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The case seems to be still stronger where the supposed certificate of the Medical Board turns out to be invalid (as here).

Appeal dismissed with costs.

Solicitor for the appellant, *Walter P. Blackmore*, Broken Hill, by *Young & Blackmore.*

Solicitors for the respondent, *J. R. Edwards & Son*, Broken Hill, by *Minter, Simpson & Co.*

B. L.

Overr *Piro v W Foster & Co Ltd* (1943) 68 CLR 313

[HIGH COURT OF AUSTRALIA.]

BOURKE . . . . . APPELLANT; PLAINTIFF,

AND

BUTTERFIELD AND LEWIS LIMITED . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 4, 5.

MELBOURNE, *Nov.* 1.

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

Personal Injury—Employer and Employee—Action for damages—Breach of statutory duty—Dangerous machinery—Duty to fence— Defence—Contributory negligence—Limits of employer's liability—Factories and Shops Act 1912 (*N.S.W.*) (*No.* 39 *of* 1912), *secs.* 33, 53, 56.

Contributory negligence is not a defence to an action to recover damages for personal injury caused by a breach of an absolute statutory duty imposed for the benefit of a class of persons of which the plaintiff is a member.

McKinnon v. *Barnes*, (1912) 12 S.R. (N.S.W.) 129, overruled.

Limits of defendant's responsibility in such a case considered.

In an action by an employee against his employer to recover damages for personal injury to the employee caused by a breach of the duty imposed upon

the employer by sec. 33 of the *Factories and Shops Act* 1912 (N.S.W.) to securely fence all dangerous parts of the machinery in his factory, the jury found a verdict for the plaintiff and, in answer to questions put to them by the trial Judge, found that the injury was due to the breach of the duty and also that it was "due to the plaintiff's own negligence in the sense that but for that negligence the accident would not have happened."

Held, by the whole Court, that the plaintiff was entitled to retain his verdict.

Decision of the Supreme Court of New South Wales (Full Court) : *Bourke* v. *Butterfield & Lewis Ltd.*, (1926) 26 S.R. (N.S.W.) 57, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Arthur Reginald Bourke against Butterfield & Lewis Ltd. in which the plaintiff by the first count of his declaration alleged that the defendant was the occupier of a factory within the meaning of the *Factories and Shops Act* 1912 (N.S.W.) and the plaintiff was a person employed in the said factory within the meaning of the said Act ; that the defendant did not securely or at all fence all dangerous parts of the machinery in the factory ; and that, by reason of that neglect and omission of the defendant, while the plaintiff was near a certain part of the machinery which was not fenced his foot became entangled in it, whereby the foot was crushed and mutilated and had to be amputated. By the second count the plaintiff alleged that every cog-wheel in the factory was not securely fenced and was not in such a position or of such construction as to be equally safe to every person employed in the factory as it would have been if it had been fenced ; that, by reason of the premises, while the plaintiff was near a certain cog-wheel which was not securely fenced, &c., his foot became entangled in it, whereby the foot was crushed and mutilated and had to be amputated. The plaintiff claimed £1,000. To the declaration the defendant pleaded not guilty, and the plaintiff joined issue on that plea. The action was tried before *Campbell* J. and a jury. At the close of the evidence the learned Judge asked the jury to answer the following questions, and the jury made the answers set out after the questions respectively :—(1) Was the gear-wheel in which plaintiff's foot was caught a dangerous part of the machinery ? —Yes. (2) Was the gear-wheel in such a position or of such construction as to be equally safe to every person employed in the

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factory as it would have been if securely fenced ?—No. (3) Was the plaintiff's injury due to the absence of a fence or guard in connection with the gear-wheel ?—Yes. (4) Was the injury due to the plaintiff's own negligence in the sense that but for that negligence the accident would not have happened ?—Yes. The jury also found a verdict for the plaintiff for £350. On a motion by the defendant to set aside the verdict and to enter a verdict for the defendant, the Full Court held, following *McKinnon* v. *Barnes* (1), that contributory negligence was a defence to an action for damages for injuries sustained by reason of a breach of a statutory duty imposed by the *Factories and Shops Act* 1912, and that the answer of the jury to the fourth question submitted to them amounted to a finding of contributory negligence. The Court therefore set aside the verdict for the plaintiff, and ordered a verdict to be entered for the defendant: *Bourke* v. *Butterfield & Lewis Ltd.* (2).

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

Other material facts appear in the judgments hereunder.

Ingham and *Anderson*, for the appellant. Contributory negligence is not a defence to an action for breach of the statutory duty imposed by sec. 33 of the *Factories and Shops Act* 1912. In *McKinnon* v. *Barnes* (1) the Court relied solely on the dictum of *Vaughan Williams* L.J. in *Groves* v. *Wimborne* (3). The object of the Act is to protect all employees, whether they be careful or negligent, and failure to fence machinery is not negligence. So that the question of contributory negligence cannot arise. Where a statute imposes in terms an absolute and unqualified duty, unless there is some statutory exception the correlative liability arising from the breach of that duty is also absolute and unqualified, and attaches in any case where the injury complained of would not have happened if the duty had been performed. If a duty unknown to the common law is imposed by statute upon A for the benefit of B in respect of a particular subject matter, which duty is both absolute and unilateral, there can be no duty on B in respect of the same subject matter (*Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation*

(1) 1912) 12 S.R. (N.S.W.) 129. (2) (1926) 26 S.R. (N.S.W.) 57.
(3) (1898) 2 Q.B. 402, at p. 419.

Co. (1); *Butler* v. *Fife Coal Co.* (2); *Watkins* v. *Naval Colliery Co.* (1897) *Ltd.* (3); *Cofield* v. *Waterloo Case Co.* (4); *Pringle* v. *Grosvenor* (5); *Pursell* v. *Clement Talbot Ltd.* (6)).

[ISAACS J. referred to *Blenkinsop* v. *Ogden* (7); *Baddeley* v. *Earl Granville* (8).]

There was no evidence to justify the jury's answer to the fourth question. There was no reason to suppose that what the appellant did was dangerous, and therefore his doing it was not dangerous (*Chief Commissioner for Railways and Tramways (N.S.W.)* v. *Boylston* (9)). Assuming that the appellant was negligent, that negligence did not cause the injury (*British Columbia Electric Railway Co.* v. *Loach* (10)). The setting in motion of the machinery was the last act which preceded the accident and was wrongful, and was the effective cause of the accident. The direction as to contributory negligence was insufficient.

Boyce K.C. (with him *Hardwick*), for the respondent. There is no case which decides that contributory negligence is not a defence to an action for breach of a statutory duty, but there are dicta to the effect that it is a defence. (See *Halsbury's Laws of England*, vol. XXI., p. 451; *Iles* v. *Abercarn Welsh Flannel Co.* (11); *Britton* v. *Great Western Cotton Co.* (12); *Groves* v. *Wimborne* (13); *Blenkinsop* v. *Ogden* (7); *Grand Trunk Railway Co.* v. *McAlpine* (14); *Davies* v. *Thomas Owen & Co.* (15).) The action for damages arising from a breach of a statutory duty is subject to the ordinary rules of common law, one of which is that contributory negligence is an answer (*Caswell* v. *Worth* (16)).

[STARKE J. referred to *Kelly* v. *Glebe Sugar Refining Co.* (17); *Gibb* v. *Crombie* (18).]

(1) (1880) 5 App. Cas. 876.
(2) (1912) A.C. 149, at pp. 162, 165, 174.
(3) (1912) A.C. 693.
(4) (1924) 34 C.L.R. 363, at pp. 370, 379.
(5) (1894) 21 Rettie 532; 31 Sc. L.R. 420.
(6) (1914) 111 L.T. 827.
(7) (1898) 1 Q.B. 783.
(8) (1887) 19 Q.B.D. 423.
(9) (1915) 19 C.L.R. 505.
(10) (1916) 1 A.C. 719, at p. 722.
(11) (1886) 2 T.L.R. 547.
(12) (1872) L.R. 7 Ex. 130, at p. 137.
(13) (1898) 2 Q.B., at p. 419.
(14) (1913) A.C. 838.
(15) (1919) 2 K.B. 39.
(16) (1856) 5 El. & Bl. 849, at pp. 853, 855.
(17) (1893) 20 Rettie 833; 30 Sc. L.R. 758.
(18) (1875) 2 Rettie 886, at pp. 889, 892; 12 Sc.L.R. 574, at p. 578.

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The answer to the fourth question is equivalent to a finding of contributory negligence (*Symons* v. *Stacey* (1)).

Anderson, in reply.

Cur. adv. vult.

NOV. 1.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The (plaintiff) appellant in this case was in the employment of the (defendant) respondent, which is a cardboard manufacturer at Darlington, New South Wales. He worked at one of two machines known as "guillotines," a fellow workman, Alfred Ball, working at the other. On 27th May 1925 the plaintiff had completed operations at his machine for the day. Leaving it, he sat down on a pile of paper near the machine worked by Alfred Ball, and putting his foot on a spoke of the gear-wheel of that machine, which was not fenced, proceeded to unlace the boot which he wore on that foot during working hours, the wheel moved, the plaintiff's foot was injured, and it subsequently became necessary to amputate it. The *Factories and Shops Act* 1912 of New South Wales provides by Part II., sec. 33, that the occupier of a factory shall securely fence all dangerous parts of the machinery therein, and that every part of the mill-gearing and every cog-wheel shall either be securely fenced, or be in such position, or of such construction, as to be equally safe to every person employed in the factory or workroom as it would be if it were securely fenced; and further provides by the same section that a factory in which there is a contravention of the section shall be deemed not to be kept in conformity with Part II. of the Act. Sec. 53 enacts that no occupier of a factory or shop shall contract with any employee against any liability under Part II. of the Act; and sec. 56 enacts that if a factory or shop is not kept in conformity with Part II. of the Act, the occupier shall, on conviction, be liable to a penalty not exceeding £10. The plaintiff brought his action under the provisions of this statute, and the presiding Judge left for the consideration of the jury the following questions :—" (1) Was the gear-wheel in which plaintiff's foot was caught a dangerous part of the machine ? (2) Was the

(1) (1922) 30 C.L.R. 169.

gear-wheel in such a position or of such construction as to be equally safe to every person employed in the factory as it would have been if securely fenced ? (3) Was the plaintiff's injury due to the absence of a fence or guard in connection with the gear-wheel ? (4) Was the injury due to the plaintiff's own negligence in the sense that but for that negligence the accident would not have happened ? " The jury answered questions 1, 3 and 4 in the affirmative and 2 in the negative, and found a verdict for the plaintiff for £350. The (defendant) respondent moved the Supreme Court of New South Wales to set aside the verdict and enter a verdict for it. The Court set aside the verdict for the plaintiff and ordered a verdict to be entered for the defendant. The verdict of the jury was set aside on the ground that the answer which the jury had given to the fourth question submitted to them amounted to a finding that the plaintiff had been guilty of contributory negligence, and that that finding entitled the defendant to a verdict and judgment, and in doing this the Court followed an earlier decision of its own—*McKinnon* v. *Barnes* (1). The plaintiff thereupon appealed to this Court, and the question of the defendant company's liability was elaborately argued before us.

In view of the case of *Groves* v. *Wimborne* (2), and the numerous subsequent cases in which its authority has been recognized, both in Great Britain and in Australia, the defendant company was forced to admit that the happening of the accident in these circumstances gave a prima facie cause of action to the plaintiff; but it contended that the jury had found contributory negligence in the plaintiff, and that in the face of that finding the plaintiff could not hold his verdict. For the plaintiff it was said that contributory negligence did not afford any defence to the action, and that, even if it did afford a defence, the finding of the jury did not amount to a finding of contributory negligence. The first question depends on the real nature of the cause of action which the statute gives to the plaintiff. The cases collected by *McCardie* J. in *Phillips* v. *Britannia Hygienic Laundry Co.* (3) seem to establish that the breach of the provisions of a statute imposing a positive duty, if it result in injury,

(1) (1912) 12 S.R. (N.S.W.) 129. (2) (1898) 2 Q.B. 402.
(3) (1923) 1 K.B. 539.

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may merely be evidence of negligence in the person who commits the breach, or may itself give to the person injured a cause of action. If the statute is enacted for the benefit of the community at large the person injured is relegated to an action for negligence; but if the statute is enacted for the benefit of a class, and the person injured be one of that class, the question of negligence, whether in the plaintiff or defendant, is immaterial. The only question is whether the plaintiff has sustained injury because of the breach of the statutory provisions. The statute we are considering comes within the second category, and the question that arises is whether the plaintiff comes within a class for whose benefit the statute was enacted. It is clear that the statute was made for the protection of employees in a factory, whether careful or negligent. Indeed, if there were no negligence, there would be little necessity for the fencing off of dangerous machinery. It is equally clear to us that the liability of the employer cannot be determined by inquiring as to whether the employee at the time of the accident was engaged in the performance of an act for the benefit of his employer or within the scope of his own employment. In our opinion the provisions of the statute are intended for the protection of all who are lawfully within the factory in their capacity of employees. But did Parliament intend to extend that protection to every employee in every circumstance? We think not. In our opinion it would be unreasonable to attribute to Parliament an intention to impose upon the employer responsibility for an injury which the employee deliberately invites, whether by adopting the means of inflicting it, or by rejecting the means of avoiding it, or for an injury which has happened because the employee deliberately took an unnecessary risk not in the interests of the employer, but for his own purposes. It is not easy to frame an exact formula; but it may be said that the employer is responsible for the negligence, but not for the misconduct, of his employee. Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact. In this case the answer of the jury to question 4 does not amount to a finding of misconduct, and in our opinion the facts would not justify such a finding. The plaintiff is therefore within the protection of the statute, and is entitled to his verdict.

During the argument reference was made to some cases in which it appears to have been suggested that in an action such as the present the defendant might rely upon the defence of contributory negligence. We think that in English law the phrase " contributory negligence " is appropriate only in an action for negligence and not in an action founded on the breach of a positive statutory duty ; but if no more was meant than that in such an action the plaintiff may be disentitled to succeed because of his own misconduct, we agree that that is an accurate statement of the law.

Much reliance was placed on the case of *Iles* v. *Abercarn Welsh Flannel Co.* (1). The plaintiff (a girl) had been injured in the defendants' factory owing to their not having fenced off machinery. The plaintiff, when going up a staircase with a skein of yarn over her arm, had been followed by a boy fourteen years of age, who had taken hold of her ankle. Upon this, she had turned round and, flinging up the yarn, had attempted to strike him with it. The yarn had been caught in the shafting, and by this means the plaintiff's arm had been caught in the machinery. The learned County Court Judge was of opinion that if the girl and boy had not been playing together the accident could not have happened, but that they might reasonably have been expected to do so at their work, and that the defendants were liable for the injuries suffered by the plaintiff, as their shafting had not been properly fenced off in accordance with the statute. His Honor further held that the defence of " contributory negligence " could not avail a defendant where he had been guilty of a breach of statutory duty. A Divisional Court dismissed the appeal on the ground that there was no evidence of contributory negligence, but intimated that contributory negligence, if established, would have been a sufficient defence. It is not easy to say that the facts of that case disclose no evidence of contributory negligence in the ordinary meaning of that phrase, but we agree with the learned County Court Judge in thinking that the conduct of the boy and girl was exactly what might have been expected to occur from employees of that age, and that contributory negligence in its strict sense afforded no defence ; we also agree with the learned Justices of the Queen's Bench Division in thinking that there was no

(1) (1886) 2 T.L.R. 547.

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misconduct by the girl, if that is the meaning of their words. We think that the Scotch cases to which we were referred are in line with the opinion we have expressed. Thus in *Gibb* v. *Crombie* (1) Lord *Neaves* is reported as saying: "Although I do not deny that there may be contributory misconduct on the part of a young person, which will disentitle him from recovering, I do not think that contributory negligence is a sufficient defence in such a case as the present. I cannot make them liable for negligence which may be the result of that over tension of the faculties which it is the object of the statute to prevent." Again, in *Pringle* v. *Grosvenor* (2) the Lord Justice-Clerk *Macdonald* said that the Legislature did not intend to provide against a person putting his hand wilfully, deliberately and intentionally into danger from mere wanton bravado or anything of that kind; but against a person committing a mistake—the inadvertent mistake it might be of going to the wrong side of a machine and thereby sustaining injury.

Finally, we should perhaps add that the fourth finding of the jury could not, in any case, have been sustained as a finding of contributory negligence. The charge of the learned Judge upon the subject of contributory negligence was inadequate; but we have thought it right to deal with the case on a broader and, we hope, a more satisfactory basis than was possible in the Supreme Court.

The appeal should be allowed and the verdict of the jury for £350 restored.

ISAACS J. This appeal raises for decision the question referred to but not determined in *Cofield* v. *Waterloo Case Co.* (3), namely, whether the defence known as "contributory negligence" is a valid defence in such an action as the present.

This action is based directly upon the employer's breach of its statutory duty to fence all dangerous parts of the machinery in its factory, the breach resulting, as it is alleged, in an injury to the appellant which necessitated the amputation of his right foot. Before considering the right to reparation, I would earnestly repeat some observations I made in *Cofield's Case* (3), a little over two

(1) (1875) 2 Rettie 886. (2) (1894) 21 Rettie 532.
(3) (1924) 34 C.L.R. 363.

years ago, on what is even more important than reparation—I mean prevention of such ghastly calamities, for which money can never be a real compensation. With reference to the statutory obligation to fence dangerous machinery, I said (1) :—" 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." The accident that maimed for life the unfortunate boy who is the present appellant occurred nearly twelve months after those observations. I venture with respect to press them once more upon the attention of the New South Wales Legislature. I would add a further suggestion. Inspectors have, it would seem, ample powers (secs. 9 and 70). In the event of a complaint being made by an inspector under sec. 35, it would probably lead to adequate protection being afforded in the given case. But there is apparently a gap in the administrative chain of security, and it might be advisable either by statute or regulation to prescribe it as a *duty* of every inspector to examine, and to report the results of his examination and inquiry, as to compliance or non-compliance with factory provisions.

As to the issue of law we have to determine, I feel no difficulty, when governing principles are ascertained and applied, in holding that the defence of contributory negligence is not available in an action based directly on sec. 33 of the *Factories and Shops Act* 1912. *Campbell* J. so directed the jury, and in my opinion he was right. In *Cofield's Case* (2) I thought it not essential, and therefore left it open for final decision. At the same time the necessary consideration of the nature and extent of the factory occupier's statutory duty towards his employees, as prescribed by the Act of 1912 at the peril

(1) (1924) 34 C.L.R., at p. 371. (2) (1924) 34 C.L.R. 363.

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of incurring the statutory penalty, led me to form some very strong impressions as to the correlative civil rights of the employees in the event of a contravention of the statute. Those impressions I tentatively expressed, and now, after full consideration, find them confirmed and strengthened. They are set out on pp. 377 to 379, and, as in accordance with them I shall specifically state my reasons for allowing this appeal, they need not be verbally quoted.

The judgment of the Supreme Court is in the main rested on the prior decision of *McKinnon* v. *Barnes* (1). The basic ground of that decision is that where there is contributory negligence the damage does not result through the defendant's breach of statutory duty; in other words, as expressed during the argument on this appeal, the connection between breach and damage is not established. The decision is primarily rested on some observations by *Vaughan Williams* L.J. in *Groves* v. *Wimborne* (2). Referring to that passage and to portion of the judgment of *Kennedy* J. in *Blenkinsop's Case* (3), which is also relied on by the respondent, there are two observations I would make. One is that in those cases no reference is made to the distinction by the other members of the Court, it being unnecessary to either decision. The other is that the only way in which the passages referred to can be reconciled with the judgment in *Blenkinsop's Case* is that the injury resulting from the statutory breach may be its indirect consequence and yet within the enactment as far as the penalty is concerned, whereas according to the dicta quoted the injury would not be the subject of a civil action unless it were the direct consequence of the breach. I understand the judgment in *McKinnon* v. *Barnes* as adopting that distinction; for otherwise it would be in direct conflict with the most authoritative decisions that contributory negligence does not necessarily destroy the causal connection between the defendant's negligence and the plaintiff's damage, but may, according to the circumstances, merely add a new co-operating factor, which is itself part of the cause—"the cause," that is, the direct or proximate cause, being the totality of co-operating factors resulting in the damage. This seems to me on the mass of authority so transparently clear, notwithstanding

(1) (1912) S.R. (N.S.W.) 129.
(2) (1898) 2 Q.B., at p. 419.
(3) (1898) 1 Q.B., at p. 785.

even the opinion of *Bowen* L.J., that nothing but the vigour with which the opposite view was maintained induces me to refer to some of the authorities which govern the point. I accordingly mention *Mills* v. *Armstrong*; *The Bernina* (1); *Grand Trunk Railway Co.* v. *McAlpine* (2); *Canadian Pacific Railway Co.* v. *Fréchette* (3); *Admiralty Commissioners* v. *s.s. Volute* (4), and *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (5). Indeed, *The Bernina* is a direct negation of the doctrine. It was a common law action against the owners of the *Bernina* for negligence causing death. The facts showed that the injury was the result of the combined negligence of the *Bernina* and the *Bushire*. The decision of the House of Lords was that the whole of the damages were recoverable against the *Bernina*. The real ground for the disqualification of a plaintiff for his own contributory negligence is stated by Lord *Watson* thus (6): "When the combined negligence of two or more individuals, who are not acting in concert, results in the personal injury of one of them, he cannot recover compensation from the others, for the obvious reason that but for *his own neglect* he would have sustained no harm."

If, in accordance with *Blenkinsop's Case* (7), the statutory duty is to guard employees against even the indirect consequence of injury, it would seem hopeless to urge that contributory negligence can be a valid defence in a civil action on the ground that it and not the statutory contravention is the direct cause. In the first place it must be borne in mind, and I pointed this out in *Cofield's Case* (8), that an action based *directly* on the breach of a statutory obligation is not an action for "negligence" as that is commonly understood. For that position, which is clear on the face of the matter, there is also the authority of *Watkins* v. *Naval Colliery Co.* (1897) *Ltd.* (9). An action based on "negligence" at common law brought, for instance, by a person not entitled to sue directly for breach of a statutory duty, may sometimes be evidenced by showing failure to comply with the

(1) (1888) 13 App. Cas. 1, at p. 16, Lord *Watson*.
(2) (1913) A.C., at p. 847, Lord *Atkinson*.
(3) (1915) A.C. 871, at pp. 878-879, Lord *Atkinson*.
(4) (1922) 1 A.C. 129, at pp. 144-145, Lord *Birkenhead* and other learned Lords.
(5) (1924) A.C. 406, at pp. 420-421, Lord *Shaw of Dunfermline*, quoting Lord *Selborne*.
(6) (1888) 13 App. Cas., at p. 16.
(7) (1898) 1 Q.B. 783.
(8) (1924) 34 C.L.R. 363.
(9) (1912) A.C. 693.

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statutory regulation (*Williams* v. *Great Western Railway Co.* (1)). There, however, as the ground of action is common law negligence, the common law defence of what is styled " contributory negligence " is available. But, as already shown, that is not because the " contributory negligence " necessarily breaks the chain of causation, for sometimes, as in *The Bernina* (2), it does not. Sometimes it does, as in *The Paludina* (3). But it cannot, merely because it is contributory negligence, break the chain of causation any more than if it were the co-operating negligence of the third person. The point to be borne in mind is that the defence is available even though the chain of causation is not broken, because, as Lord *Watson* says, the plaintiff has failed to take that care of himself which in the circumstances the common law requires of him and he must bear the consequences. This I expressed in *Cofield's Case* (4) by saying that the defendant's responsibility is, in effect, shortened by the plaintiff's obligation to take care of himself. I would, however, make it clear that I do not base my opinion that the defence of " contributory negligence " is inappropriate in the present case on the reason that negligence cannot be set off except against negligence. I explained in *Symons* v. *Stacey* (5) that " negligence " in the phrase " contributory negligence " does not always mean neglect of duty to another, but sometimes means neglect to take proper care of oneself. That obligation may be as appropriate in the case of a statutory duty as where the cause of action is pure negligence. The omission of that condition creates a disqualification in the plaintiff. But the reason I consider it inappropriate is that the statutory duty in this case is inconsistent with such a defence. Statutory duties of employers towards employees are various, and it depends entirely upon the extent of protection granted by the Legislature whether the employee is or is not freed from the common law obligation to do all that the ideal prudent citizen would do for his own safety, if he wishes to obtain redress against another whose want of care has caused him loss. For want of ability to express my reasons better, I quote what I said in *Cofield's Case* (6) :—" Protection is variously prescribed, and

(1) (1874) L.R. 9 Ex. 157.
(2) (1888) 13 App. Cas. 1.
(3) (1925) P. 40.
(4) (1924) 34 C.L.R. 363.
(5) (1922) 30 C.L.R. 169.
(6) (1924) 34 C.L.R., at p. 379.

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 provision 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."

We, therefore, have to measure the extent of protection which is granted by the statutory duty, by properly defining it. That is always necessary whatever duty is alleged to have been broken. Lord *Herschell* lays emphasis on this in *Membery* v. *Great Western Railway Co.* (1). The crucial question then is: "Does sec. 33 require the employer to free the employee from the risks of the employment carried on upon the employer's premises for his benefit, including in those risks the danger arising from the carelessness of the employee himself?" There is nothing in the enactment which expressly includes or expressly excludes the contingency of personal carelessness. But it is settled law in England, in Scotland and in Australia that the duty does extend so far as to guard the employee's life and limb even from the direct consequences of his own carelessness—that is to say, where the prescribed penalty is the subject of the proceedings for contravention. But, if that be so, why is the employer's responsibility different when sued civilly for consequential damage? *Mallinson* v. *Scottish Australian Investment Co.* (2), based on *Groves* v. *Wimborne* (3), is a recognition by this Court that in such a case as this a civil action lies to enforce the protection intended. To those authorities may be added that of Lord *Haldane* L.C. in *Watkins* v. *Naval Colliery Co.* (1897) *Ltd.* (4): "It is not disputed that this is a provision for the benefit of the workman, and that if it is broken he may therefore, if he can prove special damage, succeed in an action."

The broken causation argument failing, why should not the employee be entitled to insist in his action on the full measure of

(1) (1889) 14 App. Cas. 179, at p. 190.
(2) (1920) 28 C.L.R. 66.
(3) (1898) 2 Q.B. 402.
(4) (1912) A.C., at p. 702.

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protection as determined in penalty cases ? If he is not, it must be because there is something in the language of the statute pointing to the distinction, or an implication to the same effect arising from some element of inherent injustice in permitting him to claim *reparation* when he has contributed to his damage by conduct which at common law would be called " contributory negligence," although in precisely the same circumstances he is entitled to *security* from the same damage. The language of the Act itself offers no support to the distinction. On the contrary it leads in the opposite direction. Its preamble includes the purpose of " the extension of the liability of employers for injuries suffered by employees in certain cases." The word " liability " is not necessarily criminal liability, but is a comprehensive term capable of including and apt to include liability to the employees themselves. Sec. 33 itself requires the dangerous parts of machinery to be " securely fenced." What is meant by " securely fenced " is shown by sub-sec. 3, which allows in certain cases an alternative course. The alternative course is to have every part of mill-gearing and every cog-wheel " either securely fenced or in such position . . . as to be *equally safe to every person employed in the factory* or workroom as it would be if it were securely fenced." Again, sec. 34, which deals with machinery outside sec. 33, refers to it as " so dangerous as to be likely to *cause bodily injury to any person employed in the factory.*" The persons to be protected are not merely those who may be careful, but all employees. The suggested distinction in secs. 33 and 34 would, if valid, apply also to sec. 38. The word " causes " in sec. 38, where death or lesser injury results, would, on the respondent's contention, be calamitously restricted.

I turn then to the question of implication arising from inherent injustice. Inherent injustice is certainly not found in the essential nature of contributory negligence itself. The common law has indeed established a rule. But in Admiralty cases the loss is divided. In Quebec the plaintiff's fault is estimated by the jury, and a proportionate allowance is made (see *Canadian Pacific Railway Co.* v. *Fréchette* (1)). The truth is that we are called upon to construe and apply a modern enactment for the effective protection of

(1) (1915) A.C., at p. 878.

employees in modern factories. The Court, no less than the Parliament whose words we have to interpret, is a living organism of the same society, broadly conscious of its industrial activities and the evils intended to be met, and fully seized of the corporate sense of the community with regard to them. We have, therefore, I apprehend, to read the words of the Legislature in relation to their subject matter as nearly as we can in the sense they would naturally bear, having regard to the existing circumstances. When that is done there seems to me to be very little difficulty in coming to a conclusion.

It is common knowledge that in the modern factory system the machine, with its elaborate complication and terrific force, demands from its human attendants, not merely skill, but ceaseless watchfulness and attention, involving constant strain of every sense, and wear and tear of the nervous system. If, as I conceive, human life is to be the supreme consideration, then in those circumstances the old balancing of the common law of reasonable care for employees' safety on the one side, and, on the other, such reasonable conduct for self-preservation as is expected in ordinary life where men meet on an equal footing, is a fallacious standard. By degrees, as may be traced, legislation has come to recognize that so much cannot be fairly expected of employees whose carelessness, judged by ordinary standards, is so far created or induced by the very conditions of their occupation that it is really incidental to it and consequently ought to be guarded against by the employer.

It is necessary to consider the limitations of the employer's responsibility, for it cannot be at large. In *Cofield's Case* (1) I said: "Wilful misuse of machinery and doing acts entirely outside the sphere of employment . , . are, in my opinion, matters foreign to 'negligence,' and their legal effect may be rested upon independent considerations." They are equally foreign to the breach of statutory duty, and they mark the limits of responsibility, though in different ways. The underlying concept of such legislative regulations, perhaps not always a consciously appreciated concept, is, as I expressed it in *Australian Steamships Ltd.* v. *Malcolm* (2), that the relations of employers and employees in the actual conduct of

(1) (1924) 34 C.L.R., at p. 379. (2) (1914) 19 C.L.R. 298, at p. 333.

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industrial operations "are the relations of essential, connected and closely related parts of the same mechanism." Lord *Colonsay*, in *Wilson* v. *Merry* (1), when speaking of the employee, referred to "his position in the organism of the force employed, and of which he forms a constituent part." That concept furnishes a guide both to what is and what is not the responsibility of the employer. Within the sphere of the employment for the purposes of the organism the responsibility of the employer is absolute for all injuries caused by breach of his statutory duty. Outside that sphere the relations of employer and employee do not exist, and therefore the duty does not extend. Within the sphere of mutual relationship the common law balance is disturbed, but not, in my opinion, further. Even within that sphere it is not every injury that can in any rational sense be said to be occasioned by the breach of statutory duty. Wilful and intentional acts of self-injury are obviously outside the possible limits of what is incident to business operations, and therefore outside the just application or implication of a law regulating the mutual relations of those co-operating in industry. A workman who, for instance, deliberately removes the sufficient protection installed by his employer, or who forces his way over it in conscious defiance of the ordinary impulses of self-preservation, cannot truthfully assert that the employer has not fulfilled his statutory obligation. The employee in the case supposed has destroyed the protection in fact supplied. He has by his own act placed himself beyond what our common experience of industrial conditions has shown to be necessary for bodily security. These considerations I adopt independently of any authority or judicial assistance.

I am, therefore, not able to accept the guidance of the opposing dicta referred to in the all too briefly reported case of *Iles* v. *Abercarn Welsh Flannel Co.* (2).

There are, however, two cases, one of which I have found since the argument, which offer considerable confirmation of the views I have expressed. The first is *Pringle* v. *Grosvenor* (3). The Lord Justice-Clerk (Lord *Kingsburgh*) said of a similar section (4): "I

(1) (1868) L.R. 1 H.L. (Sc.) 326, at p. 345.
(2) (1886) 2 T.L.R. 547.
(3) (1894) 31 Sc.L.R. 420.
(4) (1894) 31 Sc.L.R., at p 422.

think the Legislature intended to provide not against a person putting" his "hand or any part of" his "person wilfully, deliberately, and intentionally into danger from mere wanton bravado or anything of that kind, but against a person committing the mistake, the inadvertent mistake it might be, of going to the wrong side of the machine and thereby getting injured." The other case is *Fotheringham* v. *Babcock & Wilcox Ltd.* (1). That was a case of prosecution for not guarding against electric wires. An employee was killed. It was found as a fact that there was no danger to the deceased if he used reasonable care. Lord *Hunter*, who gave the second judgment, said (2):—"The provision is intended to protect workmen against carelessness as your Lordship has said, and it would seem to me to be an extraordinary doctrine that an employer could relieve himself of the statutory obligation and the necessity for the provision of adequate protection for his workmen by saying:—'We warned the workmen of the danger they ran from the machinery or the wires in their neighborhood. If therefore they had exercised reasonable care the men would not have been injured.' That appears to me to be a hopelessly bad defence in the mouth of employers." And the Court held the employer liable to a penalty for contravention.

But outside the sphere of employment—that is, outside the sphere of the mutual relations—there cannot be any duty by "employer" towards "employee." Outside that sphere the "employee" does not possess that character, any more than outside the judicial sphere a Judge is a judicial officer. Beyond the limits of the employment the employee is, *vis-à-vis* the employer, simply a fellow citizen, and the ordinary law applies. Wilfulness may occur within the sphere, and, where it is then the cause of injury, it shows that the injury *did not in fact* occur by reason of the breach of the employer's statutory duty to his employee as such. But, where it is established that the accident happened outside the sphere of employment, it is not a question of whether in fact the breach of duty caused the injury: it is then clear that the injury *could not in law* be attributed to the employer's breach of his statutory duty to protect his employee as such. Where the workman is outside the

(1) (1922) 59 Sc.L.R. 497.

(2) (1922) 59 Sc.L.R., at p. 500.

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sphere of employment it is equivalent to his being outside the sphere of statutory protection.

The only question remaining is; "What is the criterion as to whether the occurrence was outside the sphere of employment?" No doubt where, as Lord *Macnaghten* said in *Reed* v. *Great Western Railway Co.* (1), quoted by Lord *Dunedin* in *Lancashire and Yorkshire Railway Co.* v. *Highley* (2), an employee is engaged on a purpose of his own, and not in the execution of his duty or in the interest of his employer, he puts himself "outside the area of protection." But the circumstances of industry are so various that great difficulty nearly always arises in determining whether the employee at the crucial moment was acting within or beyond the sphere of his employment. The test as a legal proposition is simple: "Was he doing what he was employed to do, however improperly, or was he doing something altogether outside his employment?" (See *Garallan Coal Co.* v. *Anderson* (3).) But as between employer and employee the method of approaching that question is all-important. In my opinion it depends on the way in which the terms of the employment are conveyed, and the proper criterion is as follows: How would the workman reasonably understand the terms of or the instructions in his employment? To determine this, the ordinary process must be applied, thus:—(1) If those terms *clearly*, either expressly or by implication, limit the area of the employment as distinguished from merely regulating the workman's conduct within that area, then, if in fact the workman at the crucial moment was, in contravention of those terms, acting outside the area, the employer is not liable. In other words, if no person in the workman's situation, having regard to the terms of his contract of employment or to his instructions, could reasonably believe that at the moment of the accident he was in any way engaged in performing any of his duties as employee, then he was acting outside the sphere of his employment. (*Garallan Co.'s Case* (3); *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (4).) (2) But if the terms of his contract or his instructions are, in relation to the employment, *ambiguous* to the

(1) (1909) A.C. 31, at p. 34.
(2) (1917) A.C. 352, at p. 362.
(3) (1926) 42 T.L.R. 747, at p. 748; (1926) Sc.L.T. 649, at pp. 650, 651.
(4) (1926) A.C 377.

extent that the workman could reasonably believe, and did believe, that his act at the crucial moment was within his area of employment, then as between him and his employer he must be taken to have been within that area. That is to say, if a person in his situation would reasonably believe that he was at that time in some way performing his duty as employee, however carelessly, however contrary to some direction as to his conduct as employee in performing it, and whatever accompanying indiscretion there may be, short of wilfulness of injury, he is, nevertheless, in relation to his employer, acting within his sphere of employment and within the area of statutory protection. (See *Finn* v. *Shelton Iron, Steel and Coal Co.* (1).)

For these reasons I am of the opinion that the appeal should be allowed, and the verdict for the appellant restored.

HIGGINS J. In my opinion the appeal must be allowed and the verdict for the plaintiff restored.

My grounds are two : (1) that the finding of the jury on the fourth question does not amount to a finding of contributory negligence ; and (2) (if it is proper for one to express his view on the larger subject) that contributory negligence of the injured person is not a valid defence in an action such as this, for injury caused through the neglect of the defendant to fence dangerous machinery.

I assume, in favour of the defendant, that under the New South Wales system of pleading, a defence of contributory negligence where applicable can be raised under the mere plea of not guilty.

The facts are really undisputed. The plaintiff, a lad of 17, worked an electrical guillotine in a card-board box factory. Another lad, Ball, worked another such guillotine some 4 or 6 feet away. The plaintiff rose to leave his work shortly after the usual time ; and as Ball was not at his place and his guillotine was not moving, the plaintiff proceeded to exchange his factory boots for his ordinary boots, sitting down on a pile of paper, and resting his foot on a spoke of Ball's gear-wheel. The wheel began to move (there is no evidence how) ; the plaintiff was pulled round to the front of the machine, and his foot was so injured that it had to be amputated.

(1) (1924) 17 B.W.C.C. 69, at pp. 87, 91, 92.

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Now, the jury at the trial gave a verdict for the plaintiff for £350, but, at the instance of the trial Judge, answered also certain questions. The jury found (1) that the gear-wheel was a dangerous part of the machine ; (2) that it was not in such a position or of such construction as to be equally safe to every person employed in the factory as it would have been if securely fenced ; (3) that the plaintiff's injury was due to the absence of a fence or guard in connection with the gear-wheel. These findings are not impugned by the defendant ; and finding 3 would seem at first sight to be conclusive as to the liability of the defendant, the defendant being under an unqualified duty to fence (secs. 33 and 56 of the *Factories and Shops Act* 1912 of New South Wales), and an injury having happened to the plaintiff, an employee, one of the persons for whose benefit the duty was imposed, in consequence of the failure of the defendant to observe that statutory duty. But the jury also found (4) that the injury was due to the plaintiff's own negligence " in the sense that but for that negligence the accident would not have happened." I take this to mean that if the lad had not been so rash as to put his foot on the spoke of the wheel the foot would not have been torn ; of course not. The Full Supreme Court of New South Wales has set aside the verdict on the ground of contributory negligence of the plaintiff ; and their decision was based mainly (by *Ferguson* J. solely) on a previous decision of the Supreme Court in *McKinnon* v. *Barnes* (1).

Even assuming, however, that contributory negligence of the plaintiff can be treated as a defence to the plaintiff's claim, I cannot regard the finding of the jury as amounting to a finding of contributory negligence. The jury had already found the *efficient* cause of the injury in the fact that there was no fence in pursuance of the statutory duty; and finding 4 merely shows what in legal jargon is called a *causa sine qua non*—a condition without which the accident could not have occurred. I do not want to get entangled in legal-logical-philosophical discussion as to the meaning of the word " cause." I notice that Mr. *Beven*, in his work on *Negligence*, cites from Aristotle his doctrine as to four kinds of causes (3rd ed., p. 155). Juries are not bound to accept Aristotle's doctrine ; but

(1) (1912) S.R. (N.S.W.) 129.

that there is some solid and substantial distinction between *causa causans* and *causa sine qua non* was recognized even by Plato, in an utterance of Socrates to the effect that "in reality a cause is one thing, and the thing without which the cause could never be a cause is quite another thing. And so it seems to me that most people, when they give the name of cause to the latter, are groping in the dark, as it were, and are giving it a name that does not belong to it" (*Phaedo*, c. 47, 99B). "Cause," however, is not a technical term from the point of view of lawyers, and the word is to be given the meaning in which the man in the street uses it; and here, the jury having found the failure to fence as the cause of the accident, that must be taken as the true cause, and the carelessness of the plaintiff in putting his foot on the spoke as a mere condition essential to the occurrence of the accident. At all events, the distinction between the efficient cause and the *causa sine qua non*, whether it is based on sound philosophy or not, is a distinction recognized by the Judicial Committee of the Privy Council (*British Columbia Electric Railway Co.* v. *Loach* (1); and see per *Brett* L.J. in *Chartered Mercantile Bank of India, London and China* v. *Netherlands India Steam Navigation Co.* (2)).

But even if finding 4 can be treated as a finding of contributory negligence on the part of the plaintiff, I have come to the conclusion that such a finding does not diminish or affect the liability of the defendant for breach of its statutory duty to fence—a breach to which the injury to the plaintiff was due (finding 3). The learned Judges of the Supreme Court acted on the contrary view under the constraint of a previous decision of that Court (*McKinnon* v. *Barnes* (3)), backed up, as it was, by certain dicta in English cases. This decision, as well as the dicta, must be examined; but it is noteworthy that no case has been cited to us from the English Courts in which it has been directly decided that contributory negligence affords a defence where, as here, the cause of the injury has been found to be a breach of an absolute, unqualified statutory duty (see *Factories and Shops Act* 1912, secs. 33, 56). By sec. 56 a penalty not exceeding £10 is imposed on the employer who does not keep all

(1) (1916) 1 A.C. 719, at pp. 726, 727. (2) (1883) 10 Q.B.D. 521, at p. 531.
(3) (1912) 12 S.R. (N.S.W.) 129.

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dangerous parts of the machinery fenced; but it is not contended for the defendant that such a provision for a penalty prevents the application of the ordinary right of action of an employee for whose benefit the fence is prescribed if he be injured in consequence of the neglect to carry out the statutory duty to fence. This point is treated as settled by the decision of the Court of Appeal in *Groves* v. *Wimborne* (1). Given, then, an absolute statutory duty to fence, and right of action for injury due to the neglect of that duty, what right has any Court to annex a condition that there shall be no contributory negligence on the part of the plaintiff — a condition which the Legislature has not imposed either expressly or by *necessary* implication? Professor *Roscoe Pound* in his *Spirit of the Common Law*, p. 48, aptly quoted by my brother *Isaacs* in *Cofield* v. *Waterloo Case Co.* (2), commented with good reason on the tendency of the Court "to read the doctrine of contributory negligence into statutes even where the Legislature has tried to get rid of it." But this is not even an action for negligence; and what has *contributory* negligence to do with an action of which negligence is not the basis? There is no negligence to which the plaintiff can contribute, but a breach of a statutory duty to fence. As *Rigby* L.J. said in *Groves* v. *Wimborne* (3), "the cause of action relied on in the present case has nothing to do with negligence." We are simply thrown back on the absolute statutory duty to fence; and the duty is the same whether the injured lad is careless in his conduct or not. This position is established by *Blenkinsop* v. *Ogden* (4), where the proceeding was for the penalty, not an action by the injured person; but the duty of the employer is the same in the action as in the proceeding for a penalty. *Kennedy* J. said: "It is to the interest of the State that the machinery should be safe for negligent as well as for careful people." It is true that in this case, as reported in the *Law Reports* (not so explicitly as reported in the *Law Journal* (5) or the *Law Times* (6)), *Kennedy* J. uttered some *obiter dicta* in favour of contributory negligence being a defence in an action; but it appears from the report of the argument that plaintiff's counsel *admitted* that in an action for damages the plaintiff's conduct would

(1) (1898) 2 Q.B. 402.
(2) (1924) 34 C.L.R., at pp. 378, 379.
(3) (1898) 2 Q.B., at p. 413.
(4) (1898) 1 Q.B. 783.
(5) (1898) 67 L.J.Q.B. 537.
(6) (1898) 78 L.T. 554.

preclude him from recovering. This seems to be one of the numerous cases in which counsel generously throws away an argument that does not concern him in the immediate case—like a sop to Cerberus, which neither strengthens his jaws not causes loss to the giver. Another *obiter dictum* referred to by the learned Chief Justice of the Supreme Court in his judgment is that of *Vaughan Williams* L.J. in *Groves v. Wimborne* (1). The case of contributory negligence was not raised in the action for breach of duty to fence; but the Lord Justice, deciding that the doctrine of common employment is not applicable to injury by breach of an absolute duty imposed by statute to fence for the protection of employees, expressed his opinion that there were cases in which the defence of common employment would be available, saying:—"No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. *It would be an answer for the reason that in fact the damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty*, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff." But this reference to contributory negligence was a mere digression in support, by analogy, of an argument not favoured by the other Lords Justices, that common employment would in some cases be an available defence. It is a good example of the danger incident to *obiter dicta*. But the final words of the statement point to the real working of the mind of the Lord Justice: he was thinking of the case where the injury is due to the act of the employee himself, not to the failure of the employer to fence—a case which is negatived here by finding 2. There are also *obiter dicta* to the same effect, by the King's Bench Division in *Iles* v. *Abercarn Welsh Flannel Co.* (2), by *Channell* B. in *Britton* v. *Great Western Cotton Co.* (3); but they are *obiter dicta* only and do not bind us. On the other hand, the view taken by *Wightman* J. and *Willes* J. in *Clarke* v. *Holmes* (4)

(1) (1898) 2 Q.B., at pp. 418, 419.
(2) (1886) 2 T.L.R. 547.
(3) (1872) L.R. 7 Ex. 130.
(4) (1862) 7 H. & N. 937, at pp. 946-947 (Exch. Ch.).

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seems to lift the subject out of conjecture, and to place it on a firm basis unaffected by considerations of contributory negligence. As stated by *Wightman* J. during the argument, and agreed to by *Willes* J., "the defendant was under a statutory obligation to fence the machinery, and in consequence of his not doing so the accident happened." The absolute obligation to fence having been established, and the breach of that duty, and consequent injury to the employee, "no question of negligence or of the doctrine of common employment is relevant" (per Viscount *Haldane* in *Watkins* v. *Naval Colliery Co.* (1897) *Ltd* (1)).

The case of *McKinnon* v. *Barnes* (2) has to be fully examined. But it is a case in which it was assumed, by counsel as well as the Court, that a defence of contributory negligence was available to the defendant. The jury found that the machine was dangerous, that the injury resulted from the employer's neglect to fence it, but that the plaintiff was guilty of negligence which contributed to the accident; and returned a verdict for the defendant. Counsel for the plaintiff, in moving to set aside the verdict, expressly said that they took no exception to the summing-up of the trial Judge, although the Judge had expressly told the jury that if the plaintiff had failed to take ordinary care the defendant was entitled to a verdict. The learned Chief Justice in his judgment pointed out this position clearly, saying (3):—"No exception is taken to his Honor's directions to the jury when summing up. It is admitted that he completely and properly explained to the jury the nature of the defence of contributory negligence, and put them in a position to decide whether such a defence had been made out or not."

It is impossible, therefore, to treat the case as a decision in which the point whether contributory negligence is a defence has been established after a contest, or to give to the case the weight of a definitely contested issue of law on the subject now before us.

Ferguson J. in the Court below pointed out clearly the anomaly which resulted from the case of *McKinnon* v. *Barnes* (2), which case he felt bound to follow (4):—"There is abundant authority

(1) (1912) A.C., at p. 703.
(2) (1912) 12 S.R. (N.S.W.) 129.
(3) (1912) 12 S.R. (N.S.W.), at p. 131.
(4) (1926) 26 S.R. (N.S.W.), at p. 63.

for saying that the duty imposed by this statute was one imposed for the benefit of workmen as a whole, not only for those who were careful, but for the negligent workmen as well. It seems to me an anomalous position that it should be held that an action can be maintained only by members of part of that class."

It is reassuring to find that, if the appeal be allowed, this anomaly will no longer exist; and that the measure of duty of the employer under the Act will not be treated as different in the case of an action by the injured person and in the case of a proceeding for a penalty.

Appeal allowed. Judgment appealed from discharged and verdict of jury restored. Respondent to pay costs in Supreme Court. By consent no costs of this appeal.

Solicitors for the appellant, *Taylor & Kearney.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nichols.*

B. L.