IN THE SUPREME COURT OF THE TERRITORY
OF PAPUA-NEW GUINEA.

6

ARTHUR JOSEPH BROWN — Plaintiff

- and -

THOMAS FLOWER — Defendant

6th June, 1949.

The plaintiff in this case ARTHUR JOSEPH BROWN on the 9th February, 1949, having obtained an order giving him liberty to institute an action for the recovery of compensation under the Employer's Liability Ordinance, 1912, of the Territory of Papua notwithstanding that no notice that injury had been sustained had been given by him to his employer THOMAS FLOWER as provided in section 6 of that Ordinance, on the tenth day of February, 1949, issued a writ against the defendant claiming £1,620 in respect of injuries sustained by him, this amount being the maximum amount namely three years salary which could be claimed by him under the Ordinance - see section 9.

The particulars of the plaintiff's claim are as follows:-

1. The plaintiff was employed by the defendant as a sawyer and assistant in logging in and about the seven mile near Port Moresby.

2. On or about the seventeenth day of August, 1948, whilst engaged in logging operations for the defendant the plaintiff was required to use therefor and did so use works machinery and plant supplied by the defendant, which said works machinery and plant were in a defective condition.

3. The said defect arose from and had not been remedied owing to the negligence of the defendant whose attention had previously been drawn to such defect.

4. On or about the seventeenth day of August 1948 whilst so employed as abovementioned the plaintiff sustained by reason of the said defect serious and permanent injuries, and suffered great pain of body and mind and was and will be prevented from transacting his own business for a long time and incurred and will incur expense for hospital treatment and for medical, nursing and surgical attention; his clothing was damaged and he was otherwise greatly damnified.

The defendant duly filed a Notice of Defence on the twelfth day of February, 1949.

The sections of the Employer's Liability Ordinance, 1912, relevant to the establishment of the claim for compensation based on the negligence of the defendant are sections 4(1), 5(1) and 5(4).

The plaintiff was engaged by the defendant as a sawyer in his timber milling business near Port Moresby. The Plaintiff was engaged under a written agreement dated the 14th June, 1948 to serve for a period of two years from that date. The duties were not confined to work at the mill itself - a clause in the agreement providing that the employee "shall in all things be under the direction and control of the employer, his manager and foreman and may at any time be required to work in and around the mill or in the bush". The agreement provided for remuneration at the rate of £45 per month and a bonus in respect of timber cut over a specified quantity. It provided for the deduction of £5 per month to recoup the payment of the fare by the employer but the amount so deducted was to be repaid to the employee after twelve months' satisfactory service. After the fare had been thus recouped a further £5 per month was to be deducted for six months to cover the landing bond furnished by the employer but this amount was to be repaid to the employee upon his departure from the Territory or alternatively to the Collector of Customs or in the form of a steamer or air travel ticket to Australia or partly in that form and partly in cash. The employer was to have the right under the agreement if the employee left the employment or the agreement was terminated before the expiration of one year from its date to apply any monies due to the employer for wages or otherwise towards making good the sum of thirty pounds in question. Besides the usual terms of such an agreement there was a clause providing for the payment of £100 as liquidated damages if the employee without just and lawful cause and excuse, left the employment before the expiration of the two years agreed upon.

The plaintiff duly entered the services of the defendant in terms of the agreement and on the 17th August 1948, at the instruction of the defendant was engaged in logging operations. In these operations two trucks were used - the Hauling Truck on which the logs were to be loaded and the Loading Truck which supplied the power (by moving away from the hauling truck) to lift the logs on to the hauling truck.

The hauling truck was placed in position parallel to the log to be loaded and two wooden skids 8 to 10 feet long were placed between the log to be loaded and the truck so as to form an inclined ramp from the ground to the hauling truck. The loading truck lay at right angles to the hauling truck and on its side furthest from the log to be loaded. The loading truck was connected by a wire rope terminating in a hook to a harness or bridle which consisted of a wire rope fastened at each end to the side of the hauling truck furthest from the log to be loaded. This wire rope was attached towards each end of the truck and the loop then

formed was passed under the log and over the top of the log and the hook from the loading truck was then engaged in the loop.

The length of the steel wire forming the bridle which was free of the log would be about twelve feet in length.

The loading truck faced the hauling truck so that the native driver could see the operation. The driver then backed his truck away from the hauling truck with the result that the steel wire and hook drew against the bridle and this pressure rolled the log up the skids until it rested in the desired position on the hauling truck.

On the morning of the accident two loads had been successfully loaded and three logs had been loaded into their proper position on the hauling truck in the third load - the fourth log - the one which caused the damage - was in the process of being lifted some seven feet from the ground up the skids on to the top of the three logs already in position on the truck.

This fourth log however was much thicker at the butt end (which lay towards the back of the hauling truck) than at the other end with the result that when the loading truck pulled it up nearly to the top of the skids, the greater girth of the butt end caused it to get ahead of the thin end so that it lay on the skids diagonally, with the thin end towards the ground and the butt end close to the truck.

It became apparent that the plaintiff, who was conducting the operation, must take steps to adjust its position, otherwise it could not be loaded.

The plaintiff, upon seeing the position of the log, called to the native driver of the loading truck to stop, which he did. The plaintiff then went around and placed a wooden chock which was a piece of wood about one foot by six inches in size cut diagonally in the lower end of the log and drove an axe in at the back of it to more securely hold it in position on the skid.

The native witness, TAU-NANA, who was assisting the plaintiff at the hauling truck testified that he placed a chock under the lower end of the log and the plaintiff placed one under the higher end and that neither of these chocks were supported by an axe. His evidence too placed the butt end of the log as the lower end on the skids. Having regard to the nature of the operation intended by the plaintiff who proposed pushing the higher end down with a bar, I am satisfied that the native witness was mistaken and that in fact there was only one chock, which was placed by the plaintiff in the manner stated by him; I am satisfied too that the native witness was mistaken in believing it was the

thin end of the log which was the highest.

The plaintiff then directed the truck driver to slack back three or four feet by moving the truck towards the hauling truck the required distance and the truck driver obeyed this instruction.

It so happened that one of the logs already loaded on the hauling truck was shorter than the others and the wire bridle being released from tension dropped down and fouled the end of this log.

At this stage it is clear that the log was only supported by the wooden chock and the axe in the skid at the lower end of the log.

The plaintiff then asked the native at the back of the hauling truck to free the wire bridle, but the native apparently did not understand what was required of him, so that the plaintiff walked along the log from the front of the lorry to where the rope was lying. He reached a position outside the bridle at the rear of the truck and was in the act of bending over to free the fouled wire rope when the log started to roll down the skid.

The moving log was some three feet in diameter and weighed some three or four tons. It was quite apparent that it was a moment of great peril. It is not clear from the evidence as to what exactly happened at that moment, except that the log started down the skids and the plaintiff suddenly found himself struck on the leg by a wire rope and next found himself lying between the log which had rolled down on to the ground and the truck. He then became aware that his left leg was almost severed near the ankle. Subsequently the leg had to be amputated just above the knee and as a result the plaintiff can no longer engage in his occupation, of which he has twenty years experience.

The native TAU-NANA, who was standing some twenty feet back from the truck and its rear, testified that he saw a coil of rope go into loops and one loop got around the plaintiff's leg as he tried to jump back. Quite apart from the unreliability of the witness in respect of other vital matters, I cannot accept this as being the fact because, if the loop had got round the plaintiff's leg, I am unable to see, with the tension of the log, how he could afterwards free himself. The height of the place where the plaintiff was standing, bearing in mind that the native witness was on the ground, makes me doubt whether he was in a position for any accurate observation at all.

The evidence on this aspect of the case then is unsatisfactory and yet I feel that the course of events was so rapid that it is not altogether surprising that this should be so. I am not prepared to go further than to conclude that the wire rope cut the plaintiff's leg owing

to the sudden tension being thrown on the rope by the movement of the log, although he was standing outside the bridle.. Learned counsel for the defence made a point that injury from the bridle was an impossibility, unless the plaintiff was standing inside the bridle. For my own part, I feel the probabilities favour the theory (and I say theory advisedly) - that it was the lower portion of the bridle which did the damage and I think that although the plaintiff was outside the bridle as it lay, possibly the tension may have caused it to take up with great violence an entirely different position from the position in which it lay without such tension. The plaintiff (who I am satisfied is a "workman" within the meaning of the Ordinance) bases his claim on the negligence of the defendant in requiring him to use works machinery and plant which were, to the knowledge of the defendant, defective and in spite of his complaints about the defects. The defects he complains of were -

(a) That the loading truck upon which he had to depend for the power to load the logs had defective brakes;

The evidence satisfied me that prior to the accident the plaintiff had complained to the defendant of the defective brakes and that they were in fact defective at the time of the accident, but I do not regard the fact that the brakes were defective as being the prime cause of the accident, as I will explain later -

(b) that he had no shackles: these are used to put a truck in the bridle to bring up the losing end of the log when loading;

I am satisfied that on the day of the accident the plaintiff had no shackle and had, prior to the accident, complained about the lack of a shackle and had got an unsatisfactory reply from the defendant about the supply.

(c) The absence of a winch;

The evidence indicates that a winch is mounted in the centre of the hauling truck just behind the cab and then by a series of pulleys the power is transmitted to a wire bridle, but it is necessary when using a winch to have some place to anchor a pulley away from the truck. No loading truck is necessary when a winch is used. The evidence establishes to my satisfaction that, if a winch is used, the danger of personal injury in loading a tapering log is less than when a loading truck supplies the power. It is clear from the evidence that the plaintiff, prior to the accident, asked for a winch - this is not denied by the defendant, but the defendant, apparently because of the difficulty involved in anchoring the pulley outside the truck and the difficulty which arises through the transmission of power over pulleys, did not favour its supply and in fact did not fit one, though there is evidence that he possessed a winch or winches and that one has since been fitted.

(d) The plaintiff also complains that he was not supplied with a wallaby jack to use in jacking up the losing end;

I am satisfied from the evidence of the defendant that this method is unnecessarily dangerous because of the position of the operator, who must stand on the lower side of the log to be loaded. I exclude from my mind the matter of the wallaby jack as a cause for complaint, although I note from the evidence of the defendant that a wallaby jack has been in use for logging, because he spoke of a long handled spanner being used as an emergency handle to one.

(e) Finally I am satisfied the plaintiff asked the defendant for steel chocks prior to the accident. The plaintiff has testified that steel chocks are superior to wooden chocks, but the defendant (who has less experience than the plaintiff in the timber business) has never seen or heard of these. The defendant in his defence alleges that the plaintiff was performing the work with the equipment he supplied in an unnecessarily dangerous way. He says that he hasnever seen a log chocked half-way up the skids and as this is so, it would seem likely that he never gave the plaintiff any express instructions not to adopt such a course, though the implication was strong enough. Incidentally, the defendant seems to have taken extraordinarily little interest in the plaintiff's method of work, since he never saw the plaintiff engaged in logging.

The defendant contends that the only safe method of adjusting a log crooked on the skids is to lower it on to the ground again, so that there is no danger from it accidentally slipping through the dislodgment of a chock or otherwise. He agrees that some different course must be taken if the same result is not to follow the next time the log is rolled up, and his solution, and I do not doubt that it is the proper one, is a compensating adjustment of the bridle by taking a tuck in. But, after considering the evidence, it is plain that to do this properly, if there are not special chains on the end of a bridle for adjustment, a shackle is necessary and, as I have said, I am satisfied that the plaintiff did not have the necessary shackle, though he had asked the defendant to supply shackles.

After long consideration, whilst the evidence establishes that the brakes of the loading truck were defective, I do not think that this was the real cause of the accident and in order to arrive at the responsibility, it is the real and substantial cause of the accident which I must seek. The evidence leads me to the conclusion that the danger to the plaintiff would have arisen quite irrespective of the condition of the brakes of the loading truck, because the inertia of the loading truck would have inevitably created a severe whipping of the slack wire bridle the moment the great weight of the log took up the slack. In my view, therefore, the ultimate position of the loading truck is not relevant. I gather that this accords with the view of the defence - it has not been suggested in the evidence that, with good brakes, the loading truck could take the direct strain of the weight of the log, thus avoiding any slack, and this is understandable as factors other than the brakes are involved. The accident then was attributable directly to the absence of necessary gear which it was the duty of the defendant to supply, namely the winch and shackle and particularly the latter, and this lack led to the employment of an unsafe method, namely the use of some slack in the bridle to enable the correction of the position of the log. I say nothing of the steel chocks, because if the shackles had been supplied the plaintiff could have managed without the chocks.

Learned counsel for the defence conducted his case with vigour and it is plain that a defendant in a case such as this is at some disadvantage because, whilst the plaintiff can give direct testimony of what happened, the defendant was not present at the accident. I am satisfied that the plaintiff did not voluntarily and with full knowledge consent (in the sense of agree) to take the risk involved and that the maxim "Volenti non fit injuria" does

not apply - see Smith v. Baker 1891 A.C.326, Bowater v. Rowley Regis Corporation 1944 W.N.105, and Baker v. James Brothers & Sons Limited (1921) 2 K.B.674.

The defendant has pleaded the contributory negligence of the plaintiff. This is a doctrine based on the principle that, in deciding which of the two parties shall be at a loss resulting from a casualty, justice requires that a party who, by his carelessness, has brought the loss upon himself, shall not be entitled to throw that loss upon another. The contributory negligence, as I understand it, alleged by the defendant is, firstly, in having a slack loop in the bridle the plaintiff created an unnecessary danger, and that he further created an avoidable danger to himself in standing inside the rope when attempting to free the bridle.

The burden of proof of contributory negligence lies upon the defence and the evidence does not satisfy me that the plaintiff, by the exercise of reasonable care, could have avoided the consequences of the defendant's negligence in requiring him to work without the necessary equipment for safe logging. I am not satisfied either that the plaintiff was standing inside; on the contrary, I accept his evidence that he was standing outside the bridle. I therefore find that the plaintiff was not the author of his own wrong and guilty of contributory negligence.

The defendant fails to satisfy me that the plaintiff did not properly chock the log with the chock which he placed on the skid at the lower end of the log. It is true I think that it fell out but this, in my view, is not conclusive.

The plaintiff, in my opinion, exercised reasonable care and skill, having regard to the equipment available to him.

Some evidence was tendered relating to conversations between the plaintiff and the defendant and of the payment by the defendant to the plaintiff of £250. The determinations made make it unnecessary to deal with whether, in the circumstances, either or both these matters constituted any admission of liability.

Learned counsel, who have given the court every assistance in a case of some difficulty in regard to the facts, have both very properly agreed that, in assessing the compensation which ought to be awarded to a successful plaintiff for an injury such as the present one, some regard might be had to the amount prescribed for such a loss in a worker's compensation action in the Territory of New Guinea and this seems to me equitable. In determining the amount to which the plaintiff is entitled, I must take into consideration the amount already paid by the defendant to the plaintiff. I therefore find for the plaintiff and assess the compensation payable to him for the personal injury sustained at the sum of five hundred pounds.

Bignold J.

I fix the costs at 45 guineas to successful party.

J.

Stay of proceedings 28 days

J.