Cons
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Discd
Skelton v *Collins* (1966) 115 CLR 94

[HIGH COURT OF AUSTRALIA.]

PIRO . . . . . APPELLANT ;
PLAINTIFF,

AND

W. FOSTER & COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1943.

MELBOURNE, *Sept.* 30 ; *Oct.* 1 ; *Nov.* 5.

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

Statutes—Breach of statutory duty—Failure to fence dangerous machinery—Defence of contributory negligence—Industrial Code 1920-1936 (*S.A.*) (*No.* 1453 *of* 1920 —*No.* 2276 *of* 1936), *s.* 321.

Precedent—High Court—Australian courts generally—Decision of High Court—Decision by House of Lords to the contrary.

Contributory negligence is a defence to an action by an employee claiming damages for personal injury caused by a breach of his employer's statutory duty to fence or safeguard dangerous machinery.

So *held* by the whole Court.

Caswell v. *Powell Duffryn Associated Collieries Ltd.*, (1940) A.C. 152, and *Lewis* v. *Denye*, (1940) A.C. 921, followed. *Bourke* v. *Butterfield & Lewis Ltd.* (1926) 38 C.L.R. 354, overruled.

But *held*, on the facts, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that the trial judge was not justified in finding that the employee was guilty of contributory negligence although there had been some inadvertence on his part.

Per Latham C.J., *Rich*, *McTiernan* and *Williams* JJ. : Where there is a clear conflict between a decision of the House of Lords and a decision of the High Court of Australia, the High Court and other courts in Australia should as a general rule follow the decision of the House of Lords upon matters of general legal principle.

Decision of the Supreme Court of South Australia (*Richards* J.) : *Piro* v. *W. Foster & Co. Ltd.*, (1943) S.A.S.R. 68, reversed.

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APPEAL from the Supreme Court of South Australia.

Murray Piro (hereinafter called the plaintiff), a boy fourteen years of age, was employed by W. Foster & Co. Ltd. (hereinafter called the defendant) as "feeder" to a machine for pressing sheepskins which had already undergone processes by which the wool was removed and the skins tanned. The skins, as they were brought to the machine, were fairly stiff and, save for brushing off sawdust which might be left on them from an earlier process and cutting off ragged edges too small to be worth saving, were ready to be pressed. The pressure was applied by forcing the skins up against a heavy fixed and immovable flat steel plate, about a foot or a little more in width. The skins were placed, one at a time, on a strip of the same width as the plate, composed of some strong but not metallic material which, although taut and fixed firmly at each end, had some degree of sagging in it. The skin was pressed up against the plate by a heavy revolving roller, of the same width as the plate and the strip, which was caused to pass slowly along under the strip from one end of it to the other. The plate and strip were not wide enough to press the whole length of a skin by one journey of the roller; for a sheepskin it was necessary to have at least three journeys.

The working of the machine was controlled by pressure on two pedals: by tapping his foot on one of the pedals, the operator set the roller on its course from one end, and when it reached the other end it stopped automatically: then, in order to start it on its return journey, the operator tapped his foot on the other pedal, and the roller passed back until it stopped automatically at the end of the return journey, and so on until the skin was pressed throughout. In the defendant's factory two persons worked at the machine, a feeder and an operator. At each side of the machine and as part of it, there was a shelf extending along the whole of the side of the machine and about two feet wide. The feeder's method of working was to take a skin from a table nearby on his left side, lightly brush it and roughly trim off ragged pieces with a pair of shears, and then place it on his shelf in front of him in such a way that the part of the skin further from him extended on to the strip. It was not difficult to do that, as the edge of his shelf was flush with the edge of the strip and was at the same level from the floor as the strip; at the middle of the length of the strip it was, owing to the slight sagging, a small fraction of an inch lower than the shelf.

The feeding-in was done whilst the roller was stationary. It was the work of the operator, on the other side of the machine, to take hold of the skin when the end of it had been fed onto the strip and pull it towards himself, and do any straightening out that might be

necessary. This was done before he started the roller on its course. Usually, not much straightening out was required, owing to the semi-stiff nature of the skin : and, if there were small ragged pieces not straightened out, he did not trouble about them ; they were of no value. When the operator had got the skin into position for pressing, most of it would still be lying on the feeder's shelf. Having got the skin into position, the operator started the roller, and, when it had reached the end of its course, thus pressing the part of the skin nearest to himself, the operator pulled the skin further towards himself in order that the roller, when returning, would press a further strip of the skin ; and so on until the skin was pressed throughout. Directly the roller started on a journey the feeder's shelf and the operator's shelf both automatically went up about $1\frac{3}{4}$ inches : and when the journey was completed they dropped back automatically. Whilst the shelves were up there would be less danger that the feeder or the operator would put his hand or fingers in between the plate and the strip whilst the roller was in motion. It would, at the beginning of the roller's journey, be possible to put his fingers in, but it seemed difficult to the trial judge to imagine that anyone, however inexperienced, would be tempted to do so. But, if a hand was in at the moment when the roller started, the raising of the shelf would be likely to cause the hand to be held there : and if the roller was not stopped in time the fingers would be squeezed between the plate and the strip as the roller was coming along. And, if the feeder, having his hand in that position at the moment when the roller started moving, called out to the operator to stop it, the noise of the shelves going up might prevent the operator from hearing the call ; but his Honour thought that if the feeder was doing his work as he should be doing it, his hand would not get into a position of danger.

What happened in this case was that the plaintiff had some fingers of his left hand beyond the edge of his shelf at a time when the operator started the roller : the shelf went up, and as a result his hand was caught and held there, the roller came along and the little and ring fingers were crushed between the strip and the plate, and so badly damaged that they had to be amputated. His statement in evidence was that he had fed a skin in but there was a corner of it " all creased up " : he put his left hand in to straighten that out " and all of a sudden the board " (shelf) " jumped up " : he tried to pull his hand out, but his wrist was caught ; he called out : " Stop it, stop it," but the operator did not stop the roller before the hand got caught. It seemed that when the roller had passed under the boy's fingers once, the operator, realizing that he was in trouble but supposing that his fingers were not yet immediately under the

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roller, reversed its direction and thus it passed under the fingers twice.

In an action in the Supreme Court of South Australia the plaintiff claimed (so far as is material here to state) damages against the defendant on the basis that the injury to the plaintiff was caused by the breach by the defendant of his statutory duty under s. 321 of the *Industrial Code* (S.A.) to fence or safeguard a dangerous part of machinery. The defendant alleged (so far as is material) that the plaintiff was guilty of contributory negligence and contended that that was an answer to the plaintiff's claim. The trial judge (*Richards* J.) found that the plaintiff had "had abundant and repeated warnings not to put his fingers under the plate, and that his part of the work did not call for such conduct." He also held that "at any rate for juvenile workers, the machine in question was a dangerous machine, and that s. 321 of the *Industrial Code* applies, it being evident that the machine was not securely fenced or safeguarded, as required by the section," but he found that the plaintiff had been guilty of contributory negligence, and (following decisions of the House of Lords which are referred to hereunder in preference to the decision of the High Court in *Bourke* v. *Butterfield & Lewis Ltd.* (1)) held that contributory negligence was an answer to the plaintiff's claim. He entered judgment for the defendant: *Piro* v. *W. Foster & Co. Ltd.* (2).

From this decision the plaintiff appealed to the High Court.

Hicks, for the appellant. It is clear that the respondent was guilty of a breach of duty towards the appellant under s. 321 of the *Industrial Code* (S.A.) and that this gave the appellant a prima facie right of action against the respondent. It is clear from the evidence that the machine in question could have been safeguarded in any of several ways and that the respondent failed to adopt any of these ways. The respondent now seeks to say to the appellant: "It is true I could have guarded the machine so that you would not have suffered the injury you have suffered, but I warned you that the machine was dangerous and told you not to do any of the things which would put you in danger, so you are yourself to blame for the injury which you suffered." In effect the respondent seeks to rely on the very breach of duty which founds the action in order to defeat the action. It is conceded that *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (3) and *Lewis* v. *Denye* (4) present a difficulty to the appellant on the question of contributory negligence, if they are to be regarded as law in Australia,

(1) (1926) 38 C.L.R. 354.
(2) (1943) S.A.S.R. 68.
(3) (1940) A.C. 152.
(4) (1940) A.C. 921.

but it is clear from those cases that not every act of inadvertence on the part of a workman is contributory negligence (See *Caswell's Case* (1); *Lewis* v. *Denye* (2)) and that the employer cannot avoid his statutory duty, which is the gist of the action, merely by giving warnings. The difference between *Bourke's Case* (3) and the later English authorities is rather a matter of words than of substance, and it was not for the primary judge to reject *Bourke's Case* (3). [He referred to *Houston* v. *Stone* (4).] If the matter arises for decision in the present case, it is for this Court to decide it, after giving due consideration to all the authorities. On the strictest view of the English authorities, the evidence here does not justify a finding against the appellant of contributory negligence within the meaning of those authorities. The appellant's act which resulted in his getting his hand caught in the machine was something which even the most prudent workman might have inadvertently done in the hurry and bustle of work, there being no proper guard to prevent him from doing it. Once his hand was caught, the injury was accentuated by his fellow-employee's bringing the roller back again. [He referred to *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ltd.* (5); *Craze* v. *Meyer-Dumore Battlers' Equipment Co. Ltd.* (6); *Murray* v. *Schwachman Ltd.* (7); *McLean* v. *Bell* (8); *British Columbia Electric Railway Co. Ltd.* v. *Loach* (9); *Stimpson* v. *Standard Telephones and Cables Ltd.* (10); *Wood* v. *London County Council* (11); *Proctor* v. *Johnson & Phillips Ltd.* (12); *American Law Institute Restatement of the Law of Torts*, vol. 2, s. 483; *Becker, Gray & Co.* v. *London Assurance Corporation* (13).]

E. J. C. Hogan (with him *R. M. Napier*), for the respondent. There is no absolute statutory civil liability imposed on the employer by s. 231 of the *Industrial Code*. A breach of that section may constitute prima facie proof of negligence, but the defence of contributory negligence can then be raised to an action by the employee. In any case the Court should follow the House of Lords and treat contributory negligence as a defence. [He referred to *Caswell's Case* (14).] There is no evidence that the breach of the Code was

(1) (1940) A.C. 152, at p. 179, per Lord *Wright*; at p. 164, per Lord *Atkin*.
(2) (1940) A.C., at pp. 925, 929, per Lord *Sumner*.
(3) (1926) 38 C.L.R. 354.
(4) (1943) 43 S.R. (N.S.W.) 118; 60 W.N. 55.
(5) (1934) 2 K.B. 132, at p. 140.
(6) (1936) 2 All E.R. 1150, at p. 1153.
(7) (1938) 1 K.B. 130, at p. 145.
(8) (1932) 147 L.T. 262.
(9) (1916) 1 A.C. 719.
(10) (1940) 1 K.B. 342.
(11) (1941) 2 All E.R. 230.
(12) (1943) 1 All E.R. 565, at p. 571.
(13) (1918) A.C. 101, at p. 114.
(14) (1940) A.C. 152, at p. 178, per Lord *Wright*, and at pp. 160, 166, per Lord *Atkin*.

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the cause of the accident in the present case. There was evidence to support a finding that the accident was caused by the negligence of the appellant, whether it was called "contributory" negligence or not. That may not have been the only finding open on the evidence, but it was open. [He referred to *Powell* v. *Streatham Manor Nursing Home* (1).]

Hicks, in reply, referred to *Leyland Shipping Co. Ltd.* v. *Norwich Union Fire Insurance Society Ltd.* (2).

Cur. adv. vult.

Nov 5.

The following written judgments were delivered :—

LATHAM C.J. Appeal from a judgment of the Supreme Court of South Australia for the defendant in an action in which the plaintiff, a boy of fourteen years of age, claimed damages from the respondent, his employer. The case was presented first under the *Employers' Liability Act*, but this claim was abandoned. There was also a claim for damages for negligence, the plaintiff relying upon a breach of statutory duty to fence or safeguard a dangerous part of machinery. There was a further claim, if the plaintiff failed under the last-mentioned claim, for compensation under the *Workmen's Compensation Act* 1932-1941 (S.A.). The learned trial judge, *Richards* J., held that, though the defendant was guilty of a breach of statutory duty and was therefore guilty of negligence, the plaintiff was guilty of contributory negligence and therefore failed in the action for negligence. The learned judge made an award under the *Workmen's Compensation Act*, as it was not denied that the defendant was liable under that Act.

The boy was engaged at a machine which pressed and ironed sheepskins from which the wool had been removed. He worked on one side of the machine, placing the skins in position while the machine was at rest, and another workman, known as the "operator," who worked on the other side of the machine, put the machine in motion. When the machine was working a strip upon which a sheepskin rested was pressed by a heavy roller up against the bottom of a heavy plate. In this way irregularities in the surface were ironed out and a smooth, or, if desired, a patterned, surface was produced upon the skin. The plaintiff had been clearly and adequately warned, the learned judge found, not to put his fingers into the machine, but to feed the skin into the machine and to leave all straightening and smoothing of the skin to the operator. If this instruction had been obeyed the plaintiff could not have been injured. In fact he

(1) (1935) A.C. 243.

(2) (1918) A.C. 350, at p. 361.

put his left hand into the machine to straighten out a sheepskin. The operator, having no reason to suppose that the plaintiff's hand was in the machine, put the roller into operation, and the plaintiff's fingers were caught and seriously injured. Upon these facts the plaintiff was found guilty of contributory negligence and accordingly failed in his action for negligence.

The *Industrial Code* 1920-1926 (S.A.), s. 321, provides that the occupier of a factory shall securely fence or safeguard all dangerous parts of the machinery therein. The learned judge found that the machine was a dangerous machine and had not been fenced or safeguarded. This finding has not been challenged and there was clearly evidence to support it. If the machine had been safeguarded the plaintiff could not have been injured in the way in which he was injured. The *Industrial Code* is plainly a statute designed for the protection of persons working with such machinery as that to which s. 321 applies and it has not been disputed that, in accordance with well-known principles, the injury which the plaintiff suffered gave him a cause of action : See *Groves* v. *Wimborne* (*Lord*) (1), *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* (2), and the cases mentioned in *Lochgelly Iron & Coal Co. Ltd.* v. *M'Mullan* (3).

The learned judge was faced with conflicting decisions of this Court and of the House of Lords upon the question whether contributory negligence was available as a defence in such an action. In *Bourke* v. *Butterfield & Lewis Ltd.* (4) it was held by this Court that contributory negligence is not a defence in 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. A statutory duty is absolute in the relevant sense when it requires that a particular thing be done, without reference to any questions of intent or negligence, as distinct from requiring only that the person subject to the statute shall do his best to do a particular thing. In the present case the statutory duty is absolute in this sense. *Bourke* v. *Butterfield & Lewis Ltd.* (4) was preceded by *Cofield* v. *Waterloo Case Co. Ltd.* (5), in which the same question had been considered but had not been authoritatively answered.

In the House of Lords, on the other hand, in the cases of *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (6) and *Lewis* v. *Denye* (7), *Bourke* v. *Butterfield & Lewis Ltd.* (4) was considered and the decision was disapproved. In these cases the House of Lords

(1) (1898) 2 Q.B. 402.
(2) (1923) 1 K.B. 539.
(3) (1934) A.C. 1, at p. 8.
(4) (1926) 38 C.L.R. 354.
(5) (1924) 34 C.L.R. 363.
(6) (1940) A.C. 152.
(7) (1940) A.C. 921.

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clearly decided that contributory negligence was available as a defence in an action of this kind.

The learned trial judge followed the decisions of the House of Lords in preference to the decision of this Court. The first question which arises upon this appeal is whether he was right in doing so.

This Court is not technically bound by a decision of the House of Lords, but there are in my opinion convincing reasons which lead to the conclusion that this Court and other courts in Australia should as a general rule follow decisions of the House of Lords. The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring that law: See *Robins* v. *National Trust Co. Ltd.* (1). As was said in *Trimble* v. *Hill* (2) (a decision of the Judicial Committee of the Privy Council): "It is of the utmost importance that in all parts of the Empire where English law prevails the interpretation of that law by the courts should be as nearly as possible the same." In *Webb* v. *Federal Commissioner of Taxation* (3), *Isaacs* J. referred to the passage from *Trimble* v. *Hill* (4) as a "clear suggestion" that a relevant decision of the House of Lords should be accepted by an Australian court as decisive: See also *Davison* v. *Vickery's Motors Ltd.* (5). In *Waghorn* v. *Waghorn* (6) this Court referred to the desirability of uniformity of decision with the English courts. In my opinion it should now be formally decided that it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court, and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle. Special considerations apply to constitutional cases governed by s. 74 of the Constitution (See *Baxter* v. *Commissioners of Taxation (N.S.W.)* (7); *Flint* v. *Webb* (8)), but it is unlikely that cases of this kind would come before the House of Lords. The ruling of the Court in this case will now relieve State courts from the embarrassment to which reference was made in *Houston* v. *Stone* (9), when the Supreme Court, in the absence of any such ruling as that which is now given, regarded itself as bound to follow *Bourke* v. *Butterfield & Lewis Ltd.* (10), notwithstanding the contrary decisions of the House of Lords.

(1) (1927) A.C. 515, at p. 519.
(2) (1879) 5 App. Cas. 342, at p. 345.
(3) (1922) 30 C.L.R. 450, at p. 469.
(4) (1879) 5 App. Cas., at p. 345.
(5) (1925) 37 C.L.R. 1, at p. 13.
(6) (1942) 65 C.L.R. 289.
(7) (1907) 4 C.L.R. 1087.
(8) (1907) 4 C.L.R. 1178.
(9) (1943) 43 S.R. (N.S.W.) 118; 60 W.N. 55.
(10) (1926) 38 C.L.R. 354.

The decisions in *Caswell's Case* (1) and *Lewis* v. *Denye* (2) are clear that contributory negligence is a defence in a case where the plaintiff bases his action for damages upon personal injury suffered by him in consequence of a breach of a statutory duty by the defendant, that duty having been imposed for the purpose of protecting members of a class of which the plaintiff is one from the kind of injury which he has suffered. Such an action may be regarded from two points of view—either as an action for negligence, the breach of statutory duty being evidence, possibly conclusive evidence, of negligence, or as a common law action for a breach of statutory duty in which it is irrelevant to inquire whether such breach amounts to negligence on the part of the defendant or not. A statement of the former method of approach may be found in *Lochgelly's Case* (3). On the other hand, in *Watkins* v. *Naval Colliery Co.* (1897) *Ltd.* (4), Lord *Haldane* adopted the other view, which also commended itself to this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (5): See also per Lord *Wright* in *Caswell's Case* (6). It is not, however, necessary to determine whether such an action is technically an action for negligence or a common law action for a breach of statutory duty independent of negligence, because upon either view it should now be held by this Court that contributory negligence on the part of the plaintiff is a defence to such an action.

There remains for consideration the contention of the appellant that the learned trial judge wrongly found contributory negligence on the part of the plaintiff in the present case. The findings of the learned judge are expressed in the following passages in his judgment: —" In the technical sense of that term, it cannot, I think, in view of the adequate warning given to the plaintiff and the obvious risk which he ran, be denied that he was guilty of contributory negligence. He admitted in evidence—' if I was looking at the roller at the end, I would always know when it commenced to move ' ; and he added —and this is more to the point—' I realized that it was a dangerous thing to get my hands under the plate.' And later he admitted: ' I thought before this accident occurred that it was dangerous to have my hands under this plate at any time. I could see it was dangerous.' " His Honour further said in his judgment :—" If the plaintiff in the present case had not been adequately warned not to put his hand under the plate, I might well say, having regard to the circumstances existing in the place where he was working, and to his age and the extent of his experience at the machine, though this was

(1) (1940) A.C. 152.
(2) (1940) A.C. 921.
(3) (1934) A.C. 1, at pp. 9, 23.
(4) (1912) A.C. 693, at pp. 702, 703.
(5) (1926) 38 C.L.R., at p. 360.
(6) (1940) A.C., at pp. 177, 178.

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quite long enough for him to know the danger he was running, that what he did was the result of mere heedlessness or inadvertence, or, at the worst, of carelessness. Even when the warnings he had received are taken into account I should not be prepared to stigmatize his act as 'misconduct,' i.e., in any sense involving moral obliquity. But, having regard to the repeated careful and pointed warnings administered to him, and the obviously highly dangerous nature of his act, I regretfully feel bound to hold that his conduct was negligent, within the meaning attributed to that term by the Law Lords in relation to accidents connected with dangerous machinery, and that his injury was caused by his omission to take the ordinary care which was to be expected of him in the circumstances. I must therefore dismiss the plaintiff's action based on negligence and on s. 321 of the *Industrial Code*."

There is no dispute as to the facts in the present case. The action of the plaintiff in straightening the skin was a natural action not found to have been deliberately done in defiance of warning. The learned judge expressly said that, if the plaintiff had not been adequately warned not to put his hand under the plate, he might well have said, having regard to the circumstances, that what he did was the result of " mere heedlessness or inadvertence or, at the worst, of carelessness "—which would not have amounted, in the circumstances, to contributory negligence. Accordingly, if it had not been for the warnings given to the plaintiff, the learned judge would have held that what the plaintiff did was mere heedlessness or inadvertence or, at the worst, " carelessness." Similar words are to be found in *Caswell's Case* (1), where Lord *Wright*, speaking of contributory negligence in such a case as this, says that it is a question of degree and that " the jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins." The question here is whether an inference of contributory negligence should be drawn from facts which are not in doubt. In such a case an appellate court is in as good a position to decide the question as the judge at the trial (*Powell* v. *Streatham Manor Nursing Home* (2)). The question is one of fact, depending upon the circumstances of each case.

If there had been a finding that what the plaintiff did was a deliberate act whereby in defiance of known danger he invited or consciously took the risk of injury, that finding would have justified an inference of contributory negligence. But there is no such finding. I read the reasons for judgment of the learned judge as stating that, though the plaintiff had been warned not to put his hand into the

(1) (1940) A.C., at p. 176. (2) (1935) A.C. 243.

machine, he inadvertently, without thinking on the particular occasion of the warning or of the danger involved, did put his hand into it. If the machine had been properly guarded he could not have put his hand into it. The statute was designed to protect the plaintiff and other persons using dangerous machines from just this kind of injury resulting from inadvertence or forgetfulness. This, to use the words of *Goddard* L.J. in *Hutchinson* v. *London & North Eastern Railway Co.* (1), is a case " where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent." In my opinion an employer cannot safeguard himself against the civil liability imposed upon him by the statute by saying to his employees in effect : " This machine ought to be fenced ; it is not fenced ; therefore you must be very careful in using it," and by repeating this warning from time to time. If such warnings were held to be decisive in determining whether or not contributory negligence was established, the policy of protective statutes, in so far as they involve a civil liability for damages, could readily be defeated and destroyed. The fact that such a warning was given is a circumstance to be taken into account but it is not, in my opinion, in itself decisive upon the question of contributory negligence. The inadvertence of the plaintiff remained inadvertence notwithstanding the warning, and, in all the circumstances of this particular case, the finding of contributory negligence cannot, in my opinion, be supported upon the evidence.

On this ground, in my opinion, the appeal should be allowed and the judgment for the defendant should be set aside. All the relevant facts have been determined by the learned trial judge and there is no reason why the parties should be put to the expense of a new trial upon any issue other than that of damages. In my opinion, therefore, the case should be remitted to the trial judge for the purpose of assessing damages upon the plaintiff's claim for damages for negligence and giving judgment accordingly.

RICH J. The facts in this case are fully set out in the judgment of *Richards* J. and I shall not repeat them in detail. The plaintiff's claim was based on an injury sustained by him arising out of a breach of a statutory duty on the part of the defendant in not securely fencing or safeguarding a machine operated by the plaintiff which his Honour held so far as the plaintiff—a juvenile worker—was concerned was a dangerous machine to which s. 321 of the *Industrial Code* 1920-1936 (S.A.) applied.

(1) (1942) 1 K.B. 481, at p. 488.

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For the purpose of my judgment the relevant defence to this claim was that of contributory negligence. His Honour's finding on this defence was that the plaintiff's conduct in working the machine was negligent and "that his injury was caused by his omission to take the ordinary care which was to be expected of him in the circumstances." His Honour visited the factory on two occasions and watched the machine in operation and saw and heard the witnesses. I am not satisfied that the judge with these advantages was wrong and I do not feel at liberty to substitute my own findings for his (*Powell* v. *Streatham Manor Nursing Home* (1); *Grant* v. *Australian Knitting Mills Ltd.* (2); *Donnelly* v. *Donnelly* (3)). His Honour dismissed the action. Hence this appeal.

The material questions in an appeal of this kind are compendiously stated by Lord *Greene* M.R. They are, first, whether or not a breach of statutory duty was committed and, secondly, if so, whether the act or default of the workman himself materially contributed to the accident, and, if so, whether that act or default was one which was of such a nature as to constitute contributory negligence within the meaning of the authorities (*Proctor* v. *Johnson & Phillips Ltd.* (4)). Before us the breach of duty was not contested and I confine myself to the consideration of the question whether the defence of contributory negligence is applicable to this case. The trial judge's findings which are fully justified by the evidence, show that he had come to the conclusion that he could not hold that the accident was due to mere heedlessness, inadvertence or carelessness but was due to the plaintiff taking a risk which he knew was a highly dangerous thing to do and which amounted to negligence as interpreted in the authorities from which his Honour had already quoted. Thus at the end of his judgment his Honour says:—"If the plaintiff in the present case had not been adequately warned not to put his hand under the plate, I might well say, having regard to the circumstances existing in the place where he was working, and to his age and the extent of his experience at the machine, though this was quite long enough for him to know the danger he was running, that what he did was the result of mere heedlessness or inadvertence, or, at the worst, of carelessness. Even when the warnings he had received are taken into account I should not be prepared to stigmatize his act as 'misconduct,' i.e., in any sense involving moral obliquity. But, having regard to the repeated careful and pointed warnings administered to him, and the obviously highly dangerous nature of his act, I regretfully feel bound to hold that his conduct was negligent,

(1) (1935) A.C. 243, at pp. 250, 252, 255, 256, 257, 265, 267.
(2) (1936) A.C. 85, at p. 97.
(3) (1939) 61 C.L.R. 577, at p. 581.
(4) (1943) 1 All E.R. 565, at p. 566.

within the meaning attributed to that term by the Law Lords in relation to accidents connected with dangerous machinery, and that his injury was caused by his omission to take the ordinary care which was to be expected of him in the circumstances."

The only problem, if I may so call it, is whether we should follow the decision of this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (1), which differs from the opinions expressed in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (2) and *Lewis* v. *Denye* (3), where it was held that negligence as distinguished from " thoughtlessness, inadvertence or forgetfulness " would preclude a workman from succeeding in his action. If the nature of the cause of action had been regarded as a matter of importance in the decisions on this subject there might have been less confusion in the result. Was it not *Coke* who said that pleading was " the heart-string of the common law " (Preface to *Institutes*) ? In *Caswell's Case* (2) their Lordships, with the exception of Lord *MacMillan*, appear to treat the action as being one for breach of statutory duty. And an action in negligence and an action for breach of a statutory duty are for the purposes of the defence of contributory negligence regarded as similar. The person injured must show a breach of duty and damage resulting from such breach. The onus then is imposed on the defendant to prove that his breach of duty was not the sole cause of the injury. In other words, contributory negligence can be relied upon as a defence. In my opinion the real test in an action, whether in negligence or for breach of a statutory duty, is what was the dominant or substantial cause of the injury. The American doctrine, if I understand it, is not consistent with the doctrine of English law, because under the latter doctrine even if a defendant be negligent and a plaintiff contributes to his hurt by his own negligence or failure to use reasonable care in all the circumstances the plaintiff cannot succeed. For the American doctrine we were referred to *American Law Institute Restatement of the Law of Torts*, vol. 2, s. 483 ; *Mayes* v. *Byers* (4).

The House of Lords, without giving an exhaustive definition, have, as I have mentioned, given a negative test which shows how the line is to be drawn between mere thoughtlessness or inadvertence or forgetfulness and negligence.

In quest of uniformity I considered in *Waghorn* v. *Waghorn* (5) that we should yield to a decision of the English Court of Appeal rather than follow a decision of our own Court. Technically we are

(1) (1926) 38 C.L.R. 354.
(2) (1940) A.C. 152.
(3) (1940) A.C. 921.
(4) Minn. 7 N.W. (2d.) 403 ; 144 American Law Reports annotated, (1943), p. 821.
(5) (1942) 65 C.L.R. 289, at pp. 292, 293.

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bound only by the judgments of the Privy Council, but I have no doubt that we should follow all rulings of the House of Lords on points of law common to both countries. I agree that, in the absence of any ruling of this Court, the learned Chief Justice of the Supreme Court of New South Wales in *Houston* v. *Stone* (1) was right in considering that he was bound by a decision of the High Court as the ultimate court of appeal for Australia subject to an appeal to the Privy Council. But for the future, in order to prevent circuity of action, it is advisable for us to direct that Australian courts should follow all rulings of the House of Lords and of course the Privy Council in preference to those of this Court.

In my opinion the appeal should be dismissed.

STARKE J. This appeal raises the question whether contributory negligence is a defence to an action based upon a breach of the statutory duty imposed upon the defendant by the *Industrial Code* 1920-1936 of South Australia, which provides that the occupier of a factory shall securely fence or safeguard all dangerous parts of the machinery therein. The duty is absolute in the sense that if the duty is not fulfilled the occupier " is liable for the consequences to his workmen, however blameless he may be, at least, in the absence of some qualifying words in the Act or regulation " (*Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan* (2) ; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ltd.* (3) ; *Potts or Riddell* v. *Reid* (4)).

In *Bourke* v. *Butterfield & Lewis Ltd.* (5) this Court declared that contributory negligence was not a defence to an action for breach of such a duty. And it is interesting to note that apparently the same view of the law is stated in the *Restatement of the Law of Torts* adopted and promulgated by the *American Law Institute*, vol. 2, s. 483 : " If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by a violation of such statute." Still the House of Lords has declared that the law of England is to the contrary (*Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (6) ; *Lewis* v. *Denye* (7)).

Technically the decision of the House of Lords does not bind this Court, but I have no doubt that this Court should accept the decision as a correct statement of the law of England and overrule or disregard its decision in *Bourke* v. *Butterfield & Lewis Ltd.* (5). It was suggested

(1) (1943) 43 S.R. (N.S.W.) 118, at p. 123; 60 W.N. 55, at p. 59.
(2) (1934) A.C. 1.
(3) (1936) A.C. 206, at p. 211.
(4) (1943) A.C. 1, at p. 24.
(5) (1926) 38 C.L.R. 354.
(6) (1940) A.C. 152.
(7) (1940) A.C. 921, at pp. 929, 930.

at the Bar that the learned primary judge should have followed the decision of this Court and left it to overrule or disregard its decision if it thought fit. But this appears to me a matter which other courts and primary judges must deal with as they think most conducive to the regular administration of justice and the interests of the litigant parties. I would suggest that the course adopted by the primary judge in the present case is only advisable in cases beyond question and possibly only in cases that do not involve title to property.

The appeal also raises the question whether the want of care alleged against the plaintiff and found by the learned primary judge is an answer to his action. The plaintiff in an action based upon the breach of a statutory duty cannot succeed according to the decision of the House of Lords if it is found that he has been guilty of any negligence or want of ordinary care which caused or materially contributed to the accident and the injury sustained by the plaintiff. But negligence in the plaintiff will not prevent him from recovering if the defendant after it happened could by reasonable care have counteracted it (*Radley* v. *London & North Western Railway Co.* (1); *Cooper* v. *Swadling* (2)).

The plaintiff was working in the defendant's factory at a dangerous machine, as the primary judge found, namely, at an ironing machine used for pressing sheepskins. The skins were fed in whilst the roller was stationary. The plaintiff whilst feeding in one of the skins put his hand between a board or shelf and a plate to remove creases in the skin. And whilst so engaged the machine was started by a fellow operator whereby the plaintiff's hand was crushed by the roller and he sustained serious injuries. The learned judge was satisfied that the plaintiff knew that he was taking a risk and that he had been warned on several occasions not to put his hands under the plate.

It cannot be said that the plaintiff's want of care was the substantial or decisive cause of the accident. More is to be said in favour of the view that the breach by the defendant of its statutory duty was the substantial and decisive cause of the accident.

"The rules of contributory negligence," said Lord *Wright* in *Caswell's Case* (3), "have been mainly developed in connection with road accidents, but at least since *Davies* v. *Mann* (4), the law in discussing contributory negligence in such cases has disregarded as not materially contributing causes some acts of the plaintiff which might be regarded as negligence in a sense, and treated them

(1) (1876) 1 App. Cas. 754.
(2) (1930) 1 K.B. 403, at p. 407.
(3) (1940) A.C., at p. 179.
(4) (1842) 10 M. & W. 546 [152 E.R. 588].

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as of subsidiary moment in ascertaining the causation of the injury and has fixed attention on what was judged to be the proximate or effective cause. . . . The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury." "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. . . . Cause here means what a business . . . man would take to be the cause without too microscopic analysis but on a broad view" (*Yorkshire Dale S.S. Co. Ltd.* v. *Minister of War Transport* (1)).

Had the pressing machine been securely fenced at the material time the accident to the plaintiff would not have happened and hence the breach of the statutory duty might be described as "the dominant, effective, or common-sense cause" of the accident (*Caswell's Case* (2)). It was then for the defendant to establish that the plaintiff's failure to exercise that degree of care and caution which an ordinary prudent workman would have shown in the circumstances was the substantial or a substantial or material co-operating cause of the accident. It is plain, as I have already said, that the negligence or carelessness of the plaintiff was not the substantial or decisive cause of the accident. And in approaching the question whether it was not a substantial or materially co-operating cause, which is a question of fact, the tribunal of fact must take into account all the circumstances of the work in a factory and remember that it is not every risky thing which a workman in a factory may do in his familiarity with the machinery that constitutes contributory negligence (*Flower* v. *Ebbw Vale Steel, Iron & Coal Co. Ltd.* (3); *Caswell's Case* (4); *Lewis* v. *Denye* (5); *Sparks* v. *Edward Ash Ltd.* (6)). Indeed Lord *Greene* M.R. observed that in his view "where there is a defence of contributory negligence in an action based on breach of a statutory rule which is designed to protect men as much from their own carelessness as from anything else it is wrong to draw inferences unfavourable to" an injured man. And *Goddard* L.J. has said: "It is only too common to find in cases where the plaintiff alleges that a defendant employer has been guilty of breach of a statutory duty, that a plea

(1) (1942) A.C. 691, at p. 706.
(2) (1940) A.C., at p. 171.
(3) (1934) 2 K.B. 132, at pp. 139, 140.
(4) (1940) A.C., at pp. 166, 174, 175.
(5) (1940) A.C., at p. 931.
(6) (1943) 1 K.B. 223.

of contributory negligence has been set up. In such a case I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent" (*Hutchinson* v. *London & North Eastern Railway Co.* (1)). "In dealing with the law of negligence it is possible to state general propositions, but when you come to apply those principles to determine whether there has been actionable negligence" (or, I add, contributory negligence) "in any particular case, you must deal with the case on its facts" (*The Oropesa* (2)). "The court cannot lay down any rule or set any particular standard for determining whether a plaintiff has been guilty or not of contributory negligence." It "is a question of fact depending on all the circumstances of the case, and ought not to be treated as one of law" (*Sparks* v. *Edward Ash Ltd.* (3)).

The primary judge after a full consideration of all the circumstances in the present case concluded that the plaintiff had not exercised due care and caution and was guilty of contributory negligence. Undoubtedly there is evidence to support his conclusion. He saw the ironing machine and was satisfied that the plaintiff knew the risk he ran in putting his hand between the shelf and the plate. He also heard from witnesses the nature and frequency of the warnings given to the plaintiff. But this Court "has the same right to come to decisions on the issues of fact as well as law as the trial judge" (*Powell* v. *Streatham Manor Nursing Home* (4)), especially in cases in which the credibility of witnesses is not involved and the evidence is uncontroverted. It is, no doubt, for the appellant to satisfy the Court that his appeal should be allowed: the Court should not set aside the judgment unless satisfied that the judge was wrong and that his decision ought to have been the other way (*Sankey* L.C. (5)). The primary judge in the present case said that having regard to the repeated careful and pointed warnings administered to the plaintiff and the obviously highly dangerous nature of his act he regretfully felt bound to hold that his conduct was negligent in the sense attributed to it in *Caswell's Case* (6).

But this conclusion ought not, I think, to be supported in the circumstances proved in this case. The defendant was guilty of a breach of his statutory duty which, in the words of Lord *Wright*, was from a common-sense point of view the dominant or effective cause of the injury to the plaintiff. The onus was upon the defendant

(1) (1942) 1 K.B. 481, at p. 488.
(2) (1943) P. 32, at p. 36.
(3) (1943) 1 K.B. 223, at pp. 240, 241.
(4) (1935) A.C. 243, at p. 255.
(5) (1935) A.C., at p. 249.
(6) (1940) A.C. 152.

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to establish that the plaintiff was guilty of contributory negligence. The plaintiff did not put his hand into a moving machine but into a stationary machine, which involved the risk of injury only if the machine were started without the plaintiff's becoming aware of the fact. And the machine was in fact started by a fellow operator without the plaintiff becoming aware of the fact. Counsels of prudence or of perfection had, however, been given to him to keep his hands out of the machine and avoid a risk which was obvious enough if in the course of his work the plaintiff always remembered those counsels. A good employer, however, might well think of his own duty and responsibility before giving counsels of prudence and perfection to his workmen which are likely to be forgotten and are often impossible to observe in the rush of work. Nevertheless the plaintiff did put his hand into the machine to straighten out creases in one of the skins in the course of his work. He did not intend to injure or maim himself: he was not guilty of any serious or wilful misconduct. And in my judgment his action in putting his hand into the machine stamps itself as a forgetful and inadvertent act in the performance of his work, indeed, almost mechanical in its nature. And it is from such acts as these that the statute was designed to protect the plaintiff and other workmen.

It is, I think, having regard to the burden of proof and the circumstances of this case, wrong to conclude that the plaintiff was guilty of contributory negligence or of a breach of the duty of care required of him by the decision of the House of Lords in *Caswell's Case* (1). I would add that the doctrine of the " last opportunity " or " chance " has no application to the facts of this case, for nothing that the defendant could do after the negligent conduct alleged against the plaintiff could have avoided the accident. And further that the case of *British Columbia Electric Railway Co. Ltd.* v. *Loach* (2) does not govern this case, because the only way in which the consequences of the negligent conduct alleged against the plaintiff could have been avoided was in the performance by the defendant of its statutory duty.

The appeal should be allowed.

McTIERNAN J. The appellant was employed by the respondent to feed an ironing machine in its factory at Hindmarsh in South Australia. This machine was used for pressing sheepskins which had been cleaned of wool and tanned. The appellant fed the machine by putting one skin at a time, after he had brushed and trimmed it, on to the shelf at his side of the machine so that the skin extended

(1) (1940) A.C. 152. (2) (1916) 1 A.C. 719.

to a strip of flexible material which formed another part of the machine. The roller was under this strip of material and the plate against which the skin was pressed, above it. The operator who was at the opposite side of the machine pulled the skin by the end nearest to him across the strip. He made the skin even, if necessary, and set it in position. The operator then set the roller in motion. The roller had a forward and a backward stroke. It stopped at the end of each stroke. Each time the roller was at rest the operator would pull more of the skin on to the strip. These operations were repeated until the whole of the skin was pressed. There was a shelf on the operator's side of the machine as well as on the appellant's side. Each of these shelves automatically rose $1\frac{3}{4}$ inches immediately the operator set the roller in action. When the roller was idle the shelf on the appellant's side was flush with the strip. It automatically dropped into this position when the roller completed a forward or backward movement. The appellant suffered serious injuries to his left hand when he was feeding the machine. It appears that some of the fingers of his left hand were on the strip when the roller was set in motion. The shelf rose and he was unable to extricate his hand. The action of the roller crushed the fourth and fifth fingers between the strip and the plate. It was necessary to amputate those fingers.

The appellant brought an action against the respondent in the Supreme Court of South Australia for damages or, if the action failed, for statutory compensation under the *Workmen's Compensation Act* 1932-1941 of that State. The action included an ordinary count for damages for negligence and a count based upon a breach by the respondent of the statutory duty imposed on it by s. 321 of the *Industrial Code* 1920-1936 (S.A.). This section provides that the " occupier of a factory shall securely fence or safeguard all dangerous parts of the machinery " in the factory.

The appellant, as an employee of the respondent, was within the class of persons for whose protection this section was passed. The respondent was the occupier of the factory within the meaning of the section. It had not fenced any part of this machinery securely or safeguarded it in any way. There was a danger that a person employed to feed the machine would put his fingers between the plate and the strip when the roller was starting or about to start in order to straighten out a skin or set it in a suitable position for the ironing process. The learned trial judge found that it would be a natural thing for the employee to do either of these things in the interest of the employer. His Honour had the advantage of seeing the process of ironing sheepskins and said that it was reasonably

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to be feared that a juvenile feeder might have his fingers beyond the end of the shelf when the roller started, in order to adjust a skin that was about to be ironed. The age of the appellant at the time he was injured was fourteen years and five months. The side of the machine on which he worked was a dangerous part of it (*Hindle* v. *Birtwistle* (1); *Walker* v. *Bletchley Flettons Ltd.* (2); *Stimpson* v. *Standard Telephones & Cables Ltd.* (3)). The respondent broke the statutory duty which s. 321 imposes on employers for the protection of their employees. The appellant is entitled to recover damages from the respondent if his injuries were caused by this breach of duty.

The way in which the accident happened is described in the appellant's evidence, which on this point was accepted by the trial judge. The appellant saw that there were creases in a skin which he put in the machine and he went to straighten it out when suddenly the shelf moved up and his wrist was caught. He felt the pressure increasing and called out "stop it." But the roller was not stopped before his hand was caught. It was stopped before it completed the stroke but the operator reversed the roller and it again pressed the appellant's fingers. When it finished the backward stroke the appellant pulled his hand out of the machine. The operator, having seen that the appellant was in trouble, did not know that his fingers were under the roller and for that reason reversed the direction of the roller. In consequence, the roller twice passed under his fingers. It is evident that at the time the roller started and the shelf went up the appellant's fingers were under the plate. The appellant could not have put his fingers into the dangerous place if the respondent had fenced or safeguarded the side of the machine at which the appellant worked.

The respondent's foreman Chown gave the appellant the job of feeding the machine about three weeks before the accident. Chown then put two skins in the machine for the purpose of instructing the appellant. The appellant did not remember that Chown gave him a warning not to put his hand under the plate. He said that while Chown was showing him how to feed the machine Chown put his hand in with one skin and told the appellant to put his hand in and smooth out the skin for the first stroke of the roller when the skin was crooked. But the appellant immediately qualified that statement in answering a question by the trial judge. The appellant then said that Chown did not say: "Put in your hand and straighten it out." He said: "Just straighten it out whenever it is creased."

(1) (1897) 1 Q.B. 192.
(2) (1937) 1 All E.R. 170.
(3) (1940) 1 K.B. 342.

It is true, as his Honour said in commenting on this evidence, that the direction was capable of meaning that the skin might be straightened out after the appellant put it on the shelf. But his Honour expressed this opinion about the appellant as a witness: "Although, generally speaking, the plaintiff appeared to be frank and to be attempting to give true evidence, I am not prepared to accept the whole of his evidence concerning the instructions given to him. He was giving his evidence nearly a year after the time Chown put him on to the work. His answers were, in some instances, inconsistent with each other and I do not think his memory can be relied upon." Chown gave this evidence, that he "instructed feeders all the time that they must not under any conditions put their fingers under the plate", and gave this further evidence: "When I told him to go on feeding, it is hard to get down to the words I would use. I always run through the same." To his Honour: "It is a practice I always do—I never miss on it. I remember putting him on the machine." Q. "Have you any specific recollection with regard to the instructions you gave to this particular boy when he first came on to work the machine?" A. "I remember putting him on there and standing there with him for a while. I know the instructions I give to all of them, and they would be the same right through. It is only in that way that I can say what I told the boy." XD. "I would not employ any feeder without giving those instructions. I have never put any feeder on without giving those instructions. Plaintiff was on the machine for about a couple of months before his accident. It would be four or five weeks." Q. "Do you remember any specific occasion on which you said anything to Piro about his working at the machine?" A. "It is very hard for me to answer a question like that because it is something I do daily, perhaps a dozen times a day. I can't say to a day or an hour." To his Honour: "I can't say any special date when I instructed him after he started on the machine." XD. "I have warned him—warned all of them—after they went on the machine." To his Honour: "I could not definitely remember that there was an occasion when I have gone there after the boy had started on the machine, and I then warned him. All I can go on is that it is my practice, whoever the feeder is, to go there from time to time and warn him. I did this with plaintiff—I would do it more than once in the period of a few weeks."

Hopkins, a director of the respondent, gave evidence that he had spoken to the appellant "more than once while he was on the feeding job." He said: "I asked him to be very careful not to put his fingers inside the machine, that if a skin was doubled up it didn't matter—we had plenty more skins—that it didn't matter if

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the skins became pleated and I said we could buy plenty more skins but no more fingers." Hopkins said that the appellant replied: "I won't get my fingers caught, Mr. Neil." The appellant admitted that Hopkins had this conversation with him. The appellant also admitted that he was not told by anyone to put his hand under the plate.

The operator of the machine gave the following evidence: "I did my best to tell them not to put their hands under the machine. I didn't see Piro putting his hands under the plate. If he did put his hands under the plate at any time I didn't see it. If I had seen him do so I would promptly have told him about it." To his Honour: "He must have put his hand under when he had this accident." XD. "At times I stopped the roller and went around and showed him how to put the skins under the machine, and it was then I saw him put his hands under the plate." To his Honour: "I had seen Piro put his hand under the plate and I stopped the machine and went around the other side and warned him, and I showed him how to put a skin in, and I told him what to expect if he did get his hand in the roller. I can't remember how many times I did that, but I know I did it—I suppose it would be more than once, I know I did it a number of times. They don't do it very often—it is only now and again when the skin is curled up or when a skin catches the bolster under the plate and does not go into the roller properly. The feeder may then put his hand under the plate and pull the skin out and put it in again." XXD. "Several times I went to the other side of the machine and told Piro how to do his job. If the skin was not in properly they could put their hands in under the plate and pull it out, but I would tell them not to do that. I am definite that sometimes Piro put the skins in not quite as they ought to be put in. It is quite possible for the skin to catch on the bolster—the leather belt between the roller and the plate. Even the best of feeders will sometimes put the skins in so that they will catch on the edge of the belt. When I went around the other side, I told Piro what I thought was the best way to put the skins in. I picked up a skin and put it in the roller and showed him how to do it. I would then tell him not to put his hand under the plate. I told him not to do so. I know I went around there on a number of occasions to show Piro—it would not be a dozen times a week. When he first started feeding, I went there two or three times the first day. It is not very often that I go to the other side of the roller. I said pretty much the same thing to Piro each time I went around there. I can't tell you the words I used. I told him there was no necessity to put his hands under the roller, and I showed

him, and spoke to him, and said: 'This is the way I would put them in if I was at the machine' and I would tell him that was the way I expected him to put them in. He could not do the feeding as well as a practised feeder. I could not say how long before the accident I last told him anything about the feeding. He was getting better at feeding as he went on."

His Honour said: "In the technical sense of that term, it cannot, I think, in view of the adequate warning given to the plaintiff" (the appellant) "and the obvious risk which he ran, be denied that he was guilty of contributory negligence. He admitted in evidence: 'If I was looking at the roller at the end, I would always know when it commenced to move' and he added—and this is more to the point: 'I realized that it was a dangerous thing to get my hands under the plate', and later: 'I thought before this accident occurred that it was dangerous to have my hands under this plate at any time. I could see it was dangerous.'" These admissions were made in cross-examination and it seems to me that the language suggests that this boy was agreeing with suggestions put to him by counsel.

His Honour was called upon to decide whether contributory negligence was a defence to the action in Australia. There is a conflict between the decisions of the House of Lords in *Caswell's Case* (1) and *Lewis* v. *Denye* (2), on the one hand, and the decision in *Bourke* v. *Butterfield & Lewis Ltd.* (3) on the other, whether contributory negligence is a defence to an action based upon the breach of a statutory duty of the same kind as that which is created by s. 321. The House of Lords decided that contributory negligence is a defence, whereas this Court had previously decided that it was not. His Honour followed the decisions of the House of Lords. He acted upon a statement by Viscount *Dunedin* in *Robins* v. *National Trust Co. Ltd.* (4). What is there said does not bind an Australian court to follow the decisions of the House of Lords with the same strictness as it is bound to follow the decisions of the Privy Council. The High Court itself is not technically bound by the decisions of the House of Lords: *Webb* v. *Federal Commissioner of Taxation* (5); *Davison* v. *Vickery's Motors Ltd.* (6). Australian courts which are subordinate to the High Court are technically bound only by decisions of that Court and of the Privy Council. It is within the discretion of the High Court to overrule any of its own decisions in order to bring the judicial declarations of English law in this country into conformity with English decisions (*Waghorn* v. *Waghorn* (7)). The exercise of this discretion is not limited to cases in

(1) (1940) A.C. 152.
(2) (1940) A.C. 921.
(3) (1926) 38 C.L.R. 354.
(4) (1927) A.C. 515.
(5) (1922) 30 C.L.R. 450, at p. 469.
(6) (1925) 37 C.L.R. 1, at pp. 13, 17.
(7) (1942) 65 C.L.R. 289.

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which the High Court is convinced that a decision of the Court is manifestly wrong (*Waghorn* v. *Waghorn* (1)). It follows that it should rightly be regarded as within the discretion of an Australian court, although it is bound as a general rule by the decisions of the High Court, to follow a decision of the House of Lords rather than a decision of the High Court in any case where there is a clear conflict between the two decisions and there are no circumstances which would render the law laid down by the House of Lords inapplicable to this country.

In the present case *Richards* J. was right in deciding to follow decisions of the House of Lords.

The decision in *Bourke* v. *Butterfield & Lewis Ltd.* (2) should now be overruled. The question whether contributory negligence is a defence to the count, based on s. 321 of the *Industrial Code*, should be decided in accordance with the foregoing decisions of the House of Lords.

In dismissing the action his Honour said: "If the plaintiff in the present case had not been adequately warned not to put his hand under the plate, I might well say, having regard to the circumstances existing in the place where he was working, and to his age and the extent of his experience at the machine, though this was quite long enough for him to know the danger he was running, that what he did was the result of mere heedlessness or inadvertence, or at the worst, of carelessness. Even when the warnings he had received are taken into account I should not be prepared to stigmatize his act as 'misconduct,' i.e., in any sense involving moral obliquity. But, having regard to the repeated careful and pointed warnings administered to him, and the obviously highly dangerous nature of his act, I regretfully feel bound to hold that his conduct was negligent, within the meaning attributed to that term by the Law Lords in relation to accidents connected with dangerous machinery, and that his injury was caused by his omission to take the ordinary care which was to be expected of him in the circumstances. I must therefore dismiss the plaintiff's action based on negligence and on s. 321 of the *Industrial Code*."

This estimate of the action taken to warn the appellant not to put his hand under the plate does not seem to me to be fully justified by the evidence which I have quoted. However, it was clearly proved that the appellant was warned not to do so.

The negligence which the respondent alleged is not merely that the respondent did a risky thing in putting his fingers under the plate, but that he did this thing after having been warned not to

(1) (1942) 65 C.L.R. 289, at pp. 297, 299. (2) (1926) 38 C.L.R. 354.

do it. The respondent had the burden of proving that the boy's failure to observe the warning was contributory negligence.

If the appellant had not been warned or adequately warned, it would not be correct to find that it was an omission of his duty to be careful merely to put his hand under the plate to deal with the creases in the skin which was about to be ironed: See *Caswell's Case* (1), and *Lewis* v. *Denye* (2). This view commended itself to his Honour and he also rightly eliminated wilful misconduct as the cause of the injury.

The question is whether the addition of the circumstance that the appellant was warned not to put his hand under the plate, to the fact that he did this dangerous act, justifies the conclusion that the appellant was guilty of negligence which materially contributed to his injury. Lord *Wright* said in *Caswell's Case* (3): "If the matter had been free from authority, I should, I think, have thought it simpler to hold that a workman's claim for injury caused by breach of the employer's statutory duty to fence and like duties, is only barred by blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him. This view would have been in accord with the general intention of the statute and would have avoided the technicalities which have gathered round the doctrine of contributory negligence. But that path is closed by the line of decisions in England, and if contributory negligence is properly defined, I do not feel that the distinction is for practical purposes generally other than one of words. What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety." If for any such reason the appellant forgot the warning when he attempted to deal with the creases in the skin which was about to be ironed, the appellant's conduct was not negligence. The evidence of the foreman Chown shows that the warning would be forgotten by the feeders if it were not repeated. He said: "I regularly remind them because there is a danger that they will be injured if I don't remind them." It was as equally consistent with the facts that the appellant

(1) (1940) A.C., at pp. 166, 174, 177, 178, 179.
(2) (1940) A.C., at p. 931.
(3) (1940) A.C., at pp. 178, 179.

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did not advert to the warning or the danger involved in what he was attempting to do as that he was mindful of the warning and fully realized that he was imperilling his hand. But to justify the finding of contributory negligence, it would be necessary to hold that after all due regard is given to such considerations as those stated by Lord *Wright*, the more probable hypothesis is, that the appellant was mindful of the warning and fully realized that he was imperilling his hand and by reason of these facts omitted his own duty to take due and reasonable care of himself. That hypothesis is not more probable than that the appellant's inattention to his own safety was not an omission, in the circumstances of his employment, to take due and reasonable care for his own safety.

In my opinion the defence of contributory negligence was not established and the appellant showed that the respondent omitted its statutory duty and that the breach of duty was the cause of his injuries.

The appeal should be allowed.

WILLIAMS J. The pleadings and material facts are fully stated in the reasons of the learned trial judge. From this statement it appears that the plaintiff, who is the appellant, sued the defendant in respect of injuries to his hand which he received whilst he was employed by the defendant at its factory in Adelaide to feed skins into a pressing machine. At the date of the accident, which occurred on 17th April 1942, the plaintiff was aged 14½ years. In his statement of claim the plaintiff alleged that the accident was caused by defects in the condition of the press for which the defendant was personally liable for negligence at common law, or alternatively by the failure of the defendant to securely fence or safeguard the press in breach of s. 321 of the *Industrial Code* 1920-1936 (S.A.), which provides that the occupier of a factory shall securely fence or safeguard all dangerous parts of the machinery therein, for which the defendant was personally liable.

The learned trial judge found expressly that the defendant in failing to fence the press was guilty of a breach of the statute, and, by inference, that if the press had been properly fenced the accident would not have occurred. His Honour found that the defendant had not been guilty of negligence at common law, but it is irrelevant to the decision on this appeal to reconsider his Honour's finding on this point, because it has not been contended before us that his Honour was not entitled to find that the defendant had not complied with the statute. As it is clear that, if his Honour had found that the defendant had been guilty of negligence at common law, the

defendant would have been able to plead that the plaintiff was guilty of contributory negligence, the plaintiff could not be in a stronger position if his Honour had found common law negligence than that in which he has been placed by his Honour's finding in his favour that there was a breach of the statute.

The crucial question is, therefore, whether the defence of contributory negligence can be pleaded when a plaintiff establishes that his injury has been caused by the breach of a statute which requires that certain specific safeguards shall be taken to protect a particular class, which includes the plaintiff, against the kind of injury which he has suffered. There is ample evidence to support his Honour's finding that the plaintiff was instructed that his duty was to place the skins on the table, that he was frequently warned and clearly understood that he must not place any part of his hand in the press because this was dangerous, that it was not necessary in the course of his duty to place his hand in the press, and that if the plaintiff had not disregarded this warning the accident would not have occurred. It is now clear that where a statute is passed requiring an employer to take certain specific precautions for the protection of his employees, although the statute only provides for a prosecution for breach, the statute creates an individual civil right of action in the class of persons for whose protection it is passed, so that any one of them who is injured by the breach can sue the employer in an action for damages at law. In *Bourke* v. *Butterfield & Lewis Ltd.* (1) this Court expressed the view that, since such a statute is passed in order to protect employees against the dangers to which they would ordinarily be subjected in the course of their employment, an employer who fails to comply with the statute cannot be heard to say that an employee has by his negligence materially contributed to an accident, which would not have occurred but for the breach by the employer of the provisions of the statute. It was held, therefore, that the only defence open to an employer in such a case is to plead and prove that, despite the failure to comply with the statute, the accident would not have occurred but for the deliberate and wilful misconduct of the employee. But the English courts have taken a different view, and it is now established by the recent decisions of the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (2) and *Lewis* v. *Denye* (3) that such a breach is, for the purposes of an action for damages brought by an employee who has been injured against his employer, " equivalent to negligence " (per Lord *Simon* L.C. in *Lewis* v. *Denye* (4)), so that an employer will

(1) (1926) 38 C.L.R. 354.
(2) (1940) A.C. 152.
(3) (1940) A.C. 921.
(4) (1940) A.C., at p. 925.

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succeed in such an action if he can prove that in all the relevant circumstances the employee was guilty of contributory negligence. A most relevant circumstance is, of course, the fact that the statute was intended to guard against acts such as errors of judgment, thoughtlessness, inadvertence and forgetfulness which inevitably occur where employees are engaged on the same tasks day after day, so that it is not sufficient to establish contributory negligence to prove that the accident was materially contributed to by one of these acts. In such cases it is the breach of the statute and not such an act which is the dominant or effective cause of the injury (per Lord *Wright* in *Caswell's Case* (1)). But it is clear that there is a divergence between the principles of law applicable to the defence open to an employer laid down by this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (2) and those laid down by the House of Lords in these decisions.

The learned trial judge found that the plaintiff had not been guilty of deliberate and wilful misconduct within the principles of law enunciated in *Bourke* v. *Butterfield & Lewis Ltd.* (2), but had been guilty of contributory negligence of such a kind as to preclude him from complaining of the defendant's breach of duty within the principles of law enunciated by the House of Lords; so that, if contributory negligence was open as a defence, the defendant was entitled to succeed. Founding his opinion upon a statement made by Lord *Dunedin*, when delivering the judgment of the Privy Council in *Robins* v. *National Trust Co. Ltd.* (3), that, "when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board", his Honour considered that he should follow the decision of the House of Lords rather than that of this Court. Lord *Dunedin's* remarks have been attacked by Lord *Wright*, a present member of the House of Lords and of the Judicial Committee, in an article in the *Cambridge Law Journal*, vol. 8, No. 2, at p. 135, to which we were referred by Mr. *Hicks*. His Lordship said that "to define and declare colonial law is the province of the Privy Council which is the ultimate court of appeal for that purpose." Lord *Wright's* view would appear to be technically

(1) (1940) A.C., at pp. 179, 180. (2) (1926) 38 C.L.R. 354.
(3) (1927) A.C. 515, at p. 519.

correct, but Lord *Dunedin's* view is eminently practical. Lord *Dunedin's* view closely approximates that expressed by *Isaacs* J. in *Webb* v. *Federal Commissioner of Taxation* (1). A decision of the House of Lords is a decision of the highest judicial tribunal of the Empire. It is a final decision, because "the House of Lords alone does not depart from its rulings, and they remain, unless altered by legislation, the reason being that the House of Lords is a legislative body" (per *Rich* J. in *Waghorn* v. *Waghorn* (2)). It is the invariable practice for the Australian courts, including this Court, to follow a decision of the House of Lords as of course, without attempting to examine its correctness, although the decision is not technically binding upon them; and it would appear to be most inadvisable to hold that, where there has been a previous decision of this Court, this Court should adopt a different practice and merely review its own decision in the light of the subsequent decision of the House of Lords in order to decide whether it considers its previous decision to be wrong. In this event, if this Court decided to adhere to its own decision, there would be a conflict between the interpretation of the law as declared by the highest judicial tribunal in the Empire and as declared by this Court. This Court has on several occasions given up its view in order to conform with that of the Court of Appeal. This is because, as the Privy Council pointed out in *Trimble* v. *Hill* (3), "it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same": See *Waghorn* v. *Waghorn* (4). The importance of uniformity is clear in the present case, because, since the two decisions of the House of Lords, the Court of Appeal has been busy applying and extending the principles there laid down to numerous cases of breach of statutory duties of all kinds (Cf. *Hutchinson* v. *London and North Eastern Railway Co.* (5); *Sparks* v. *Edward Ash Ltd.* (6); *Proctor* v. *Johnson and Phillips Ltd.* (7)); so that, if this Court adhered to its own decision in *Bourke* v. *Butterfield & Lewis Ltd.* (8), the divergence between the interpretation of the same law in England and in Australia could tend to become even more accentuated in the future than it is at present.

In *Hall* v. *Wilkins* (9) and *Houston* v. *Stone* (10) the Supreme Court of New South Wales held that, where there is a conflict between a

(1) (1922) 30 C.L.R. 450, at pp. 469, 470.
(2) (1942) 65 C.L.R. 289, at pp. 292, 293.
(3) (1879) 5 App. Cas. 342, at p. 345.
(4) (1942) 65 C.L.R. 289.
(5) (1942) 1 K.B. 481.
(6) (1943) 1 K.B. 223.
(7) (1943) 1 All E.R. 565.
(8) (1926) 38 C.L.R. 354.
(9) (1933) 33 S.R. (N.S.W.) 220; 50 W.N. 44.
(10) (1943) 43 S.R. (N.S.W.) 118; 60 W.N. 55.

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decision of this Court and a subsequent decision of the House of Lords, the courts of a State should follow the decision of this Court, leaving it to this Court to determine whether to adhere to its own decision or to follow the subsequent decision of the House of Lords, but *Robins* v. *National Trust Co. Ltd.* (1) was not cited to the Supreme Court of New South Wales in either of these cases and in any event it was a proper course for the Supreme Court to take in the absence of a ruling by this Court on the question. For this Court to rule that the courts of a State should follow a decision of this Court rather than a subsequent decision of the House of Lords would be to place these courts in a serious difficulty, because they would then have to decide whether they should follow such a ruling or the statement of Lord *Dunedin* in the Privy Council. It would also cause the expense and delay of a needless appeal if they were bound to follow a decision which this Court on appeal would be certain to reverse because it was inconsistent with a subsequent decision of the House of Lords.

For these reasons I am of opinion that the learned trial judge was right in founding himself upon the principles of law as laid down by the House of Lords in *Caswell's Case* (2) and in *Lewis* v. *Denye* (3) in preference to those laid down by this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (4).

As I have said, there was ample evidence upon which his Honour, who saw the plaintiff in the witness box, was entitled to hold that the plaintiff fully understood the prohibition against placing his hands in the press and fully understood the danger of doing so, and that his action was not the result of error of judgment, inadvertence, thoughtlessness, or forgetfulness, but that he deliberately chose to run the risk of doing an act which he knew could result in damage to himself if the press were put in motion without warning. The plaintiff did not take the risk with the intention of harming himself, but in order to straighten a skin in the machine, so that he was not guilty of wilful misconduct; but this work was part of the operator's and not of his own duties, so that he took a risk which it was unnecessary for him to take in order to do his work

The question whether the plaintiff was guilty of contributory negligence was one of fact. His Honour correctly directed himself in law as to the circumstances which he should take into account, and as to the amount of weight he should attach to them, in order to determine whether they were sufficient to establish contributory negligence, so that, applying the principles which should guide

(1) (1927) A.C. 515.
(2) (1940) A.C. 152.
(3) (1940) A.C. 921.
(4) (1928) 38 C.L.R. 354.

appellate Courts upon appeals on questions of fact determined by a judge without a jury laid down by the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (1), his Honour's finding of fact should not be disturbed.

The appeal should be dismissed with costs.

Appeal allowed with costs. Judgment of Supreme Court set aside. Judgment for plaintiff. Case remitted to Supreme Court for further hearing limited to assessment of damages and the costs of the action.

Solicitor for the appellant, *F. G. Hicks*, Adelaide, by *Raynes Dickson, Kiddle and Briggs.*

Solicitors for the respondent, *E. J. C. and L. M. Hogan*, Adelaide, by *R. T. Cahir.*

E. F. H.

(1) (1935) A.C. 243.