[HIGH COURT OF AUSTRALIA.]

DAVIES . . . . . APPELLANT;
PLAINTIFF,

AND

ADELAIDE CHEMICAL AND FERTILIZER COMPANY LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 1, 2.

SYDNEY, *Dec.* 5.

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

Industrial law—Dangerous machinery—Breach by employer of statutory duty to safeguard machinery—Contributory negligence—Employee doing work involving risk—Knowledge of risk—Statute—Statute directed to protecting employee against that risk—Industrial Code 1920-1943 (*S.A.*) (*No.* 1453 *of* 1920—*No.* 32 *of* 1943) *s.* 321.

The plaintiff was employed as a greaser in the defendant's factory. It was his duty to lubricate a machine consisting of a slowly-moving conveyer belt which was supported by rollers. To grease certain points on the rollers it was necessary for him to reach under the belt. It was his practice over a number of years to grease the rollers while the belt was in motion; this, as he knew, involved some risk, but it was not highly dangerous. There was evidence that the works manager had had ample opportunity of seeing the plaintiff lubricating the machinery while it was in motion and direct evidence that both the engineer and foreman had often seen the plaintiff so doing. He was never instructed to have the machine stopped while he was greasing it, but it would have been stopped if he had so requested. While he was reaching under the moving belt to grease a roller his arm was caught between belt and roller and he suffered injury. He claimed of the defendant damages in respect of the injury, on the footing that it was the result of a breach by the defendant of the duty to safeguard dangerous parts of machinery as required by s. 321 of the *Industrial Code* 1920-1943 (S.A.). If the machine had been so safeguarded the injury could not have occurred. The trial judge held that there had been a breach of this

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duty, but that the plaintiff's claim failed because he had been guilty of contributory negligence in not having the machine stopped while he was greasing it.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Rich* and *Starke* JJ. dissenting), that the evidence did not support the finding of contributory negligence and the plaintiff was entitled to judgment.

Decision of the Supreme Court of South Australia (*Mayo* J.), reversed.

APPEAL from the Supreme Court of South Australia.

The plaintiff, William David Davies, was employed for many years at the factory of the defendant, the Adelaide Chemical and Fertilizer Co. Ltd., as a greaser, his duty being to lubricate various kinds of machinery. One of the machines consisted of a conveyer belt supported by rollers on which it moved slowly. The grease points on the rollers were accessible from one side only of the belt, and the plaintiff had to reach to some extent under the belt to lubricate some of the points. It was his regular practice over a number of years to grease the rollers while the belt was in motion, which he had done without injury; this was not highly dangerous, but it involved some risk, and the plaintiff was aware of the risk. During that time the then works manager, the engineer and the foreman all had ample opportunity of seeing him at this work and there is direct evidence that the engineer and foreman had often seen him greasing the rollers in motion. None of these officers was called to say that it was not conceived to be his duty so to act or, at all events, proper practice on his part sanctioned by them. The now factory manager agreed in his cross-examination that after working there for some years the plaintiff would hestitate to ask that some part of the plant should be stopped and that he would gradually get round to the state of mind that he would run a slight risk rather than have it stopped. In the course of a letter to a medical expert informing him of the facts of the case, the defendant's solicitors said that the plaintiff was employed by the defendant as a greaser " and, in particular, it is his work to grease the rollers of a conveyer belt system while the belt was actually in operation." The plaintiff was never given any instruction to have the machine stopped while he was doing the greasing, but he knew he could have it stopped for this purpose. On the occasion in question, he was reaching under the moving belt to lubricate a roller when his arm was caught between the belt and the roller, and he suffered a slight injury which later resulted in dermatitis.

He brought an action against the defendant in the Supreme Court of South Australia, alleging that the injury was the result of negligence on the part of the defendant at common law, and, alternatively,

that it was the result of a breach of duty by the defendant under s. 321 of the *Industrial Code* 1920-1943 (S.A.).

The action was tried by *Mayo* J., who decided that negligence at common law had not been proved; as to the alternative claim, he held that the machine was one to which s. 321 of the *Industrial Code* applied and that the defendant had committed a breach of duty under that section, but that this claim also failed because the plaintiff was guilty of contributory negligence in not having the machine stopped while he was greasing it. The action, as to both claims, was dismissed.

From this decision the plaintiff appealed to the High Court.

The relevant statutory provisions are set forth in the judgments hereunder.

Hicks, for the appellant. Something more than contributory negligence in the ordinary sense must be shown on the part of the appellant in order to afford a defence to the claim for breach of the statutory duty; the proximate cause of the injury must still be found (*Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (1)). What the trial judge found to be contributory negligence on the part of the appellant—the mere act of greasing the machine while the belt was moving—was the very thing from the consequences of which it was the respondent's statutory duty to safeguard him. It was only while the belt was moving that the machine was dangerous; the danger against which the respondent was bound to protect the appellant was that arising from the fact that the belt was in motion while the appellant was working on it. The doing of the act from the danger of which the master must protect the servant cannot be contributory negligence on the part of the servant (*Weblin* v. *Ballard* (2)). The contrary view would defeat the purpose of the statute imposing the duty. The appellant never received any instruction as to how he should do his work; it must, therefore, be taken that he was authorized to use his own discretion (*Smith* v. *Chas. Baker & Sons* (3)). Moreover, it must have been well known to officers of the respondent company who were in authority over the appellant that it was his practice to grease the machine while the belt was moving; he was never directed not to do so, and the respondent must be deemed to have approved the practice. That being so, the finding that he could have had the machine stopped is not to the point. Where there is no likelihood of grave injury, the worker may take the risk without being guilty of contributing negligence

(1) (1940) A.C. 152: See pp. 163, 164, 166, 171, 174-176, 187.
(2) (1886) 17 Q.B.D. 122.
(3) (1891) A.C. 325.

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(*Hutchinson* v. *London and North Eastern Railway Co.* (1)). [He also referred to *Clarke* v. *Holmes* (2) ; *Key* v. *Commissioner for Railways* (3) ; *Bowater* v. *Rowley Regis Corporation* (4) ; *Beven* on *Negligence*, 4th ed. (1928), pp. 775 et seq. ; *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 679 ; *Betts* v. *Whittingslowe* (5) ; *Wilsons and Clyde Coal Co. Ltd.* v. *English* (6) ; *Vyner* v. *Waldenberg Bros. Ltd.* (7).]

Alderman K.C. (with him *Brazel*), for the respondent. The question of contributory negligence was for the primary judge, provided that the evidence was sufficient to support his finding (*Gibby* v. *East Grinstead Gas and Water Co.* (8) ; *Smith* v. *Baveystock and Co. Ltd.* (9)). In the present case there was abundant evidence to support the finding. There was no duty on the appellant to grease the machine while it was in motion, nor was there any system requiring him to do so. He knew he was taking a risk and chose to do so although he could easily have had the machine stopped and, as appears from the evidence, sometimes did have it stopped. In these circumstances a finding that his injury was due to his own fault was amply justified.

Hicks, in reply.

Cur. adv. vult.

Dec. 5. The following written judgments were delivered :—

LATHAM C.J. The plaintiff, William David Davies, was employed by the defendant company as a greaser in an establishment in which there was a rubber conveyor belt travelling slowly over rollers and carrying superphosphate. The bearings of the rollers were greased through projecting nipples by means of a grease gun with a flexible nozzle. The nipples could be reached from the outside of the apparatus and could be greased without danger, except at one part of the conveyor where there was a platform which made access to certain of the nipples awkward and difficult from the side on which the nipples were placed. On 5th October 1943 the plaintiff, in order to remove a squeak in a roller, greased these particular nipples by reaching under the moving belt. His hand and arm were somehow caught between the belt and the rollers and, though no bones were broken, his skin was affected as a result with dermatitis. He sued

(1) (1942) 1 K.B. 481, at p. 488.
(2) (1862) 7 H. & N. 937 [158 E.R. 751].
(3) (1941) 64 C.L.R. 619, at pp. 627, 628.
(4) (1944) K.B. 476.
(5) (1945) 19 A.L.J. 322.
(6) (1938) A.C. 57.
(7) (1945) 2 All E.R. 547.
(8) (1944) 1 All E.R. 358.
(9) (1945) 1 All E.R. 278, 531.

the company for damages. The learned trial judge held that there was no evidence of negligence at common law, but that the apparatus was dangerous machinery and therefore that the *Industrial Code* 1920, s. 321, applied. Section 321, so far as relevant, is in the following terms—" The occupier of a factory shall securely fence or safeguard (*a*) all dangerous parts of the machinery therein." The defendant company was the occupier of a factory. This part of the decision is not challenged. But the learned judge also held that the plaintiff had been guilty of contributory negligence and that therefore the action failed. The plaintiff appeals to this Court.

It must now be taken as settled law that contributory negligence on the part of the plaintiff is a defence to a claim for breach of a statutory duty to safeguard dangerous machinery: *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (1); *Piro* v. *W. Foster & Co. Ltd.* (2). But in these cases it was said that a line must be drawn " where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins." It would be strange if a plaintiff should lose the benefit of a statute designed for his protection by requiring a person to safeguard dangerous machinery because he did the very thing against the consequences of which the statute was intended to protect him: see *Hutchinson* v. *London and North Eastern Railway Co.* (3). Such statutes are considered necessary, not only because accidents happen with moving machinery without fault on the part of any person, but also because people will be careless in varying degrees. No safeguard will prevent people deliberately sticking their fingers into moving machinery, and there is obviously reason in the view that such statutes are not intended to give a right of civil action to a person who, having before his mind on the particular occasion the danger against which the statute was intended to protect him, deliberately takes a risk which he is then aware could be avoided by taking that degree of care which the circumstances obviously require. But the statutes are intended to prevent accidents happening through carelessness and they should not be so construed and applied as to deprive of remedy a person within their protection whenever there is any carelessness on his part which helps to bring about his injury.

The onus is on a defendant to establish contributory negligence on the part of a plaintiff. In the present case the finding of contributory negligence is based on the following facts:—The plaintiff was a very experienced greaser; he had been doing the same work for some twenty-six years and had been regularly engaged in the

(1) (1940) A.C. 152.
(2) (1943) 68 C.L.R. 313.
(3) (1942) 1 K.B. 481, at p. 488.

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work of greasing many machines in the establishment. In particular, he had been greasing the rollers of the conveyor in question for a period of about seven years. It was definitely found by the learned trial judge that he could have had the conveyor stopped by making a request that it be stopped. Further, the conveyor was not working continuously and there were opportunities readily available for greasing the conveyor when it was not in motion. The plaintiff said in evidence that in all his work he knew what risks he was running and that he knew exactly what he was doing. He said :— "I don't suppose there are many in the works who can show me how to grease or do that kind of work. I would certainly know better than anyone in the place as to the risks I ran and how to do the work. It was not necessary to stop the elevator to properly do the greasing." He also said :—"I didn't think there was any *real* risk when I went to do this greasing, you have to be careful. Provided you are careful you may be all right. . . . Because of the slowness of the running I would not expect anything *serious* to happen to me." Thus he knew that it was dangerous to grease rollers from the far side by reaching underneath the belt when it was moving.

In my opinion these facts are all consistent with momentary inattention and thoughtlessness in performing an operation which was very familiar to the plaintiff. There is no evidence upon which it can be found that the accident was due to any deliberate act done in conscious or foolhardy defiance of this realised danger. The evidence is consistent with pure accident without inadvertence, and also with mere inadvertence. When this is the case it should not, in my opinion, be held that the defendant has discharged the burden cast upon him of proving contributory negligence in a case where there has been a failure to observe statutory precautions designed for the protection of persons using dangerous machinery and where, if those precautions had been observed, the accident would not have happened in the way in which it did happen. In my opinion, therefore, the evidence does not support in this case a finding of contributory negligence on the part of the plaintiff, and the decision of the Supreme Court should be set aside. Judgment for the plaintiff for damages should be substituted, and the action should be remitted to the Supreme Court for assessment of damages.

RICH J. This is an appeal from a judgment of the Supreme Court of South Australia in favour of the defendant. The appellant in an action against the respondent claimed (amongst other things) damages from the respondent for a breach of duty imposed upon it by the

South Australian *Industrial Code* 1920-1943, s. 321. This section provides that " the occupier of a factory shall securely fence or safeguard all dangerous parts of the machinery therein." The defendant in the action as a defence to the plaintiff's claim pleaded contributory negligence on the part of the plaintiff. The learned judge held that this defence was established and gave judgment for the defendant, and it is against this judgment that the present appeal is brought. The substantial issue on this appeal, in my opinion, is whether there was evidence to support the finding of the learned judge that the plaintiff was guilty of contributory negligence.

Whether contributory negligence could be a defence to an action for negligence based upon breach of a statutory duty was considered by this Court in *Piro* v. *W. Foster & Co. Ltd.* (1). After an examination of the English cases I considered that this Court should follow the rulings of the House of Lords on points of law common to England and Australia. In the same case (2) I came to the conclusion that the real test in an action such as this, as well as in the ordinary action of negligence, is what was the dominant or substantial cause of the injury, and that the House of Lords without giving an exhaustive definition had given in the cases considered in *Piro's Case* (1) a negative test of negligence which shows how the line is to be drawn between mere thoughtlessness or inadvertence or forgetfulness and negligence. While it may be said that the mere fact that a plaintiff knows that the work he is engaged in " was manifestly dangerous of itself does not constitute contributory negligence " (see *Weblin* v. *Ballard* (4)), the question is ultimately one of fact in each particular case.

In the present case the learned trial judge, *Mayo* J., in addition to the evidence which he heard, had the added advantage of visiting the defendant's factory and watching the working of the machinery. In his judgment he made an exhaustive examination of the evidence, and as a result of the evidence and of the knowledge gained by his inspection, he came to the conclusion that the plaintiff's claim failed because he was guilty of contributory negligence which was as he found the effective cause of his injury. In my opinion the learned judge's finding on this issue was warranted by the evidence. According to this evidence the plaintiff, who had had considerable experience in the particular job, knew that he could cause to be stopped the conveyor belt for the purpose of lubricating and, as the learned judge pointed out, he made his own choice deliberately. Instead of taking the precautions which he knew he ought to have taken, he

(1) (1943) 68 C.L.R. 313.
(2) (1943) 68 C.L.R. at p. 325.
(3) (1886) 17 Q.B.D. 122, at p. 127.

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chose to take the risk of doing what an ordinary prudent man would not in the circumstance have done. As the plaintiff himself said, "I thought I was doing something dangerous. . . . If I had stopped the belt there would have been no danger." In view of this evidence it could hardly be said that the plaintiff's injury was due to thoughtlessness or inadvertence.

In my opinion the learned judge was justified upon the evidence in finding that the substantial cause of the plaintiff's injury was the plaintiff's own negligence. Accordingly the appeal should be dismissed.

STARKE J. The respondent is a manufacturer of superphosphates and uses conveyor belts for the ready movement of materials from one part of its works to another. The belts are endless and of thick rubber twenty-four inches wide and they travel upon rows of cylindrical rollers. The rollers were so arranged as to give the belt, at which the accident to the appellant occurred, a trough shape for the purpose of carrying the load. There were some sixty-six sets of rollers carrying the loaded belt, about two feet apart, and having some two hundred and sixty-four greasing points.

The appellant was a greaser in the employ of the respondent and in greasing one of the rollers whilst the belt was in motion his arm was drawn in between the loaded belt and one of the rollers whereby he sustained injuries.

The primary judge held that the respondent was guilty of negligence in that it had not complied with the provisions of s. 321 of the *Industrial Code* of South Australia which required it to securely fence or safeguard all dangerous parts of the machinery in its works. He also held that this negligence was a contributing cause of the accident to the appellant and this finding has not been attacked.

But he also held that the appellant was guilty of contributory negligence, or in other words, that the appellant omitted to use that care of himself that an ordinary prudent and reasonable man would have used in the circumstances. The injury to the appellant, as the primary judge found, was therefore the result of two causes operating at the same time, a breach of duty by the respondent and the negligent omission or contributory negligence on the part of the appellant (*Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (1); *Piro* v. *W. Foster & Co. Ltd.* (2)).

The appellant himself deposed that he went with his grease gun to grease one of the rollers whilst the belt was in motion and that his arm, which he put under the moving belt, was suddenly drawn in

(1) (1940) A.C. 152. (2) (1943) 68 C.L.R. 313.

under the rollers whereby he sustained injury. He said that he knew that he was doing something dangerous and that if the belt had been stopped there would have been no danger. The appellant had no right to stop the belt for greasing purposes but there was an employee in charge of the belt whose duty it was to stop the belt if so required. But the appellant asserts that it was his duty to grease the rollers of the conveyor belt whilst the belt was actually in operation, and this statement appears to be true, for it is confirmed in a letter of the respondent's solicitors to its medical adviser stating the manner in which the accident happened. This fact, however, does not relieve the appellant of the duty of using reasonable care for his own safety but rather accentuates the need of such care. Much as one must sympathize with the appellant in these circumstances, still there is ample evidence to sustain the finding of the primary judge that the appellant's own negligence contributed substantially to his injury. And the decision of the House of Lords in *Caswell's Case* (1) and of this Court in *Piro's Case* (2) affirm that contributory negligence affords a defence to an action based upon a breach of the statutory duty imposed upon the respondent by the *Industrial Code*: see for example *Gibby* v. *East Grinstead Gas and Water Co.* (3).

The law has been altered in New South Wales (*Statutory Duties (Contributory Negligence) Act* 1945) but no such alteration has been made in the law of South Australia whether it be or be not desirable.

This appeal should be dismissed.

DIXON J. The very complete judgment of the learned judge from whom this appeal comes has reduced the case to one question. It is whether the plaintiff appellant cannot recover because his own carelessness contributed to the injury of which he complains. His Honour decided the question against him and the appeal depends upon the correctness of that decision. The primary breach of duty on the part of the defendant respondent consists in a failure to safeguard dangerous parts of machinery and to cause the safeguards to be constantly maintained in an efficient state while such parts are in motion or use for the purpose of a manufacturing process, as required by statute.

The machinery concerned is a horizontal conveyer belt supported by rollers. The endless belt is driven by a drum or drums turned by electrical power and travels over a series of idler rollers two feet apart which carry the weight of the belt and its burden. Each transverse idler is broken into three rollers. The middle roller is

(1) (1940) A.C. 152.
(2) (1943) 68 C.L.R. 313.
(3) (1944) 1 All E.R. 358.

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horizontal; the two outside rollers are inclined upward from it, so that the belt may run with a concave transverse section in order better to contain the material it carries. For lubrication each section of three rollers had four grease points. Of the four grease points two were placed on the bearings at the respective ends of the horizontal roller and at the inner ends of the inclined rollers and therefore under the belt. The grease points carried nipples to which the greaser would attach the connection of the grease gun manually. To do this it is necessary for him to reach to some degree under the belt. But for some distance on one side of the belt access to the inner grease point is more or less obstructed by a staging that had been erected. Here in order to attach the connection of the grease gun to the nipple the greaser had to reach under the belt from the other side. The nipple on the bearing nearer the obstructed side of the conveyer belt is placed on the side of the bearing towards which the belt travels, so that a hand and arm stretched out to the nipple might by contact with the belt be drawn in between the belt and the roller. Unless all reasonable prospect be excluded of a greaser lubricating the belt while moving, this arrangement involves a danger and brings the material parts of the machinery under the statutory requirement that they should be safeguarded and the safeguards maintained while the machinery is in motion. His Honour held that the nipple was part of the machinery within the enactment and that that part was dangerous for any person greasing the bearing while the belt was travelling. This conclusion is amply supported by *Chasteney* v. *Michael Nairn & Co. Ltd.* (1), and is not now disputed. But it is important to bear in mind why the machinery is considered dangerous and must be so safeguarded. It is lest a greaser should be hurt in lubricating the machine while in motion. The plaintiff was the defendant's greaser and the injury of which he complains was sustained in lubricating the machine while in motion. As he sought to attach the connection of the grease gun to the further nipple his arm was drawn in between the roller and the belt. The fault on his part that has barred his recovery for the injury is that he did thus grease the machinery while in motion, instead of stopping it before lubricating the points under the belt or, at all events, those on the further side.

Upon consideration I have come to the conclusion that, in the circumstances disclosed by the evidence, the plaintiff's act in lubricating a grease point or points without stopping the machinery did not amount to such negligence on his part as to preclude his recovering

(1) (1937) 1 All E.R. 376.

for the defendant's breach of statutory duty. I shall state first the affirmative grounds upon which I base this opinion.

The plaintiff who for very many years had acted as the defendant's greaser, regularly lubricated the rollers of the conveyer belts while they were in operation. It was his common practice to do so and everyone about the plant was aware of it. No independent evidence of his having been seen greasing the further nipples from the unobstructed side of the belt was given, but a vehement inference arises that he openly did so. The conveyer belts had formed part of the plant for some seven or eight years before the accident, and the staging had obstructed one side of the particular belt for some four years. During that time the then works manager, the engineer and the foreman all had ample opportunity of seeing him at this work and there is direct evidence that the engineer and foreman had often seen him greasing the rollers in motion. None of these officers was called to say that it was not conceived to be his duty so to act or, at all events, proper practice on his part sanctioned by them. The now factory manager agreed in his cross-examination that after working there for some years the plaintiff would hestitate to ask that some part of the plant should be stopped and that he would gradually get round to the state of mind that he would run a slight risk rather than have it stopped. In the course of a letter to a medical expert informing him of the facts of the case, the defendant's solicitors said that the plaintiff was employed by the defendant as a greaser " and, in particular, it is his work to grease the rollers of a conveyer belt system while the belt was actually in operation." This, I think, is an accurate statement of the facts, as well as being an admission not lightly to be set aside. It is confirmed by the fact that, when he returned to work after recovering from his more immediate injuries, the plaintiff for a year or more continued the same practice of greasing the conveyer belt rollers while in motion. Neither before or after the accident was he ever instructed or advised not to do so. In fact, though the practice did involve some degree of risk, it was not highly dangerous and, as between stopping the belts or greasing them in motion, the inconvenience to the factory of stopping the belts might easily be regarded as outweighing the risk. At all events, I think that in following such a practice at the time of the accident the plaintiff was not guilty of such negligence as to disentitle him to recover, because he was not acting contrary to any rule, instruction, advice or practice made, given or established by the defendant as his employer or in his own interest or for his own convenience but, on the contrary, was performing his duties according

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to his habitual and long-standing practice for which he had the apparent, and, as I think, actual approval of the factory management who treated it as part of his ordinary work.

Having stated the positive reasons for the view which I adopt, I shall now say why I do not think they are outweighed by the countervailing considerations which prevailed with the learned judge. Among those considerations was the fact that the entire responsibility for lubricating the plant rested upon the plaintiff, who had been at that work for very many years, was expert at it, and, as he himself claimed or conceded, knew better than anyone what risks there were. Another consideration was that any request he made that the machinery should be stopped would certainly have been complied with by the employee whose duty it was to control the switches. He had other machinery stopped for the purpose of lubrication and though he had not ever had the conveyer belts stopped for the purpose, he had had them stopped when he had found a defect or the like needing remedying. Then he had not acted from thoughtlessness or inadvertence but was able to assess the risk, and having done so, took it. Perhaps I should add that on the particular occasion on which he was injured he was not going over all the grease points (about 264) but only one or two where a squeak had been heard. So the stoppage need not have been for long. The employee who controlled the switch was at hand.

His Honour remarks on the fact that he knew there was no protection from the moving belt and rollers and contemplated the risk on that basis, and his Honour in effect contrasted the facts with a case in which the employee places his hand or some part of his body in a stationary machine that is unexpectedly started.

The reason why the foregoing considerations do not seem to me to be enough to support a conclusion that the plaintiff was guilty of such negligence as to defeat the prima-facie liability of the defendant for its breach of statutory duty is that they amount only to circumstances showing that he was as much alive as anyone to the factors involved in the practice of greasing the conveyer belt rollers in motion—including the risk, such as it was—and that had he thought it necessary he might have departed from the practice by asking that the belt be stopped.

But these are all matters affecting the employer's primary duty and in my opinion do not involve that degree of culpability on the plaintiff's part which disqualifies him from attributing his injury to the lack of the very safeguards which are required by statute for the direct object of preventing the precise thing. It was open to the employer,

the defendant, to take such measures as would ensure that the machinery was stopped on all occasions before greasing. Then the material parts of the machinery would not have been dangerous and the duty to safeguard would not have been broken. But so far from taking such measures, the defendant approved of the contrary practice; the participation of the employee in the practice cannot amount to contributory negligence relieving the employer of liability for breach of its resultant duty to safeguard. That would mean the transfer to the employee of the employer's responsibility for ensuring that there was no greasing of the machinery in motion as an alternative to providing safeguards against the danger involved in so greasing it. I should perhaps add that the learned judge said that the course the management intended to be followed probably was that some parts of the plant (including, he thought, the conveyer belt in question) should only be greased when not running. If his Honour meant to include in the word "management" the engineer and foreman in the factory, or even the then factory manager, I cannot think the inference is well founded. My view is very much to the contrary. But I am not sure that his Honour did not have in mind some higher authority in the company.

For the foregoing reasons I think that the appeal should be allowed.

McTiernan J. It does not seem to be necessary to repeat the facts. In my opinion there should be judgment for the appellant upon his claim founded upon a breach by the respondent of its statutory duty under s. 321 of the *Industrial Code* 1920-1943. *Mayo* J. found that there was a breach of this duty. It appears from the evidence that if the respondent had performed its statutory duty the appellant would have been prevented from lubricating the machinery while the conveyer belt was in motion, at the point at which he was attempting to do so when his hand was caught in the belt. *Mayo* J. found that the appellant's damage was "consequential upon" the respondent's default. That conclusion is amply justified by the evidence.

But on the respondent's plea of contributory negligence the learned judge found for the respondent. This is a good plea in an action founded upon a breach of a statutory duty to protect workmen imposed by such an Act as the *Industrial Code* 1920: see *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (1); *Lewis* v. *Denye* (2). *Mayo* J. found that the appellant was guilty of contributory negligence by greasing the machinery at the point in question while the

(1) (1940) A.C. 152. (2) (1940) A.C. 921.

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belt was in motion and that his contributory negligence was " the effective cause " of his injury. In my opinion the finding that the appellant was guilty of contributory negligence should not stand.

In deciding this issue against the appellant the learned judge applied this standard, " Did he act or did he omit to do anything evincing a want of ordinary care ? " It does not seem to me that the criterion expressed by these words is in substance the same as that laid down in *Caswell's Case* (1) ; although I should think that it was that criterion which his Honour intended to apply. In *Caswell's Case* (2) Lord *Atkin* observed that " a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine." The criterion of what would be such a want of care on the part of the workman that he ought to be adjudged guilty of contributory negligence is contained in two passages in the judgment of *Lawrence* J. in *Flower* v. *Ebbw Vale Steel Iron & Coal Co. Ltd.* (3), which are repeatedly quoted and approved in *Caswell's Case* (1) and there stated to be a valuable guide for the decision of the issue of contributory negligence in a case like the present one. *Lawrence J.* observed (4) that it is not true to say that the doctrine of contributory negligence " demands of a workman in a factory a higher degree of care than an ordinary prudent workman in a factory would show." It is to be noticed that the word used is " would " not " ought." Applying the criterion approved in *Caswell's Case* (1) the question here is whether the appellant by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances would have avoided the result of the respondent's breach of statutory duty. In considering whether an ordinary prudent workman would have taken more care than the appellant, all the circumstances of work in the respondent's factory have to be taken into account, and it has to be borne in mind, as *Lawrence* J. said (5) " that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence." Lord *Wright* said in *Caswell's Case* (6): " 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 to the fatigue, to the slackening of attention

(1) (1940) A.C. 152.
(2) (1940) A.C., at p. 166.
(3) (1934) 2 K.B. 132, at pp. 139, 140.
(4) (1934) 2 K.B., at p. 139.
(5) (1934) 2 K.B., at p. 140.
(6) (1940) A.C., at p. 178.

which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety." *Mayo* J. found that the appellant knew that he could have had the belt stopped for the purpose of lubricating at the point at which he was attempting to apply the grease gun when his hand was caught by the belt, if he had given a signal to the man in charge, and that he deliberately chose not to give the signal and to lubricate at that point although he knew it was risky to do so, and also the nature of the risk. But the evidence proves that the appellant was very familiar with all this machinery and that it had been his practice for a number of years before the accident to grease at the point in question and at other comparable points while the belt was moving. This was the first time that his hand was caught in the belt. Having regard to his familiarity with this machinery and the fact that he had safely done this apparently risky thing on many occasions, it was not necessarily contributory negligence on his part to do it on the occasion when he met with the accident. In these circumstances, I think that the inference that he exhibited a lesser degree of care than an ordinary prudent workman in this factory would have shown cannot be supported. There is the evidence that he repeated this risky act, but there is no evidence that he was doing it in a negligent manner. The principle stated in the following passage in *Weblin* v. *Ballard* (1) is relevant here :—" It was next argued, that, as a matter of law, upon the facts proved and stated by the judge, the deceased was guilty of contributory negligence. The facts proved and stated by the judge, who had twice viewed the place, to use the judge's own words, were as follows :—' The use of the ladder appeared by the evidence to have been so manifestly dangerous that every one who saw the ladder so used must have been aware of the danger.' This, it was argued by the defendant, proved that the deceased had been guilty of contributory negligence. We do not agree. The mere fact that the deceased knew that the work was manifestly dangerous of itself does not constitute contributory negligence."

A case of contributory negligence cannot be made out on the ground that the appellant was given instructions but broke them.

It does not seem to me that the Court, the tribunal of fact in this case, ought to find that the appellant was guilty of contributory negligence. The evidence is, in my opinion, insufficient to support such a conclusion.

(1) (1886) 17 Q.B.D. 122, at p. 127.

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I agree that the appeal should be allowed and the action remitted to the Supreme Court for the assessment of damages.

Appeal allowed with costs. Judgment of Supreme Court set aside. In lieu thereof enter judgment for plaintiff for damages to be assessed. Remit cause to Supreme Court to assess such damages and to make such order dealing with the costs of the action as may be just.

Solicitor for the appellant, *F. G. Hicks*, Adelaide.
Solicitors for the respondent, *Alderman, Brazel & Clark*, Adelaide.

E. F. H.