[HIGH COURT OF AUSTRALIA.]

FITZPATRICK . . . . . APPELLANT;
PLAINTIFF,

AND

WALTER E. COOPER PROPRIETARY LIMITED AND ANOTHER . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1935.

MELBOURNE, *Nov.* 20; *Dec.* 19.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Negligence—Evidence—"Res ipsa loquitur."

Practice—Action for negligence—Reference in address to jury by defendant's counsel to plaintiff's right to workers' compensation—Whether trial vitiated.

While working on the ground floor of a building which was in the course of erection the plaintiff's husband was killed by a bag of plaster falling on him from a skip which had been raised to a considerable height above him by men employed by the defendant. In an action under Part III. of the *Wrongs Act* 1928 (Vict.) (Lord Campbell's Act) the plaintiff proved the accident and the resulting injury. The defendant gave evidence that the precautions taken in securing the skip were those in general use and regarded by experts as sufficient, but nevertheless, for some reason which could not be explained, the skip tilted and the fall of the bag resulted. In his opening address to the jury plaintiff's counsel said that the action was the plaintiff's only opportunity of obtaining redress for the death of her husband. The defendant's counsel in his final address said that a verdict for the defendant would not deprive the plaintiff of her rights under the *Workers' Compensation Act*. The plaintiff's counsel did not ask the Judge to discharge the jury because of this remark, but the Judge told the jury they had nothing to do with workers' compensation. The jury returned a verdict for the defendant.

Held, by *Latham* C.J., *Starke* and *Dixon* JJ. (*Rich* and *McTiernan* JJ. dissenting), that the verdict should stand. On the evidence the jury were entitled

to bring in the verdict which they returned, and the trial Judge had adequately dealt with the remark of the defendant's counsel as to workers' compensation.

The principle of *res ipsa loquitur* considered.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

APPEAL from the Supreme Court of Victoria.

The appellant, Frances Mary Fitzpatrick, brought an action in the Supreme Court of Victoria against the respondents, Walter E. Cooper Pty. Ltd. and William Lamping, claiming £3,000 damages under the *Wrongs Act* 1928 (Vict.), Part III. (Lord Campbell's Act), for the negligence of the defendant company and the individual defendant causing injuries to the plaintiff's husband, on 5th November 1934, from which he died on 9th November 1934. The action was brought by the widow on behalf of herself and the two children of herself and the deceased, Frances Fitzpatrick and Terence Fitzpatrick. The defendants denied negligence, and pleaded contributory negligence on the part of the deceased and that the deceased voluntarily accepted and undertook the risk.

On 5th November 1934 the deceased was employed working on the ground floor of a building which was in the course of erection in Melbourne. While he was so employed a skip containing fibro-plaster sheets and two bags of plaster each weighing about 120 pounds was hoisted to a great height above him. During this process one of the bags of plaster fell from the skip upon the deceased, causing him injuries which resulted in his death. The crane and the skip were at the time under the care and management of men employed by the defendant company, which was not the deceased's employer. Evidence was given by the defendants of the manner of securing the ropes on the skip and of the efficacy of the method employed.

In his opening address to the jury plaintiff's counsel said :—" This action is the plaintiffs' only opportunity of obtaining redress for the loss they have suffered. The death of the worker has left them penniless." Defendants' counsel in his final address to the jury countered this statement by saying that a verdict for the defendants would not deprive the widow and children of their rights under the *Workers' Compensation Act*. Plaintiff's counsel objected, and the learned Judge told the jury to put the matter out of their minds

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

as it had nothing to do with the case. Before retiring, the foreman asked whether "we have to consider the workers' compensation," and the learned Judge again informed them that they had nothing whatever to do with that matter. Plaintiff's counsel did not ask the Judge to do more and made no application for the discharge of the jury.

The jury returned a verdict for the defendants. The plaintiff appealed to the Full Court and sought a new trial or alternatively that judgment be entered for the plaintiff on the issue of liability and that a new trial be ordered on the question of damages. The Full Court dismissed the appeal.

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

Further facts appear in the judgments hereunder.

Gorman K.C. (with him *L. Little*), for the appellant. The jury's verdict can only be explained by the foreman's question as to workers' compensation. This shows that the jury were considering the possibility of the plaintiff being compensated under that Act. The reference to the plaintiff's right to receive workers' compensation was the cause of grave injustice to the plaintiff (*Rowe* v. *Edwards* (1)). Both in the case of a plaintiff who says that the defendant is insured and in the case of a defendant who says that the plaintiff is insured, the Court should give very grave consideration to the effect of such a statement. In this case it is fair to assume that very unsatisfactory and unreasonable results were due to that comment. The trial Judge should have directed the jury on the question of negligence that they should find for the plaintiff, because on the evidence the jury must have come to the conclusion that there was negligence on the part of the defendants. It is a case of *res ipsa loquitur* in a very strong form. The evidence was that if the skip was properly adjusted the accident could not have happened. The accident did happen, and, therefore, the skip could not have been properly adjusted. The onus of proving that the skip was properly adjusted lay heavily upon the defendants (*Winnipeg Electric Co.* v. *Geel* (2)). This is not an ordinary case of negligence, in which the onus of proof was on the plaintiff. The defendants raised the object

(1) (1934) 51 C.L.R. 351.

(2) (1932) A.C 690, at p. 699.

into a position of danger (*Flannagan* v. *Harris* (1)). There is no suggested explanation on the part of the defendants. A finding that the ropes were tied properly would be against the weight of evidence, and there is a complete absence of any satisfactory explanation by the defendants.

Gamble, for the respondents. It is sufficient if the defendants give evidence tending to negative negligence. They need not prove that there was no negligence. A reasonable explanation is all the defendants are called upon to show in order to rebut the prima facie case (*The Kite* (2)). If the evidence given by the defendants does not disprove negligence but leaves the matter open, the onus that rests on the plaintiff has not been discharged. The witness who gave evidence that if the skip was properly tied the accident could not have happened was not giving expert evidence and was merely saying that if the ropes were properly tied the skip would probably not slip. There is ample evidence to negative negligence on the part of the defendants and to justify the jury's finding. The verdict was not only justifiable but was the proper verdict on the evidence. It is sworn that all reasonable precautions were taken. In *Flannagan* v. *Harris* (3) the defendant called no evidence, and the evidence was all one way, but here evidence was in fact given that all reasonable precautions had been taken. [He referred to *Salmond* on *Torts*, 7th ed. (1928), p. 34.]

[LATHAM C.J. referred to *Salmond* on *Torts*, 8th ed. (1934), p. 468.]

The statement made by defendants' counsel to the jury with regard to workers' compensation was provoked by the comment of plaintiff's counsel. The defendants' counsel merely drew the jury's attention to the law, which the jury might be presumed to know. It was also for the purpose of keeping the jury's mind on the real issue and to attempt to eliminate sympathy for the plaintiff. *Rowe* v. *Edwards* (4) is an entirely different case. That case referred to the question

(1) (1896) 17 L.R. (N.S.W.) 403, at p. 412; 13 W.N. (N.S.W.) 121, at p. 123.
(2) (1933) P. 154, at pp. 167-168.
(3) (1896) 17 L.R. (N.S.W.) 403; 13 W.N. (N.S.W.) 121.
(4) (1934) 51 C.L.R. 351.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

of damage, not to the question of liability. The trial Judge exercised his discretion in not discharging the jury (*Grinham* v. *Davies* (1)). The propriety of the reference to the *Workers' Compensation Act* must be determined according to the circumstances of the particular case, and in the present case it was a proper comment to make.

[McTIERNAN J. referred to *Croll* v. *McRae* (2).]

The statement was not made to the jury to persuade them to forswear their oaths. There is ample evidence to support the finding of the jury.

L. Little, in reply, referred to *Mercovich* v. *Mullaney* (3).

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

LATHAM C.J. The defendant company was in November 1934 engaged in erecting a building in Melbourne. The defendant Lamping was employed as a dogman. It was part of his duty to attach and fix ropes to crates or skips used for the purpose of containing material to be raised or lowered by a crane. On 5th November 1934 a truck arrived with a load contained in a crate and consisting of about 30 sheets of fibro-plaster and two bags of plaster. The weight of the load was more than one ton. Each bag of plaster weighed about 120 lbs. The defendant Lamping fixed ropes on the crate. He gave a signal and the man in charge of the crane raised the load with Lamping, and manœuvred it to the sixth floor, which was its destination. Lamping walked to one end of the crate to get it into position for depositing or unloading the material. The crate tipped about two feet out of the horizontal: Lamping saved himself, but one of the bags fell off. It struck the plaintiff's husband, who was working on the ground level, and he died as a result of the injuries which he received. The plaintiff sued the two defendants for damages for negligence under the *Wrongs Act* 1928.

The plaintiff proved the accident and the resulting injury to and death of her husband. The defendant denied negligence, pleaded contributory negligence and also alleged that the defendant voluntarily accepted the risk of material falling upon him. Uncontradicted

(1) (1929) 2 K.B. 249, at p. 254.
(2) (1930) 30 S.R. (N.S.W.) 137; 47 W.N. (N.S.W.) 50.
(3) (1934) V.L.R. 285.

evidence was given by the defendants that the system of securing the ropes was that which was always used in the industry and that it was regarded by experts as perfectly safe. The defendant Lamping gave evidence that he fixed and tied the ropes properly. He showed the jury exactly what he did. The following questions and answers are part of his cross-examination :—

"May I take it, after your demonstration outside, that it is impossible for an article to fall from one of those skips if properly tied ? Yes, absolutely.

"Quite impossible. You have no doubt of that, have you ? No.

"If a skip be properly tied nothing can fall from it. Is that right ? Yes, that is right. . . .

"Tell us why the bag fell from the skip seeing that you can make a skip fool-proof by proper tying ? I could not tell you. I do not know. . . .

"Had you ever previously known a properly tied load to tilt ? No.

"You will agree that it should not do it ? It should not do it, no.

"And the only reason why a load can tilt is if all those precautions are not taken, is it not ? If there was something missing ? There was nothing missing.

"That is the only way in which a load can tilt, if something is missed in the original tying ? Yes, I suppose so. . . .

"But when something falls it is only because it is not properly adjusted ; is not that right ? That is right."

It was proved that when, after the accident happened, the crate was hauled to the top of the building, it was out of the horizontal, that the men undid the ropes, and pulled the slack tight again.

The jury found a verdict for the defendant. No objection is taken to the direction given to the jury by the learned Judge, *Martin* J. The plaintiff applied to the Full Court for an order for a new trial. The Full Court dismissed the application with costs and an appeal is now brought to this Court. It was not seriously contended that there was evidence of contributory negligence or evidence that the plaintiff's husband voluntarily accepted the risk mentioned.

The jury are the judges of fact and this Court should not set aside the verdict of the jury unless it is shown that the verdict is such as reasonable men, conscious of their duty as jurors, could not give.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Latham C.J.

The plaintiff gave prima facie evidence of negligence. It is conceded that this is a case of *res ipsa loquitur*—that is, that proof of this accident happening in these circumstances was prima facie evidence of negligence on the part of the defendants. The defendants did not give any evidence showing or even suggesting how the accident happened, but they did give evidence to show that precautions were taken and that such precautions were the precautions which a skilled and careful man would take. In these circumstances they were unable to present any explanation of the happening of the accident. Was the jury entitled to accept the evidence that every precaution was taken, and to reject the evidence given by the same witness, that, if every precaution was taken, the accident could not have happened ?

In the first place it is important to consider what the position of the defendants was when prima facie evidence of negligence was given. In *Byrne* v. *Boadle* (1) *Pollock* C.B. said :—" The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them." In *Scott* v. *London and St. Katherine Docks Co.* (2) a general principle was stated by the Exchequer Chamber in the following words : " Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." This statement suggests that, in a case where the rule of *res ipsa loquitur* applies, the defendant must, in order to escape liability, explain how the accident happened and show that

(1) (1863) 2 H. & C. 722, at p. 728 ; 159 E.R. 299, at p. 301.

(2) (1865) 3 H. & C. 596, at p. 601 ; 159 E.R. 665, at p. 667.

it happened apart from any negligence on his part. The appellant cites *Winnipeg Electric Co.* v. *Geel* (1) in support of this interpretation. In this case the Judicial Committee of the Privy Council cited with approval the description given by *Fry* L.J. in *The Merchant Prince* (2) of the position of the defendant in " a case to which the principle often called *res ipsa loquitur* applies." *Fry* L.J. said :— " It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (3) it was laid down by Lord *Herschell* that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to show inevitable accident." Possibly the defendant would satisfy this condition by giving evidence that every reasonable precaution was taken, though nevertheless the accident happened.

A recent authority on the onus of proof in a case of this class is to be found in *The Kite* (4). *Langton* J., after citing the passage already quoted from *Scott* v. *London and St. Katherine Docks Co.* (5), says :—" What they have to do is to give a reasonable explanation, which, if it be accepted, is an explanation showing that it happened without their negligence. They need not even go so far as that, because, if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident " (6). It is therefore argued that the defendants must give some evidence which, if it does not establish, at least suggests, a positive explanation of the accident which is consistent with the absence of negligence on their part. I do not think that the authorities really establish this view, in spite of the use of the word " explanation," which, appropriate in many cases, in inappropriate in others. In a case to which the principle of *res ipsa loquitur* applies the position is that the plaintiff launches

(1) (1932) A.C., at p. 699.
(2) (1892) P. 179, at p. 189.
(3) (1886) 11 P.D. 114.
(4) (1933) P. 154.
(5) (1865) 3 H. & C., at p. 601 ; 159 E.R., at p. 667.
(6) (1933) P., at p. 170.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Latham C.J.

his case by proving facts which not only permit, but, in the absence of other contrary evidence, require, an inference of negligence on the part of the defendant. It is then for the defendant to repel this inference if he can. The most effective way to do this is for the defendant to explain that the accident actually happened in such a way as to disprove negligence, for example, by unavoidable accident. But the defendant may not be able to adduce such evidence. It will, however, be sufficient if he can exclude the inference of negligence by showing "all the possible causes" of the accident, and further showing "with regard to every one of these possible causes that the result could not have been avoided" (*The Merchant Prince* (1)). If he can only show that the happening of the accident is as consistent with the absence of negligence as it is with the presence of negligence it appears to me (notwithstanding what *Langton* J. said in *The Kite* (2)) that he leaves the positive inference of negligence unanswered. He has only shown that the accident *might* possibly have happened without negligence, whereas the plaintiff has shown that prima facie it did happen by reason of negligence.

There may, however, be a case, such as this, in which all that the defendant can do is to give evidence to the following effect:—"I don't know how the accident happened, and I don't see how it could have happened. It did happen in fact, but I say, in spite of that fact, that I took every reasonable precaution. I give sworn evidence showing precisely and fully what precautions I did take, and I ask the jury to believe that evidence in spite of the happening of this accident which, admittedly, I cannot explain." It may be difficult to induce a jury to believe such evidence, but, if the jury does believe it, such evidence in my opinion rebuts the presumption of negligence which otherwise would have remained unimpaired. It cannot be denied that accidents do happen even when the greatest care is taken, and that sometimes it is impossible to discover and to explain how a particular accident did happen.

The important question, therefore, appears to me to be whether the jury could in this case, on the evidence, reasonably come to the conclusion that there was no negligence. The movement of Lamping

(1) (1892) P., at p. 189. (2) (1933) P. 154.

toward one end of the crate in fact tipped the crate out of the horizontal plane to such a degree that the bag of plaster slipped off. It is plain that in fact something went wrong either in the distribution of the load on the crate or in the tying of the ropes. The former alternative was not suggested by any evidence and it is (I think) excluded as the sole cause of the accident by the evidence which showed that the ropes had slipped, because it became necessary (after the accident) to readjust them by taking up the slack. Thus if it be assumed that there was no defect in the ropes (and no evidence was given to suggest any defect), the fault must have been in the tying of the ropes. Was it open to the jury as reasonable men to believe that Lamping was careful in tying and yet that he made a mistake or slip on this occasion ? The ground of defendants' liability must be discovered, not merely in a mistake or a slip, but, if it be a case of mistake or slip (as distinct from recklessness or want of relevant skill) in a mistake or slip which is negligent. Generally a mistake or slip by a person assuming the skill of a particular art is the result of negligence. But it cannot be said that this is always the case. A mistake in typing does not necessarily indicate that the typist has been careless. It appears to me that the adoption of any other principle would go far to establish a general rule of legal responsibility for the consequences of accident (as distinct from negligence) in any case where it could not be proved by the defendant that the accident was inevitable in the sense that it was due to causes entirely beyond his control. In my opinion the law does not prescribe so high a standard as this. I am therefore unable to say that it was plainly unreasonable for the jury in this case to accept the evidence given for the defendants to show that proper care was taken. In this case, it is true, the difficulty of accepting such evidence is increased by the fact that the witness Lamping, while testifying that all reasonable precautions were in fact taken, also testified in an equally positive manner that, such precautions having been taken, it was impossible for the accident to happen, though it did in fact happen. But I agree with the Full Court that it was open to the jury to accept his sworn testimony that he tied the ropes as he said he did and that there was no better way of tying the ropes, and to reject as erroneous his opinion that therefore such an accident

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Latham C.J.

as in fact happened could not occur. The jury saw the witness and could determine whether he was truthful on a question of fact where he was personally interested and where he himself provided the material for challenging his veracity. It is not for an appellate tribunal to substitute its view of the facts for that of the jury, though a verdict may, in appropriate proceedings, be set aside if it is unsupported by evidence or otherwise such that no reasonable men could give it. I am unable to satisfy myself that this verdict is of such a character, and accordingly, in my opinion, there is no ground for a new trial so far as this aspect of the case is concerned.

Another ground which was relied upon by the appellant is that the plaintiff is entitled to a new trial by reason of the conduct of the defendants' counsel in referring in his address to the jury to the plaintiff's right to recover compensation under the provisions of the *Workers' Compensation Act*. In his opening address plaintiff's counsel said to the jury : " This action is the plaintiffs' only opportunity of obtaining redress for the loss they have suffered. The death of the worker has left them penniless." In his final address to the jury defendants' counsel corrected this statement by saying that a verdict for the defendants would not deprive the widow and children of their rights under the *Workers' Compensation Act*. Plaintiff's counsel objected. The learned Judge upheld the objection, and told the jury to put the matter out of their minds as it had nothing to do with the case. Before the jury retired the foreman asked : " Do we have to consider the workers' compensation ? " The learned Judge said :—" No, you do not have to consider workers' compensation one bit. You have nothing whatever to do with workers' compensation."

The plaintiff relies upon the cases which hold that a new trial may be granted where reference has been made in the presence of the jury to the fact that a defendant is covered by insurance against the liability sought to be enforced against him. The authorities are collected in *Grinham* v. *Davies* (1). It is recognized as a rule of practice that " the jury shall not be informed by or on behalf of the plaintiff that the defendant is insured " (2). If the rule is violated, it is a matter of discretion for the Judge to determine

(1) (1929) 2 K.B. 249.

(2) (1929) 2 K.B., at p. 250.

what course he should take. He may order the discharge of the jury, or he may consider it sufficient to warn the jury to ignore the statement which has been improperly made. A Court of appeal may review the exercise of that discretion by the Judge if justice requires it, all the circumstances being taken into account (*Croll* v. *McRae* (1)).

What then are the circumstances of this case ? The origin of the difficulty in this case is to be found in what was said by plaintiff's counsel. What was said by defendants' counsel was a natural reply to what had been said by plaintiff's counsel, though it would have been better if he had simply asked the Judge to deal with the matter, without himself saying anything about the *Workers' Compensation Act*. The Judge, however, did deal with the matter very definitely and clearly. The plaintiff's counsel did not ask the Judge to do more. No application was made on behalf of the plaintiff for the discharge of the jury. In my opinion these facts, apart from other considerations, are sufficient to show that it would not be just to allow the plaintiff, after taking the chance of obtaining a favourable verdict from the jury, to obtain a new trial upon this ground.

In my opinion, therefore, the appeal should be dismissed with costs.

RICH J. This is an appeal from an order of the Full Court of Victoria refusing a new trial in an action brought under Lord Campbell's Act where the jury found for the defendant. The death in respect of which the action was brought was that of the plaintiff's husband, who was killed while working at a building in course of erection. His death was caused by a bag of plaster falling upon him from a skip suspended high above him from a hoist. It is not a case of master and servant. The operations were conducted by different sub-contractors. The defendant company raised a contention that *pro tempore* someone else was the master of the men in charge of the skip, but it paid them, and it is unlikely the jury found for the defendant on that ground. The plaintiff's case was launched by means of the principle expressed in the maxim *res ipsa loquitur*. Why should a bag of plaster fall from the skip unless there was

(1) (1930) 30 S.R. (N.S.W.) 137 ; 47 W.N. (N.S.W.) 50.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Rich J.

negligence in the management of the hoist or the skip or in securing the skip or the bags? The defendant's case was that every care had been taken, that the fastenings were perfectly made, that there was nothing which ought to have tilted the skip, but that nevertheless when the dogman stood on the edge of the skip to guide it it left the horizontal so that the bag slid off the skip and fell on the deceased. Not unnaturally the defendant looked for other defences besides a mere denial of negligence. It sought refuge in contributory negligence and *volenti non fit injuria*. These defences, which were without foundation, were left to the jury with a strong direction which ought to have discouraged any jury from finding for the defendant upon them. The plaintiff's counsel took no objection to their submission to the jury, feeling probably that his case was so strong that wisdom lay in allowing the verdict of the jury to conclude as many of the defendant's points as possible. In spite of the evident strength of the plaintiff's case, however, the jury did find for the defendant. The plaintiff seeks to account for this unexpected result by suggesting that the jury were led away from the proper consideration of the issues by a reference which the defendant's counsel made to the plaintiff's right to recover workers' compensation from the deceased's employer. This irrelevancy on the part of the defendant's counsel was explained as arising from a statement made by the plaintiff's counsel that she was penniless and had no other opportunity of obtaining redress. Whether the plaintiff's counsel did or did not go beyond what was material to an action under Lord Campbell's Act, the defendant's counsel ought not to have introduced the question of the defendant's right to workers' compensation. But when such situations arise the trial Judge is in a better position to deal with them than any appellate Court can be, and generally the course which he in his discretion adopts will be final, although no doubt the ultimate question in every Court of appeal is whether for any reason the trial has miscarried. In the present case the trial Judge dealt with the matter then and there by telling the jury to put it out of their minds, that it had nothing to do with the case. In spite of this, the foreman at the end of the summing up asked: "Do we have to consider the workers' compensation"? His Honor:—"No, you do not have to consider workers

compensation one bit. You have nothing whatever to do with workers' compensation." No objection has at any stage been made to the learned Judge's charge. The Full Court of Victoria was of opinion that the jury were entitled upon the evidence to find no negligence, and that having regard to the Judge's warning to the jury about workers' compensation there was no mistrial.

Upon the facts of the case I think the verdict was quite clearly erroneous, but the question is whether it was not within the jury's province to err, and whether they should not be taken to have done no more or less than err in the decision of the issue without being distracted from its consideration by taking into account other possible remedies of the plaintiff.

Perhaps the most authoritative exposition of the doctrine of *res ipsa loquitur* is contained in the speeches of Lord *Dunedin* and Lord *Shaw of Dumfermline* in *Ballard* v. *North British Railway Co.* (1). Lord *Dunedin* criticizes, as " too absolute a method of expressing the legal result in all cases," the statement that the fact of the accident raised a presumption of negligence which the defendant must rebut or overcome by contrary evidence when the rule applied. He says: " I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence." He quotes the well-known statement of *Erle* C.J. from *Scott* v. *London and St. Katherine Docks Co.* (2) and emphasizes the words " in the absence of explanation," not in the absence of " proof " (3). Lord *Shaw of Dumfermline* makes the following observations upon the doctrine known as *res ipsa loquitur* :—" If that phrase had not been in Latin, nobody would have called it a principle. My views about it and its use and application are simply these : (1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, i.e., that a thing tells its own story—not always, but sometimes. (2) But, although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem relevant—to use the expression of one of your Lordships—relevant to infer liability

(1) (1923) S.C. (H.L.) 43, at pp. 53-55 and p. 56.

(2) (1865) 3 H. & C., at p. 601 ; 159 E.R., at p. 667.

(3) (1923) S.C. (H.L.), at p. 54.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Rich J.

for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains: *res ipsa loquitur*. The expression need not be magnified into a legal rule; it simply has its place in that scheme of, and search for, causation upon which the mind sets itself working (1)." It appears from these statements that, once the rule is found applicable, an explanation is demanded either by way of hypothesis or by way of evidence. Unless it is forthcoming negligence ought to be inferred. The inference is not necessarily a legal inference. Its strength as an inference of fact may be a matter of degree according to circumstances.

In the present case no explanation was made. All that could be said was that although every care had been taken the accident had happened for some reason not stated. I cannot think that it was open to the jury to say that some unknown thing had been done or omitted which led to the accident but which implied no negligence. The evidence clearly establishes that the skip did assume such an angle that the bag by its own weight slid off. It is futile to say that its ropes were so fastened over the hook that it could not slip: that the weight was properly distributed and that the bags needed no further securing. The verdict appears to me to be unreasonable, and, whether it is to be accounted for by the jury's persistently contemplating workers' compensation or some other cause, it ought to be set aside.

The appeal should be allowed and a new trial ordered.

STARKE J. The constitutional tribunal for the determination of the issues of fact in this case was the jury. A Court of appeal has no right or authority to disturb its finding unless it is one to which the jury, viewing the evidence reasonably, ought not to have come.

The plaintiff is the executrix of the deceased, who was her husband, and founded her action upon the *Wrongs Act* 1928 (Lord Campbell's Act), alleging that his death was caused by the negligence of the defendants. The onus of establishing this allegation lay, in the beginning and always, upon the plaintiff. She proved that the defendants were engaged in raising material, during the erection of

(1) (1923) S.C. (H.L.), at p. 56.

a building, in a crate or on a tray, by means of a crane, and that a bag of plaster, weighing some 120 lbs., fell from the crate or tray upon her husband and killed him. Prima facie, such an accident does not happen in the ordinary course of things if those who have the management use reasonable care and skill. She therefore launched a prima facie case, or gave evidence of negligence on the part of the defendants. It was then for the defendants to go forward with the proof and establish, if they could, to the satisfaction of the jury, that the accident was not due to any want of reasonable care or skill on their part. Now the defendants could not assign any cause for the accident, but they led proof and demonstrated before the jury how the crate or tray was loaded, and how it was secured by ropes to prevent it tilting, as in fact it did, whereby the bag of plaster slid off it, and they also led proof that the method of fastening adopted by them was constantly used in the industry and regarded as perfectly safe. The jury found a verdict for the defendants ; the verdict therefore negatives any want of care or skill on the part of the defendants, and is a finding that they were not guilty of the negligence charged against them. Judges, or other juries, might not have reached the same conclusion, but that is quite immaterial, for the finding of the jury is not, I think, of such a character that, viewing the evidence reasonably, the jury ought not to have so found.

The other matters relied upon in support of the appeal are either untenable, or were not taken in the notice of appeal to the Supreme Court or there relied upon, and cannot therefore be brought forward at this late stage of the case.

The appeal should be dismissed.

DIXON J. The facts of this case are very simple. The appellant's husband was killed while at work at a building in course of erection. A bag of plaster fell upon him from a skip a great height above him as it was hoisted by a jib-crane towards the window of an upper story. The crane and the skip were at the time under the care and management of men employed by the defendant company, which was not the dead man's employer. Although there was a dispute at the trial whether the defendant company had not lent its servants

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Dixon J.

and temporarily parted with control over them so that it was not liable for their acts and omissions at the time of the accident, it may be taken for the purposes of this appeal that, if any of the men in question were negligent, the defendant company is responsible for the consequences of their negligence. Notwithstanding the unlikelihood of such an accident occurring without some failure of care in fastening the skip, in securing the bag, or conducting the operation of hoisting it, the jury found a verdict for the defendant. No objection was taken to the charge of the learned Judge to the jury, and, indeed, no objection could have been taken to it, except that his Honor left to them two defences which there was no evidence to support. The defences were contributory negligence and *volenti non fit injuria*. No doubt it was felt safer to leave to the jury every issue raised by the defendants in a case in which the plaintiff's case was so strong. If an objection had been made on the part of the plaintiff, there can be little doubt that the defences would not have been left to the jury, at any rate without specific questions being asked. In the circumstances it is impossible to allow the objection to be raised at this stage. In attempting to account for the jury's verdict, the plaintiff's counsel placed less reliance on the possibility of their having found for the defendant on either of these two issues, in reference to which they received a very strong direction from the learned Judge, than upon the hypothesis that they were led away from a proper consideration of the cause of the fall of the bag by some observations made by the defendant's counsel in the course of opening his case to them. The observations were to the effect that a verdict for the defendants would not deprive the plaintiff of her rights under the *Workers' Compensation Act*. Counsel's statement was not introduced as a gratuitous irrelevance but was directed to answering a remark made in his opening by the plaintiff's counsel as to the penniless condition of the plaintiff, who, he said, had no other opportunity of redress, a remark which, perhaps, might be justified on the ground that the action was brought under Lord Campbell's Act. The possibility of the plaintiff's possessing a remedy under the *Workers' Compensation Act* could not be taken into account in assessing damages under Lord Campbell's Act and a reference to such a remedy could only contribute to the chance of error. But

when some fact or matter which should be excluded from the jury's consideration of a case is discussed before them, it is in the first place for the Judge presiding at the trial to decide what is the appropriate and sufficient remedy to apply. If what is communicated to the jury is not so prejudicial as in the opinion of the trial Judge to make it unsafe to proceed with the trial, and in the result the party whose interests may be adversely affected fails to obtain the verdict, it remains open to him to complain upon a new trial application that, notwithstanding the measures taken by the Judge to remove the prejudice, there has been a miscarriage. But the Court of appeal would give great weight to the opinion of the trial Judge and his exercise of discretion, and would be justified in setting aside the verdict only if, upon a consideration of the whole case, the proper conclusion appeared to be that the trial had miscarried. In the present case the learned Judge at once told the jury to put the matter out of their minds as it had nothing to do with the case. Whether, because the jury imperfectly understood this injunction, or because it seemed desirable to have it confirmed, the foreman, as the jury were about to retire to consider their verdict, asked the question, did they have to consider workers' compensation? They received an emphatic answer that they had nothing whatever to do with it.

It is, I think, impossible to regard the trial as having miscarried because of the introduction of the topic of workers' compensation. The manner in which the counsel's reference was made, the treatment it received at the hands of the trial Judge, and the nature of the dangers to which it left the plaintiff exposed, must all be taken into account. When this is done, no considerations are left which a Court can properly entertain for supposing that the jury's verdict was influenced by the availability of a remedy for the plaintiff under the *Workers' Compensation Act*.

The substantial question in the case is whether the finding, which the verdict must be taken to imply, that the fall of the bag was not occasioned by negligence on the part of the defendants, is unreasonable.

The burden of establishing negligence lies upon the plaintiff. It is a necessary ingredient in her cause of action, and, on the whole

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Dixon J.

evidence, a jury should be reasonably satisfied as to its existence before finding in her favour. But the fall of the bag was an accident of such a nature as to afford in itself sufficient proof of negligence. In the absence of any information explaining how, consistently with the absence of fault in tackle or in manipulation, the accident did happen, or might have happened, not only would it be legitimate to infer that the bag fell through some defect in one or the other which due care would have avoided, but to refuse to do so would be both unsafe and unfair. Further, reasonable care for the safety of others demands an unusual exactness and thoroughness in the precautions taken to prevent the fall of a heavy weight moved at a great height above a place where men are working. But I do not think the nature of the accident and the imminence of the danger, if safeguards prove insufficient, are matters which throw a legal burden of disproof upon the defendant. The issue remains one which the plaintiff must establish. The question whether the circumstances do establish the issue is quite different from the question whether proof of the circumstances is enough to reverse the legal onus of proving the issue. The former question opens two successive inquiries, first, whether enough appears to entitle a jury to find the issue for the plaintiff, and, second, whether so much appears as to make it unreasonable for it to do otherwise. The latter question involves the reversal of a legal presumption. It means that, in point of law, the plaintiff has become entitled to have the issue found in his favour, unless the defendant adduces sufficient evidence to support a positive finding that negligence was absent.

When damage is caused by some unusual event which might reasonably be expected to happen only as the result of an omission to take ordinary precautions, or of a positive act of negligence, and it arises out of operations or the behaviour of inanimate things which are within the exclusive control of a party, no more is required to support an allegation of negligence against him unless and until some further facts appear which supply an explanation of the cause of the accident and displace the ground for inferring negligence. The circumstances may be so strong that a failure to be satisfied of negligence would be unreasonable. But, in my opinion, it is not the law that a legal presumption arises under which the burden of

disproving negligence rests upon the party denying it, so that unless evidence is forthcoming reasonably sufficient to support a positive finding that negligence was absent, the party alleging negligence is entitled to a verdict as a matter of law. The distinction is clear between, on the one hand, a rule of law which, as soon as given facts appear, places the legal burden of proof upon the opposite party, and, on the other hand, a presumption of fact arising from circumstances, even if the presumption be so strong that, although the legal burden of proof is unchanged, a finding that the issue was not established would be set aside as unreasonable. In the first case, the Court must direct a verdict if the party upon whom the legal burden of proof is thrown fails to adduce evidence sufficient to discharge it. For the sufficiency or insufficiency of evidence to prove a fact or the absence of a fact is always a question of law for the Court. But, in the latter case, the Court could never direct a verdict and, except under the statutory power given by Order LVIII., rule 4, of the *Rules of the Supreme Court*, could but set aside the verdict found and submit the case to another jury. (See per *Willes* J., *Ryder* v. *Wombwell* (1); per *Cussen* A.C.J., *Driver* v. *War Service Homes Commissioner* [*No.* 1] (2); cf. *Shepherd* v. *Felt and Textiles of Australia Ltd.* (3); per Lord *Wright*, *Mechanical and General Inventions Co. and Lehwess* v. *Austin and The Austin Motor Co.* (4).)

The principle expressed in the phrase *res ipsa loquitur* does no more than furnish a presumption of fact. Except for the isolated dictum of Lord *Wright* in *Winnipeg Electric Co.* v. *Geel* (5), which, probably, was not meant to deal with the distinction and, in any case, appears to be rather an illustration of the effect of the statutory presumption there in question drawn from the principles affecting collisions at sea, there is, I believe, no authority supporting the view that a presumption of law arises as a result of the operation of the principle expressed as *res ipsa loquitur*. (Cp., per Lord *Dunedin* and Lord *Shaw of Dunfermline*, *Ballard* v. *North British Railway Co.* (6), and, per *Scrutton* L.J., *Britannia Hygienic Laundry Co. Ltd.*

(1) (1868) L.R. 4 Ex. 32, at p. 38.
(2) (1924) V.L.R. 515; 46 A.L.T. 102.
(3) (1931) 45 C.L.R. 359, at pp. 371, 379, 391.
(4) (1935) A.C. 346, at pp. 379, 380.
(5) (1932) A.C. 690, at p. 699.
(6) (1923) S.C. (H.L.) 43.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

Dixon J.

v. *Thornycroft (John J.) & Co.* (1), and *Langham* v. *Governors of Wellingsborough School and Fryer* (2).)

Thus, the question in the present case is whether in all the circumstances appearing in evidence a finding absolving the defendants from liability was unreasonable. There can be no doubt that the accident did speak for itself. Loads properly secured and balanced do not fall off skips in mid-air if there be no unexpected failure of tackle and no mismanagement. The evidence of those in charge of the operations elucidated the accident to some extent. At the conclusion of the case, it appeared clearly enough that the skip inclined from the horizontal when the dogman leaned out from one end, stretching out a hand and foot to guide the load as it approached the wall. From that place on the wall some wire ends projected, which he sought to hold in guiding the skip. When it inclined from the horizontal, the bag slid off as some sheets of plaster upon which it rested moved. These articles were not secured to the skip. But the ropes from the corners of the skip, by which it was suspended from the double hook at the end of the wire rope of the crane, would provide some check. It further appeared that, after the accident, the skip did not right itself and the ropes over the hook needed adjusting. These ropes were slung in pairs from diagonally opposite corners of the flat skip. The practice was to sling them upon the double hook of the crane so that the suspended skip was horizontal, and then lash them tight with manilla to prevent them slipping on the hooks. In effect, a ring was thus formed which the double hooks passed through. It is evident that on the occasion of the accident one or other of the following things must have occurred:—(1) When the dogman leaned out of the skip with hand and foot extended, the increased weight or leverage at that end, coupled, perhaps, with the manner in which he pulled upon the rope grasped by his other hand, may have caused the ropes to slip on the double hook of the crane. This could happen only through some imperfection at the point where the ropes were lashed, either through them working loose, or having been badly tied, or the like. (2) Or, without any slipping of the

(1) (1925) 135 L.T. 83, at p. 89.

(2) (1932) 147 L.T. 91, at pp. 93, 94.

ropes until the load slid, the mere weight of the dogman so far from the centre of the skip may have caused the skip to incline so far from the horizontal that the plaster sheets and the bag slid. No explanation was given of the cause of the inclination from the horizontal, but it is clear that it took place and was enough to make the contents of the skip slide. I think that upon the evidence no other view of what actually happened was open to the jury. The case for the defendant simply was that every proper step had been taken, that the system followed was safe and that the preparation and tying of the skip was faithfully performed.

It, accordingly, seems to me that the ultimate question in the case is whether it would be unreasonable to find that, although some insufficiency in the tying occurred, or some miscalculation as to the effect of the load in tilting the skip when the dogman was guiding it from the end, or both, yet it took place in spite of the exercise by all concerned of due diligence and care. Was it not open to the jury to believe that the mistake or defect which occurred was something which eluded the vigilance of those in charge of the skip and hoist? An error or miscalculation even in a matter so plainly affecting the safety of others may be made without negligence. Evidence was given which, if believed, tended to show that diligence was maintained at a standard which the jury might consider amounted to a full exercise of the care reasonably demanded by the circumstances. It must be remembered that it is always a question of fact what in given circumstances the exercise of reasonable prudence and care involves. A jury's finding upon this, as upon other questions of fact, is subject to the control of the Court. But the interference of the Court in such a case as the present depends upon the question whether it is unreasonable to find that the error or defect from which the accident arose occurred in spite of a full exercise of reasonable care.

In my opinion the answer to this question is that it was within the province of the jury so to hold, and that on the evidence of the witnesses, whom they must be taken to have believed, such a finding could not be set aside as unreasonable.

I, therefore, think the appeal should be dismissed.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

McTIERNAN J. Three issues were left to the jury:—Were the defendants negligent? Was the deceased guilty of contributory negligence? Did the deceased agree to accept the risk of the accident happening? There was no evidence to support a finding adverse to the plaintiff on the second or third issues, but plaintiff's counsel, relying on the extremely tenuous case made by the defendants on both these issues and on the Judge's comments, took no objection to either issue being left to the jury. A general verdict was returned, and it is not possible to say with certainty whether the jury found against the plaintiff on the first issue but for her on the second and third issues. However, the assumption on which we are asked to consider this appeal is that the jury so found. Neither before the Supreme Court nor before us has any point been taken that the second and third issues should not have been left to the jury.

The grounds relied on by the appellant are (1) that the references by defendants' counsel to the plaintiff's rights under the *Workers' Compensation Act* vitiated the trial, and (2) that the verdict was against the evidence and the weight of evidence. Defendants' counsel sought to justify the references to the plaintiff's rights under the *Workers' Compensation Act* as a just answer to the statement of her counsel in his opening that she was penniless and had no other opportunity of obtaining redress. It was contended that defendants' counsel was entitled to counteract the effect of such an emotional appeal by informing the jury that the plaintiff had another remedy. In my opinion a reference by a defendant's counsel to a plaintiff's rights under the *Workers' Compensation Act* may be as mischievous as the statement by a plaintiff's counsel that a defendant is insured (cf. *Rowe* v. *Edwards* (1)). If the plaintiff's counsel erred in his opening, the proper course for defendants' counsel was to object and to ask the Judge either to direct the jury to dispel these sentimental considerations from their minds or to discharge the jury. No such application was made.

If it appears that these references to the *Workers' Compensation Act* led to a miscarriage of justice, the appellant is entitled to a

(1) (1934) 51 C.L.R., at p. 357.

new trial (see *Croll* v. *McRae* (1), and the cases there cited). In the present case appellant's counsel did not ask the Judge to discharge the jury, being content with the warning which the trial Judge gave the jury to disregard the references to the *Workers' Compensation Act*. The contention for the appellant is that the jury's verdict cannot be explained on any other hypothesis than that they decided to leave the plaintiff to her rights under the *Workers' Compensation Act*, perhaps thinking that she would receive double compensation if they returned a verdict in her favour or that the statutory remedy would adequately compensate her. The strength of the prima facie case which the happening of the accident made for the plaintiff and the unconvincing character of the case made by the defendants lend force to this contention. It is true that the jury's inquiry "Do we have to consider the workers' compensation?" made after the final direction of the Judge was emphatically answered in the negative by the trial Judge. But it may be that the prejudice sown in the minds of the jury was ineradicable. (See *Croll* v. *McRae* (2), per *Street* C.J.)

It is unnecessary, however, to deal further with the appellant's first contention, because in any case the appeal should, in my opinion, succeed on the ground that the verdict was against the evidence and the weight of evidence.

The appellant's husband was killed in the light-well of a building in course of erection by a bag of plaster or cement which fell out of a skip which was being hoisted by a crane over the place where he was working. The crane was operated by one, Carlson, the dogman on the skip was the defendant, Lamping, and the crane and the skip were under the control of Lamping and the other defendant. This is a case in which the plaintiff is entitled to rely on the fact of the accident as prima facie evidence of negligence on the part of the defendants. In the ordinary course of events the bag would not have fallen on the deceased if the defendants who were in control of the crane and skip were not negligent in conducting the operation of hoisting materials over the head of the workmen into the rising

(1) (1930) 30 S.R. (N.S.W.) 137; 47 W.N. (N.S.W.) 50.

(2) (1930) 30 S.R. (N.S.W.), at p. 144; 47 W.N. (N.S.W.), at p. 51.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

McTiernan J.

structure. (See *Byrne* v. *Boadle* (1); *Scott* v. *London and St. Katherine Docks Co.* (2).)

The skip, which is also described as a crate, was a flat rectangular platform without sides. It had been conveyed by truck to the building, loaded with 30 sheets of plaster, each 8 feet by 6 feet. On top of these were two bags of plaster, one of which was the bag which killed the deceased. Each bag weighed 120 lbs. The truck was driven under the crane, and without any further packing of the load the skip was hung on the hooks of the crane and hoisted by the crane. The weight of the load was one and a half tons. The gear for lifting the skip consisted of two wire ropes running to and from opposite corners of the skip and hung on the hooks at the point of intersection. These ropes were lashed together underneath the hooks by a scaffold rope, and in addition there were four other manilla ropes around the skip. The crane was swung from the incomplete side of the light-well when it attained an altitude between the third and fourth floors and then raised to a point opposite the sixth floor. Here Lamping moved from the centre of the skip to the narrow side next the wall in order to direct it to a landing. The skip tipped, some of the sheets of plaster shifted, one bag slipped and would have fallen off had it not been jammed in the corner ropes, the other bag fell over the side and caused the fatal accident.

The evidence adduced for the defendants was to the effect that all proper precautions were taken by them, both in the adjustment of the skip to the hooks and in the disposition and tying of the ropes to render the operation of hoisting the skip free from danger to workmen below. Now the bags were left lying on the sheets of plaster and not tied down: the skip was not provided with sides: there was no net to catch anything which might fall from the skip. But evidence was adduced for the defendants that it was not in the ordinary practice of the building trade to tie the load on to the skip, and that the method employed for tying the crate to the crane was that which was always used in hoisting up bags of plaster and it was regarded as "perfectly safe." It is manifest that the accident would not have happened had there not been the omission of any

(1) (1863) 2 H. & C. 722; 159 E.R. 299.

(2) (1865) 3 H. & C. 596; 159 E.R. 665.

precaution to prevent the bag falling on the deceased when the skip tipped. Lamping, who said in evidence that all proper precautions were taken, was hardly consistent in calling out to the deceased, as the load was being swung over: "You'd better watch yourself, I am coming over there." Moreover, it is not sufficient to negative negligence to prove that the ordinary practice of the building trade was followed (*Blenkiron* v. *Great Central Gas Consumers Co.* (1)). Although the practice of builders was said to have been observed, yet, if the skip tipped, there was nothing to prevent anything on it from falling to the ground.

The verdict proceeds upon the assumption that it was not reasonable to say that anything over which the defendants had any control could have caused the platform of the skip to leave the horizontal plane. In other words, the assumption on which the verdict is founded is that the accident was due to some unavoidable cause. When, as here, the happening of the accident proved a prima facie case of negligence, the defendant cannot be said, as a matter of law, to have repelled the case against him by suggesting that the accident was inevitable, that is, due to a cause unavoidable by him, unless the evidence indicates or suggests what that cause was or provides a basis on which it may be reasonably inferred. What was requisite in the defendants' case to make the conclusion of inevitable accident one that might be reasonably reached is stated in *The Merchant Prince* (2) by *Fry* L.J. :—"In the case of *The Annot Lyle* (3) it was laid down by Lord *Herschell* that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable for damages. The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown

(1) (1860) 2 F. & F. 437; 175 E.R. 1131.

(2) (1892) P., at p. 189.

(3) (1886) 11 P.D. 114.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

McTiernan J.

inevitable accident. In the present case the defendants have not shown what was the cause. They have left that entirely undecided. In fact, their evidence has been largely given to show that the event never did happen; but, unfortunately for them, it did happen. Nor have they enumerated all the causes which might have produced the effect, and shown that they were inevitable. In fact, it is impossible, it seems to me on the evidence before us, to enumerate what might have been the probable causes of this accident. How can we say? It may be that if we knew the real cause of this accident we should have found some simple piece of negligence on the part of some of the servants of the defendants in not doing something which would have avoided the collision. Therefore, on that simple ground, the defendants fail in this case." (See also *The Merchant Prince* (1), per Lord *Esher* M.R.) The reasons of *Fry* L.J. were approved by the Judicial Committee in *Winnipeg Electric Co.* v. *Geel* (2). In that case their Lordships said they agreed with "the statement of the principle made by *Duff* J. in the following words in his judgment in the Supreme Court in the present case (3): 'The statute creates, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed'" (4). After quoting from the passage above cited in which *Fry* L.J. said that the burden of proving inevitable accident rests on the defendant, their Lordships continued:—"The learned Lord Justice proceeds to show how serious that burden may be. It is not necessary in the present case to decide whether or not the matter is one to which the principle *res ipsa loquitur* applies, but the rule as to burden of proof is the same under the statute. Nor is it necessary further to emphasize that in some running-down cases under the statute the defendant may discharge the burden, as already explained, by other evidence than that of inevitable accident."

(1) (1892) P., at p. 187.
(2) (1932) A.C. 690.
(3) (1931) S.C.R. (Can.) 443, at p. 446.
(4) (1932) A.C., at p. 699.

Their Lordships gave instances of various ways in which the defendant in that case might rebut the presumption raised against him by the statute " by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury . . . or by proof that the circumstances were such that neither party was to blame, because neither party could avoid the other " (1).

The defendants' evidence, therefore, which is limited to a statement of precautions taken to prevent such an accident as that which occurred is clearly insufficient in law to repel the strong prima facie case of negligence against them. Indeed, in the present case, the defendant Lamping said that he was unable to give any explanation as to the " cause of this tipping."

It may be added that the admission of the defendant Lamping that if the precautions deposed to in the defendants' case had been taken the accident would not have happened does not leave any reasonable ground for belief in the defendants' case. The following evidence was given by him under cross-examination :—

" Mr. *Gorman* : May I take it, after your demonstration outside, that it is impossible for an article to fall from one of those skips if properly tied ? Yes, absolutely.

" Quite impossible. You have no doubt of that, have you ? No.

" If a skip be properly tied nothing can fall from it. Is that right ? Yes, that is right.

" And you are certain of that ? Yes.

" I suppose you will agree that this man, Fitzpatrick, is dead ? You know that, do you not ? Yes, I know that.

" And you know that he was hit by a bag which fell from your skip. Do you agree with that ? Yes.

" Have you any doubt that it was a bag which fell from your skip which hit him ? No.

" Tell us why the bag fell from the skip seeing that you can make a skip fool-proof by proper tying ? I could not tell you. I do not know.

" You were on the skip ? Yes.

" You saw the bag fall ? I do now know how it happened, though.

(1) (1932) A.C., at p. 695.

H. C. OF A. 1935.

FITZPATRICK v. WALTER E. COOPER PTY. LTD.

McTiernan J.

"Does it occur to you that some of those knots may not have been tied with the precision which marks your tying to-day? No; the knots were right.

"The wires were right? Yes.

"The bags were right? Yes.

"Everything was right, except Fitzpatrick. Everything was right, was it not? Is that so? Yes.

"Do you remember telling the Coroner that a load would not tilt because a dogman changed his position? Yes.

"Your load did tilt, did it not? Yes, it tilted.

'Had you ever previously known a properly tied load to tilt? No.

'You will agree that it should not do it? It should not do it, no.

"And the only reason why a load can tilt is if all those precautions are not taken, is it not? If there was something missing? There was nothing missing.

"That is the only way in which a load can tilt, if something is missed in the original tying? Yes, I suppose so."

The words of *Fry* L.J. above cited, namely: "In fact, their evidence has been largely given to show that the event never did happen; but, unfortunately for them, it did happen" (1), may be aptly applied to the defendants' evidence, and compare the remarks of the Judicial Committee in *Grant* v. *Australian Knitting Mills Ltd.* (2):—"According to the evidence, the method of manufacture was correct: the danger of excess sulphites being left was recognized and was guarded against: the process was intended to be fool-proof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so."

There is, in addition to these admissions, positive evidence strongly supporting the presumption of negligence. Immediately after the accident, Carlson and Lamping took the skip to the top of the building. There they straightened the skip. When asked how

(1) (1892) P., at p. 189. (2) *Ante*, p. 61.

the skip was straightened, Carlson answered: "Lamping and I tightened the ropes a bit." Lamping in his evidence said: "We undid the scaffolding ropes on the end and pulled the slack tight again." In answer to the question of the trial Judge "Had there been any change in the tension of the ropes?" Lamping answered: "Yes, one was slack." It should be remembered also that the plaintiff's case was reinforced by the other positive evidence, which has already been mentioned: the absence of any sides to the skip, the omission to tie the bag down so that it could not fall from the skip if it tipped.

It might well be that it was negligent on the part of the defendants not to foresee that this skip, loaded as it was, and manœuvred by the dogman while it was being hoisted, might tip, with the result that the whole or part of the load would fall at the place where the deceased was working. For, as *Palles* C.B. said in *Flannery* v. *Waterford & Limerick Railway Co.* (1):—"No doubt, in determining whether this inference of fact might *reasonably* be drawn, we, although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn."

But in any case, for the reasons given, the verdict should not be allowed to stand and the appeal should be allowed.

It becomes unnecessary to consider whether it is just to make the assumption on which the argument proceeded, that the jury did not find against the plaintiff on the second and third issues.

Appeal dismissed.

Solicitor for the appellant, *Gerald S. Berrigan.*

Solicitors for the respondent, *Secomb & Woodfull.*

H. D. W.

(1) (1877) I.R. 11 C.L. 30, at p. 37.