IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GENERAL LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-17-01313

BULENT AYCICEK — Plaintiff

v

FLOWLINE INDUSTRIES PTY LTD
(ACN 004 871 489) — Defendant

JUDGE:	HIS HONOUR JUDGE BROOKES
WHERE HELD:	Melbourne
DATE OF HEARING:	8, 9, 13, 14, 15, 16, 19, 20, 21, 22 and 23 March 2018
DATE OF RULING:	18 April 2018
CASE MAY BE CITED AS:	Aycicek v Flowline Industries Pty Ltd (ACN 004 871 489) (Ruling)
MEDIUM NEUTRAL CITATION:	[2018] VCC 477

RULING

Subject:	PRACTICE AND PROCEDURE
Catchwords:	Civil jury trial – verdict of negligence and contributory negligence – motion by plaintiff for judgment notwithstanding the jury verdict (*non obstante veredicto*) – test to be applied – factors to be considered
Cases Cited:	*King v Amaca Pty Ltd* [2011] VSC 422; *Naxakis v Western General Hospital* [1999] HCA 22; *Mayhew v Lewington's Transport Pty Ltd* [2010] VSCA 202
Ruling:	Application to set aside jury's verdict, *non obstante veredicto*, with respect to contributory negligence dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Richards QC with Ms M Yerusalimsky	Zaparas Lawyers Pty Ltd
For the Defendant	Mr D Curtain QC with Mr M Clarke	Wisewould Mahony

HIS HONOUR:

1 On 23 March 2018, the jury in this matter delivered a verdict by way of answers to the following questions:

Question 1: Was there negligence on the part of the defendant which was a cause of injury, loss and damage to the plaintiff?

Answer: Yes.

Question 2: Was there a breach by the defendant of the *Occupational Health and Safety (Manual Handling) Regulations* 1999 (up to 30 June 2007) which was a cause of injury, loss and damage to the plaintiff?

Answer: Yes.

Question 3: Was there a breach by the defendant of the *Occupational Health and Safety Regulations* 2007 (after 1 July 2007) which was a cause of injury, loss and damage to the plaintiff?

Answer: No.

Question 4: If "Yes" to Question 1 and/or Question 2 and/or Question 3, in what sum do you assess the plaintiff's:

a. pain and suffering damages;

b. economic loss damages.

Answer: 4a: $148,000

4b: $255,000.

Question 5: Was there any negligence on the part of the plaintiff which was a cause of his injury, loss and damage?

Answer: Yes.

Question 6: If "Yes" to Question 5, by what percentage is it just and equitable to reduce the plaintiff's claim on account of the plaintiff's own share in the responsibility for the loss and damage?

Answer: Thirty-eight per cent.

2 Following the verdict, Senior Counsel for the plaintiff moved for a declaration *"non obstante veredicto"* with respect to the jury's finding of contributory negligence, having obtained leave prior to verdict.

3 As traversed on the application, the principles upon which such a declaration could be made are conveniently set out by Kyrou J in *King v Amaca Pty Ltd* (under New South Wales Administered Winding Up)[1] as follows:

> "7. In order for a defendant's application for judgment notwithstanding the jury's verdict to succeed, the defendant must establish that there was no evidence upon which a reasonable jury, properly directed, could return a verdict for the plaintiff.
>
> 8. Where there is evidence to support the jury's verdict, the verdict cannot be disregarded even if the trial judge were strongly against the jury's conclusion.
>
> 9. A trial judge hearing an application for judgment notwithstanding the jury's verdict should determine the application on the evidence most favourable to the party that carries the onus of proof.
>
> 10. A trial judge should proceed with great caution and only exercise the power to give judgment in disregard of the jury's verdict in the clearest of cases."

4 These principles were more expansively considered by the High Court in *Naxakis v Western General Hospital*,[2] where Gaudron J stated:

> "It is well settled that, where there is a jury, the case must be left to them '[i]f there is evidence upon which [they] could reasonably find for the plaintiff', or, as was said by Hayne JA in the Court of Appeal, the case can be taken away only if 'there was no evidence on which the jury could properly conclude that the plaintiff had made out his case'. That does not mean that the case must be left to the jury if the evidence is 'so negligible in character as to amount only to a scintilla'. However, if there is evidence on which a jury could find for the plaintiff, it does not matter that there is contradictory evidence or, even, as was said by Harper J at

1 [2011] VSC 422 (31 August 2011)
2 [1999] HCA 22

first instance, 'that the overwhelming body of evidence points to the [contrary]'."[3]

5 Further, McHugh J ruled as follows:

> "... By the middle of the last century, however, it had become settled doctrine that a 'scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence'. So, when the defendant asks the judge to take away an issue of negligence from the jury on the ground that there is no evidence of negligence, the question is, as Willes J said in a non-negligence context, 'not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established'.
>
> When the defendant submits that there is no evidence to go to the jury, he or she raises a question of law for the judge to decide. The question for the judge is not whether a verdict for the plaintiff would be unreasonable or perverse but whether the plaintiff has adduced evidence which, if uncontradicted, would justify and sustain a verdict in his or her favour. An appellate court may later be able to set aside the verdict on the ground that it is unreasonable or against the weight of the evidence. But the function of the trial judge is more circumscribed.
>
> In determining whether there is evidence upon which the jury could properly find for the plaintiff, the trial judge must consider those parts of the evidence which, if accepted, could reasonably establish negligence - whether directly or inferentially. If such evidence has been tendered, it matters not that other evidence has been tendered that may contradict it even if the contradictory evidence comes from a witness, part of whose evidence is relied on to prove the negligence. ... ."[4]

6 Additionally, Kirby J stated as follows:

> "Special caution is needed before withdrawing from the jury the resolution of a dispute of facts where the case is not one of direct proof but of the reasonable and definite inferences which are to be derived from the evidence given. Because claims in negligence quite often depend upon circumstantial evidence and the inferences therefrom, once some evidence is adduced which, if accepted, could found a verdict in favour of the plaintiff, it requires the clearest case to support the conclusion that, for legal purposes there is no evidence at all or that the jury could not reasonably accept such evidence as exists or act upon it."[5]

7 The particulars of contributory negligence appended to the defendant's Defence state as follows:

> "(a) failing to seek assistance where the plaintiff knew or ought to have known that assistance was needed;

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3 *Naxakis v Western General Hospital* (*ibid*) at paragraph [16]
4 *Naxakis v Western General Hospital* (*ibid*) at paragraphs [39], [40] and [41]
5 *Naxakis v Western General Hospital* (*ibid*) at paragraph [66]

(b) if the work caused him any difficulty then failing to notify his superior of the same or failing to do so within a reasonable time;

(c) lifting the said crate when he knew or ought to have reasonably known it was unsafe for him to do so;

(d) if the duties carried out by the plaintiff caused him pain or injury (which is denied) then he:

(i) failed to promptly complain of the same;

(ii) failed to promptly seek alternative duties;

(iii) failed to promptly seek lighter duties;

(iv) failed to promptly seek medical treatment;

(v) failed to promptly cease those duties."

8 The areas of dispute between the plaintiff and the defendant, identified in the respective submissions, concentrated on evidence with respect to:

(a) the circumstances surrounding the lifting of a 60 to 65-kilogram crate on 23 August 2005; and

(b) the circumstances under which the plaintiff continued at work, principally between 2006 and 2012.

9 It should be stated that the defendant called no evidence on liability, and the parties concentrated on the plaintiff's own evidence with respect to the issue of contributory negligence.

10 The plaintiff admitted in evidence that he had been inducted on occupational health and safety issues at the commencement of his employment in 2002. It was part of this induction that he was told not to lift, by himself, weights in excess of 20 kilograms.[6]

11 The plaintiff gave uncontradicted evidence that prior to him lifting the 60-kilogram weight by himself shortly before "knock off time" on 23 August 2005, he:

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6 Transcript ("T") 201, Lines ("L") 20-23; T208, L29 – T209, L1; and T209, L5

(a) had not appreciated its actual weight and no-one had told him of its actual weight;[7]

(b) had seen other people perform the same task;[8]

(c) himself performed the same manoeuvre previously;[9]

(d) had not been told, specifically, to lift such a crate by himself;[10]

(e) if he had known that it weighed in the vicinity of 60 kilograms, would not have lifted it.[11]

12 The plaintiff gave further uncontradicted evidence that on his return to full-time duties in 2006:

(a) he complained to persons in authority, to wit, Mr P Butler[12] and Mr Stan Muscat,[13] that weights he was lifting, and the work he was performing, were causing him pain;

(b) responses from the former were to the effect he would "joke around" or say "bullshit";[14] and from the latter that he "would sometimes change the job".[15]

13 It was in this context that Senior Counsel for the defendant submitted that the jury's verdict was consistent with the following finding:

(a) the plaintiff knew, or ought to have known, that he was acting contrary to instructions given at the time of induction in 2002, in that he was not to attempt lifting weights above 20 kilograms by himself;

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7 T142, L22-23; T204, L14-19; T207, L31 and T209, L5
8 T142, L31 – T143, L24; T144, L17-24 and T403
9 T143, L22
10 T208, L30
11 T207, L31 – T208, L4
12 T155, L1-20; T227, L27 – T228, L6
13 T238, L3-9; T228, L5-7
14 T155, L1-20
15 T228, L5-8

(b) the plaintiff knew or ought to have known that the weight of the crate, although not specifically told, was well in excess of 20 kilograms and was therefore unsafe to lift;

(c) the plaintiff could have, and should have, either asked for assistance, and, if none available, leave the weight to be lifted by workers in the next shift;

(d) the plaintiff had never been told to specifically lift such a crate by himself.

14 Senior Counsel for the plaintiff submitted that, taking the best view of the evidence for the defendant:

(a) the system of a one-man lift of the crates was at least tolerated by the employer;

(b) the system of a one-man lift of the crates was inherently unsafe and consistent with the jury's answers to Questions 1 and 2;

(c) the plaintiff gave uncontradicted evidence that he had not been told, and did not know, the weight of the crates.

15 During the charge, the jury was directed, without exception, that "conduct on the part of the plaintiff that amounts to mere inadvertence, inattention, lapse in concentration or misjudgement does not amount to contributory negligence".[16]

16 Further, the jury had been directed earlier, once again without exception, that "the employer's duty is not just to set up a safe system of work, it is to maintain and enforce it. It must take reasonable steps to make sure employees follow and adhere to the system. Action and prevention is part of an employer's duty to its employees."[17]

17 The jury were also charged, without exception, to the following effect:

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16 T957, L19-23
17 T919, L7-11

> "I also direct you that the duty of the defendant to provide its employees with a safe place of work and a safe system of work is a duty which requires the defendant to take into account the possibility of inadvertence, inattention and misjudgement on the part of its employees, that is it is obliged to take into account that its employees are not always perfect and have such lapses, right."[18]

Findings with respect to lifting the crate

18 The plaintiff was instructed at his induction in 2002 not to lift weights in excess of 20 kilograms.

19 The defendant thereafter tolerated a system whereby workers were permitted to lift weights of approximately 60 kilograms by themselves.

20 The only inference open on that evidence, and consistent with the jury's verdict on Questions 1 and 2, is that the employer failed to take reasonable steps to enforce a safe system of work.

21 The plaintiff's action in lifting the crate was consistent with the defendant's system and his actions could probably be described as "mere inadvertence, inattention, lapse in concentration or misjudgement".[19]

22 It follows that, in my view, a finding of contributory negligence was against the weight of evidence.

23 However, I am conscious that it is not my role to act as an appellate court. In particular, the dicta of McHugh J cited in paragraph 5 above to the effect:

> "An appellate court may later be able to set aside the verdict on the ground that it is ... [unreasonably] ... against the weight of the evidence. But the function of the trial judge is more circumscribed."

24 Accordingly, in all the circumstances, I consider that the jury may have inferred that the plaintiff ought to have known that the weight of the crate was such that it was not required of him to attempt a solo lift of same, ten minutes prior to "knock off", when there was no other worker available to assist him; or that the task could've waited untill the commencement of the next shift and

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18 T920, L13-20

19 See *Mayhew v Lewington's Transport Pty Ltd* [2010] VSCA 202

assistance sought, or that the next workers on that line could safely lift and remove the crate themselves.

25 In those circumstances, I consider that there was an inference open upon which the jury could return a verdict for the defendant to the effect that the plaintiff's own negligence was a cause of injury, loss and damage to himself.

Findings with respect to failing to cease work or demand lighter duties

26 Although not strictly necessary to decide this matter, the response by Mr Butler, to the effect to get on with his work, and that of Mr Muscat, to the effect that sometimes he changed the job and sometimes he did not, did not reasonably require the plaintiff to cease work or demand lighter duties.

27 It follows that the plaintiff's application is dismissed.

28 I will hear the parties as to consequential orders.

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