow and forearm against the rib. Before it began to slew, the miner had been about six to eight inches from the rib."

[4] The allegations of negligence in the appellant's statement of claim were numerous and vague. However it appears from his Honour's reasons that four specific allegations were pursued at the trial. They were:

1. that the respondent should have used a retracting spool to keep the cable taut, thus avoiding the need for a man to be in close proximity to the miner as the appellant was;

2. failure to warn the appellant of the risks involved in his job;
3. failure to adequately supervise the appellant to ensure that warnings were heeded; and
4. failure to instruct the appellant precisely about the safe distances from operating machinery and correct places to stand.

[5] Before this Court only the first and a version of the fourth of these were pursued. The fourth was particularized as a failure to instruct the appellant to stand behind and to the side of the machine, no specific distance being contended for.

[6] His Honour rejected the first of these because, he said, the engineer who deposed to the possible use of a retracting spool had very little experience in underground mining and those who were experienced rejected the proposal as impracticable. It is of some significance, as the respondent contended in this Court, that, at the date of trial some seven years after the accident, retracting spools were still not in use in underground mines; they were still, apparently, in an experimental stage. The problem in perfecting them appears to involve the heaviness of the cable, the need to affix it to the roof of the pillar and the degree of tension which would need to be placed on it to ensure that it remained at all times out of harm's way. As Mr Douglas SC, who appeared for the respondent in this Court, pointed out, neither of the respondent's witnesses who gave evidence on the practical problems involved, Messrs Sutton and Hazeldean, were cross-examined on this point. In the circumstances his Honour was, in our view, justified in rejecting the evidence of the engineer, Mr McDougall, upon whose evidence this ground was based.

[7] Mr Douglas QC who appeared for the appellant did not, in the end, attempt to specify the other particular of negligence with greater particularity than an instruction to stand behind and to the rear of the miner.[1] Framed in this way the allegation faces the difficulty that the appellant's evidence, which the trial judge appeared to accept in this respect, was to the effect that he was standing behind and to the rear of the machine when it slewed. Consequently an instruction merely to that effect would not have avoided the accident. Moreover the appellant admitted in an answer to interrogatories that he had been instructed to stand behind the miner, in particular behind the driver's cabin which was at the right rear of the miner. He had also been instructed, he admitted, as to the handling of the cable.

[8] The appellant knew that, when the miner was mining, it "jumps around a fair bit", that it could slew and that if it did slew it would do so towards his side.[2] He also knew, as was plainly the case, that if, whilst the miner was mining, he stood entirely within the saw-tooth he would be safe from harm. It was not contended on his behalf that there was not sufficient room within the saw-tooth for him to stand in complete safety. Unfortunately he did not do this because, although his body was within the saw-tooth, one of his arms was exposed because he put his hands on his hips.

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1 At one point he submitted that the instruction should have been to stay at least two metres back from the machine; but he conceded that no such allegation or submission was made below and that there was no evidence that any such instruction would have been practicable.

2 The floor sloped towards that side.

[9] It is true that the appellant was quite inexperienced and had shown a lack of application in the performance of other work for the respondent. And it follows from these facts that the respondent's duty to instruct and supervise[3] was higher than it would have been in the case of an experienced worker of demonstrated competence.

[10] No doubt also minds may differ as to the extent to which, in the performance of a simple task which nevertheless may place a person in a situation of danger unless performed with care, detailed instructions and constant supervision are necessary. But we cannot be satisfied that the learned primary judge was wrong in the present case when he said that it "is difficult to see what extra information the defendant should have given him to alert him to the risk of injury".

[11] If the appellant had stood completely within the saw-tooth when the miner was mining, where he knew he was safe, the accident would not have occurred. His Honour was entitled to conclude that it was his momentary carelessness in putting his hands on his hips, or perhaps not moving further into the saw-tooth if he wished to put his hands on his hips, that was the sole cause of his injury.

[12] We cannot be satisfied that, in the circumstances, the learned primary judge was wrong in concluding that the respondent was not negligent. We would therefore dismiss the appeal with costs.

[13] **McPHERSON JA**: I agree with the joint reasons of Davies and Pincus JJA for dismissing this appeal with costs. Judging by the mine accident report dated 24 January 1992, there was initially a belief that the appellant plaintiff might perhaps have slipped on the wet floor of the mine gallery; but at the trial it did not emerge as part of the plaintiff's case that he had done so. In fact, on the evidence given by the plaintiff, the injury was caused when the mechanical miner started operating and slewed sideways, as it was expected and perhaps intended it would do. It struck the plaintiff's right elbow, which was projecting out beyond the safety of the sawtooth because he had his hands on his hips. It is difficult to conceive of any useful instruction that could have been given that would have avoided or sensibly diminished the risk of such an injury taking place. If there was an appropriate warning that could have been given, it was not alleged or put to the defendant's witnesses at the trial. The plaintiff's case on appeal was not conducted on the footing that any such, but unspecified, warning ought to have been given but on the two bases identified in the joint reasons of Davies and Pincus JJA. For the reasons given by their Honours, neither of those allegations can succeed.

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[3] Failure to supervise was not relied on in this Court except, of course, to the extent that it was involved in the allegation of failure to instruct referred to earlier.