[HIGH COURT OF AUSTRALIA.]

GORMAN AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

WILLS AND WIFE . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 6, 7, 10, 19.

Griffith C.J., Barton and Isaacs JJ.

Negligence—Dangerous condition of staircase on business premises—Liability of lessee—Effect of covenant by lessor to keep in repair—Invitation to customers to use staircase—Insufficient lighting—Evidence—Admissibility.

The defendants were lessees of the ground and first floors of a building which they occupied for the purpose of their business. The only means of communication between the two floors on the premises was by a staircase leading from a room on the ground floor, but the lease authorized the lessees to use another staircase in an adjoining building for access to their premises above the ground floor. The building consisted of more than two floors but it did not appear whether the other floors were occupied or not. The lease, which contained a covenant by the lessees to keep the premises in repair, did not in terms include the staircase in the building. This staircase was used daily by the lessees and their servants. The female plaintiff, having called to see the lessees on business, was invited by one of their servants to go from one floor to another by the staircase, and, while doing so, she tripped on one of the steps, fell down, and was injured. Immediately afterwards part of the lead covering upon the step where she had fallen was found to have been pushed out so as to project beyond the edge of the step.

The plaintiffs brought an action for negligence against the lessees to recover damages for the injuries the female plaintiff had sustained in the fall. The defendants denied the negligence and denied that the staircase was in their possession or control. There was no direct evidence as to the condition of the lead on the step immediately before the accident, but some evidence was given that the staircase was insufficiently lighted.

Held, that, on these facts, there was evidence to go to the jury that the staircase was in the possession or control of the defendants in such a way as to make them responsible for its condition to persons invited by them to use it; and also evidence from which the jury might infer that the accident was caused by a defect which the defendants knew, or ought, if they had exercised reasonable care, to have known to exist. The duty of the defendants as occupiers was, not to guarantee the safety of the premises, but to use reasonable care to prevent danger to persons coming there by invitation and using the premises in any way that was reasonably to be expected. Even if it was the duty of the lessor, as between him and the lessees, to keep the premises in repair, that fact would not qualify the duty of the lessees, though it might be relevant as evidence on the question whether the duty had been performed.

Held, further, that the condition of the staircase as to light being a relevant and material fact affecting the nature and extent of the duty of the lessees, evidence that several weeks after the accident an architect examined the premises and found that their structural character was such that that particular part of the staircase would not have received much light, was admissible, subject to a proper foundation being laid for it by showing that the conditions as to light were the same at the time of the examination as at the time of the accident.

Decision of the Supreme Court: *Wills* v. *Gorman*, (1906) 6 S.R. (N.S.W.), 472, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action of negligence brought by the respondents against the appellants. The latter were auctioneers and land and estate agents carrying on business in certain premises in Sydney, and the declaration alleged that on these premises there was a staircase leading to certain offices of the appellants, which were also part of the premises, and that the appellants negligently allowed the staircase to be insufficiently lighted, and the stairs to become and remain dangerous to persons using them, and certain lead nosing covering the stairs to become worn and loosened and to project, by reason whereof the female respondent, while using the stairs at the invitation of the appellants and on business concerning them, fell and was seriously injured.

The appellants, by their pleas, said they were not guilty, and denied that they were in possession of the staircase or using it in their business, and that the staircase was on their premises as alleged, and issue was joined on these pleas.

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At the trial before *Pring* J. a nonsuit was moved for on the grounds that there was no evidence of an obligation on the part of the appellants to repair the staircase, inasmuch as it was not in their exclusive possession or control, and that there was no evidence of negligence. The nonsuit was granted. The Full Court, however, made a rule absolute for a new trial, on the ground that there was evidence of negligence to go to the jury, and that the staircase was in the possession and control of the appellants: *Wills* v. *Gorman* (1).

From this decision the present appeal was brought by leave of the High Court.

The material portions of the evidence appear in the judgments.

J. L. Campbell, for the appellants. There was no evidence of any breach of duty on the part of the appellants. The evidence as to the condition of the staircase and the circumstances surrounding the accident was equally consistent with there having been no negligence as with the existence of negligence. There was no evidence as to how or when the condition of the lead, as seen after the accident, arose. This is not a case where the maxim *res ipsa loquitur* applies. There must be some positive reason why an unfavourable inference, rather than a favourable one, should be drawn. Assuming that the condition of the lead was defective, the defect was not shown to be such that the appellants could by reasonable care have discovered it. [He referred to *Mountney* v. *Smith* (2); *Wakelin* v. *London and South Western Railway Co.* (3); *Cotton* v. *Wood* (4).]

[ISAACS J. referred to *Mersey Docks and Harbour Board* v. *Gibbs* (5).]

The only duty of the owner of premises is to warn the visitor of any dangerous place then existing. But in this case it is consistent with the plaintiffs' evidence that the appellants might have examined the step the moment before the accident without discovering anything to suggest danger. [He referred to *Indermaur* v. *Dames* (6); *Crafter* v. *Metropolitan Railway Co.* (7);

(1) (1906) 6 S.R. (N.S.W.), 472.
(2) 1 C.L.R., 146.
(3) 12 App. Cas., 41, at p. 45.
(4) 8 C.B.N.S., 568.
(5) L.R. 1 H.L., 93.
(6) L.R. 1 C.P., 274, at p. 289.
(7) L.R. 1 C.P., 300.

Longmore v. *Great Western Railway Co.* (1); *Pollock on Torts*, 5th ed., pp. 427, 518; *Toomey* v. *London, Brighton and South Coast Railway Co.* (2); *Smith* v. *Great Eastern Railway Co.* (3); *Briggs* v. *Oliver* (4).] The Court must be satisfied that a jury could reasonably infer negligence: *Metropolitan Railway Co.* v. *Jackson* (5).]

[BARTON J. referred to *Cornman* v. *Eastern Counties Railway Co.* (6).

ISAACS J. referred to *Kearney* v. *London, Brighton and South Coast Railway Co.* (7).]

Again, there was no evidence of any duty owed by the defendants to the plaintiffs. The plaintiffs were bound to prove that the defendants exercised such a possession or control over the staircase as imposed upon them a duty to repair it or to examine it for the purpose of ascertaining its condition as regards repair. The lease recognized the existence of other portions of the building not let to the defendants, the occupants of which would have an equal right to make use of the staircase. The lessor was bound to keep it in repair, and the defendants were entitled to assume that he had done so. The defendants made no representation that the staircase was in a safe condition. The lessor made whatever representation was made, because the duty to repair lay upon him.

[BARTON J.—Suppose there was no exclusive control and no duty on the part of the defendants to repair. If they, as occupiers, invite customers to use the stairs, are they not all the more bound to warn them of possible danger?]

They were only bound to warn them of danger of which they knew or ought to have known. [He referred to *Miller* v. *Hancock* (8); *Birmingham, Dudley and District Banking Co.* v. *Ross* (9); *Russell* v. *Watts* (10); *Wilkinson* v. *Fairrie* (11); *Pearson* v. *Spencer* (12).]

[ISAACS J. referred to *Paddock* v. *North Eastern Railway Co.* (13); *Union Lighterage Co.* v. *London Graving Dock Co.* (14).]

(1) 19 C.B.N.S., 183.
(2) 3 C.B.N.S., 146.
(3) L.R. 2 C.P., 4.
(4) 4 H. & C., 403.
(5) 3 App. Cas., 193.
(6) 4 H. & N., 781; 29 L.J. Ex., 94.
(7) L.R. 6 Q.B., 759.
(8) (1893) 2 Q.B., 177.
(9) 38 Ch. D., 295.
(10) 10 App. Cas., 590.
(11) 1 H. & C., 633.
(12) 1 B. & S., 571; 3 B. & S., 761.
(13) 18 L.T.N.S., 60.
(14) (1902) 2 Ch., 557.

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L. Armstrong (*Perry* with him), for the respondents. The staircase was in the exclusive control of the defendants. There is nothing in the evidence to suggest that any other persons used or had a right to use it. The mere existence of a floor above those let to the defendants proves nothing. The staircase was contained within the four walls of the part occupied by the defendants, and was not expressly excluded from the lease. [He referred to *Martyr* v. *Lawrence* (1).]

Even if the defendants only had an easement over the staircase their duty to persons whom they invited to use it was the same: *John* v. *Bacon* (2). The occupier impliedly promises to persons whom he invites there on business that they will incur no risk that reasonable inspection and diligence can prevent. It is immaterial that another person was bound to repair the stairs. [He referred to *Francis* v. *Cockrell* (3); *The "Moorcock"* (4); *The "Apollo"* (5); *The "Calliope"* (6); *Hyman* v. *Nye* (7); *Winch* v. *Conservators of the Thames* (8); *Lax* v. *Corporation of Darlington* (9).] There was evidence from which the jury might have inferred that the defendants knew or ought to have known of the existence of the danger. Evidence as to the condition of the staircase in respect of lighting should have been admitted. The duty of the occupier is the more imperative if the place to which the customer is invited is dark or badly lighted. The jury were entitled to use their knowledge of common things and draw an inference as to the cause of the lead covering being in the condition in which it was proved to be: *Fenna* v. *Clare & Co.* (10); *Simson* v. *London General Omnibus Co.* (11); *Smith* v. *London and South Western Railway Co.* (12). From the condition of the lead after the accident they might well have concluded that it was worn through or nearly through before the accident took place. [He referred to *Doe* v. *Fuchau* (13); *Doe* v. *Young* (14).] If they came to that conclusion they might fairly have thought that the defendants knew, or should have known, of the state of the

(1) 2 DeG. J. & S., 261, 347.
(2) L.R. 5 C.P., 437.
(3) L.R. 5 Q.B., 501.
(4) 14 P.D., 64, at p. 70.
(5) (1891) A.C., 499.
(6) (1891) A.C., 11.
(7) 6 Q.B.D., 685.
(8) L.R. 7 C.P., 458; L.R. 9 C.P., 378.
(9) 5 Ex. D., 28.
(10) (1895) 1 Q.B., 199.
(11) L.R. 8 C.P., 390.
(12) L.R. 6 C.P., 14.
(13) 15 East., 286.
(14) 8 Q.B., 63.

stairs, and were guilty of negligence in failing to warn the female plaintiff.

If a new trial is granted, the order as to costs should allow the plaintiffs to have their costs of the first trial if they succeed in the second. The Supreme Court held that they could not make such an order, being bound by Rule 159. They did not exercise their discretion, and therefore there can be no objection to their order being varied by making the costs of the first trial costs in the cause. [He referred to *Sydney Harbour Trust* v. *Warburton* (1); *Robertson* v. *Robertson* (2); *Bew* v. *Bew* (3); *Green* v. *Wright* (4); *Field* v. *Great Northern Railway Co.* (5); *Fletcher* v. *London and North Western Railway Co.* (6).]

J. L. Campbell, in reply. The lessor must be taken to have reserved the staircase from the lease to the defendants. That being so, it was his duty to keep it in repair, and there was no duty on the defendants to warn a customer unless they knew of the danger. The accident was not one which in the ordinary course of things was likely to occur. [He referred to *Welfare* v. *London, Brighton and South Coast Railway Co.* (7); *Kiddle & Son* v. *Lovett* (8).]

[BARTON J. referred to *Ford* v. *Metropolitan and Metropolitan District Railway Companies* (9).

ISAACS J. referred to *Wheeldon* v. *Burrows* (10).]

The Supreme Court, in the exercise of its discretion, refused to make any order as to costs, and that discretion should not be interfered with: *International Paper Co.* v. *Spicer* (11).

[GRIFFITH C.J.—In that case the Supreme Court exercised its discretion, but in the present case it seems to have thought it had no authority to do so.]

Cur. adv. vult.

December 19.

GRIFFITH C.J. In this case the plaintiffs James Wills and his wife sued the defendants to recover damages for an alleged

(1) 23 N.S.W. W.N., 53.
(2) 6 P.D., 119.
(3) (1899) 2 Ch., 467.
(4) 2 C.P.D., 354.
(5) 3 Ex. D., 261.
(6) (1892) 1 Q.B., 122.
(7) L.R., 4 Q.B., 693.
(8) 16 Q.B.D., 605.
(9) 17 Q.B.D., 12.
(10) 12 Ch. D., 31.
(11) 4 C.L.R., 739.

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breach of duty on the part of the defendants, in allowing a staircase on premises under their control, to which the plaintiffs were invited on the defendants' business, to be in such an unsafe condition that the female plaintiff tripped and fell down the staircase, and was injured. The defendants pleaded not guilty, and denied that the staircase was on their premises or in their possession, and that they were using it in their business.

The facts are that the female plaintiff went to the defendants' premises in Sydney, and saw one of them on a matter connected with their usual business. The defendants were occupying under lease the ground floor of a building in Pitt Street, and also the first floor. The only access to the first floor from the ground floor on these premises was by a staircase and stairs leading from a large room occupying the whole ground floor. One of the defendants, whom the female plaintiff wished to see, had an office on the first floor. The building consisted of more than two floors, but it does not appear whether the second floor was occupied or not. The lease from the lessors to the defendants authorized the defendants and their customers to use another staircase in an adjoining building for access to the defendants' premises above the ground floor. On these facts the defence was raised that the defendants were not in possession of the staircase leading from the large room on the ground floor to the first floor. The lease did not in terms include this staircase. The female plaintiff having gone to the defendants' place of business and asked to see one of the defendants, was invited by one of the defendants' servants to go to the first floor by this staircase. She accordingly went up, saw him, and came down again. On her way down she tripped on the staircase and fell. There was evidence that after she fell she got up and looked at the place where she had tripped, and found that part of the lead covering upon one of the stairs was projecting or standing out about an inch from the lip of the step, which I understand to mean, though that was of course a question for the jury, that that part of the lead which lay along the outer edge of the stair had in some way been pushed out beyond the edge of the stair; whether it was broken or formed a loop does not appear. Evidence was given that the staircase was in fact badly lighted. Evidence

tendered to show that the structural character of the place was such that that particular part of the staircase would not receive much light, was rejected by the learned Judge. Those are substantially the facts of the case. On that evidence a nonsuit was moved for on the ground that there was no evidence of negligence, and no evidence that the defendants were in possession of the premises, and the learned Judge granted a nonsuit, on the ground that the defendants were not shown to be in possession of the premises or of the staircase in such a way as to impose upon them any legal responsibility for their condition.

The law on the subject is laid down in the well-known case of *Indermaur* v. *Dames* (1) by *Willes* J., who said, after pointing out the difference between voluntary visitors to a place, who may be expected to take care of themselves, and customers invited to the premises for the purpose of the business carried on by the defendants:—"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." In the Exchequer Chamber on appeal that passage was quoted by *Kelly* C.B. in delivering judgment as stating the law correctly (2). The duty, therefore, of the person occupying the premises is not to guarantee the safety of the place, but to use reasonable care to prevent danger to visitors who may be using the premises in any way that is reasonably to be expected. And the danger with respect to which he must take care is that of which he knows or ought to know the existence. Therefore, the omission to inform himself of the danger, or actual ignorance of its existence, is not an excuse. It follows that, if the occupier gives warning to the customer of the existence of the danger, that is evidence of the use of reasonable care to prevent danger to persons using the premises with reasonable care. If the occupier does not give

(1) L.R. 1 C.P., 274, at p. 288. (2) L.R. 2 C.P., 311, at p. 313.

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warning of danger of which he knows, or ought to know, that is evidence of want of reasonable care to prevent such danger.

The obligation arising from the occupation, the existence of a contract between the occupier and another person does not qualify it. If such a contract exists, it is only relevant evidence on the question whether the duty has been performed, that is, whether the occupier has in fact taken reasonable care. If, as suggested, the occupier relied upon the promise of third persons to see to the condition of the premises, or upon their assurance that they would be kept in proper condition, that may be evidence of the performance of the duty, but the character of the duty is not altered. In the case of a dark passage the duty of a person inviting a customer to use it is the same; he must use reasonable care to prevent danger. But the care that would be sufficient in the case of a well lighted place would not necessarily be sufficient in the case of a dark one. The degree of care necessary varies with the extent of the darkness. If the place were very dark indeed, the duty would probably extend so far as to compel the occupier to ascertain that the place was reasonably safe for persons using it in the dark with a reasonable regard for their own safety. Whether the proper amount of care under the circumstances has been used is a question for the jury. The case of *Wilkinson* v. *Fairrie* (1), which was the only case cited as to a dark passage, has no relevancy to the case of a person invited to go there.

That being the law applicable to the case, what were the facts? The jury might, on the evidence, have thought that the lead on the stair which the plaintiff was invited to use was worn so thin that a person going down the stair carelessly might break or displace the lead, and so make the staircase dangerous. That was an inference which they might have drawn from the state of things described as existing immediately after the accident. They might also have thought that, if the place had been well lighted, the state of the lead would have been obvious to anyone using such a staircase with reasonable care. It appeared from the evidence that the defendants or their clerks must have used the staircase almost daily, because one of the defendants had his

(1) 1 H. & C., 633; 32 L.J., Ex., 73.

office at the top of them. They ought, therefore, to have known the actual condition of the stairs, and as regards their duty to a person invited there, they are in no better position than if they had actually known it. If, then, the lead was in such a condition as alleged, there was evidence not only of a duty on the part of the defendants, but also evidence of a breach of the duty to take reasonable care to prevent damage from an unusual danger of which they would have known or ought to have known if they had looked at the staircase in a proper condition of light, but also of a breach of that duty. The condition of the staircase as to light was a relevant and material fact, and the evidence tendered on that point should have been received. On both grounds, therefore, there should be a new trial; there was evidence of negligence to go to the jury, and the evidence as to lighting was wrongly rejected. I am of opinion, for these reasons, that the nonsuit was rightly set aside, and the appeal therefore fails.

BARTON J. It is necessary to assume, merely for the purpose of this appeal, that the evidence for the plaintiffs was correct in fact. That being so, certain questions suggest themselves. The first is: what was the condition of the staircase? Well, as to that, it was a staircase covered with sheet lead. The female plaintiff swore that the lead was in one place worn away and standing out about an inch from the lip of the step. I will take it that the statement that the lead was worn away was merely opinion or inference, because there is nothing in the evidence to indicate that the witness even observed the condition of the stair until after she had met with the accident. But it is obvious, if merely from what has happened, that the lead was in a weak or worn condition, and, in the view I take, as I shall presently show, it was not necessary, to establish liability, that the danger should have been actually observed by the defendants, or that the lead should have been so worn through as to show the step of the stairs. It is sufficient to say that there was this evidence of its worn state, whether the lead was worn through or not. Was there, then, in fact such a danger, or so probable a danger, as to constitute an actual risk to strangers passing up or down?

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There was no evidence, it is true, of the actual condition, as to whether the lead was worn through or not up to the time when the accident occurred, and it is only fair to the defendants to take it that the projection of the lead which was afterwards observed was caused, or, at any rate, probably caused by the female plaintiff in the act of descending the stairs. Now, this staircase was the main communication between the two flats or floors which the defendants occupied under their lease. There was necessarily a daily traffic between the two floors in which the business was carried on, by the partners and their clerks. One partner had a room at the top of the stairs and was no doubt going up and down daily. So that there was on the part of the defendants an opportunity of observation such as could not possibly occur on the part of the female plaintiff. There was very little light except at the door of the "insurance" room which opens out on the landing. Now, in the fact of the mere impact of the female plaintiff's foot driving out the lead—because the assumption is that no injury to the lead had occurred until the loosening of that piece which afterwards had to be put back by some other person—there is circumstantial evidence of the injured condition, or at all events of the weakness of the lead. That was a condition of danger. In the facts of the occupation and use of the staircase by the defendants and their clerks, and the ordinary through traffic independent of visitors, there was evidence from which the jury might well have inferred that the condition was likely to become more dangerous, and one that with ordinary caution the defendants should have observed as men of ordinary or average prudence; that in fact there was such a risk as would be foreseen by persons of average prudence in the position of the defendants, and that there was an added danger from the fact of the staircase being badly lighted, which was another fact that must be taken into consideration as having been present to the minds of the defendants, and as warning them of the duty to prevent visitors from incurring unnecessary risk.

Next, what was the relation between the female plaintiff and the defendants? She says she went on business to get a plan of a house which had been put into their hands by her husband. She was invited to go upstairs to Mr. Hardie's office. Then, having

gone up by these stairs, she was told that the plan was downstairs. A clerk volunteered to go down with her and went down in front of her, so that she was at the time of the accident actually accompanied by a person in the employment of the defendants, who, on their behalf, and within the scope of his authority, had invited her to go downstairs when she went on this journey which resulted in her being injured. It appears then that the defendants, under a contract with other persons, used these stairs in their business, whether as exclusive owners or not, and the partners and their employés regularly passed along them from one part of their premises to the other, and they invited the female plaintiff as a customer to go up and down the staircase. Thus the relationship between her and the defendants was one similar to that described in *Indermaur* v. *Dames* (1).

Did not that relationship then impose a duty on the defendants to guard her from such a risk as a person of average prudence in their position should have foreseen? Their daily use of these stairs ought to have told them of their condition. They therefore knew or ought to have known, and for the purpose of the law the one condition is the same as the other in this case, that there was this danger, and having invited the female plaintiff to visit them, and to pass from one part of the premises to the other on these stairs, there was a duty upon them to guard her against a risk they knew or ought to have known to exist. If they had exclusive possession of the staircase, as to which the facts so far stated are not very definite, their duty under the circumstances would be to keep invited persons free of actual risk, by keeping in repair, or if necessary repairing, this staircase. But assuming that they had not exclusive possession, their duty would be to do what they could in reason to prevent injury or damage to persons using the place in consequence of their invitation. For that it is not necessary to cite authority.

Now, the answers to the queries I have stated show that, for the purposes of their own business the defendants brought the female plaintiff into a situation which a prudent person in their position would know to involve a certain risk to her. So far as they could reasonably exercise any control of that situation which

(1) L.R., 1 C.P., 274; L.R. 2 C.P., 311.

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would save her from damage, the result of a danger which they ought to have observed, it was their duty to exercise that measure of control. Assuming in their favour that they were not entitled in law to exercise the complete physical control or care which would be involved in keeping or putting the staircase in reasonably safe repair, and so preventing, or when it existed removing, the danger to which business visitors to their offices were exposed, then were they relieved of all duty? Would it have been out of their power to exercise within reasonable bounds any saving control of the situation? Clearly it would not have been out of their power. So long as a danger existed which they ought to have known, and which they were inviting business visitors, who knew nothing of it, to incur, it was at least their duty to protect them, as far as possible, against that which they, if their law is good, had no legal right to physically prevent or remove. The least onerous form in which they could discharge that duty was to warn the female plaintiff. That minimum of care or control does not, at the present stage of the evidence, appear to have been exercised by them. Until the facts stated in evidence on the part of the plaintiffs are rebutted, as they may be when the evidence for the defendants comes to be heard, I am of opinion that these circumstances are such as to constitute a *primâ facie* case of negligence, and so to require an answer before the defendants can be absolved; and that they come within the meaning of the remarks of *Brett* M.R. in *Heaven* v. *Pender* (1), cited in *Mountney* v. *Smith* (2).

I have not thrown much stress on the question of the darkness of the stairway. Undoubtedly that is a fact which must be taken into consideration in connection with the other facts of the case, although, in my opinion, there would be a *primâ facie* case of negligence without that. But I am compelled to mention it again because of the rejection of evidence as to the condition of the place in respect of light. An architect was called to give evidence with respect to that point, who said he went to see the place six weeks after the accident, there being nothing to show that there had been any alteration in the structure in the interval. Evidence as to the condition of the building with regard to lighting was

(1) 11 Q.B.D., 503, at p. 509. (2) 1 C.L.R., 155.

tendered and rejected. It may be that His Honor was technically right in rejecting the evidence at that stage. It may be that the plaintiffs should have laid some foundation for the evidence by showing with reference to surrounding circumstances that, at the time of the visit the architect made to the place, the condition of the staircase with regard to light was the same as on the day in question. It may be, therefore, that when the case goes down to the second trial some foundation of that sort should be laid. But, subject to that foundation being laid, the evidence is admissible, I have no doubt, and it is desirable to express an opinion since we are affirming an order for a new trial.

I am therefore of opinion that the majority of the Full Court were right and that this appeal should be dismissed.

ISAACS J. The plaintiff went to the defendants' business premises upon business which concerned them as occupiers, and in connection with their business. A member of the public, in the situation of the female plaintiff, would or might naturally believe from the position of the stairs, their relation to the defendants' offices on the first and second floors, the user of the stairs by the defendants' clerk, and the directions she had received, that the defendants were in possession and control of the stairs, and therefore it is unnecessary to consider the contractual relations with regard to the stairs as between the defendants and their landlord. In these circumstances the rule stated by *Willes* J. in *Indermaur* v. *Dames* (1), and read by the learned Chief Justice applies.

The duty being clear, damage having in fact occurred to the female plaintiff, and no contributory negligence being proved, the question is was there evidence of a breach of duty causing the damage? In other words, was there evidence proper to be submitted to a jury that the damage was caused by unusual danger which the defendants knew or ought to have known, and which they neglected to prevent or give notice of. In my opinion there was in the facts stated by the Chief Justice abundant evidence of all these matters upon which a jury could, if so minded, reasonably find in favour of the plaintiffs.

(1) L.R. 1 C.P., 274, at p. 288.

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There were two contentions advanced on behalf of the defendants, as to which, in view of their general importance, I desire to address myself. It was argued that the plaintiffs were rightly nonsuited because the evidence is consistent with either reasonable care or negligence. That however is not the proper test. The true test is whether the evidence given for the plaintiffs supports the assumption of negligence more than that of reasonable care.

In *Cotton* v. *Wood* (1), *Erle* C.J. says the plaintiff fails to establish a case if he leaves "a perfectly even balance"; and *Williams* J. points to the same result "where the evidence is equally consistent with either view." In *Hammack* v. *White* (2) *Keating* J. decided against the plaintiff, saying:—"The case is left in this position, that it is equally probable that there was not as that there was negligence on the part of the defendant." In *Wakelin* v. *London and South Western Railway Company* (3) Lord *Halsbury* L.C. says:—"And if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails." No direct proof has been given of want of reasonable care to prevent the dangerous condition of the stairs. But, in my opinion, the nature and circumstances of the accident itself are such as to afford sufficient evidence from which negligence may be inferred. It has been contended, and this is the second question I wish to refer to, that the doctrine of *res ipsa loquitur* is confined to such cases as a bag of sugar falling from a crane: *Scott* v. *London Dock Co.* (4); or a barrel of flour falling out of a window: *Byrne* v. *Boadle* (5); or a brick falling from a railway bridge: *Kearney* v. *London, Brighton and South Coast Railway Co.* (6). But such instances do not form a distinct class by themselves, they are only illustrations of a principle. That principle has been stated by *Brett* J. in *Gee* v. *Metropolitan Railway Co.* (7) in these terms:—"Where something happens which would not happen, if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence

(1) 8 C.B.N.S., 568, at p. 571.
(2) 11 C.B.N.S., 588, at p. 599.
(3) 12 App. Cas., 41, at p. 45.
(4) 3 H. & C., 596.
(5) 2 H. & C., 722.
(6) L.R., 6 Q.B., 759.
(7) L.R., 8 Q.B., 161, at p. 175.

on the part of the defendants." In *Crisp* v. *Thomas* (1) the same learned Judge, then Lord *Esher* M.R. said:—"The application of the maxim *res ipsa loquitur* depends upon whether the Judge in each particular case can see that the mere fact of a thing happening is more consistent with there being negligence than not." The judgment of *Lopes* L.J. contains observations to the same effect. In some cases to require the plaintiff to give direct evidence of the want of reasonable care might amount to a denial of justice, or be what *Pollock* C.B. describes in *Byrne* v. *Boadle* (2) as preposterous. If the happening of the accident, having regard to its nature and circumstances, and being unexplained, supports the assumption of defendants' negligence better than that of their reasonable care, the onus of explanation or contradiction is cast upon them. The position is well summarised by *Holmes* J. in *Pinney* v. *Hall* (3) in 1892. He says:—"What is meant by *res ipsa loquitur* is, that the jury is warranted in finding, from their knowledge as men of the world, that such accidents usually do not happen except through the defendant's fault, and therefore in inferring that this one happened through the defendant's fault unless otherwise explained: *Doyle* v. *Boston and Albany Railroad* (4). But that depends on the kind of accident." In that case, a woman leaving an office in defendants' building and walking carefully down the stairs suddenly fell down and was injured. The Court drew attention to the fact that there was no evidence that the place was insufficiently lighted, and it also concluded from the evidence before it that the plaintiff knew she had reached the stairs and saw their construction. As the learned Judge stated "the case was the naked case of a person tumbling down stairs," and so the Court held that the defendant was entitled to have a verdict entered for him. In the present case there is very much more. The worn out condition of the lead, worn out to such an extent that it caught the female plaintiff's foot and tripped her, the want of sufficient light to see its condition, the usually gradual manner in which a material like lead deteriorates, and the consequently frequent opportunities for inspection, are circumstances

(1) 63 L.T.N.S., 756, at p. 757.
(2) 2 H. & C., 722.
(3) 156 Mass., 225.
(4) 145 Mass., 386.

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which, as they stand unaffected by explanatory or rebutting testimony, leave the accident one that would not ordinarily happen if reasonable care were taken. So far as appeared therefore at the close of the plaintiffs' case the evidence more strongly supported the case of neglect than that of care, and would certainly justify a jury in finding that the defendants were negligent.

As to *Wilkinson* v. *Fairrie* (1) it is not in my judgment to be regarded as applicable to cases where a person is expressly or tacitly invited to enter premises for mutual business purposes: See *per Blackburn* J. in *Indermaur* v. *Dames* (2), and *per Cockburn* C.J. in *Paddock* v. *North Eastern Railway Co.* (3).

GRIFFITH C.J. The Supreme Court ordered that the costs of the first trial should "abide the event" of the second trial. We are told that on the construction put upon those words by the Supreme Court, the plaintiffs cannot, under any circumstances, get their costs of the first trial, though if the defendants succeed on the next trial they will get their costs of both trials. We are asked instead of making that order, to make an order that the costs of the first trial be costs in the action, so that the party ultimately successful will get the costs of both trials. The learned Judges of the Supreme Court are reported to have said that they had no power to make such an order, referring to a rule of the Supreme Court that lays down the rule to be applied where no order is made as to costs. But that rule cannot limit or affect their power to make such an order in a proper case. It appears that in other cases the Supreme Court has made an order that the costs in the case of a nonsuit at the first trial should be costs in the action. We are unable to entertain any doubt that the Supreme Court has power to make such an order, or that this is a case in which such an order should be made. If the learned Judges had exercised their discretion, and, in that exercise, refused to make such an order, we would not interfere with their discretion. But in this case they refused to exercise their discretion, and, in the exercise of our discretion, we think that the costs of the first trial should be made costs in the action.

(1) 1 H. & C., 633. (2) 36 L.J.C.P., 183. (3) 18 L.T.N.S., 60.

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Appeal dismissed. Order of the Supreme Court varied by ordering that the costs of the first trial be costs in the action.

Solicitors, for the appellants, *Dibbs & Parker.*

Solicitors, for the respondents, *Lewis, Levy & Fulton.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

ALEXANDER . . . . . APPELLANT; DEFENDANT,

AND

DONOHOE . . . . . RESPONDENT. COMPLAINANT.

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SYDNEY, *Dec.* 12, 17, 21.

Griffith C.J., Barton and Isaacs JJ.

Immigration Restriction Act 1901 (*No.* 17 *of* 1901), *sec.* 9—*Immigration Restriction Amendment Act* 1905 (*No.* 17 *of* 1905), *sec.* 12—*Master of vessel from which prohibited immigrant enters Commonwealth—Formal defect in conviction—Fine imposed without alternative of imprisonment—Appeal—Statutory prohibition—Amendment—Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 37.

The master of a ship from which a prohibited immigrant had entered the Commonwealth was convicted in a police Court, by a magistrate exercising federal jurisdiction, of an offence under sec. 9 of the *Immigration Restriction Act* 1901, and ordered to pay a fine of £100 and costs.

On an application to the High Court for a prohibition:

Held, that the magistrate had the same power as regards costs as if he had been exercising his ordinary jurisdiction, and that, even if the conviction was defective in that it did not impose a term of imprisonment in default of payment of the fine, the High Court had power under sec. 37 of the *Judiciary Act* to amend it by adding the alternative.

The grounds of the prohibition being statutory, the High Court dealt with it as an appeal, and made an order dismissing the appeal with costs.

PROHIBITION.

The appellant was master of the ship *Port Logan*. While the ship was in the port of Newcastle one of the crew, who was, in