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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

CORDINGLEY v PORT KEMBLA STEVEDORING & AGENCY CO PTY LTD

Reynolds, Hutley and Samuels JJA

10 March 1975

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR NEGLIGENCE – EMPLOYEE INJURED IN WORK-PLACE ACCIDENT – SUFFICIENCY OF EVIDENCE – INFERENCE AS TO FACTS – COMPETING HYPOTHESES – WHETHER CLAIM MADE OUT.

Claim for damages for negligence of fellow-employee (a crane operator) in giving a signal for the lowering of a sling load in hold of ship. Evidence given that the load had been jammed, and after being freed it dropped 8 or 9 inches crushing the plaintiff's hand. No evidence was given that a signal to lower was given after the load was freed – neither the crane operator nor the hatchman who relayed instructions from the hold were called. Trial judge held that the jury were entitled to draw the inference that a signal to lower was in fact given.

HELD: Appeal allowed. Verdict overturned.
It could not be said that on the material in this case the more probable inference was that the injury arose from the deliberate but negligent act assigned. The true explanation of the happening remained in the realm of conjecture. Accordingly, as no affirmative inference that the hatchman gave a signal could reasonably be drawn, the appeal succeeded and the verdict could not stand.

REYNOLDS JA: ... This is not a case like *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470, or *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352; [1952] ALR 308, where no direct evidence is available. It is a case where direct evidence was available. But the plaintiff preferred to rely on circumstantial evidence to support a secondary basis of his claim. I say 'secondary' because the case was mainly conducted to support the claim that the plaintiff was sent to work in unsafe conditions. That, however, it seems to me, is not to the point, for the legal principle involved remains the same. This principle has its classic exposition in the unreported case of *Bradshaw v McEwans Pty Ltd*, a decision in the High Court of Australia handed down on 27th April 1951, which has been cited many times with approval by the High Court, and in particular in such cases as *Holloway v McFeeters* (*supra*). In that case the High Court said:

> "In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture: see per Lord Robson in *Richard Evans and Co Ltd v Astley* (1911) AC 674, 687, But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise; cf. per Lord Loreburn. (*ibid* 678). All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

In the present facts, no more is shown than that a sling load dropped 8 to 9 inches. This could have happened by a deliberate act or accidentally. If one accepts that the dropping was not due to slack being taken up when the load was freed, it could have happened by reason of a deliberate act of the crane operator, an accidental activation of the crane or a defect in the crane mechanism. If it happened by reason of a deliberate act of the crane operator, then he was either acting on a signal from the hatchman or inexplicably of his own motion. Nothing is known as to the control and mechanism of the crane. If the hatchman acted in turn on a direction from the holder he was departing from practice and routine for no good reason.

I do not think it can be said that on this material in these circumstances the more probable

inference is that the injury arose from the deliberate but negligent act assigned. In my view, the true explanation of the happening remains in the realm of conjecture. In *Holloway v McFeeters* (*supra*) the judgment of the majority cited with approval a passage from the judgment of Kay LJ in *Smith v South-Eastern Railway Company* (1896) 1 QB 178, which included the following extract at p188:

> "I venture to say, with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of the facts, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on the one side and the other was exactly equal."

I do not understand this judgment or the citation as intending to place a party who relies on circumstantial evidence in a preferred position to one who relies on direct evidence; nor do I understand it to mean that if one hypothesis is that for which the plaintiff contends, it must always be for the jury to pronounce on the question of probability. A judicial control certainly remains. This is not a case like the two decisions of the High Court, to which I have made reference, where a general inference of negligent conduct is sought to be drawn, as against non-negligent conduct, i.e where there are only two hypotheses negligence or no negligence. The jury were told it was open to them to infer that the load dropped because the hatchman gave a signal to the crane operator. That was the only way in which the case was left to the jury and it was without objection. To borrow the language of Kitto J in *Holloway v McFeeters* (*supra*) the evidence:

> " ... provided them with no foundation that I can discern for reaching any state of mind which could properly be called a satisfaction in respect of the particular fact.'

No affirmative inference that the hatchman gave a signal can reasonably be drawn. This ground of appeal succeeds and the verdict cannot stand.
