[HIGH COURT OF AUSTRALIA.]

DUNLOP RUBBER AUSTRALIA LIMITED Defendant, Appellant;

AND

BUCKLEY . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *Nov.* 18, 19; *Dec.* 19.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Statutes—Machinery—"Dangerous"—Duty to "securely fence"—Absence of "fence"—Provision of cord whereby to stop machine—Injury to employee—Liability of employer—Action for damages—Jury's verdict for employer—Reasonableness—Factories and Shops Act 1912-1950 (*No.* 39 *of* 1912—*No.* 21 *of* 1950) (*N.S.W.*), *s.* 33.

In an action for damages for injuries sustained by the plaintiff while employed by the defendant at a rubber mill at its factory, the evidence showed that the machine in question consisted of two heavy power-driven steel rollers, each about two feet in diameter, standing chest high above the floor, the rollers lying side by side in a horizontal plane. The rollers revolved at a rate of approximately one revolution in every four seconds and therefore it took a second for the top of the roller to make a quarter turn to the nip between the two rollers. The operator fed by hand into the valley between the rollers "slabs" of crude rubber, from thirty pounds to sixty pounds in weight. Except for the position of the rollers the operation was similar to that carried out by any housewife who feeds washing into a mangle. Stretched horizontally across the top of the machine and within reach of the operator was a "stop cord" which when pulled caused the machine to stop. On the occasion of his injury the plaintiff had fed one "slab" of rubber into the rollers and was feeding in another "slab" when part of the first "slab" folded back and slapped down his hand which was drawn in. He screamed and reached for the stop cord with his free hand, but missed it. Another employee pulled the cord and stopped the machine. The plaintiff's left hand was lacerated and the skin pulled off the fingers. At the time of the injury the rollers on this machine had not become sufficiently hot to heat the rubber and reduce it to the sticky pulpy mass required to produce a continuous sheet of rubber. There was evidence that on several occasions during a

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period of ten or eleven years employees working, either on this or on a similar type of mill, had had their hands drawn or nearly drawn between the rollers, one such employee losing a finger. The defendant did not call any evidence. The jury found a general verdict for the defendant.

Held, by *Webb*, *Fullagar* and *Kitto* JJ. (*Dixon* C.J. and *McTiernan* J. dissenting), that the verdict was not so unreasonable as to be " almost perverse ", nor could it be said that the jury " failed to perform their duty ", therefore the defendant was entitled to retain its verdict.

The meaning of the words " fence " and " dangerous " as used in s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.), discussed.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

Daniel Thomas Buckley was employed by Dunlop Rubber Australia Ltd. to operate a rubber rolling machine in its factory. The machine consisted of two heavy power-driven steel rollers, each about two feet in diameter, standing chest-high above the floor, the rollers lying side by side in a horizontal plane. The rollers revolved at a rate of approximately one revolution in every four seconds, thus taking one second for the top of the roller to make a quarter turn to the " nip " between the two rollers. The operator fed by hand into the valley between the two rollers what were described as " slabs " of crude rubber, from thirty pounds to sixty pounds in weight. Except for the position of the rollers the operation was similar to that carried out by any housewife who fed washing into a mangle. Stretched horizontally across the top of the machine and within reach of the operator was a " stop cord " which when pulled caused the machine to stop.

On 11th May 1950, while Buckley was operating the machine his left hand was crushed between the rollers of the mill.

He brought an action against the company for damages, alleging a breach of s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.) in that the mill was a dangerous machine and that the defendant company had neglected securely to fence and guard it.

Buckley said in evidence that on the occasion of his injury, he had fed one " slab " of rubber into the rollers and " was feeding in another ' slab ' when part of the first ' slab ' folded back over and slapped my hand down, and before I knew where I was my hand was drawn in ". Buckley said he screamed and reached for the stop cord with his free hand, but missed it. Another employee, who was standing nearby, pulled the cord and stopped the machine.

In the course of the operation of the machine the rollers become heated by friction, and the operation was designed to heat the rubber

and reduce it to a sticky pulpy mass so that the slabs as they were being rolled would be flattened out and joined up to other slabs undergoing the same process in order to produce a continuous sheet of rubber. At the time Buckley sustained the injury the rollers on the machine had not become sufficiently hot to heat the rubber into the soft and sticky state necessary to complete the operation.

Evidence was given that on several occasions employees working, either on the subject mill or on a similar type of mill, had had their hands drawn or nearly drawn between the rollers. An employee lost one of his fingers on one such an occasion. Another employee had both of his hands caught, but escaped with little or no injury. Yet another employee said that one of his hands had been drawn towards the " nip " of the rollers on at least one occasion, but that he had been able to pull the stop cord in time to escape injury. He said also that on another occasion portion of his clothing had been drawn into the rollers and pulled off him.

The defendant did not tender any evidence.

The jury returned a verdict for the defendant.

The plaintiff appealed against that verdict to the Full Court of the Supreme Court on the grounds : (i) that the verdict was against evidence and such that reasonable men could not find, (ii) that on the uncontradicted evidence of the plaintiff and his witnesses there were on the rubber mill in question dangerous parts within the meaning of s. 33 (1) of the *Factories and Shops Act* 1912-1950, and (iii) that the trial judge was in error in not directing the jury that the provision by the defendant of a safety cord on the rubber mill could be construed by the jury as an admission by the defendant that the rubber mill had dangerous parts within the meaning of that Act.

The Full Court of the Supreme Court (*Street* C.J., *Owen* and *Taylor* JJ.), allowed the appeal and ordered a new trial.

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

L. C. Badham Q.C. (with him *C. Langsworth*), for the appellant. The question of whether a piece of machinery comes within the category of " dangerous " within the meaning of s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.) is a question of pure fact. The verdict of the jury cannot be interfered with unless it was unreasonable in the sense as to be almost perverse and that the jury have failed to perform their duty (*Hocking* v. *Bell* (1)).

(1) (1945) 71 C.L.R. 430, at p. 498.

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It is not as though in this case there was any evidence which the jury were compelled to accept of a number of accidents having been caused by this machine. Very little evidence on this point was given, and such as was given may very readily, owing to its obviously unsatisfactory nature, have been disregarded by the jury. The mere fact that an accident happened on one occasion, or rarely, is not conclusive evidence that the machine was dangerous (*Hindle* v. *Birtwhistle* (1) per *Wills* J.). The question of "dangerousness" as applied to machinery is entirely one of degree, and is not concluded by a consideration of any one factor, and where a question of degree exists that is pre-eminently a matter for the jury: see *Davies* v. *Thomas Owen & Co. Ltd.* (2); *Inglis* v. *N.S.W. Fresh Food & Ice Co. Ltd.* (3), and *Walker* v. *Bletchley Flettons Ltd.* (4).

C. R. Evatt Q.C. (with him *W. J. Knight*), for the respondent, referred to: *Carroll* v. *Andrew Barclay & Sons Ltd.* (5); *Lewis* v. *Denye* (6); *Betts* v. *Whittingslowe* (7); *Smith* v. *Morris Motors Ltd.* (8); *Cofield* v. *Waterloo Case Co. Ltd.* (9); *Piro* v. *W. Foster & Co. Ltd.* (10), and *Sutherland* v. *Executors of James Mills Ltd.* (11).

L. C. Badham Q.C., in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered:—

DIXON C.J. This is an appeal by leave from an order of the Supreme Court of New South Wales setting aside a verdict for the defendant in an action and directing a new trial. The action was brought by an employee against his employer for personal injuries suffered while at work. His work was that of a mill hand in a rubber works and at the time of the injury the operation in which he was engaged was that of passing pieces of rubber through a rolling mill. The cause of action which at the trial was submitted to the jury was for breach of statutory duty in failing to fence a dangerous machine. The cause of action depends on s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.). That section provides that the occupier of the factory shall securely fence all dangerous parts of the machinery therein. The provision then goes on to

(1) (1897) 1 Q.B. 192, at p. 195.
(2) (1919) 2 K.B. 39, at p. 41.
(3) (1943) 44 S.R. (N.S.W.) 87, at p. 95; 61 W.N. 79, at pp. 81, 82.
(4) (1937) 1 All E.R. 170, at p. 175.
(5) (1948) A.C. 477.
(6) (1940) A.C. 921.
(7) (1945) 71 C.L.R. 637.
(8) (1950) 1 K.B. 194.
(9) (1924) 34 C.L.R. 363.
(10) (1943) 68 C.L.R. 313.
(11) (1938) 1 All E.R. 283, at p. 285.

speak in detail of specified parts of machines and to require that all fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process.

The question, differently decided by this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (1) and by the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (2), whether contributory negligence is an answer to a cause of action for a breach of statutory duty was set at rest in New South Wales by the *Statutory Duties* (*Contributory Negligence*) *Act* 1945 which was passed after the decision in *Piro* v. *W. Foster & Co. Ltd.* (3). Section 2 (1) of that Act provides that contributory negligence on the part of a person who has sustained personal injury shall not be a defence to an action for damages for that injury founded on a breach of duty imposed on the defendant for the benefit of a class of persons of which the person so injured was a member at the time the injury was sustained.

The words " securely fenced " in s. 33 appear to be satisfied if machinery is provided with a guard which forms an adequate protection to the operator or those frequenting the factory who might otherwise come into contact with it or be exposed to the dangers which the parts of the machinery create. The word " fenced " seems to have been used traditionally in relation to tools and machine tools to describe a guard. In the sixth paragraph of the definition of the word " fence " contained in the *Oxford English Dictionary* the word is defined under the heading " technical uses " to mean a guard, guide, or gauge designed to regulate the movements of a tool or machine, and examples of this use are given from the early part of the 18th century. The examples, it is true, suggest that then the purpose of the " fence " was to guard rather the work or the application of the tool than the safety of the operator. In *Nicholls* v. *F. Austin* (*Leyton*) *Ltd.* (4), language is used by two members of the House of Lords which shows that they accepted this meaning. Lord *Thankerton*, speaking of the corresponding provision s. 14 of the *Factories Act* 1937 (Imp.) (1 Edw. 8 & 1 Geo. 6, c. 67), says that the obligation to fence is an obligation to provide a guard against contact with any dangerous part of a machine. Lord *Macmillan* says: " The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it " (5).

(1) (1926) 38 C.L.R. 354.
(2) (1940) A.C. 152.
(3) (1943) 68 C.L.R. 313.
(4) (1946) A.C. 493, at pp. 499, 501.
(5) (1946) A.C., at p. 501.

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In the application of the provision both in Great Britain and New South Wales the question has been raised whether the provision requires the fencing of a machine, if to fence it or guard it is impossible consistently with the machine being used practically. In *Davies* v. *Thomas Owen & Co. Ltd.* (1), *Salter* J. speaking of s. 10 (1) of the *Factory and Workshop Act* 1901 (Imp.) (1 Edw. 7, c. 22) said: "The statute does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use" (2). Referring to this observation, *Isaacs* J. in *Cofield* v. *Waterloo Case Co. Ltd.* (3) said that the judgment of *Salter* J. established, in accordance with preceding cases, that the statutory obligation is absolute and must be obeyed even if the machine is, by fencing, rendered commercially impracticable or mechanically useless. But in *Lewis* v. *Denye* (4), Viscount *Simon* L.C. made the following observations on the question: "Does s. 10 impose an obligation to provide such a degree of secure fencing for a dangerous machine as makes the machine no longer dangerous at all to a reasonably careful workman, even though this result could only be attained at the expense of making the use of the machine impracticable, and hence in effect prohibiting its use altogether? Or is a dangerous machine to be regarded as 'securely fenced' under s. 10 if the fencing protects the workman from danger so far as that can practicably be done, consistently with the machine being used? If the first of these two views were correct, this might amount to a prohibition of the use of circular saws altogether (even saws of the most modern type, such as this one, fitted with the best known safety devices), and I should be extremely unwilling to make the present case the occasion for a final pronouncement on this issue, which is so important to British industry alike in peace and in war, unless this were necessary for our decision. It is not so necessary and I desire to reserve my opinion as to the correctness of the view expressed by Salter J. in *Davies* v. *Thomas Owen & Co. Ltd.* (5) which would interpret the section as meaning that if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful, the statute in effect prohibits its use". In accordance with the view expressed by Viscount *Simon*, *Jordan* C.J. in *Inglis* v. *N.S.W. Fresh Food & Ice Co. Ltd.* (6), reconsidered the dictum

(1) (1919) 2 K.B. 39.
(2) (1919) 2 K.B., at p. 41.
(3) (1924) 34 C.L.R. 363, at p. 374.
(4) (1940) A.C. 921, at pp. 931, 932.
(5) (1919) 2 K.B., at p. 41.
(6) (1943) 44 S.R. (N.S.W.) 87, at p. 95; 61 W.N. 79, at pp. 81, 82.

of *Salter* J. in *Davies* v. *Thomas Owen & Co. Ltd.* (1). His Honour's conclusion was that the obligation cast upon the occupier by s. 33 was to see that every part of the mill gearing and every cog wheel is so fenced or in such a position or so constructed as to be as safe as is reasonably possible for the careless as well as the careful workers consistently with the machine being used. His Honour was there concerned with the third paragraph of s. 33. But his conclusion relates to the whole of s. 33. After that decision, however, the *Factories and Shops* (*Amendment*) *Act* 1946 (N.S.W.) was passed. By s. 2 (f) (i) of that Act s. 33 was amended so as to provide that the duty imposed on the occupier of a factory by the section should be an absolute duty in no way qualified by any other provision of the Act. Probably this provision makes it necessary to adopt the view that the impracticability of fencing, that is guarding, a machine or part of a machine, is no answer to the requirements of the section if the machine or part is in truth dangerous. In Great Britain judicial decision now appears to have brought about the same result: See *Miller* v. *William Bootham & Sons Ltd.* (2); *Dennistoun* v. *Charles E. Greenhill Ltd.* (3); *Mackay* v. *Ailsa Shipbuilding Co. Ltd.* (4). No evidence, however, was admitted in the present case to show positively that it was not possible to provide a guard in respect of so much of the machine as was said to be dangerous.

The word "dangerous" in the section has been the subject of some judicial examination and its meaning may be taken to be settled by authority. At the one extreme dangers are to be excluded from consideration which are only the result of the deliberate action of individuals or of action which could not be reasonably anticipated. At the other extreme, it is to be recognized that the purpose of the provision is to see that the workmen are protected, even though from consequences of their own lack of care, inadvertence, mistakes or even foolishness. Further, the kind of dangers to be considered includes dangers to persons who may come into the proximity to the machine, although not at work upon it, as well as to persons who operate the machine or whose work takes them to it. In *Hindle* v. *Birtwhistle* (5), *Wills* J. said that machinery or parts of machinery is or are dangerous if, in the ordinary course of human affairs, danger may be reasonably anticipated from the use of them without protection, and added, that the contingency of carelessness on the part of the

(1) (1919) 2 K.B., at p. 41.
(2) (1944) K.B. 337.
(3) (1944) 2 All E.R. 434.
(4) (1945) S.C. 414.
(5) (1897) 1 Q.B. 192, at p. 195.

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workman in charge of it and the frequency with which that contingency is likely to arise are matters that must be taken into consideration. He described the question as entirely a question of degree. In *Walker* v. *Bletchley Flettons Ltd.* (1), *du Parcq* J. quoted the observation of *Wills* J. (2) and said if he were to venture to expand a little what his Lordship said he would say, and he thought he was saying nothing inconsistent with what that learned judge had said, that a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. These authorities were applied to analogous language in s. 55 of the *Coal Mines Act* 1911 (Imp.) in *Smithwick* v. *National Coal Board* (3). *Tucker* L.J. adopted from a textbook the statement that the behaviour of human beings that has to be regarded is such behaviour as is reasonably foreseeable, which is not necessarily confined to such behaviour as is reasonable behaviour, and went on to say: "An employer, of course, has to contemplate acts of carelessness, acts of negligence, and so on, but he has not to fence what would otherwise be a dangerous part of the machinery which is really inaccessible and to which no ordinary reasonable workman would be expected to go anywhere near or to come into contact with in any way" (4). *Denning* L.J. said: "I think that the test for this purpose is substantially the same as the test whether machinery is 'dangerous' within the Factories Act, 1937. It is 'dangerous' if it is such that it may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature is prone. The occupier must realize that not everybody is careful: many are hasty, careless or inadvertent; some are unreasonable, or even disobedient. It may be unlikely that they will act in such a way, but it is not only the likely but also the unlikely accident against which the occupier must guard. He must guard against all conduct which he can reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely, but also what is unforeseeable, or, at least, not to be foreseen by any ordinary man" (5).

The result was summed up in a passage in the opinion of the Lord Justice-Clerk (Lord *Cooper*) in *Mitchell* v. *North British Rubber*

(1) (1937) 1 All E.R. 170, at p. 175.
(2) (1897) 1 Q.B., at p. 195.
(3) (1950) 2 K.B. 335.
(4) (1950) 2 K.B., at pp. 347, 348.
(5) (1950) 2 K.B., at pp. 350, 351.

Co. Ltd. (1), a case to which it will be necessary to recur. His Lordship said: "The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part?"

In the present case a direction was given to the jury giving the effect of these definitions of dangerous parts of a machine. The only issue submitted to the jury really was whether the machine at which the plaintiff was injured was dangerous, or possessed dangerous parts. The jury found for the defendant. In the Full Court of New South Wales, their Honours thought that this finding was unreasonable and set aside the verdict, ordering a new trial. The question for our consideration is whether the jury might reasonably find that the machine was not dangerous or that the parts in question were not dangerous or whether the view of the Full Court is right. This question depends upon the nature of the machine and an appreciation of the risks involved in working it. Unfortunately, no photograph or diagram of the machine was produced upon the hearing of the appeal. We were told that before the jury a model was exhibited, but this was not produced to us. With the help of counsel, however, we obtained from the transcript of the evidence what I believe is a sufficiently clear description of the machine and the manner in which it is operated.

The mill consists of two large steel rollers of equal size with their axes in the same horizontal plane. The diameter of each is about 2 feet and the length is 4 feet 6 inches. The rollers revolve in opposite directions inwards, and the distance between them may be varied. They were probably about half an inch apart. They rotate at unequal speeds, that further from the operative rotating slightly faster; the speed is, however, about one revolution in four seconds. The purpose of the rollers is to roll slabs or blocks of rubber to a uniform thickness and to join them in a continuous sheet. Slabs or blocks of rubber which are brought from the

(1) (1945) S.C. (J.C.) 69, at p. 73.

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cracking machine, a rolling machine with grooves upon the rollers, are placed in the valley or bowl between the two rollers and rolled through. The rollers become heated; indeed, after a time they are water cooled. Under such heat the rubber becomes soft and pliable. Pieces of rubber weighing 30 to 40 lbs. are placed in the rollers and rolled downwards. The rubber will first fall upon a tray whence it is brought back to go through a second time. The rubber spreads out between the rollers and when it is reduced to a width and thickness which is suitable it is joined to another such piece and the whole put through the roller. The operative wears thick gloves, because of the heat of the roller. The plaintiff in giving evidence said that the pieces of rubber varied in size as they come from the cracking machine. It is brought down in a pile of rubber on a tray. The operative lifts off a lump of rubber anything from 30 to 60 lbs. in weight. A 40 lb. piece would be about 2 feet long by a foot wide. It is a heavy piece of crude crinkled rubber as it comes from the cracking machine. The rubber is brought down in a pile on a tray and puts them between the rollers through which they would go. They would fall underneath and the operative would repeat the process until they get sufficiently heated to be joined. He puts a lump through and he follows it through with another lump and then with a third. They are flattened and warmed and as they go through again they get hot. He picks up one sheet and laps it over and puts it through again. The rollers are about breast high and the operative works with his hands over the valley between the rollers placing the rubber in the nip of the machine. It is not necessary for him to get his hands very close to the actual nip. How close is a matter in dispute, the defendant suggesting not closer than a foot and the plaintiff saying that it is necessary to go somewhat closer. A former employee, who was called, said that he had been working at a similar machine for about ten or eleven years and that you must place the rubber into the nip of the machine to get it in and you must follow on with the other bit to join it up. It is a matter of how far you keep your hands away. If the rubber is hard you must go close to put it in.

Suspended over the rollers at the time of the accident was a safety cord to stop the machine in case of emergency. It is not clear from the description whether it was at right angles to the rollers or horizontally above the first of them but parallel with it.

On 11th May, 1950, the accident occurred shortly after the mill had been set in motion. It had not warmed up and the plaintiff had put through three slabs of rubber and was about to start, or had started, the operation of joining them up. He says: "When

I was loading up, I put one piece down and took another piece to put it in. I threw it in on top of the other one. Somehow or other the other one folded back over and slapped my hand down, and before I knew where I was my hand was drawn in. I screamed out immediately as soon as I felt the hand going down and I snapped for the cord to stop the machine. Had I reached it there and then I could have stopped the machine but I missed it. I went completely under the cord. I screamed out and a chap right beside me snapped the stop cord. The rubber slammed against my hand and the roll was sufficient pressure to crush it. If it had gone right down between the nips, I would not have been able to pull it out immediately the machine was stopped but I was able to pull it out". The fellow employee referred to in this evidence as "a chap right beside me" was working close by and witnessed the accident. He said that he heard the plaintiff scream and swung round. His left hand had been carried up on the moving roller and was caught. He was trying to strike the safety cord over his shoulder but could not reach it. He had been carried up the machine on his right side. The employee immediately struck the safety cord and stopped the machine and the plaintiff then extricated himself.

Evidence was given of other occasions upon which workmen had had their fingers, hands or clothing caught in the nips of that or other similar machines. The effect of the evidence was that on several occasions before the accident employees had had their hands either drawn in or nearly drawn in between the rollers. One man had lost his finger in such a manner and another had had both hands caught. Still another had had his hand drawn in towards the nip but had been able to pull the stop cord. The same man on another occasion had had some of his clothing drawn into the rollers and pulled off. Upon all these occasions the stop cord had enabled the operatives to stop the machine before injury was done or before more extensive injury was done. Great reliance apparently was placed by the defendant on the stop cord as a safety device. Cross examination of the plaintiff was directed to show also that he had been warned by the foreman not to get his hands near the nip of the rollers, that if there was a guard over the bite of the rollers the machine could not be operated, and that in actually feeding the rubber into the top of the machine the plaintiff knew he should not try to push it in. Questions in pursuance of this line of cross examination were rejected by the learned judge on the ground that as contributory negligence was no defence and as liability depended on the dangerous character of the machine, such questions were not relevant.

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In the Full Court, *Street* C.J., *Owen* and *Taylor* JJ. took the view that a finding that the machine was not dangerous within the meaning of s. 33 of the *Factories and Shops Act* 1912, as amended, was unreasonable and could not stand. I agree in this view. It is true that what is dangerous involves a matter of degree. It is true also that the question what may reasonably be expected in the way of conduct on the part of persons working a machine and other persons in a factory, involves a matter of fact. But upon all matters of fact and of degree the jury's determination is subject to the control of the court and if their conclusion is one which a reasonable man, who clearly understood the question to be decided, could not reach, it must be set aside. The question here is one of characterisation. Should the machine be characterised as dangerous ? It appears to me that the very nature of the machine, including its capacity for carrying in the fingers, or hand, or clothing of an operative speaks for itself. Common experience shows that all machinery depending upon rollers exposes the person using them to the risk of his hands or his clothing being involved in the rollers. Common experience is here borne out by the actual experience in relation to the particular machine. It is no doubt true that the jury were at liberty to discount the evidence of previous accidents. It is also true that the jury were at liberty to take into account the fact that the machines were widely used over a long period of years and the instances given were not numerous when considered in relation to the extent and period over which the machines had been used, but, nevertheless, they remained illustrations of what might happen. It may well be true that in every case, some carelessness, inattention or folly on the part of the workman would explain the fact that he had become involved in the machine. But that is nothing to the point. By definition a machine is dangerous if it exposes persons guilty of inadvertence, inattention, carelessness or folly to danger. How far this principle may go is shown by the case of *Smithwick* v. *National Coal Board* (1) already cited. But an example very close to this case may be seen in *Mitchell* v. *North British Rubber Co. Ltd.* (2) which has already been cited. That was a case of a rubber rolling mill which the tribunal of fact had held not to be dangerous. It was an electrically driven calendar for rolling rubber in sheets of uniform width and thickness. It consisted of four rollers placed one above the other revolving slowly. The bulk rubber was fed by an operative on one side into the nip of the top rollers and then by an operative on the other side into the nip below and so on. The operative injured had the latter

(1) (1950) 2 K.B. 335.

(2) (1945) S.C. (J.C.) 69.

duty and got her hand caught between the third and fourth revolving rollers while placing the rubber sheet on the fourth roller. The machine had been in use for over twenty-five years without causing an accident. The Sheriff Substitute took the view, having regard to the simplicity of the process of placing the sheet rubber in position on the fourth roller and to the slowness of the rollers in revolution, that the nip between the third and fourth rollers was not a dangerous part of the machinery and found that the factory proprietors were not guilty of contravention of s. 14 (1) of the *Factories Act* 1937. This finding was set aside by the Court of Justiciary (Lord *Mackay* dissenting) on the ground that notwithstanding the ease of the operation, the long use of the machine without an accident and the further fact that the government inspectors had never suggested that it was dangerous, the nip was a potential source of danger at all events to a worker who might be careless and inattentive.

The very emphasis laid upon the stop cord by the defendant serves to bring out more clearly the fact that some device to prevent injury was felt to be necessary. A stop cord is not the device which the statute prescribes. What it requires is fencing, that is guarding. In all of the circumstances, I am of opinion that it was not possible on the evidence for the jury to deny that the rollers in operation did not form a dangerous part of the machine.

For these reasons I agree with the decision of the Full Court and would dismiss the appeal.

McTIERNAN J. I am of the opinion that the appeal should be dismissed.

The plaintiff was employed by the defendant at a rubber mill at its factory, and in the course of operating the mill, his left hand was lacerated and the skin pulled off the fingers by the action of the mill. In an action which he brought against the defendant for damages, the jury found a general verdict for the defendant. The only causes of action presented to the jury were founded upon s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.) which imposes upon the occupier of a factory a duty securely to fence all dangerous parts of the machinery therein and to maintain the fencing in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process. An amending Act (No. 17 of 1946) by s. 2 (f) (i) makes the duty imposed by s. 33 absolute.

The only count, which it is now material to consider, was for an alleged breach of duty to fence or guard all dangerous parts of

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the mill. The defendant's plea to this count raised the issue whether or not any part of the mill was dangerous. It was admitted upon the pleadings that the mill was not fenced. Other matters put in issue were whether the Act applied or the defendant employed the plaintiff, or the defendant had machinery in its factory. Nobody has contended that the jury found for the defendant upon any of those issues. It was also admitted upon the pleadings that the plaintiff was struck and injured by the machinery at which he alleged the defendants employed him to work. However, in argument in this Court it was contended that the jury may have been dissatisfied with the plaintiff's evidence that he was working at the rubber mill when he was injured. Having regard to the admission upon the pleading, the verdict for the defendant could not stand if the jury found against the plaintiff only upon the issue as to the cause of the injury. The breach of s. 33, alleged by the plaintiff, was that the nip of the rollers of the mill was a dangerous part of the machine. It was not denied by the defendant that there was no fence or guard to prevent a workman from putting either or both hands upon the rollers or close to the nip of the rollers while they are revolving and he is feeding the machine with rubber. The only substantial matter is whether the jury was justified in rejecting the plaintiff's proof that the nip was a dangerous part of the machine. The evidence adduced for the plaintiff consisted of evidence describing the rubber mill, the way in which the plaintiff was injured, evidence of other accidents, and medical evidence. For the purposes of this appeal the medical evidence is not material. *Owen* J. who delivered the judgment under appeal, gave a summary of the evidence as to the material matters. The summary is accurate and adequate for the purposes of this appeal and I adopt it. "The machine in question consisted of two heavy power-driven steel rollers, each about 2-feet in diameter, standing chest-high above the floor, the rollers lying side by side in a horizontal plane. The rollers revolve at a rate of approximately one revolution in every four seconds; so that it would take a second for the top of the roller to make a quarter turn to the 'nip' between the two rollers. The operator feeds by hand into the valley between the two rollers what are described as 'slabs' of crude rubber, from 30 to 60 lbs. in weight. Except for the position of the rollers the operation is similar to that carried out by the housewife who feeds washing into a mangle. Stretched horizontally across the top of the machine and within reach of the operator is a 'stop cord', which when pulled causes the machine to stop.

The plaintiff said that, on the occasion of his injury, he had fed one ' slab ' of rubber into the rollers and was feeding in another ' slab ' when part of the first ' slab ' ' folded back over and slapped my hand down, and before I knew where I was my hand was drawn in '. He says that he screamed and reached for the stop cord with his free hand, but missed it. Fortunately, another employee was standing nearby and he was able to pull the cord and stop the machine. It should be added that in the course of the operation the rollers become heated by friction, and the operation is designed to heat the rubber and reduce it to a sticky pulpy mass so that the slabs as they are rolled will be flattened out and joined up to other slabs undergoing the same process in order to produce a continuous sheet of rubber. At the time of the injury the rollers on this machine had not become sufficiently hot to heat the rubber into the soft and sticky state necessary to complete the operation. Evidence was given that on several earlier occasions employees working, either on this or on a similar type of mill, had had their hands drawn or nearly drawn between the rollers. One man, Linins, lost his finger on one such occasion. Another employee, Johnson, had both hands caught, but escaped with little or no injury; and a man named Bell said that his hand had been drawn towards the ' nip ' of the rollers on at least one occasion, but that he had been able to pull the stop cord in time to escape injury. He said also that on another occasion portion of his clothing had been drawn into the rollers and pulled off him ".

The defendant called no evidence and at this stage no objection is taken to the summing up.

None of the evidence adduced by or for the plaintiff at the trial was contradicted. I agree with *Owen* J. that the transcript of the evidence reveals nothing upon which the jury could have considered that the credit of the plaintiff or of any of his witnesses was not good. The question was whether the rubber mill, as described by the evidence was dangerous. This was a question of fact and therefore one for the jury. *Owen* J. applied the right test in order to decide the question whether upon the evidence which has been referred to, a jury of reasonable men could find that the machine was not dangerous. The jury were not at liberty to apply their own tests as to whether the nip of the rollers was a dangerous part of the machine. It was the jury's duty to apply the criteria contained in the directions to them on this matter.

I agree with *Owen* J. that a jury of reasonable men who applied those criteria could not reasonably find that the nip of the rollers was not a dangerous part of the rubber mill. *Wills* J. said in

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Hindle v. *Birtwhistle* (1) :—" Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters which must be taken into consideration ".

Upon the cross-examination of the plaintiff's witnesses it seems to me to be fair to say that the defendant conceded that but for the cord which the operator could pull in case of emergency the mill was dangerous. This cord, of course, was not a fence or a guard which protected the mill hand from touching the rollers or putting his hands near the nip. It was contended that the cord was an integer of the machine and with it the nip of the rollers was not a dangerous part of the machine.

In the case of *Walker* v. *Bletchley Flettons Ltd.* (2) *du Parcq* J. said :—" a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur ".

In my opinion it would be unreasonable for the jury to find that the mere addition of the cord reduced to any appreciable degree the possibility of the rollers or the nip being a cause of injury to a mill hand feeding it with rubber slabs.

WEBB J. If any part of the rubber mill was dangerous without the safety cord then I think the addition of the safety cord, whether it was made with the mill and as part of it or was added after the mill was constructed, could not be found to have eliminated the danger. It might be otherwise if there was a safety device which operated automatically.

It appears to have been common ground throughout that the question whether the mill was dangerous depended not merely on the nature of its construction and the method of its working, but also on the occurrence of other accidents. It is impossible to say that because an accident had happened once the machine was dangerous (*Hindle* v. *Birtwhistle* (3), per *Wills* J.). There was no

(1) (1897) 1 Q.B., at p. 195.
(2) (1937) 1 All E.R., at p. 175.
(3) (1897) 1 Q.B. 192, at p. 195.

submission or suggestion that this mill was so constructed and operated that even without evidence of other accidents it would have been unreasonable for the jury to find that the mill was not dangerous.

The plaintiff, the respondent here, had the onus of proving not merely that other accidents had happened but that they did so under such circumstances that a jury of reasonable men must find that the mill was dangerous. It becomes necessary then to see what was the evidence for the plaintiff on this point. It is true that the plaintiff's evidence was not contradicted by evidence for the defendant company, the appellant here. But it was still necessary for the plaintiff to prove that accidents had occurred in such numbers and under such circumstances that it was imperative that the jury should find that the machine was dangerous. Now the evidence called by the plaintiff was indefinite as to the number of other accidents and in no instance did it reveal that the accident was not wholly or mainly due to the conduct of the operative concerned. Two witnesses were called by the plaintiff to prove other accidents. One had been working a similar mill in the defendant company's factory for ten or eleven years without injury. although his clothes were caught in the mill on one occasion. How that came about does not appear. This witness also said that on a few occasions he saw operatives with their hands caught; but he added that none was injured. He could remember the name of only one man who was caught and that man was not hurt. The other witness for the plaintiff said that while operating a mill his fingers were caught and were amputated, but gave no explanation of how that occurred. That accident was in May 1950; that for which the plaintiff is claiming was also in May 1950.

Such being the evidence, and as it is common ground that evidence of other accidents was necessary to warrant a verdict for the plaintiff, I am unable to take the view that the verdict for the defendant company was "unreasonable and almost perverse": *Cox* v. *English, Scottish and Australian Bank Ltd.*, per Lord *Davey* (1). The evidence for the plaintiff was so indefinite as to the number and circumstances of the other accidents, and the period over which they took place i.e. ten or eleven years, was so lengthy that I think it was open to the jury to decline to find for the plaintiff. After all it was "entirely a question of degree" (*Hindle* v. *Birtwhistle*, per *Wills* J. (2)).

I would allow the appeal, set aside the judgment of the Full Court of New South Wales, and restore the verdict and judgment for the defendant company, the appellant here.

(1) (1905) A.C. 168, at p. 170. (2) (1897) 1 Q.B., at p. 196.

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FULLAGAR J. I have not been able to see in this case any sound reason for interfering with the verdict of the jury. That verdict may or may not be open to criticism. But, whether it be regarded as wise and just or not, it appears to me to be an understandable verdict which was fairly open on the evidence.

It appears to have been common ground throughout that the only question in the case—if there was a question at all—was the question whether the machine used in the defendant company's factory was "dangerous" within the meaning of s. 33 of the *Factories and Shops Act* 1912-1950 (N.S.W.), which provides that the occupier of any factory shall securely fence all dangerous parts of the machinery therein. This question was, subject to proper guidance as to the meaning of the word "dangerous", a question for the jury to decide, and it was, in effect, the question, and the only question submitted to them.

Guidance as to the meaning of the critical word was given to the jury by *Kinsella* J., in terms which have not been criticised but are really too favourable to the plaintiff. The generally accepted exposition is that given by *Wills* J. in *Hindle* v. *Birtwhistle* (1). That learned judge, dealing with a statute which, so far as material, was in terms identical with those of s. 33 of the New South Wales Act, said :—"It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree." The case was a case in which injury had been caused to a workman by a shuttle flying out of a shuttle-race. *Wright* J., in a short judgment agreeing with that of *Wills* J., said :—"It is a question of degree and of fact in all cases whether the tendency to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the word 'dangerous'." (2).

The passage quoted from the judgment of *Wills* J. has not entirely escaped the attentions of the glossators, but it has been, I think, generally accepted as an accurate exposition. And, if one may say

(1) (1897) 1 Q.B. 192, at pp. 195, 196. (2) (1897) 1 Q.B., at p. 196.

so with the greatest respect, it appears to give an eminently sound and sensible explanation of what is meant by the word in question in its context. It gives to that word a liberal meaning, which is adequate for the attainment of the manifest object of the statute. At the same time it recognises that the word itself indicates that the occupier of a factory is not to be liable for *any* injury caused by *any* machine however improbable it may have seemed *a priori* that the machine would ever hurt anyone. In truth there is hardly any machine or tool in human use which is not capable of inflicting bodily harm on its user. Yet there are many machines and tools which we would not instinctively describe as dangerous or regard as dangerous in any real sense—an ordinary household sewing machine, an ordinary household mangle (such as is described by *Owen* J. in this case), a wringer, a lawn-mower, a pick, a tin-opener. It is essentially a matter of degree, as *Wills* J. and *Wright* J. said (1), and essentially therefore a matter which is prima facie appropriate for a jury to decide.

Coming to the present case, the first observation I would make is that much difficulty has been experienced in obtaining anything like an accurate picture of the machine in question. It seems to me a somewhat remarkable fact that a working model was (as we were informed by counsel) provided by the plaintiff for the assistance of the jury, but was not produced to us. No clear explanation was offered as to why it was not available to this Court. No photograph or drawing or diagram was produced. We were able, with the assistance of junior counsel for the respondent, to obtain a fair understanding of the machine and the way in which it worked, but it is difficult to feel confident that one fully appreciates the position and function of the "stop-cord", or the exact way in which sheets of rubber are inserted in the machine, or the exact way in which the plaintiff's hand came between the rollers. It seems to be a fact that the jury was in a better position than this Court to understand the machine and its working, and this fact must incline one to caution, if not reluctance, when one is asked to say that the verdict of the jury ought to be set aside.

The matter of the nature and working of the machine itself was the first matter which the jury was bound to take, and presumably did take, into consideration. The other matter which they had to take into consideration was certain evidence as to prior accidents with similar machines. As to this two witnesses were called for the plaintiff. A man named Linins gave evidence that on 11th May

(1) (1897) 1 Q.B., at pp. 195, 196.

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1950 (a very short time before the accident to the plaintiff) he was "caught in the mill" and his "fingers were taken off". That was the whole of his evidence. This, coupled with the plaintiff's own accident, would at first sight afford strong evidence that the machine was dangerous, and would clearly justify an affirmative finding. But there was no evidence whatever as to how this event happened, and much might turn on the manner of its happening. Counsel for the plaintiff having left the matter as he did, counsel for the defendant would naturally not cross-examine as to the details of the event described. But he might quite legitimately have invited the jury to take little notice of an event about which they had been told so little, and the jury might quite legitimately have accepted such an invitation.

The other witness on this aspect of the case was a man named Bell. Bell had been working for the defendant company for about twelve years: he left the company's employment very shortly after the accident to the plaintiff. For about "ten or eleven" years of that period he had been working on a "mill" similar to that which caused the injury to the plaintiff. He did not say how many such mills the company had in its factory, but he said that it had "quite a number" of them. He said that, in the period of his employment, he had seen mill operatives with their hands caught "on a few occasions". The only man whom he was able to mention by name or otherwise identify was a man named Johnson, who "did not meet with very bad injury". He said:—"It is something that happens every now and again: it might happen that you are not hurt". In cross-examination he was unable to give any further details. He said that he could not "bring to recollection" any case of a man "having got an injury which cost him a finger". But he said "there have been some". Pressed with the point of view that he had been working in the factory for a long period and could not specify a single serious accident, he said (for the first time) that he had himself been "caught", but had saved himself by pulling the "stop-cord". Pressed further, he recalled an occasion on which his clothes had been caught and he had "jumped back and left his clothes there".

Now, it is quite impossible for an appellate court to say what view ought to be taken of Bell's evidence, or to say that the jury was bound to take any particular view of it. But it seems to me equally impossible to deny that the jury was at liberty not merely to discount the evidence of Bell but to regard it as false in so far as it favoured the plaintiff, and further to regard it as favourable to the defendant in so far as it showed an absence of any serious

accident over a period of " ten or eleven " years in a factory which was using " quite a number " of the machines in question. The alleged episode in which Bell's clothes had been " torn off him " (to use the expression used by *Kinsella* J. in his charge—it is fair to say that it was not used by Bell himself) may well have carried with the jury a significance which it was not intended to carry. To me it sounds plainly incredible, though I do not know that it would have led me to reject the whole of Bell's evidence so far as it favoured the plaintiff. The jury, however, may well have taken the same view as I take of that piece of evidence, and—aided perhaps by a general impression of Bell in the witness-box—have proceeded to say that they did not believe a word of what he said as to prior accidents. They were perfectly entitled to take that view.

The fact that the defendant called no evidence was a matter which the jury might well, of course, take into account, and this aspect of the case was strongly put to them by the learned trial judge in his charge. But it was quite proper for them to deal with the case on the evidence before them, and it would not, in my opinion, have been unreasonable for them to say :—" We know nothing about the accident to Linins. We find nothing reliable in the evidence of Bell except that no serious accident occurred on a considerable number of machines over a long period of years. We have, of course, the accident to the plaintiff, but, everything considered, we are not prepared to say that the machine was ' dangerous ' in the sense explained to us by the judge." Whether they did in fact reason in that way is beside the point. Whether I would reason in the same way is equally beside the point. The jury may well have reasoned in that way, and a verdict which may have been founded on such reasoning should not, in my opinion, be set aside.

I have not thought it necessary to discuss the rules which have been laid down relating to the setting aside by an appellate court of the verdict of a jury. I have proceeded on the basis of what was said by *Dixon* J. in *Hocking* v. *Bell* (1). I do not myself think that the verdict in this case comes anywhere near to being so unreasonable as to be " almost perverse ", and I am not able to say that the jury have " failed to perform their duty ".

In my opinion, this appeal should be allowed, the judgment of the Full Court set aside, and the verdict and the judgment founded thereon restored.

(1) (1945) 71 C.L.R. 430, at pp. 498, 499.

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KITTO J. I agree that the appeal should be allowed for the reasons stated by my brother *Fullagar* J.

Appeal allowed with costs. Order of the Full Court of the Supreme Court of New South Wales discharged. In lieu thereof order that the appeal to the Full Court be dismissed with costs and that the verdict and judgment for the defendant company be restored.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nichols.*
Solicitor for the respondent, *Aidan J. Devereux.*

J. B.