[HIGH COURT OF AUSTRALIA.]

COFIELD . . . . . APPELLANT;
PLAINTIFF,

AND

THE WATERLOO CASE COMPANY LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 26, 27, 28.

MELBOURNE, *June* 10.

Knox C.J., Isaacs Gavan Duffy, Rich and Starke JJ.

Personal Injury—Breach of statutory duty—Dangerous machinery—Duty to fence—Contributory negligence—Misdirection—New trial—Factories and Shops Act 1912 (*N.S.W.*) (*No.* 39 *of* 1912), *secs.* 33, 53.

In an action brought by the widow of a deceased employee against his employer the plaintiff alleged by the first count of the declaration negligence as to providing proper guards and reasonable precautions for the safe working of a certain machine in the defendant's factory whereby the deceased was injured and killed, and by the second count, based on the *Factories and Shops Act* 1912 (N.S.W.), that the defendant in contravention of that Act neglected and omitted securely or at all to fence the dangerous parts of the machine whereby the deceased was injured and died. The jury returned a general verdict for the defendant on both counts.

Held, that in the particular circumstances there should be a new trial as to the second count, there having been a misdirection on the question of contributory negligence upon which the jury might have acted.

Quære, whether contributory negligence is a defence to an action to recover damages for injuries caused by a breach of the duty created by sec. 33 of the *Factories and Shops Act* 1912 (N.S.W.), which requires the occupier of a factory to "securely fence all dangerous parts of the machinery therein."

It is the duty of the occupier of a factory within the meaning of the *Factories and Shops Act* 1912 (N.S.W.), to make the machinery safe for negligent as well as careful people.

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Per Isaacs and *Rich* JJ.: The doctrine of *Wakelin* v. *London and South-Western Railway Co.*, (1886) 12 App. Cas. 41, and that of contributory negligence in relation to statutory protection of machinery, considered.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought by Alice Mary Cofield, as administratrix of the estate of Andrew James Cofield deceased, against the Waterloo Case Co. Ltd. The plaintiff by the first count of her declaration alleged that the defendant was possessed of and had the care, control and management of a certain case factory, and used in such factory a certain machine, namely, a swinging crosscut-saw, driven and put in motion by mechanical power for the purpose of sawing timber; that the said machine when so driven and put in motion was, as the defendant well knew or ought to have known, dangerous to persons working at and attending it; that the deceased was employed by the defendant in the said case factory to work at and attend the said machine; yet the defendant so negligently conducted itself in and about the possession, care, control and management of the factory, and in and about providing an improper, dangerous and unsafe machine for the purpose of being used as aforesaid, and in and about failing and neglecting to provide proper and necessary guards and fittings for the safe working of the machine, and in and about failing and neglecting to properly guard the said machine, and in and about failing and neglecting to take all reasonable precautions for the safe working of the machine, and in and about selecting unfit, incompetent and unskilful persons to superintend the erection and instalment of the said machine, and in and about erecting and installing the machine in an unsafe manner, and in and about allowing and permitting in the said factory a negligent and unsafe system of working the said machine, that the deceased, whilst lawfully working at and attending the machine and whilst the machine was being driven and put in motion as aforesaid by the order and under the direction of the defendant and its servants, was struck and cut by the machine and his abdomen was cut open, and by reason of the wounds and injuries thereby occasioned to him the deceased died. By the second count the plaintiff alleged

that the defendant was the occupier of a certain factory within the meaning of the *Factories and Shops Act* 1912 (N.S.W.) and the deceased was employed by the defendant in such factory; that within the said factory was certain machinery driven and put in motion by mechanical power; that such machinery consisted amongst other things of a swinging crosscut-saw which had certain dangerous parts required to be securely fenced by the defendant in pursuance of the said Act, yet the defendant neglected and omitted to securely or at all fence the said dangerous parts; and that by reason of the premises, whilst the deceased was lawfully employed as aforesaid at the said machine and whilst the same was so being driven and put in motion as aforesaid by the order and under the direction of the defendant and its servants, the deceased was struck and cut and injured whereby he died. The defendant traversed both counts of the declaration, and pleaded not guilty.

The action was tried before *Campbell* J. and a jury, which returned a verdict for the defendant. The plaintiff appealed to the Full Court by way of motion for a new trial, and the Full Court dismissed the appeal with costs.

From that decision the plaintiff now appealed to the High Court.

Other material facts appear in the judgments hereunder.

As the judgments dealt only with the verdict upon the second count, the arguments as to the first count are not reported.

Ackerman, for the appellant. As to the second count there was a breach of sec. 33 of the *Factories and Shops Act* 1912 (N.S.W.). The obligation under that section to fence the machine so as to avoid danger to a workman arising from the saw coming beyond the bench could easily have been carried out, but the obligation remained although the result of fencing might have been to render the machine useless (*Davies* v. *Thomas Owen & Co.* (1)). If the accident could not have happened if the machine had been properly fenced, it is immaterial that the injured man was guilty of contributory negligence (*Blenkinsop* v. *Ogden* (2)). There was no evidence of contributory negligence, and the direction on that question was wrong. It is not necessary that there should be direct evidence

(1) (1919) 2 K.B. 39, at p. 42.

(2) (1898) 1 Q.B. 783.

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connecting the injury with the negligence of the respondent, but the connection may be shown by inference (*Meehan* v. *Dick* (1)). The verdict was not one which reasonable men could find.

Hardwick, for the respondent. It was for the jury to say whether the machine was dangerous and, if so, whether it was securely fenced; they must be taken to have answered those questions in favour of the respondent.

Ackerman, in reply, referred to *David* v. *Britannic Merthyr Coal Co.* (2).

Cur. adv. vult.

June 10.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. This was an action by the widow and administratrix of Andrew James Cofield for compensation, based upon the *Compensation to Relatives Act* 1897 of New South Wales. She declared upon two counts. The first, described as a common law count for negligence, alleges that the respondent so negligently, unskilfully and improperly conducted itself in the possession, care, control and management of its factory, in which the deceased was employed, and in and about providing proper guards and reasonable precautions for the safe working of a swinging crosscut-saw, that the deceased was injured and died. The second count is based upon the *Factories and Shops Act* 1912, and alleges that the respondent was the occupier of a factory within the meaning of the Act, containing a swinging crosscut-saw which had dangerous parts, and that the respondent neglected and omitted securely, or at all, to fence the dangerous parts of the saw, in contravention of the Act, whereby the deceased, who was employed in the factory, was injured and died. The respondent traversed these counts, and also pleaded not guilty. The jury found a verdict for the defendant on both counts.

The evidence adduced at the trial proved that the crosscut-saw was covered by a hood, and was so balanced by a weight that it could not come forward to the sawing bench without the use of some

(1) (1915) 17 Gaz.L.R. (N.Z.) 779.

(2) (1909) 2 K.B. 146.

external force: it must be pulled forward by the operator for the purpose of using it, and the resistance of the weight thus overcome. But the evidence showed, also, that if an operator pushed the saw back too violently, then the momentum acquired might overcome the resistance of the weight and cause the saw to swing forward over the bench, and thereby expose him to danger. Again, in cutting through timber with knots or of varying densities, the saw might jump out of the cutting slot, or unexpectedly accelerate in the softer parts, and so expose an operator to danger. These risks might have been avoided, according to the evidence, by a check preventing the saw swinging beyond a certain point.

We think a new trial should, as a matter of discretion, be refused on the first count, but it must be allowed on the second, for reasons which we shall presently develop. The duty of an occupier of a factory under the *Factories and Shops Act* is more onerous than his duty at common law, and the trial of both counts in the same proceeding may obscure the essential difference in those duties, and lead to confusion. Consequently, we deem it unnecessary to discuss the reasons of the Full Court for refusing a new trial upon the first count, and we neither affirm nor deny their accuracy.

Now, as to the second count, that based upon the *Factories and Shops Act*:—The jury was directed that, if the swinging crosscut-saw was a dangerous machine, then there was an absolute obligation on the owner of the factory securely to fence it. They were further directed that they had to determine whether the saw was a dangerous machine, and whether it was securely fenced in the ordinary meaning of those words, and, if so, whether the injury to the deceased was the result of any breach of duty. A more elaborate exposition of what was "a dangerous machine" within the meaning of the Act, and of "secure" fencing for the purposes of the Act, was desirable in the present case. It would have been well to point out that the defendant's duty was to make the machine "safe for negligent as well as careful people." *Wills* J. put the matter very clearly in *Hindle* v. *Birtwistle* (1):—"It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably expected from

(1) (1897) 1 Q.B. 192, at p. 195.

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the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration." Again, it would have been well to explain that a fence, in connection with machinery, is a barrier screen, shield or guard, designed to protect or regulate the movement of a machine or the dangerous parts of a machine. If the machine or parts of it were dangerous, then it would be for the jury to determine whether the methods adopted for protecting and regulating the movement of the particular machine constituted a safe and secure fencing. But all this was probably implied in the charge of the learned trial Judge, and no objection was taken to the charge, either at the trial, or before the Full Court, or before this Court. And we should feel some difficulty in ordering a new trial on the second count based on the insufficiency of the charge when no such objection has been made. This brings us to the learned Judge's direction upon contributory negligence.

It was suggested from the Bench that contributory negligence might not afford a defence to a breach of the duty created by the *Factories and Shops Act*. The point was not made at the trial, nor was it taken or argued on appeal, and the jury may not have found that the deceased was guilty of contributory negligence. They gave a general verdict for the defendant. Under these circumstances we think it better to express no opinion upon the point. It will, upon a new trial, be open to the plaintiff. The trial Judge may then think it right to obtain a specific finding upon the question whether the deceased was or was not guilty of contributory negligence, and thus raise the point, in case of an affirmative finding, for actual decision.

The plaintiff did, however, object upon appeal "that his Honor should have directed the jury that it was not contributory negligence on the part of the deceased to work the machine which caused his

death in the way it is ordinarily worked even although the jury might have been of opinion that a safer way of working might have been adopted." The learned Judge, dealing with the facts, stated that the suggestion of contributory negligence rested apparently on the evidence of witnesses who said that the deceased might have carried out his work with perfect safety if he stood always to the left of the saw, and not in front of the slot in which the saw worked, but he also pointed out that other witnesses stated that in cases in which a " tailer out " was not employed, the ordinary method of working the saw was to stand in front of it and that the deceased " had been warned of the danger of this proceeding." We cannot think this a satisfactory method of treating the evidence on this most critical part of the case. Mr. George Henry Mason, the foreman of the defendant's factory, gave the following evidence :— " Q. : Do you know it was the last cut when Mr. Cofield was killed ?—A. : Yes. Q. : Is there any occasion for any pressure to be put on that piece between the saw and the block?—A. : It would all depend upon what cut he would make ; on the first cut, No ; on the last cut, Yes. On the last cut he would place his hand on and pull the saw forward. He would hold the last cut up against the bench to stop it coming forward. There is not any occasion to hold the earlier cuts because the timber is of longer nature and it holds itself against the bench. Q. : Is there any occasion for him to put his left hand against that ?—A. : Yes, certainly." It thus appears that the deceased could not have stood with perfect safety to the left of the saw on the " last cut," and that the evidence of the witnesses who said that he could have carried out his work with perfect safety if he stood always to the left of the machine, was totally inapplicable to the work in hand when he was killed. The evidence of the other witnesses who said that the ordinary practice was to stand in front of the saw when a " tailer out " was employed also missed the critical point that upon the last cut the deceased was practically compelled, in the due performance of his work, to stand in front of the saw. Again, the learned Judge's reference to the warning given by Mr. Smith to the deceased was not, in our opinion, sufficiently explicit. The witness Smith had warned the deceased that he should not allow the saw to swing whilst

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he was removing timber from the bench. But his warning was quite irrelevant unless the jury were satisfied that the deceased was swinging the saw when he was killed, and we think they should have been so informed. The objection which has been taken to the direction with regard to contributory negligence is sufficient, we think, to cover these defects in the charge. And the defects are so material upon a critical part of the case that we consider a new trial proper upon the second count. It is impossible to say that no substantial miscarriage of justice has been occasioned by reason of these defects.

An appeal to the Supreme Court of New South Wales in this case was dismissed, and *Cullen* C.J. said that one of the difficulties in the way of the appellant was whether, assuming all other matters in the plaintiff's favour, there was evidence which obliged the jury as reasonable men to come to the conclusion that the accident occurred through the condition of the machinery. But the jury gave a general verdict, and it is impossible to say upon what defence their verdict was based. The Chief Justice does not say that there was no evidence to go to the jury upon the question of causation, and we gather that he thought the question was properly left to them. We certainly agree with this view. But if we cannot say upon what defence the jury found their verdict, and there is a serious defect in the trial upon a substantial issue, which may have been the issue upon which the verdict was founded, then a new trial is inevitable.

ISAACS J. I am of opinion that this appeal should be allowed and a new trial ordered on the second count only. Full consideration of the evidence and the charge of the learned Judge at the trial with reference to that count lead me to the belief that justice will be better served if a new trial take place. But that opinion is restricted to the second count for the following reasons: Whatever rights the plaintiff may have can be as fully asserted under the second count as under the first, and the second count is free from certain complications of pleading and of evidence that would arise if both counts were proceeded with. It therefore becomes unnecessary to decide anything with reference to the questions of fact or law that

arose on the appeal respecting the first count. It is very desirable to abstain from any unnecessary observation on the facts. But there are two branches of the case as now remaining as to which the law must necessarily be stated. They are (1) the nature of the statutory obligation on which the second count is founded; (2) the evidentiary law of causation of injury. There is another branch of the law, namely, contributory negligence, which does not, in the view I take, call on this occasion for definite expression but which does, in my opinion, demand that caution should be observed lest it be assumed to be beyond question.

(1) *Section* 33.—The second count was based on sec. 33 of the *Factories and Shops Act* 1912 (No. 39) of New South Wales. The section enacts: "The occupier of a factory shall securely fence all dangerous parts of the machinery therein," &c. It is not out of place to draw the attention of the Legislature to the fact that the only penalty it has provided for the disregard of so essential a precaution for the preservation of human life is "a penalty not exceeding ten pounds." For wilful contumacy, perhaps after some dreadful accident, a further ten pounds a day at most may be exacted. Is that a real enforcement of sec. 33, having regard to the temptation of material interests? That is, of course, the responsibility of Parliament, but, in fairness to Parliament itself and in justice to the helpless employees who are unnecessarily exposed to imminent risks, the occasion warrants the serious attention of the Legislature being drawn to the matter. Similar observations apply to some, if not all, other States in Australia. The only other portion of the Act which needs to be referred to is sec. 53, providing that "no occupier of a factory or shop shall contract with any employee against any liability under this Part of this Act." The expression "this Part" includes sec. 33. What, then, is the obligation placed on the occupier of a factory? In view of the nature of the evil to be remedied, and the unqualified words of the enactment, this would not be doubtful, even though there were no judicial guidance. The local enactment is the latest form of successive legislative attempts, beginning in England in 1844, amended in 1878, 1891 and 1895, and followed in Australia, to avert the risk of mutilation or death to which in the constantly advancing use of

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complicated and dangerous machinery the human operators are more and more exposed. Industry, like war, is a struggle for ascendancy and sometimes for existence. The form the legislation of New South Wales has taken in sec. 33 raises the very distinct question how far there has been placed on the proprietor of a factory the obligation of securing his employees from mutilation or death by the machinery he installs, even if there be, on their part, some want of skill or some failure to observe the precise procedure necessary to escape such consequences. Lord *Shaw* in *Butler* v. *Fife Coal Co.* (1) says :—" The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making *the remedy effective and the protection secure.* This principle is sound and undeniable." The language of the section itself being in the broadest and most unqualified terms, how then is it to be interpreted so as to make " the protection secure ? " It was contended that it was sufficient if there is freedom from danger *provided a certain course or method of procedure is adopted by the workman.* But, assuming such a state of facts to be established, is that sufficient to exclude the obligation of " securely fencing ? " Or is the neglect of an employee to observe that procedure—even supposing it would amount to contributory negligence where the duty of the factory proprietor depended on the common law—enough to excuse the proprietor from observing his statutory obligation ? The answer on principle must be No. The object of the provision is *prevention* of injury. Therefore the duty inculcated by the section preceded any actual use of the machine.

There are, however, English decisions of authority that are of great weight and assistance. The broad interpretation of this class of enactment was initiated in 1851, under the less stringent type of protection, by the case of *Coe* v. *Platt* (2). The case of *Redgrave* v. *Lloyd & Sons* (3), though directed to a slightly different aspect, was founded on the same principle. The case of *Hindle* v. *Birtwistle* (4)

(1) (1912) A.C. 149, at pp. 178-179.
(2) (1851) 6 Ex. 752 (see particularly per *Parke* B., at p. 757).
(3) (1895) 1 Q.B. 876.
(4) (1897) 1 Q.B. 192.

is a landmark in this branch of law. There the occupier of a cotton factory was summoned for neglecting to fence the shuttles of his looms. The Act of 1891 so amended the Act of 1878 as to require "all dangerous parts of the machinery" to be securely fenced or to be made equally safe. An accident took place by a shuttle flying out and seriously injuring a weaver. It was caused by his own negligence in improperly fixing a part of the machinery too taut. The question arose whether the duty to fence was excused by the weaver's own negligent act. The Court held it was not. The issue was, as *Wills* J. said (1), whether "the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working." This was negatived. In a judgment which cannot be too highly valued the learned Judge says:—"I entirely disagree with such an interpretation, and think that it would limit most materially a very beneficial Act of Parliament. It seems to me that machinery or parts of machinery is and are *dangerous if in the ordinary course of human affairs danger may be reasonably anticipated* from the use of them without protection." Again, "In considering whether machinery *is dangerous, the contingency of carelessness on the part of* the workman in charge of it and *the frequency with which that contingency is likely to arise*, are matters that must be taken into consideration. It is entirely a question of degree." *Wills* J., therefore, so far from regarding the carelessness of workmen as a reason for annihilating the manufacturer's obligation to fence, looks upon it as a human factor which may increase the necessity of guarding the operator. In *Blenkinsop* v. *Ogden* (2) another Court came independently to the same conclusion, *Kennedy* J. observing (3): "*It is to the interest of the State that the machinery should be safe for negligent as well as for careful people.*" *Purcell* v. *Clement Talbot Ltd.* (4), in 1914, was the case of an unfenced machine where the jury found that a machine was dangerous if worked in an upward direction, because it was used the reverse way. Lord *Wrenbury* (then *Buckley* L.J.) said (5):—"In the present case the machine is such that it can

(1) (1897) 1 Q.B. at p. 195.
(2) (1898) 1 Q.B. 783.
(3) (1898) 1 Q.B., at p. 786.
(4) (1914) 111 L.T. 827.
(5) (1914) 111 L.T., at p. 829.

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be used either in an upward or downward direction. The statutory obligation is so to fence it that a workman who uses it shall not be injured whichever way the machine is worked. In my opinion there has been a breach by the employers of *that statutory duty that a workman using it shall not be injured whichever way the machine is worked.*" Finally, there is the case of *Davies* v. *Thomas Owen & Co.* (1). In that case, as in almost all the modern cases of the kind, separate questions put to the jury elucidated by their answers the whole opinion of the jury on the several necessary issues and obviated the necessity of a new trial. The judgment of *Salter* J. established, in accordance with preceding cases, that the statutory obligation is absolute, and must be obeyed even if the machine is by fencing rendered commercially impracticable or mechanically useless. Human life is the supreme consideration.

(2) *Evidence as to Causation of Injury.*—This has been dealt with very briefly by the Supreme Court. The learned Chief Justice of New South Wales, with the concurrence of the rest of the Court, said: "It seems to me that the plaintiff's case must fail on the ruling in *Fraser* v. *Victorian Railways Commissioners* (2), through the absence of connection between any negligence disclosed in the evidence and the actual occurrence of the accident." In an earlier part of his judgment his Honor referred to *Fraser's Case* as following a number of English cases, including *Wakelin* v. *London and South-Western Railway Co.* (3). The ruling was in argument before us supported by learned counsel for the respondent, urging that there were several possible reasons any of which could be consistently assigned as *the cause* of the injury. For instance, he said there was the absence of a fence, the carelessness of the deceased, a jam, a knot, an accidental swing of the saw, and so on. Consequently, so ran the argument, causation was not established. The passage relied on in *Wakelin's Case* (4) is: "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." *Fraser's Case* calls for no investigation now,

(1) (1919) 2 K.B. 39.
(2) (1909) 8 C.L.R. 54.
(3) (1886) 12 App. Cas. 41.
(4) (1886) 12 App. Cas. at p. 45.

since it is relied on simply as a recognition of *Wakelin's Case* (1). *Wakelin's Case* has been considered and elucidated in later cases, including some before the two supreme British tribunals. The words "equally consistent" seem to be frequently read as if they were simply "consistent"—no force being given to the word "equally." Therein lies grave error. A Court has always the function of saying whether a given result is "consistent" with two or more suggested causes. But whether it is "equally consistent" is dependent on complex considerations of human life and experience, and in all but the clearest cases—that is, where the Court can see that no jury applying their knowledge and experience as citizens reasonably could think otherwise—the question must be one for the determination of the jury. The case of *Canadian Pacific Railway Co.* v. *Pyne* (2), decided in 1919, contains a passage of considerable importance as indicating the proper test to be applied. The facts of the case are immaterial: it is the principle alone that is useful. The tribunal was the Privy Council, and the Board consisted of the Lord Chancellor (Lord *Birkenhead*), Viscount *Haldane*, Lord *Buckmaster*, Lord *Parmoor* and Mr. Justice *Duff*, the last named delivering the judgment. At p. 246 this passage appears:—"If the facts in evidence pointed to something beyond the control of the appellants' company as the cause of the accident with *a probability equal* to that attaching to the inference which ascribes it to the default of the company, then, of course, a verdict against the company ought not to have been given. But the jury were not conducting a scientific investigation. 'Courts,' as Lord *Loreburn* said in *Richard Evans & Co.* v. *Astley* (3), 'like individuals, habitually act upon a *balance* of probabilities'; and it was within the *province of the jury to estimate the comparative degrees of probability* ascribable to the rival explanations advanced by the parties. Their Lordships agree with the Manitoba Court that the probabilities were *not so precisely balanced* as to justify the conclusion that the jury acted unreasonably in preferring the hypothesis presented by the respondent." That passage may well be regarded as a clear and definitive direction in future cases. But as indicated in the passage quoted, the doctrine

(1) (1886) 12 App. Cas. 41.
(2) (1919) 48 Dom.L.R. 243.
(3) (1911) A.C., at p. 678.

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of *Wakelin's Case* (1), as it is called, had been already the subject of the highest consideration. Optimism would lead one to say nothing further on the subject, but *Duff* J. said in a case in the Canadian Supreme Court in 1913, *Cottingham* v. *Longman* (2) :—" The subject of the nature of proof upon which a jury is entitled to act in civil cases was fully discussed in some recent judgments (see *Grand Trunk Railway* v. *Griffith* (3), and *Jones* v. *Canadian Pacific Railway Co.* (4)), but, notwithstanding these judgments, the error will doubtless survive." The learned Judge was justified in his anticipation, notwithstanding that the last-mentioned case of *Jones* v. *Canadian Pacific Railway Co.* (5) was a Privy Council case, decided in August 1913, by Lords *Atkinson*, *Shaw* and *Moulton*. That is a very important case on this branch of the law, because it reviews all the leading cases. Among other cases approved by it is the case of *Williams* v. *Great Western Railway Co.* (6), which now, bearing the highest judicial stamp of authority, must be read with *Wakelin's Case*. There *Pollock* B. used the words " *even balance* of the evidence " and *Amphlett* B. said :—" There are *many supposable circumstances* under which the accident may have happened, and which would connect the accident with the neglect." The Court held the facts were for the jury's determination. *Jones's Case* (7) quoted with approval the following passage in Lord *Loreburn's* judgment in *Richard Evans & Co.* v. *Astley* (8) :— " It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities. In the present case, the theory that this man climbed upon the van, or tried to do so, for his own

(1) (1886) 12 App. Cas. 41.
(2) (1913) 15 Dom.L.R. 296, at p. 297.
(3) (1911) 45 Can.S.C.R. 380.
(4) (1913) 29 T.L.R. 773.
(5) (1913) 29 T.L.R. 773 ; 83 L.J. P.C. 13 ; 110 L.T. 83.
(6) (1874) L.R. 9 Ex. 157.
(7) (1913) L.J. P.C., at p. 22.
(8) (1911) A.C., at p. 678.

purposes, whether to gossip with the other brakesman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points and would save time by alighting where the points were, and could conveniently do so by using the steps which were on the brakes van, whereas there were none on the truck, seems to me very probable." *Jones's Case* also includes the quotation already mentioned in *Pyne's Case* (1). That is all the more significant, because Lord *Atkinson*, who delivered the judgment, was the dissentient Lord in *Astley's Case* (2). Before parting with *Jones's Case* it is very desirable to say that their Lordships thought causal connection was established if " the breach of the statutory duty was either the *sole* effective cause of the injury or was so connected with it as to have *materially contributed to it*" (3). A case that brings into conspicuous relief the true principle of law regarding sufficient proof of causation to go to the jury is *Kerr* v. *Ayr Steam Shipping Co.* (4). Reference to the head-note, and to Earl *Loreburn's* judgment at p. 222, is for the present sufficient. The last case to be mentioned on this point is *Craig* v. *Corporation of Glasgow* (5). The Scottish Court had held in *Wakelin's Case* (6) and in *Metropolitan Railway Co. v. Jackson* (7) that, there being various causes to which the accident was consistently referable, the plaintiff failed. The House of Lords reversed the decision and *Wakelin's Case* was distinguished.

(3) *Contributory Negligence.*—" Contributory negligence " is a phrase representing a doctrine of the common law. It is founded on the obligation of a person injured, and seeking to make the defendant liable, that he should not have failed in personal circumspection—that is, to take such care of himself as was reasonable in the circumstances, including the defendant's negligence. In other words, the law expects of every one in the ordinary normal circumstances of life to avert, so far as he reasonably can, any danger to which another exposes him. Otherwise he is regarded

(1) (1919) 48 Dom.L.R. 243.
(2) (1911) A.C. 674.
(3) (1913) 110 L.T., at p. 87.
(4) (1915) A.C. 217.
(5) (1919) 35 T.L.R. 214; 56 Sc.L.R. 186.
(6) (1886) 12 App. Cas. 41.
(7) (1877) 3 App. Cas. 193.

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as the author of his own wrong and at the common law is disentitled to succeed. The defendant's responsibility is, in effect, shortened by the plaintiff's obligation to take care of himself.

In *Owners of s.s. Bogota* v. *Owners of s.s. Alconda* (1) Lord *Shaw* says: "I take the principle to be that, although there might be . . . fault in being in a position which makes an accident possible, yet if the position is recognized by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which *with reasonable conduct* on his part could have been avoided." That assumes the parties are, so to speak, on an even footing. What would be expected of an adult placed in danger by the initial fault of the defendant would not be expected of a child of tender years similarly placed. On the field of industry, however, experience has shown that the relative situation of employer and employee is not that of persons on an even footing, that in dangerous trades there is not the ordinary normal condition of things, and that the employees are not in fact in the independent position of strangers faced with peril through negligence. Professor *Roscoe Pound* in his work *The Spirit of the Common Law* (1921), at p. 48, says:—"A workman, engaged constantly upon a machine, so that he comes to be a part of it and to operate mechanically himself, omits a precaution and is injured. The common law says to him, 'You are a free man, you have a mind and are capable of using it; you chose freely to do a dangerous thing and were injured; you must abide the consequence.' As a matter of fact, it may well be he did not and could not choose freely. Before the days of workmen's compensation it was said that statistics showed the great majority of industrial accidents happened in the last working hour of the day, when the faculties were numbed and the operative had ceased to be the free agent which our theory contemplated. But there was no escape from the legal theory. That very condition was a risk of the employment, and was assumed by the labourer. Legislation had been changing these rules yet Courts long had a tendency to read the doctrine of

(1) (1924) Sc.L.T. 291, at pp. 295-296.

contributory negligence into statutes even where the Legislature had tried to get rid of it." Legislation has sought to embody in the form of compulsory safeguards the sense of the community regarding the weaker position of the employee. Protection is variously prescribed, and ranges from partial increase of safety to absolute security. The question may, on some fitting occasion, arise whether or not, to the extent to which the statutory protection is carried beyond the protection afforded by the common law, the protected person is relieved from the common law obligation of protecting himself, and consequently whether or not to that extent his omission with respect to personal circumspection is a defence where the statutory provision is not observed. This is independent of sec. 53, above quoted. That section, prohibiting contracting out of the statutory protection and certainly showing that a deliberate surrender of personal security is impossible, is hardly consistent with the position that an accidental loss by mere carelessness can have that effect. The action for breach of statutory duty is not for " negligence " in the ordinary sense (see per Viscount *Haldane* L.C. in *Watkins* v. *Naval Colliery Ltd.* (1)), and it might seem out of place to speak of " contributory negligence " as if it were. The true meaning of the somewhat artificial phrase " contributory negligence " has been described in *Symons* v. *Stacey* (2). But there are many cases which contain dicta (they are no more) to the effect that, while the absolute duty is as high as stated in the first branch of this judgment—that is, entitling the workman to protection from his own inability to protect himself—yet he is held to the same measure of self-protection as at common law : in other words, he is regarded as a child needing protection, but as a grown man if he does not receive it. These are considerations desirable to bear in mind should the facts render it necessary. One word may be added. Wilful misuse of machinery and doing acts entirely outside the sphere of employment, as distinguished from doing in a prohibited manner acts within the sphere of employment, are, in my opinion, matters foreign to " negligence," and their legal effect may be rested upon independent considerations.

(1) (1912) A.C. 693, at p. 703.

(2) (1922) 30 C.L.R. 169, at pp. 177-178.

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RICH J. I have had the advantage of reading the judgment of my brother *Isaacs*, and agree with it.

Appeal allowed. New trial on second count only. Costs of first trial to abide result of second trial. Appellant to have costs of new trial motion to Supreme Court. Appellant to have such costs of this appeal as are usual in forma pauperis.

Solicitor for the appellant, *V. Ackerman.*
Solicitor for the respondent, *J. G. Webster.*

B.L.

Rev *Palmer* v *Carey* (1926) 37 CLR 545

[HIGH COURT OF AUSTRALIA.]

CAREY . . . . . APPELLANT;

AND

PALMER . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *April* 3, 4, 7.

MELBOURNE, *June* 10.

Knox C.J., Isaacs and Starke JJ.

Contract—Construction—Agreement to lend money to trader—Repayment out of proceeds of goods—Bankruptcy of trader—Transfer of goods to lender declared void—Security, lien or charge of lender over goods.

By an agreement in writing made in New South Wales between the appellant and a person carrying on business in Sydney as an indentor, which recited that the latter required additional capital to enable him to extend his business and that the appellant had agreed to advance various sums of money not exceeding £1000, it was agreed that the borrower should from time to time purchase goods for the purpose of the business and the appellant should advance the purchase-money therefor, which would be applied exclusively to such purchase. In consideration therefor the borrower covenanted (*inter alia*) to sell the goods as