CASE NOTES

SHEEN v. FIELDS PTY LTD[1]

Personal injury in course of employment — negligence — breach of statutory duty — obligations of employer.

The Plaintiff (P) was employed by the Defendant (D) and whilst working in the course of that employment a piece of steel flew into his left eye causing blindness in that eye. P claimed damages against D for breach of statutory duty and negligence. The High Court unanimously found in favour of D. Mason, Wilson and Dawson JJ. concurred with the reasons of Gibbs C.J., whereas Murphy J. preferred to rely upon the decisions at first instance and on appeal to the Full Court of the Supreme Court of Queensland.

At the time of the accident P

> was replacing a set of bearings on a pump drive gearbox on a cane harvester. He was endeavouring to force the bearings onto the shaft by using a hammer and punch, and while he was doing so, a piece of steel came off either the punch or the bearings and penetrated his eye.[2]

Now the trial judge found that it was undesirable to use a hammer and punch for this purpose in a workshop, since to do so would cause a risk of injury to the workman and possible damage to the bearings. Further, the trial judge rejected P's evidence that the foreman instructed him to force the bearings on in that manner, and found that two acceptable methods were readily available and used in D's workshop. The trial judge concluded, as a matter of evidence, that the foreman had told P to use one of these two methods but that P disregarded that instruction and chose to use his own inherently dangerous method. Thus, it was held by the trial judge and agreed to by the Full Court of the Supreme Court that there was no basis for a finding of negligence against D.

On this negligence claim Gibbs C.J. agreed with the decisions below, holding that the injury to P was not one of a reasonably foreseeable class of injuries. The learned Chief Justice held that the foreman

> told the appellant to use either . . . [of the alternative methods] and there was evidence to support that conclusion. In those circumstances the respondent had no reason to expect that the appellant would employ a different method which was dangerous if eye protection was not used.[3]

Without wishing to generalise unjustifiably it appears that His Honour espoused the following proposition:

> Where an employer instructs his employee to perform a task in a particular manner the employer can have no liability for negligence if the employee chooses of his own accord to use a different method and thereby suffers injury.

Of course, there is nothing new in this proposition. However, common sense dictates some limitations to this proposition which, although not relevant in the facts of the case as found by the trial judge, may often be decisive. The limitations or qualifications to this proposition include:

(1) The instruction should be a clear and unequivocal direction given by a person with appropriate authority in the circumstances, and not a mere statement of wish or desire. Statements such as 'there are alternative methods' or 'I think method "X" is more appropriate' may be insufficient depending upon the tone and authority with which they were made. The proposition is not

[1] (1984) 51 A.L.R. 345. Full High Court of Australia, Gibbs C.J., Mason, Murphy, Wilson and Dawson JJ.

[2] (1984) 51 A.L.R. 345, 346 *per* Gibbs C.J.

[3] *Ibid.* 350.

necessarily inapplicable in the case of equivocal statements, but the surrounding circumstances would assume greater importance in deciding whether it applies than they do in the case of unequivocal directions — *e.g.* does this employee have a record of using his own method regardless of alternatives so that it would be unsafe for the employer to assume that he would take heed of the less than unequivocal direction given to him;

(2) the instructed method should not be unlawful;

(3) the instructed method should be reasonably and readily available in the circumstances and also in the facilities provided by the employer and it must be a method generally accepted within the trade or profession as being appropriate;

(4) the proposition would apply if the employee purported to use the instructed method but varied it so greatly, of his own accord, that it was no longer recognisable as the instructed method. Similarly the proposition would not apply if the variation was so minor and, in the circumstances, reasonable that it could still be said that the instructed method was in use. Just how great is the variation, and how reasonable considering accepted practices and other surrounding circumstances, would be a question of fact and degree; and

(5) the proposition only relates to liability for negligence, not other causes of action.

It seems that once again, given the facts in the case as found by the trial judge, the law of negligence has reflected both common sense and a result with which few laymen should be dissatisfied.

P also alleged breach of statutory duty, claiming that D failed to provide him with safety goggles. Rules made pursuant to Sections 38 and 97 of the Factories and Shops Act 1960 (Qld) required D to provide P with safety goggles if a 'hazard' existed resulting in the 'likelihood of injury' to the eyes of an employee. In particular, Clause 21 of Rule 1 provided that:

(1) Where there is a likelihood of injury to the eyes of an employee protection shall be provided in accordance with the SAA Standards for Industrial Eye Protection AS CZ7-1967 and AS Z45-1967 as amended from time to time.

(2) An employee shall wear or as the case may be use eye protection provided under the provisions of this clause.

The SAA Standards referred to make it clear that if an employee is exposed to flying particles the provision of safety spectacles is the minimum acceptable method of protection.

Gibbs C.J. then analysed the major question for determination[4]: whether there was a 'likelihood' of injury to P's eyes within the meaning of the rule. It was not disputed that D failed to provide eye protectors, and therefore if such a 'likelihood' existed D had breached the duty imposed by the rule.

As the rule prescribes a specific precaution for the safety of the employee in a case where the employer on whom the duty is laid would be bound to exercise due care in any event under the law of negligence, then Gibbs C.J. concluded that:

> the duty will give rise to a correlative private right unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears[5].

such a conclusion being based upon the High Court decision in *O'Connor v. S. P. Bray Ltd*[6]. Gibbs C.J. held that due to his assessment of the 'likelihood' of injury in the circumstances of this case it was not necessary for him to consider whether the Act and Rules were here intended to give the employee a private right; however, the Full Court of the Supreme Court assumed that such a right was intended and Gibbs C.J. expressly refused to cast any doubt on the correctness of that assumption.[7]

In determining whether or not a 'likelihood' of injury to P's eyes existed, Gibbs C.J. held that 'likelihood' in Clause 21 means:

> something less than probability but more than a remote possibility[8],

or, in the words of Deane J. in *Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees' Union*[9]:

[4] *Ibid.* 348.
[5] *Ibid.*
[6] (1937) 56 C.L.R. 464, 478.
[7] (1984) 51 A.L.R. 345, 348.
[8] *Ibid.*
[9] (1979) 42 F.L.R. 331, 346; (1979) 27 A.L.R. 367, 380.

a real or not remote chance or possibility, regardless of whether it is less or more than 50 per cent.

However, the definition of 'likelihood' does not decide the case alone, as the critical question was whether that 'likelihood' was to be judged

(i) by considering the overall activities in the factory and not merely the nature of any one task — the view taken by Demack J. in *Moscrop v. Vigilante*[10] and which he followed in the present case; or

(ii) by considering the particular task being performed by the employee in question — the view taken by the Full Court of the Supreme Court in the present case.

Gibbs C.J. answered this question succinctly, stating that:

> the question whether there is a likelihood of injury is to be asked in relation to the particular work done by the employee whose safety is to be protected. Of course, the injury may result from the work of others, as well as from the employee's own activities, and in that sense Demack J. was right in saying that the overall activities in the factory are to be considered. However, if he meant that because activities in one part of the factory created a likelihood of hazard to the eyes of employees there, an employee in another part of the factory should have worn safety spectacles, although that employee was not exposed to the hazard, I cannot agree with him. The Rules and Standards are intended to ensure the safety of the employees concerned, and not to insist on the observance of unnecessary precautions. The question is whether, in all the circumstances, there was a likelihood of injury from any cause to the eyes of the particular employee.[11]

The statement of Gibbs C.J. above indicates that in determining 'likelihood' one should consider:

(i) the hazards created by the particular work done by the employee whose safety is to be protected; and

(ii) the hazards created by the work of others and which are likely to injure the employee whose safety is to be protected.

However, one should not consider:

(iii) the hazards created by the work of others in one part of the factory and which are likely to injure the employees in that part but which are not likely to injure the employee whose safety is to be protected.

Gibbs C.J. had no problem in deciding that, given the present facts, the likelihood of injury to P's eyes was 'no more than a remote possibility'.

In assessing hazards created by the work of others the evidence showed that there were two grinding wheels in the workshop and that it was necessary for employees using those wheels to use safety spectacles, as the work on those wheels created a hazard of eye injury to those employees. However, Gibbs C.J. held that there was no evidence that those grinding wheels, or any other operation in the factory, placed P in a position of hazard while he was working at his job at the time he sustained his injury. Thus, the evidence as to the grinding wheels falls within class (iii) above and so was disregarded; and further, there was no evidence at all falling within class (ii).

As to class (i), whether the work done by P created a likelihood of hazard to P's eyes, Gibbs C.J. considered both the work as done by P and the work as D reasonably expected him to do it. It was this distinction which led Gibbs C.J. to conclude that:

> [T]he likelihood of injury must be judged in the light of the circumstances which are known, or which ought to have been known, to the employer.[12]

This proposition would be subject to qualifications similar to those mentioned above in relation to the common law of negligence. Gibbs C.J. considered class (i) above thus:

> It is clear that a workman using a hammer and punch to drive a bearing onto a shaft should wear safety spectacles, because of the danger that chips of metal may fly off. On the other hand, there is no evidence, or suggestion, that an employee who put a bearing onto a shaft by one of the two other methods suggested would be exposed to any risk from flying metal. If the appellant had performed his task in accordance with the method which his employer expected him to adopt, he would not have been at risk. The likelihood of injury must be judged in the light of the circumstances which are known, or which ought to have been known, to the employer on whom the duty is cast. It would be

[10] Unreported, Supreme Court of Queensland.
[11] (1984) 51 A.L.R. 345, 349.
[12] *Ibid.*

> unreasonable to construe the rule as casting an obligation on an employer to protect his employee from the consequences of his own independent decision to adopt a dangerous method of working which is different from the method he was instructed to adopt unless the employer could reasonably be expected to foresee that the employee might act in this way.[13]

Gibbs C.J. concluded this matter in a way similar to his conclusion on the common law question:

> In the present case, if the appellant had done the work as the respondent expected him to do it, there would have been no likelihood of injury to his eyes.[14]

Note that his Honour also commented that there was no evidence in support of a finding that D should have known that P would do the work in the way in which he in fact did it. Thus, Gibbs C.J. seems to accept the view, or at least not to reject the view, that if an employer instructs his employee to use a certain method of work but knows or ought reasonably to know — due to past experience with this employee, or the unavailability of the instructed method, *etc.* — that the employee will do the work in some other way which will expose the employee to the likelihood of injury, then the employer is bound to provide for the employee's safety. Of course, a distinction would need to be drawn between the case where the employer knows or ought reasonably know that the employee will not use the instructed method but will use another specific method and the case where the employer is unaware of the alternative method which will be used by the employee. The circumstances, including the strength of the employer's knowledge that the employee will not follow instructions, will determine whether and to what extent the employer in the latter case would be bound to inquire into and assess the alternative method to be used by the employee and provide for the employee's safety in relation to that method. At any rate, it seems that whether there is the likelihood of injury to a particular employee will be determined not only in light of the instructed method of work to be used by the particular employee and other instructed methods of work to be used by other employees and which would create a risk of injury to the particular employee, but alternatively, in light of the method of work which the employer knows or ought reasonably to know the particular employee will use and other methods of work which the employer knows or ought reasonably to know other employees will use and which would create a risk of injury to the particular employee. This is consistent with my previous discussion in relation to the common law of negligence, especially qualification (1) to the proposition there discussed.

In the end result then, Gibbs C.J. concluded that there had been no breach of statutory duty. His Honour's conclusion was based primarily upon the fact that the relevant statutory provision sought to cover the situation where 'there is a likelihood of injury to the eyes of an employee', and upon his Honour's subsequent opinion that, considering only the circumstances which are known, or which ought to have been known, to the employer, the work method which the employer reasonably expected the employee to use did not involve any such likelihood of injury.

Two further observations warrant some comment.

First, one can ask whether the decision of the High Court conforms with the general statement of principle first enunciated by Lord M'Laren in *Bett v. Dalmeny Oil Co.*[15] and later accepted in cases such as *Lochgelly Iron and Coal Company Limited v. M'Mullan*[16] and *Wilsons and Clyde Coal Company Limited v. English*[17], that the obligation of an employer, whether in assessing the tort of negligence or the tort of breach of statutory duty, is threefold — 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision'.[18] Whilst the issues of adequate material and proper system appear to have been adequately covered in the judgment,[19] there is no direct indication that the employer provided competent staff or effective supervision. If one can assume that the foreman mechanic was competent in the area of the employee's work then the criterion of 'competent staff' has no great relevance to this case, as no other staff were relevantly involved. However, the criterion of 'effective supervison' has obvious importance in a case of physical injury

[13] *Ibid.*
[14] *Ibid.*
[15] (1905) 7F. 787.
[16] [1934] A.C. 1.
[17] [1938] A.C. 57.
[18] (1905) 7F. 787, 790.
[19] (1984) 51 A.L.R. 345, 346, 349.

caused by the method of work used, especially when, as in this case, what the employer knew or 'ought to have known' assumed such weight. The facts appearing in the judgment do not conclusively determine this issue one way or the other, and the learned Chief Justice did not directly refer to it. It is true that

> [t]he learned trial judge found that Mr Leach told the appellant to use either the press or the oil, and that the appellant chose to use his own inherently dangerous method in disregard of the foreman's instructions.[20]

However, there is an obvious distinction between pre-work instruction and subsequent supervision whilst that work is being actually carried on. One may assume that if such supervision had occurred then the foreman, or other appropriate staff member, may have had a chance to prevent the appellant using his inherently dangerous method. Just what degree of supervison is 'effective' or reasonable must, of course, depend on the circumstances, but the High Court in this case declined to direct any attention to this issue.

Secondly, as a broader policy issue, one can ask whether it is legally and socially desirable to use as the yardstick for injury compensation the compliance or otherwise with statutory or regulatory provisions directed primarily at the prevention of such injuries rather than at the remedies available when such injuries occur. This question is part of the much larger question concerning the merits of the present state of the law relating to compensation for personal injuries. This question extends beyond the scope of this case note and the author therefore declines to embark upon any consideration of it.

PETER ICKERINGILL*

DEPUTY COMMISSIONER OF TAXATION v. STEWART[1]

Sales Tax Assessment Act — exemption for public benevolent institution — definition of goods.

The respondents (R) conducted a business of selling lottery tickets to sporting and charitable bodies. From September, 1977 R also supplied these bodies, free of charge, with a small machine which dispensed the tickets mechanically upon the insertion of a twenty cent coin. The machines were supplied on condition that only tickets supplied by R would be dispensed from them. The machines tended to increase the demand for lottery tickets which R sold at a profit to the bodies using those machines, and this explained R's willingness to supply them free of charge. However, twenty-four such machines were supplied to the Adelaide Children's Hospital and the tickets used in those machines were supplied free of charge by R, as a charitable gift.

The applicant (A) claimed sales tax and additional tax in respect of all the machines supplied by R between September, 1977 and November, 1979. The Court at first instance held that such tax was assessable on all the machines supplied. On appeal to the Full Court of the Supreme Court of South Australia it was held that the machines supplied to public benevolent institutions were exempt from the tax. A appealed from that decision to the High Court.

It was held by Gibbs C.J., Brennan, Deane and Dawson JJ. (Murphy J. dissenting), that sales tax was not payable in respect of the machines supplied to the abovementioned Hospital, and thus the appeal was dismissed.

Section 17(1) of the Sales Tax Assessment Act (No. 1) 1930 (Cth) provides that:

> Subject to, and in accordance with, the provisions of this Act, the sales tax imposed by the Sales Tax Act (No. 1) 1930 shall be levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use.

[20] *Ibid.* 346.

* B. Comm. (Hons); LL.B. (Hons).

[1] (1984) 58 A.L.J.R. 191, Full Court of the High Court of Australia, Gibbs C.J., Murphy, Brennan, Deane and Dawson JJ.