[HIGH COURT OF AUSTRALIA.]

SWINTON . . . . . APPELLANT;
PLAINTIFF,

AND

THE CHINA MUTUAL STEAM NAVIGATION COMPANY LIMITED AND OTHERS. } RESPONDENTS.
DEFENDANTS AND THIRD PARTY,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 20, 23.

MELBOURNE, *Oct.* 8.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Negligence—Ship—Cargo—Dangerous substance delivered for carriage—Mustard gas—Military secret—Control of unshipping, storage and conveyance—Special order by Minister—Unloading hold of ship—Wharf labourer—Invitee—Injury—Leakage of gas—Shipowners and master—Knowledge of invitee—Duty of care—Unusual danger—Damages—Liability—National Security (General) Regulations (S.R. 1939 *No.* 87—*S.R.* 1942 *No.* 557), *reg.* 66.

The duty which an occupier of premises owes to an invitee is to exercise that degree of care, which in the circumstances is reasonable to prevent injury from unusual danger of the existence of which the occupier knew or ought to have known. This duty is not limited to actual or imputed knowledge of the facts which constitute the unusual danger, but extends to actual or imputed knowledge of facts creating a likelihood of the existence of such a danger.

Decision of the Supreme Court of New South Wales (Full Court): *Swinton* v. *The China Mutual Steam Navigation Co. Ltd. and Others*, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by William Robert Swinton against (a) the China Mutual Steam Navigation Co. Ltd. and (b), by virtue of the *Law Reform (Miscellaneous Provisions) Act* 1946 (N.S.W.), the China Mutual

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Steam Navigation Co. Ltd. and the Ocean Steamship Co. Ltd., to recover the sum of £2,000 as damages for injuries said to have been sustained by him whilst discharging cargo from a ship.

By his declaration the plaintiff alleged, ((a) and (b)), that the defendants were the occupiers of the ship and that he was on the ship at their invitation for the purpose of discharging cargo, and that there was in the ship a harmful and dangerous gas, and the defendants so negligently conducted themselves in and about the care, control and management of the ship and of the gas that he suffered the injuries complained of. Alternatively, he alleged that he was lawfully on the ship for the purpose of discharging cargo, and he also alleged similar acts of negligence against the defendants.

The defendants denied the allegations.

By his particulars the plaintiff specified the act of negligence relied upon as the failure to give proper warning to the plaintiff that there was on the ship a dangerous and harmful gas, and the failure also of the defendants to take proper precautions to ensure that that dangerous and harmful gas did not come into contact with the plaintiff while working in the ship.

The defendants claimed from the Commonwealth of Australia, which, before the hearing, was added as a third party under the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1946, contribution or complete indemnity in respect of any sum which the plaintiff might recover against either or both of the defendants, on the grounds (1) that the injury sued for arose whilst the plaintiff at the request of the defendants was engaged in unloading the harmful and dangerous gas from the defendants' ship, and the gas had been carried in that ship and was consigned to the Commonwealth, which, at the request of the defendants, undertook that it would properly and carefully supervise and control the gas and the discharge and unloading thereof from the ship so as to prevent injury arising from the dangerous nature of the gas to those engaged in discharging and unloading it, and the Commonwealth so negligently conducted itself in and about the supervision and control of the gas and its discharge and unloading that the plaintiff by reason of the dangerous nature of the gas suffered the injury complained of; and (b) that the injury sued for arose whilst the plaintiff was on the ship for the purpose of discharging cargo which included ammunition, explosives and inflammable substances consigned to the Commonwealth and prior to the commencement of discharging the cargo the ship had been lawfully ordered by the Commonwealth to proceed to a certain

wharf there to tranship the ammunition, explosives and inflammable substances in the service of the Commonwealth and there to remain until the whole of those goods and substances had been unshipped and by the said order it was directed that the Commonwealth should have control of the whole of the unshipping, handling, storage and conveyance of those goods and substances, and the Commonwealth so negligently and carelessly conducted itself in and about the suspension and control of those unshipping operations that the plaintiff suffered the injury complained of.

The allegations were denied by the Commonwealth.

According to the evidence given on the hearing, it appeared that in November, 1942, the steamship *Idomeneus* belonging to the defendant companies loaded a certain cargo at Liverpool in England consigned to the Royal Australian Air Force in Sydney. This particular cargo consisted of a number of drums of what was later found to be mustard gas, but that information was not disclosed at the time to the captain of the ship. He received written instructions to the effect that a number of " Y/3 Drums " were to be stowed in the No. 1 lower hold, and when his vessel reached port the stowage space would be inspected by " a trained and fully equipped Decontamination Party, who will be responsible for supervising the removal of the explosives, and for any decontamination action necessary ". The drums were stowed as directed in the lower No. 1 hold, and civilian cargo was also stowed in the same hold, which was then covered and sealed with tarpaulins, and further cargo was stowed in the 'tween decks and the upper hold. These drums were to be delivered in Sydney, but on arrival in Melbourne it was discovered that some Melbourne cargo had been stowed in the No. 1 lower hold, and it was therefore necessary to remove that cargo before the ship proceeded on its voyage to Sydney.

That hold was inspected in Melbourne by Wing Commander Le Fevre of the Royal Air Force, who was a very highly qualified and competent chemist and at the date of the hearing and of the appeal held the position of Professor of that Chair in the University of Sydney. For security reasons, at and about the time the injury was alleged to have been sustained, it was deemed necessary to keep secret the nature of the contents of the drums, but on an inspection by Wing Commander Le Fevre for the purpose of ascertaining whether it was safe for men to work in the No. 1 lower hold, and using the chemical tests then recognized and approved as standard and sufficient, he was unable to discover any signs of the presence of mustard gas or any evidence of leakage from any of the drums.

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In the 'tween decks immediately above No. 1 lower hold there had been carried a cargo of bags of soda ash, and after the men commenced to work on the discharge of cargo from the lower hold they were affected by some form of noxious gas and serious consequences developed. They were afflicted with vomiting and acute nasal and throat irritation, and temporary blindness subsequently occurred. As a result of those happenings the work in that hold was discontinued except that sufficient cargo was replaced to provide proper stowage while the vessel continued on its voyage to Sydney.

On arrival in Sydney, Captain Dark, the captain of the ship, was served with an order under reg. 66 of the *National Security (General) Regulations* which, after reciting the power of the Minister to make orders for the provision of shipping, unshipping, handling, storage or conveyance of ammunition, explosives or inflammable substances at any place specified in the order, and after reciting a delegation of those powers pursuant to the authority conferred upon him, directed the ship to proceed to a wharf at Walsh Bay and there to unship " ammunition, explosives and inflammable substances in the service of the Commonwealth . . . until the whole of the said cargo shall have been unshipped ". The order further provided that a senior officer of the Movements and Shipping Section, R.A.A.F., was to be present and to perform duty at the wharf and was to have control of the whole of the unshipping and handling of the ammunition and other inflammable substances, and also a guard, consisting of members of the R.A.A.F., was to be present and would perform such guard duties on the ship and on the wharf as the officer in control of the operations should direct.

The ship reached Sydney on 13th January 1943 and was boarded by Wing Commander Le Fevre and officers of the R.A.A.F., including an officer of the Shipping and Movements Section. A conference took place with the captain and the first officer of the ship with regard to the occurrences in Melbourne, and the captain was obviously concerned to see that nothing of a similar nature should occur while the cargo was being unloaded in Sydney. The position was complicated by the fact that national security required strict secrecy in regard to this particular cargo so that it should not be known that the ship was carrying mustard gas, but the captain, at that stage, in the light of his knowledge of what took place in Melbourne, was apprehensive that the drums might conceivably contain mustard gas. At the conference that suggestion was denied by Wing Commander Le Fevre, who said that, in

his opinion, the noxious gas was the result of the mingling of the soda ash with other chemicals which had been carried from another part of the ship on the boots of the men engaged in unloading in Melbourne, and that there was not any risk from mustard gas fumes.

Toward the evening of 14th January 1943 the covering of the No. 1 lower hold was being approached and two inspections were carried out, one at a quarter to six o'clock and the other at six o'clock on the same evening, by Wing Commander Le Fevre and by Mr. Mackenzie, a civilian chemist, who had been asked to make tests, apparently by the defendants. These tests showed no trace of mustard gas or other noxious vapours, and at about three o'clock on the morning of the next day, the 'tween decks having been cleared, the No. 1 lower hold was opened and the plaintiff and the other men on the ship began to work there. There was evidence that something unusual was noticed, and at four o'clock, and again at seven-thirty o'clock on that same morning further tests were conducted by Mr. Mackenzie, both of which proved negative. At ten o'clock on that morning Wing Commander Le Fevre made another inspection and another test with the same result.

In the certificate given by Wing Commander Le Fevre as a result of his inspection at a quarter to six o'clock on the evening of 14th January 1943 he stated that he was " certain that No. 1 hold does not contain a concentration of mustard gas vapour sufficient to endanger men working there ", but, he added, as was also included in all the other certificates given either by himself or by Mr. Mackenzie, a recommendation that, in view of the events which had happened in Melbourne, the men working in the No. 1 lower hold should wear respirators.

The plaintiff, while working in that hold was affected by mustard gas and received certain injuries for which the jury awarded him as damages the amount mentioned above.

During the course of his cross-examination Wing Commander Le Fevre was asked whether, at the conference which was held on the ship in Sydney, his attitude was that the men in Melbourne had not been affected by mustard gas but by some other chemical, and to that he replied " Yes, that would have been so ". He was then asked the following question—" Of course, the reason for that was, as you say, security reasons? " and to that he answered " Two reasons ; security was the predominant one, and the second one was that I could then proceed to make the right recommendations for mustard gas on the wrong reasons—even if they were the

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wrong reasons. There was, however, a conflict of evidence as to whether or not the Wing Commander told Captain Dark in Sydney, and prior to the morning of 15th January 1943, his real belief that the injuries to the men in Melbourne were caused by mustard gas. Captain Dark was emphatic that he was not so informed, but Wing Commander Le Fevre was certain that he told the captain this at some time, and he thought that he conveyed that information to Captain Dark before 15th January 1943. According to Captain Dark's evidence he was never warned against mustard gas and in fact was assured that it was not present.

The plaintiff gave evidence that no gas masks were provided, and that he was never warned that there was any risk in working in No. 1 lower hold and was never advised to wear a gas mask. Evidence, however, was given by the fourth officer and other witnesses that gas masks were in fact provided and made available to the men, and that the recommendation that they should wear them was read out to the men on the ship in his presence.

After the summing-up had been concluded, counsel for the defendant companies asked the trial judge to leave to the jury the question: Did the defendants know or ought they to have known that there was a dangerous leak of gas in the lower hold? The judge (*Clancy* J.) refused to accede and said that he would not put that question to the jury.

The jury gave a verdict in favour of the plaintiff in the sum of £1,050, of which twenty-five per cent was to be paid by the Commonwealth as third party.

Upon an appeal to the Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) that Court held that the trial judge was in error in failing to give the direction asked for at the trial, allowed the appeal and ordered a new trial.

From that decision the plaintiff, by leave, appealed to the High Court.

J. H. McClemens K.C. (with him *J. R. Nolan*), for the appellant. The Full Court of the Supreme Court erred in holding that the trial judge should have given the direction sought by counsel for the respondent companies at the conclusion of his summing-up. Having regard to the relationship existing between the appellant and the respondents as established by evidence and by admissions made on behalf of these respondents, the duty of those respondents towards the appellant was as stated to the jury by the trial judge (*Jury* v. *Commissioner for Railways* (*N.S.W.*) (1); *Wilsons &*

(1) (1935) 53 C.L.R. 273.

Clyde Coal Co. Ltd. v. *English* (1); *Naismith* v. *London Film Productions Ltd.* (2); *Payne* v. *British India Steam Navigation Co. Ltd.* (3)). Having regard to the circumstances and the conduct of the case the summing-up was correct and adequate. The Full Court also erred in holding that the master of the ship was never warned against mustard gas and in holding that the respondent companies their servants and agents were not aware before the ship arrived at Sydney that No. 1 lower hold of the ship contained mustard gas. It should not have held that there was not any obligation on the respondents to protect the appellant against mustard gas. The proper issues were those put by the trial judge to the jury. The errors of the Full Court as to the evidence, the effect of the evidence and the inferences to be drawn from the evidence misled the Full Court and so prevented it from considering properly and correctly the true issues involved. The decision of the Full Court was the result of its own findings of fact based on its own view of the meaning and effect of the evidence and the inferences to be drawn therefrom, and those findings of fact were inconsistent with the facts as properly found by the jury.

K. A. Ferguson K.C. (with him *J. K. Manning*), for the respondent companies. There was not any duty on the respondent companies to warn the appellant because the Commonwealth was in control of the hold in pursuance of the provisions of the "secret" order, and was the "occupier". The liability in respect of dangerous premises is on the "occupier". That is because he has the "possession and control" of the premises. It is a question of the construction of the order as to who was in control, and the order, in terms, put the Commonwealth in control. Even if the respondent companies were the "occupier", they were liable only for damages which flowed from any unusual danger of which they knew or ought to have known. Accordingly, before any liability could arise, it was necessary for the jury to find: (a) that the damage flowed from an escape of mustard gas; and (b) that the respondent companies knew or ought to have known of that escape of mustard gas; and (c) that the appellant was not warned. The failure to leave question (b) to the jury therefore amounted to a misdirection. The conclusion expressed by the trial judge that the respondent companies were under a duty to warn, can be justified only on the basis that because the respondents knew or ought to have known of *some* danger in the hold, they had a general

(1) (1938) A.C. 57.
(2) (1939) 1 All E.R. 794.
(3) (1947) S.A.S.R. 236.

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duty to warn against *all* dangers which might be discovered or might not be discovered, provided only that damage resulted. In other words, that there was a duty to warn at large. There is not any duty on an occupier to give a warning in the abstract. There must be a duty and a failure to perform that duty. Here the only duty upon the respondent companies was a duty to warn against *the particular danger* which caused the damage. If the failure to warn against the particular danger which caused the damage is not the negligence relied upon, then the breach of duty alleged must be either : (a) failure to warn against other dangers, or (b) failure to warn against all possible dangers, including those which the respondent companies did not know and those as to which it cannot be said that they ought to have known. In this case, failure (a) did not result in any damage, therefore no cause of action could arise in respect thereof. Further, (b) involved a concept which would impose on an occupier a duty to warn against *every* danger which might subsequently be found to have existed, including a danger which he did not know existed and as to which it cannot be said that he ought to have known.

L. C. Badham K.C. (with him *R. Chambers*), for the Commonwealth, the respondent Third Party. The question arises whether a third party is entitled to argue that the Full Court should have entered a verdict for the respondent companies. Although a cross-appeal was not lodged, by s. 37 of the *Judiciary Act* 1903-1950, this Court may give such judgment as ought to have been given in the first instance (*Ryan* v. *Ryan* (1)). The evidence discloses that there was not any breach of the duty to take care. There was not any evidence of negligence. The evidence of the appellant and his witnesses consists solely of an account of how the appellant came to be injured and a statement that he was not warned by anyone of the ship's company that there was deleterious gas on the ship. The tests by the chemists were the most approved at that time, and although many tests were taken they all failed to discover the presence of gas in harmful quantities. What more could have been done ? What warning could have been given ? The secret order was not carried out. It was directive only. To say that the Commonwealth was in control is an abuse of words. It was a question of fact which on the evidence could be determined either way, and therefore was a matter for the jury. If the Commonwealth was in sole control then the respon-

(1) (1914) 18 C.L.R. 601.

dent companies escape and so does the third party *qua* those proceedings.

J. H. McClemens K.C., in reply.

Cur. adv. vult.

The Court delivered the following written judgment :—

This is an appeal by leave from an order of the Supreme Court of New South Wales setting aside the verdict of a jury and directing a new trial. The verdict set aside was obtained by the plaintiff, who is the appellant in this Court, in an action against the owners of the ship *Idomeneus* to recover damages for personal injuries sustained by the plaintiff while he was at work as a wharf labourer aboard the ship. The personal injuries were produced by mustard gas which had escaped from one of three drums of that gas stowed in the hold where the plaintiff was at work during the discharge of the cargo in Sydney. The jury awarded the plaintiff £1,050 damages. The date when the plaintiff was affected by mustard gas is 15th January 1943 and the action was commenced on 13th September 1948. By his declaration the plaintiff put his cause of action in two ways. In one set of counts he alleged that the defendant shipowners were occupiers of the ship, that he was on the ship at their invitation for the purpose of discharging the cargo, that in the ship was the gas which was harmful and dangerous and that the defendants were negligent in the control and management of the ship and of the gas. In a second set of counts the plaintiff alleged that the defendant shipowners had the care, control and management of the ship (not that they were occupiers), that he, the plaintiff, was lawfully in the ship for the purpose of discharging cargo (not that he was an invitee), that in the ship was the gas which was harmful and dangerous and that the defendants were negligent in the control and management of the ship and of the gas.

It appeared that *Idomeneus* loaded at Liverpool in November 1942 a cargo for Melbourne and Sydney. Part of the cargo was received from the Royal Air Force consigned to the Royal Australian Air Force. Some of it was described as ammunition, certain phosgene bombs were stowed in No. 4 lower hold and some containers simply called " drums " were stowed in No. 1 lower hold. In fact the drums contained mustard gas. The master was not informed of the nature of the contents of the drums, which was a matter of military secrecy. But before he sailed the explosives officer of the R.A.F. embarkation unit at Liverpool gave him written instruc-

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tions to the effect that on the ship's reaching port the space where the chemical weapons, as they were called, were stowed would be inspected by a decontamination party who would be responsible for the removal of the explosives and that in case of leakage all interior fittings and linings must be thoroughly decontaminated or removed and replaced. He was told also, apparently in the shipowner's office, that he was carrying Y/3. drums and G.I. bales and he must refer to the book on dangerous cargo. The chief officer told the master that he thought the drums contained mustard gas and other officers of the ship seem to have treated it as an accepted fact, but until the ship reached Melbourne the master had no definite information about the contents of the drums. In No. 1 hatch there were upper and lower 'tween decks and a lower hold. The drums were stowed in the lower hold, the hatches of which were covered with three tarpaulins and battened down, a precaution, it may be inferred, against the escape of mustard gas from the hold. The drums were so stowed, as it was discovered afterwards, that one of them lay against a beam. The result was that the side of the drum chafed until a hole was worn in it through which the gas escaped.

Idomeneus arrived at Melbourne on 8th January 1943 and there she discharged some cargo. On behalf of the R.A.A.F. a highly skilled chemist named Wing Commander Le Fevre attended. He is now Professor of Chemistry in the University of Sydney and he was attached to the Air Force as a chemical warfare adviser with an honorary commission as Wing Commander. It was found necessary to open up No. 1 lower hold and to work it. The wharf labourers who worked in No. 1 lower hold were markedly affected by what in fact was mustard gas. Their eyes watered and became inflamed, their skin became hot and itchy and they vomited. Some of them were sent to hospital. The hatchman asked the mate whether it was not mustard gas and spoke of the similarity of the smell.

All this occurred on 10th January 1943. Next day the ship sailed for Sydney. At an earlier stage Wing Commander Le Fevre had made some chemical tests of the atmosphere of the hold, which proved negative, but he saw the symptoms of the men and discussed them with the medical officers at the hospital. He appears to have had no opportunity in Melbourne of making further chemical tests. According to the evidence of the master Wing Commander Le Fevre told him that it was not mustard gas that had affected the men but soda ash, which formed part of the cargo. The ship's agents in Melbourne, however, sent a secret communication to

the ship's agents in Sydney containing an account of the manner in which the wharf labourers in Melbourne had been affected. To what they attributed it does not appear. But, as was conceded in evidence, by this time the agents, the master and the ship's officers knew that the cargo in No. 1 lower hold included drums of mustard gas.

Idomeneus arrived in Sydney on 13th January 1943. In advance of her arrival an order had been made under reg. 66 of the *National Security (General) Regulations*. That regulation among other things enabled the Minister by order to make provision for the shipping, unshipping, handling, storage or conveyance of ammunition, explosives or inflammable substances at any place specified in the order.

The order directed the ship to proceed to a specified wharf, there to unship the ammunition, explosive and inflammable substances. It ordered that a senior officer of the R.A.A.F. Movements and Shipping Section should there be present and perform duty and should "have control of the whole of the unshipping, handling, storage and conveyance of the ammunition, explosives and inflammable substances". The order then provided for a guard, forbade smoking and the use of matches in the vicinity of the specified cargo and commanded expedition.

It is not clear upon the evidence who was the duty officer for the purpose of carrying out the order. However, on the arrival of the ship a conference was held with the master at which a Wing Commander Alder as well as Wing Commander Le Fevre was present. Representatives of the ship's agent and of the stevedoring company and a civilian chemist were also present. The last was employed by the ship's agents to give technical advice and information. According to the evidence given in support of the defendants' case, the master asked what should be done to prevent a recurrence of what happened in Melbourne and suggested that gas masks should be worn by the men working No. 1 hatch. An examination of the atmosphere in No. 1 hatch above the lower hold had already been or was about to be made by Wing Commander Le Fevre and by the civilian chemist. The examination was by smell and by drawing a certain volume of air through a chemically impregnated reagent paper and afterwards treating the paper. The results of the examination were negative and the two chemists expressed the opinion that there was no sufficient concentration of gas to be injurious to the men. The effect produced in Melbourne upon the men was explained as due to soda ash and the spilling around the opening of the hatch of other chemicals which the boots

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of the men brought in contact with the soda ash. The master asked to what the vomiting was attributable and threw doubt on the explanation. Someone said that to insist on the men wearing gas masks would be to reveal that phosgene or mustard gas was included in the cargo. Wing Commander Alder thought it impracticable to insist on the wearing of gas masks. Wing Commander Le Fevre appears to have supported the proposal that the men should wear gas masks. In his evidence he said that at some time he told the master that it was possible that the cause of the mischief in Melbourne was mustard gas. But otherwise he maintained the position he had taken up that it was due to soda ash and chemicals. In evidence he said in effect that he did so partly because the test he applied for mustard gas gave a negative result and in any event he could recommend the right course of wearing gas masks even if it were for a wrong reason and partly because it was imperative to guard as closely as possible the secret that mustard gas formed part of the cargo. The master demanded certificates in the case of each of the holds of No. 1 hatch before the men began to work it.

Wing Commander Le Fevre certified that on the evening of 13th January he inspected the atmosphere of all sections of No. 1 hold and could not detect the presence of mustard gas by smell but stated that it was arranged that they make a more complete examination when the hatch covers were lifted. At 5.45 p.m. on 14th January he gave a certificate that he had inspected the lowest section of No. 1 hold and, as in Melbourne, had been unable to detect the presence of mustard gas vapour by smell and that a chemical test had shown a similar negative result. He went on to state that he was therefore certain that No. 1 hold did not contain a concentration of mustard gas vapour sufficient to endanger men working there. "However", he proceeded, "in view of the events occurring in Melbourne under the same circumstances I recommend that the men should wear respirators." The civilian chemist gave short written statements of his opinion of the conditions as on the evening of 13th January, 6 p.m., and again on 14th January and as at 4 a.m. and 7.30 a.m. on 15th January. The effect of these statements was that he was unable to detect any vapours, but he strongly recommended the use of respirators. Whether the men were in fact asked to wear respirators and whether respirators were actually provided was a disputed issue at the trial. The lower hold in No. 1 hatch was opened up about 3 a.m. on 15th January and the gang proceeded to work it about 3.30 a.m. The plaintiff was a member of the gang. As they worked through

the shift they suffered increasing discomfort. Throat, nose and eyes were irritable. Their eyes watered and became inflamed. There was an unpleasant smell, like rotting vegetables, a smell which had come from the hatch of the lower hold before it was opened up. In shifting cargo they had disturbed the tarpaulins and the smell then manifested itself in the 'tween decks. They ceased a few minutes before 7 a.m., and as the morning wore on a number of them, including the plaintiff, became badly affected by the injurious consequences of exposure to mustard gas. The fourth officer of the ship, who was on duty at No. 1 hatch, was also gassed. According to his evidence seven gas masks belonging to the ship were made available to the men, who picked them up. According to the plaintiff's evidence this did not occur; there were no gas masks available and the men did not try gas masks. In this he was borne out by another member of the gang whom the plaintiff called as a witness and by the watchman. There was evidence in support of the fourth officer's story, but the jury must be taken to have accepted the plaintiff's case upon this question. It was pointed out as a fact lending probability to the plaintiff's version that, wearing gas masks, the gang could not possibly have worked through a full shift and that nevertheless no second gang was provided. But, however this may be, it is enough that upon a definite and clear issue there being evidence both ways the jury found for the plaintiff.

The first point made for the defendants is that as a result of the order made under reg. 66 and of the course taken by the officers of the R.A.A.F. pursuant to the order the responsibility passed from the master and the shipowners so that they were under no obligation of care for the safety of the wharf labourers from dangers arising from the nature of the cargo in the hold they were working. This contention cannot be supported. Neither the regulation nor the order made under it purports to take the possession of the ship or any part of it out of the shipowners or to deprive the master of authority in respect of the working of the ship. The regulation is concerned with the handling of the ammunition, its unshipment and conveyance. The danger to the wharf labourers arose in the present case from the presence in the hold where they were working cargo, civilian and military without distinction, of poison gas. The injury from which the plaintiff suffered was not inflicted upon him by the cargo in course of handling it under the direction of an officer appointed under the order. He was injured by reason of a condition of things in the hold already brought about by the cargo under the defendants'

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control and management, a condition affecting the safety of the place where he worked. For that the defendants remained responsible.

The part that the officers of the R.A.A.F. played may have contributed to the danger or weakened the efforts of the master to prevent injury to the wharf labourers. But they did not and could not relieve him of his duty of care. The defendants took the view that because of the part such officers played the Commonwealth was liable to indemnify the defendants or to contribute to the damages awarded against them and accordingly joined the Commonwealth as a third party. The conduct of the trial was not simplified by the presence of the Commonwealth, which the plaintiffs had not chosen to join as a co-defendant. But nothing turns upon the position of the Commonwealth, which the jury found should contribute twenty-five per cent of the damages awarded to the plaintiff. As between the plaintiff and the defendants the defendants remained responsible for the exercise of that measure of care which the law imposes upon a shipowner with reference to the safeguarding of stevedores' labourers from unusual dangers when they come aboard the ship to work her. Apart from the issue whether gas masks were provided, which must be taken to have been found in the plaintiff's favour, the facts gave the plaintiff a strong case. A wharf labourer employed by a stevedore who has undertaken the discharge of the ship on behalf of the shipowner enters the ship's hold upon business in which the shipowner has a material interest (see *Lipman* v. *Clendinnen* (1)). He is an invitee: *Marney* v. *Scott* (2); cf. *Scott* v. *Foley*; *Aikman & Co.* (3). This is the assumption on which the decision of the House of Lords proceeds in *London Graving Dock Co. Ltd.* v. *Horton* (4). The defendants were therefore under a duty to exercise reasonable care to prevent injury to the plaintiff from unusual danger in the place to which he came as an invitee, that is, from unusual danger of which the defendants by their servants knew or ought to have known. The degree of care required is that which is reasonable in the circumstances—"The degree of care which (the) duty (of care and skill) involves must be proportioned to the degree of risk involved if the duty should not be fulfilled"—Lord *Wright* for the Privy Council in *Northwestern Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (5). In other words, the measure of care increases in pro-

(1) (1932) 46 C.L.R. 550, at pp. 558-560.
(2) (1899) 1 Q.B. 986.
(3) (1899) 16 T.L.R. 55; 5 Com. Cas. 53.
(4) (1951) A.C. 757.
(5) (1936) A.C. 108, at p. 126.

portion with the danger involved in the custody or control of an agency potentially harmful, that is to say, the danger should the safeguards employed, if any, prove insufficient or unsuccessful. "The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."—per Lord *Macmillan*, *Glasgow Corporation* v. *Muir* (1). See further per Lord *Dunedin* in *Dominion Natural Gas Co. Ltd.* v. *Collins* (2) and *Faulkner* v. *Wischer & Co. Pty. Ltd.* (3).

The cargo carried in the lower hold of No. 1 hatch was known from the outset to be unusually dangerous. At all events in Melbourne its true character was known to the master and officers of *Idomeneus*. The possibility of an escape of the gas not only existed; it was adverted to and understood. The casualties among the wharf labourers in Melbourne could be explained by an escape of gas and, in spite of the opinion expressed by Wing Commander Le Fevre, could not but arouse apprehension that a drum might be leaking. It was, of course, for the jury to attach what weight they chose to the evidence about the opinions expressed by the two chemists and, if they accepted it, to form their own views as to the credence or interpretation and effect which the master gave to them in fact or in the circumstances ought to have given to them. But in any case the situation was one placing upon the shipowners a duty of exercising through their servants a very high degree of care for the safety of the wharf labourers entering the hold. At the trial the judge's charge to the jury by no means stated the duty of the shipowners with exactness or accuracy and it tended to disregard the distinction between the shipowners and others, for example, the stevedores, who might possibly have been joined as defendants. But apparently it was not considered important to draw a distinction between the stevedore and the shipowners, perhaps for reasons that do not sufficiently appear. As to the exact description of the defendants' duty, if the defects in its statement had been completely remedied, it may well be that the defendants would have obtained no advantage and they might have suffered a disadvantage.

(1) (1943) A.C. 448, at p. 456.
(2) (1909) A.C. 640, at p. 646.
(3) (1918) V.L.R. 513; 701.

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At all events the defendants' counsel at the trial advisedly took one objection only to the direction and to that he has consistently adhered. The objection was expressed in a request that the judge should leave this question to the jury, viz., did the defendants know or ought they to have known that there was a dangerous leak of gas in the lower hold ?

It will be seen that the learned counsel based his request upon the well-known formulation of the rule in *Indermaur* v. *Dames* (1), but treated the actual existence of a dangerous leak of gas as the " unusual danger " for the purpose of the application of the rule, so that the plaintiff could not succeed unless the jury found that the actual leak of mustard gas was known or ought to have been known to the defendants' servants.

The appeal in the end depends upon the correctness of this view of what was the " unusual danger " of which the defendants knew or ought to have known. Is it essential that the danger, the subject of such knowledge, should be the actual existence of an escape of gas or is it enough that it should be the contingency or likelihood of an escape of gas occurring or having occurred through a defect in or injury to a drum or drums or through some other mischance ? From the time the drums of mustard gas were stowed the possibility of something occurring to liberate a gas of so injurious a character created dangers against the consequences of which it was incumbent upon those responsible for the control and management of the ship to exercise a high degree of care, provided they knew or ought to have known of the dangerous character of the contents of the drums stowed. They may have had no more than a suspicion of the precise nature of the contents, mustard gas, until the ship reached Melbourne. But from the beginning they knew that whatever the drums contained was dangerous and formed some description of " chemical weapon ". The occurrence in Melbourne led to them receiving definite information that it was mustard gas, besides providing grounds for apprehending that mustard gas might be escaping, notwithstanding the explanation suggested by Wing Commander Le Fevre.

This situation involved a risk of a serious character for persons put to work in No. 1 lower hold. It amounted to a danger, an unusual danger. The direction which the learned counsel sought would, if given, have confined the defendants' duty of care unduly and made it depend on a condition too narrowly limited. It follows the request was rightly refused and that the verdict of the jury should be sustained. For these reasons the appeal should

(1) (1867) L.R. 2 C.P. 311.

be allowed with costs, the order of the Full Court of the Supreme Court allowing the appeal to that Court and setting aside the verdict for the plaintiff and directing a new trial should be discharged and in lieu thereof it should be ordered that the appeal to the Full Court of the Supreme Court be dismissed with costs, not including the costs of the third party.

Appeal allowed. The defendants respondents to pay the plaintiff appellant's costs of the appeal. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the defendants' appeal to that Court be dismissed and that the defendants pay the plaintiff's costs of such appeal. Restore verdict of the jury and judgment for the plaintiff for £1,050. *No orders as to the costs of the third party.*

Solicitor for the appellant, *A. J. Devereux.*

Solicitors for the respondent companies, *Norton, Smith & Co.*

Solicitor for the respondent third party, *D. D. Bell,* Crown Solicitor for the Commonwealth.

J. B.