01/74

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

NOU v ERMA CONSTRUCTIONS PTY LTD

Hope, Reynolds and Bowen JJ A

9 May 1974

CIVIL PROCEEDINGS – EMPLOYEE INJURED AT WORK – STRUCTURE COLLAPSED DUE TO FELLOW EMPLOYEE USING A PIECE OF TIMBER WHICH WAS TOO SHORT FOR THE PURPOSE – NEGLIGENCE OF FELLOW EMPLOYEE – CONTRIBUTORY NEGLIGENCE – WHETHER INJURED EMPLOYEE LIABLE FOR CONTRIBUTORY NEGLIGENCE.

An action was brought against an employer for an employee's personal injuries suffered in an accident which occurred during course of employment. Defendant denied negligence and raised a case of contributory negligence. The plaintiff in the course of his employment as a carpenter and driver for the defendant was in the habit of erecting and using a temporary platform structure from which to load building material on to a truck. His injuries resulted from the collapse of a structure which on this occasion had been erected by a fellow employee named Kevend. The collapse was due to Kevend using a piece of timber which was too short for the purpose.
[Ed. A great deal of the judgment deals with the question whether the trial judge should have left the issue of contributory negligence to the jury. The salient portion of the judgment for our purposes deals with the effect of reliance upon a fellow workman in considering contributory negligence.]

HELD: Employee not negligent.
There was no basis on which the jury could come to a conclusion that the employee's failure to examine the structure or to test it before he stood on it was negligent. It was the case of a practice which had been used for a great many years; it was a practice which, so far as the evidence went, was a safe practice. There was no suggestion in the evidence of any particular incident or event on the day when the injury was sustained which would have led the plaintiff to suspect that the usual practice had not been complied with or to warn him there was some danger in the structure which had been erected by his fellow workman on that day.

HOPE JA: ... It must be remembered this was not some isolated occasion when, for the first time, such a structure was made for purposes of assisting in the loading of the truck. It was something that had happened for years, and in which the plaintiff had participated for years. The plaintiff said he had constructed these platforms hundreds of times himself without trouble. Mr Kevend was also an employee of the defendant who worked on building sites and was known to the plaintiff, and known to be concerned with the building sites. There was thus a system which had been used for years for loading trucks and which had been found safe in the past.

What the plaintiff was complaining about in the present action was not that the system that was used was negligent, but rather that on the particular occasion there was negligence in the construction of the platform. It was on that issue that the plaintiff succeeded. It was put for the defendant that since the plaintiff was a very heavy man, namely, some eighteen stone, he should not have relied on the fact that his fellow workmen, Mr Kevend, had erected the structure which seemed to be similar to those which had been used for many years; he should have inspected to see that the pieces of timber were of the proper length, or alternatively, he should have checked it, presumably by standing on it or slowly putting his weight on it in some way, to make sure it would hold him. So the question arises whether, in those circumstances, failure to take either of those courses was something upon which the jury could base a finding of contributory negligence.

The effect of reliance upon a follow workman was dealt with in the House of Lords in the case of *Grant v Sun Shipping Co Ltd* [1948] 2 All ER 238; (1948) AC 549 at p567, where Lord du Parcq said:

> "My own conclusion, therefore, is that the pursuer did not fail to take the ordinary care that would be expected of him in the circumstances. If the standard of the conduct of an ordinary prudent man is preferred, I do not think that his own conduct fell below it. Almost every workman constantly,

> and justifiably, takes risks in the sense that he relies on others to do their duty, and trusts that they have done it. I am far from saying that everyone is untitled to assume, in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common."

It may well be that Lord du Parcq was dealing with the particular case before him. However it seems to me that the passage I have just quoted indicates the way in which the present case should be approached: was it lack of reasonable care on the part of the plaintiff not to inspect or examine this structure, or to test it, before he stood on it in the way he did which led to his fall?

In my opinion there was no basis on which the jury could come to a conclusion that his failure to do this was negligent. It was the case of a practice which had been used for a great many years; it was a practice which, so far as the evidence went, was a safe practice. There is no suggestion in the evidence of any particular incident or event on 3rd September which would have led the plaintiff to suspect that the usual practice had not been complied with or to warn him there was some danger in the structure which had been erected by his fellow workman on that day.
