IN THE SUPREME COURT OF QUEENSLAND Appeal No. 31 of 1979

FULL COURT

BEFORE:

Mr. Justice Lucas

Mr. Justice Kelly

Mr. Justice Sheahan

BRISBANE, 5 NOVEMBER 1979

BETWEEN:

GEOFFREY FRANCIS CUNNINGHAM (Plaintiff) Respondent

- and -

WALKERS LIMITED (Defendant) Appellant

JUDGMENT

MR. JUSTICE LUCAS: This is an appeal from a judgment of Mr. Justice Kneipp given in Townsville on 25 June 1979 in a case in which he found that the defendant was guilty of negligence, refused to find that the plaintiff was guilty of contributory negligence, and assessed general damages in the sum of $35,000.

The plaintiff, a boilermaker by trade, was employed by the defendant at its foundry in Mackay. The work that he was doing was that of bending a large piece of steel plate about 9 feet by 4 feet and three-eighths of an inch thick.

According to him, it weighed about 590 pounds, but the judge was of the opinion that it might have weighed something less than that.

This plate was to be rolled into a cylinder, and this was done by passing it through a series of rollers mounted horizontally, the operation of which had the effect of bending the plate as it passed through them. The plate was lifted into the rollers by means of a small overhead travelling crane operated by electricity, and at various stages in the work it was necessary to remove the plate from the rollers, and on occasions to hammer it with a heavy hammer weighing 12 pounds in order to achieve the correct degree of bending. The plate was attached to the crane by a rope with a hook on the end, and the plate was attached to this hook by means of a clamp which was described as a screw-dog clamp or screw-dog or screw clamp. This was a heavy steel object with a ring on the top through which was passed the hook of the crane.

Through one of the legs was a threaded hole and through that is screwed a heavy threaded bolt the end of which if screwed far enough bore up against the inside surface of the opposite leg.

Now, after the plate had been removed from the rollers and had been hammered for possibly about a minute, half a minute to a minute, the crane was operated so as to introduce the plate again into the rollers. However, the plate slipped from the clamp which was holding it, and fell on the plaintiff's right leg, injuring him severely.

The learned judge found that the defendant was guilty of negligence, and no attack has been made in the appeal on that finding.

The learned judge was invited to find that the plaintiff had been guilty of contributory negligence in accordance with certain particulars which had been given in the defence.

Three of these particulars were persisted in at the trial, but the learned judge refused to find that the plaintiff had been guilty of contributory negligence in any of the relevant respects, and on appeal his finding has only been challenged with respect to one of those particulars of negligence. This was the allegation which asserted that the plaintiff had been guilty of contributory negligence in that he had failed to check the tightness of the clamp after the steel sheeting which the plaintiff had earlier attached to the clamp had been subjected by him to extensive hammering.

Now, the learned judge found that there was a contradiction in the plaintiff's evidence with regard to this, for in an answer to an interrogatory in which the plaintiff had been asked two questions in relation to the tightening of the screw he gave answers which, at all events at first sight, appear to be inconsistent with each other. Interrogatory 11 asked a number of questions which were of a general nature and were directed to the period during which the plaintiff had been employed by the defendant. One of those questions was in interrogatory 11(h)(ii):

> "(ii) Had you retightened the screw in the metal clamp after hammering of the plates? Had you seen other employees of Walkers Limited retighten the screw in metal clamp in such circumstances?"

To this the plaintiff answered:

> "I retightened the screw after hammering the plate. I have seen other employees tighten the screw on special circumstances."

Interrogatory No. 12 was directed to the event which occurred on the occasion of the accident, and this interrogatory included a question in which he was specifically asked:

"(1) Did you retighten the screw in the metal clamp prior to the final raising of the steel plate before the accident?"

Interrogatory 12(m) was:

"(m) If 'Yes' to 12(1)

(i) Was the screw in the metal clamp already tight?

(ii) Did the metal screw bite into the steel plate on this occasion?

(iii) Did you notice any distortion or damage to the metal clamp or screw?"

The plaintiff answered in the following way:

"12(1) In answer to interrogatory number 12(1) I say that I did not retighten the screw in the metal clamp prior to the final raising of the steel plate before the incident referred to in the statement of claim."

The plaintiff also answered in respect of interrogatory 12(m):

"12(m) In answer to interrogatory number 12(m) I say that the screw in the metal clamp was already tightened."

The plaintiff answered this interrogatory, although strictly speaking he should not have done. Secondly he said that it bit into the steel plate on the occasion in question; and thirdly that he did not notice any distortion or damage to the metal clamp or screw.

The plaintiff in examination-in-chief did say that he had a specific recollection of having tightened the screw on this occasion after he had performed the hammering; but after hearing him cross-examined - and he was cross-

examined closely in relation to this in view of the apparent conflict between what he said in evidence and what he had said by way of answers to interrogatories - the learned judge came to the conclusion that it was probable that he was relying more on his general recollection of his habit in tightening the screw after the plate had received the hammering than on any specific recollection that he had done so on this occasion.

The plaintiff explained the apparent inconsistency between his answers to the interrogatories by saying that he had understood the two questions to be directed to different stages of the operation, the general question in interrogatory No. 11 being specifically directed to the tightening of the screw after the hammering had been done, and the question in interrogatory No. 12 directed particularly to the occasion in question being directed to the tightening of the screw prior to the final raising of the steel plate before the accident, and he explained that he took this interrogatory to be directed to the stage at which the bolt attaching the plate was inserted into the hook on the crane.

The learned judge did not find that a particularly convincing answer on the face of it, but dealing with the matter carefully in his judgment he did come to the conclusion that there might not have been an unduly refined distinction between the occasions to which the plaintiff took the two interrogatories to be directed.

As to his evidence in the witness-box the learned judge said that it was common enough for a basically honest witness to fail to draw a distinction between his recollection of having done something and being certain of having done something because to do it was habitual. The learned judge was considerably impressed with the plaintiff as a witness, and he said that after seeing him closely cross-examined on the matter and having regard to his overall impression of him he was satisfied that he was

completely honest about the matter and that he should accept what he said.

He made a crucial finding on this matter in these words. Having said that he would be prepared to find as more probable than not that the plaintiff did retighten the clamp, he said: "A fortiori I am not prepared to find that he did not tighten it." That, as I say, is the crucial finding because the onus with regard to this matter was on the defendant, and in order to succeed the defendant required a positive finding that the plaintiff did not retighten the clamp, and this is the finding which the learned judge refused to make. The basis for the allegation of contributory negligence according to this particular therefore fell to the ground. The learned judge had the advantage which is denied to us of having heard and seen the witnesses, and I am by no means satisfied that the finding that he made is wrong. I cannot discover any basis upon which it would be appropriate to interfere with the finding made in this matter.

Turning to the question of damages, the plaintiff was severely injured in the accident. He sustained a fracture of his right tibia and right fibula, and he was admitted to hospital where he remained for some time. He was discharged on crutches, and it was not until the middle of October 1973 that he was able to discard the crutches. That is a period of nine months after the accident. He was then walking with a stick until December 1973, 11 months after the accident. It was necessary for him to have a further operation on his leg in May 1977, and in October 1978 he was operated on to remove a blood clot which was attributable to the injuries which he received in the accident.

He was 44 years of age at the time of the accident. He was educated to Junior standard. He qualified as a radio technician at the age of 21, and he qualified as a boilermaker at the age of 36 in 1964. He intended to work throughout the rest of his career as a boilermaker. As a

result of the injuries which he received he is not now able and will not be in the future to follow his trade of a boilermaker nor to do any work of a heavy nature.

The difficulty which presented itself in the assessment of damages for economic loss in this case was that in July 1973 the plaintiff set up in a business of another kind in equal partnership with his wife. This was the business of trading in hi-fi equipment on a retail basis, a venture which, according to the figures which were placed before the learned judge, has been reasonably successful. However, there were figures before the learned judge which showed that the probability was that he would have received net wages, if he had continued as a boilermaker up to the date of tibial, of about $41,700; whereas from the time of the start of the new business until the date of trial his profits, or his share of the profits of the business, amounted to $19,000 before tax. Until he started the new business he lost wages as a boilermaker of about $2,500, and quite clearly a substantial amount should have been awarded to him in respect of his economic loss up to trial. The learned judge however assessed a global sum under all headings, as I say, of $35,000.

So far as pain and suffering and loss of amenities were concerned, he had spent a considerable time in hospital. He had undergone a number of operations. He had to walk on crutches and with a stick for nearly a year. He had to give up activities which he enjoyed before the accident of gliding, jogging and golf. He found that he could not enjoy swimming as much after the accident. He was left with a disability of his right leg assessed by Mr. Douglas, an orthopaedic surgeon, at 25 per cent, and he was left also with certain vascular troubles which necessitated his sleeping with his leg elevated and the continual wearing of an elastic stocking. In these circumstances one would think that he was entitled to a substantial sum under the heading of pain and suffering and loss of amenities, and taking the award as a global sum I am unable to say

that it is outside the limits of a sound, discretionary judgment. In my opinion therefore the appeal should be dismissed with costs.

MR. JUSTICE KELLY: I agree that the appeal should be dismissed. I agree with the reasons of my learned brother the presiding judge. There is only one matter on which I would wish to add something. That is in relation to the answers to interrogatories 11 and 12. Interrogatory 11 is directed to the period of the plaintiff's employment prior to the date of the accident, whereas interrogatory 12 is directed to the date of the accident itself. Further, interrogatory 11 does refer to retightening of the clamp after the hammering of the plates; whereas interrogatory 12 refers to retightening prior to the final raising of the steel plate. It is to that distinction that the learned judge quite correctly refers in his reasons.

MR. JUSTICE SHEAHAN: I agree with the order which the learned presiding judge proposes, and I also agree with the reasons which he has advanced for coming to that conclusion.

MR. JUSTICE LUCAS: The order of the Court is as I indicated.

We order that the amount paid into court as security for costs by the appellant be paid out to the solicitors for the appellant.
