[HIGH COURT OF AUSTRALIA.]

HAMILTON . . . . . APPELLANT;
PLAINTIFF,

AND

NUROOF (W.A.) PROPRIETARY LIMITED RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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SYDNEY, *April* 9; *Aug.* 10.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Negligence—Employer—System of work—Duty to provide safe system—Repairs to roof—Use of molten bitumen—Placed in buckets—Necessity to raise buckets to higher levels—Lifting done manually—No provision of lifting gear—Likelihood of bitumen spilling—Danger to person lifting—System unsafe—Failure to take reasonable care for employee's safety.

The defendant company was engaged in carrying out repairs, involving the use of molten bitumen, to the roof of a motor generator room on the sixth floor of a city building. The bitumen was heated on the roof of the fifth floor and placed in open buckets which, when two-thirds full, weighed forty pounds. Each bucket was raised by means of a rope to the level of the sixth floor roof and then carried manually up a fixed iron ladder leading from the sixth floor roof to the roof of an iron shed beside the motor generator room and then passed by hand again from the shed roof to a workman on the roof of the motor generator room. The roof of the motor generator room was about five feet eight inches higher than the shed roof. The plaintiff, a labourer employed by the defendant company, was stationed on the shed roof lifting the buckets of molten bitumen from that roof to a workman positioned on the motor generator roof, who took the centre of the handle and lifted the bucket to the roof where he stood. The plaintiff performed this operation on two occasions without incident, but on the third occasion as he stood on the shed roof with one such bucket in his hands and raised in front of him the bitumen spilt over the side of his face, his hands and forearms inflicting severe injuries.

Held, that it is the duty of an employer to take reasonable care and foresight to avoid exposing employees to unnecessary risks and that it is a breach of that duty to disregard the likelihood of their occurrence; and by *Dixon* C.J., *Fullagar* and *Kitto* JJ., *Williams* and *Taylor* JJ. dissenting, that as in this

case the danger of the plaintiff sustaining injury was both real and evident and care and foresight could not easily ignore it, and as the adoption of a safer method of performing the work was a simple matter, the defendant company was liable in damages to the plaintiff.

Dictum of Lord *Dunedin* in *Morton* v. *William Dixon Ltd.* (1909) S.C. 807, at p. 809, criticised by *Dixon* C.J., *Fullagar* and *Kitto* JJ.

Decision of the Supreme Court of Western Australia (*Wolff* J.), reversed.

APPEAL from the Supreme Court of Western Australia.

On 4th August 1955 Gavin Athol Hamilton, a labourer employed by Nuroof (W.A.) Pty. Ltd., brought proceedings against that company in the Supreme Court of Western Australia to recover damages for injuries sustained by him on 17th May 1954 whilst engaged with another employee of the company in bitumenising the roof of the motor generator room on the top of Shell House, St. George's Terrace, Perth. The plaintiff based his action upon an implied agreement by the defendant company as his employer to provide a safe system of work, proper instruction for carrying out such work and effective supervision thereof or, alternatively, negligence in the defendant company as such employer in failing to provide the same. The breaches of agreement and acts of negligence alleged were failure to provide covered buckets to prevent the escape of molten bitumen used in the work on which the plaintiff was engaged, failure to provide adequate lifting gear for raising buckets containing such bitumen, failure properly to instruct the plaintiff as to a safe mode of performing the work and failure to provide a trained person to supervise the work. The defendant company denied the implied agreement and the negligence so alleged, and raised the defence of contributory negligence as well as two other defences not material to this report.

The action was tried by *Wolff* J. who on 21st December 1955 entered judgment for the defendant company substantially on the ground that no particular danger attached to the method of handling the bitumen and that the duty to take reasonable care to safeguard the plaintiff from injury in performing the work did not require the defendant company to adopt any other method or take any other measures.

From this judgment the plaintiff appealed to the High Court.

The material facts are fully set out in the judgments of the Court hereunder.

C. H. Smith, for the appellant. The duties resting upon the respondent employer may be summarised as follows: (a) to take

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all reasonable precautions for the safety of the appellant (*Wilsons & Clyde Coal Co. Ltd.* v. *English* (1)); (b) where the nature of the task is constantly varying, to decide the lay-out of the job and, in doing so, to pay due regard to the safety of the employees, as by inspecting the work to be done, giving them proper instructions as to how it is to be done and providing the necessary equipment (*Speed* v. *Thomas Swift & Co. Ltd.* (2), approved in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* (3); (c) when an employer asks his men to work with dangerous substances, to provide proper appliances to safeguard and protect them against their own heedlessness (*Clifford* v. *Charles H. Challen & Son Ltd.* (4); *Drummond* v. *British Building Cleaners Ltd.* (5)). Where the evidence clearly establishes that an employer has done nothing to guard against an obvious danger and his failure to do so was the cause of the accident, then the person injured is entitled to recover against him. In being required to raise molten bitumen, patently a dangerous substance, in the manner indicated, the appellant was exposed to unnecessary risk and in such circumstances it was the duty of the respondent to provide some means of elevating the bucket which would not involve the appellant in the risk of being burnt, should the bucket become upset, or a container so constructed and guarded that its contents would not spill in the event of an accident occurring. The situation here is similar to that in *Bath* v. *British Transport Commission* (6). If the risk is obvious and the precaution also obvious the Court needs nothing further by way of evidence to reach a conclusion in favour of the appellant. The respondent's answer to the appellant's case was that it was unnecessary for it to do anything because the system had been in operation for years without incident and therefore nothing further need be done. This was no defence at all. [He referred to *General Cleaning Contractors Ltd.* v. *Christmas* (7); *Bath* v. *British Transport Commission* (8).] Here a reasonably prudent employer would have provided some safety precautions, and the remedies available were both cheap and obvious. There is no evidence that the appellant was himself guilty of any negligent act.

E. F. Downing Q.C. (with him *J. Dunphy*), for the respondent. The principle upon which the duty of an employer towards his workmen is to be evaluated is that enunciated by Lord *Dunedin* in

(1) (1938) A.C. 57, at p. 81.
(2) (1943) K.B. 557, at p. 563.
(3) (1945) A.C. 197, at p. 202.
(4) (1951) 1 K.B. 495, at pp. 497, 498.
(5) (1954) 1 W.L.R. 1434, at p. 1442; 3 All E.R. 507, at p. 512.
(6) (1954) 2 All E.R. 542, particularly at pp. 544, 545.
(7) (1953) A.C. 180, at p. 194.
(8) (1954) 2 All E.R., at p. 544.

Morton v. *William Dixon Ltd.* (1). [He referred to *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* (2); *Paris* v. *Stepney Borough Council* (3).] In all the cases where an employer has been held liable there has been an obvious danger and an obvious remedy. The appellant failed to establish either leg of the principle enunciated by Lord *Dunedin* (4). He produced no evidence to show what the practice was, and so far as the second leg is concerned he failed to show either that there was an obvious danger or an obvious remedy. In considering the obligation of the employer it is necessary to consider the nature of the job to be done, and the particular job here was only a small one. The trial judge had no material on which to find negligence on the part of the respondent within the principle stated. There was no omission to do something which in the light of the circumstances it would have been folly not to do. The risk must be so obviously one to be guarded against and which can be guarded against before it can be said to be folly on the part of the employer not to take some step to guard against it. This has not been shown to be so. [He referred to *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* (5).] If the Court considers that negligence on the part of the employer has been established it must give consideration to the question of negligence on the part of the appellant. [He referred to *Law Reform (Contributory Negligence and Tortfeasors' Contribution)* Act 1947 (W.A.), s. 4.] The appeal should be dismissed.

C. H. Smith, in reply.

Cur. adv. vult.

Aug. 10.

The following written judgments were delivered :—

DIXON C.J. AND KITTO J. The question for consideration upon this appeal is whether a workman, who in the course of handling a bucket of heated bitumen spilt it over the side of his face and his arms, has established that his employer is liable to him in damages for the injuries which he sustained on the ground of a failure in the employer's duty of due care for the safety of a workman employed by him. *Wolff* J. who tried the workman's action against his employer for damages, found for the defendant substantially on the ground that no particular danger to any ordinary workman attended the method adopted for handling the bitumen and the duty to take reasonable care to safeguard the workman from risk of injury in

(1) (1909) S.C. 807, at p. 809.
(2) (1956) A.C. 552, at pp. 556, 557, 558.
(3) (1951) A.C. 367, at p. 382.
(4) (1909) S.C., at p. 809.
(5) (1956) A.C. 552, at pp. 570, 571.

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performing his work did not require the employer to adopt any other method or take any other measures. It is from this decision that the appeal comes.

The more material facts are few and simple. The employer, the defendant, had contracted to repair with bitumen certain flat roofs at the top of a building of six storeys. The sixth storey was set back from the fifth and was surmounted by a motor generator room against one wall of which an iron room or shed had been constructed. The work included the use of bitumen on the roof of the motor generator room. Three or four buckets would be sufficient. It was found convenient to heat the bitumen on the open space on the roof of the fifth floor. Thence it was necessary to lift the heated bitumen to the roof of the motor generator room. For that purpose a bucket or drum was used capable of containing four gallons. Two-thirds full it weighed forty pounds. It might have been possible by the use of a rope to pull it up from the fifth floor directly to the top of the motor generator room, but perhaps, with the length of rope necessary, there was a risk of the bucket swaying and striking the wall, which would have been disfigured if any of the bitumen were spilt upon it. The course was preferred of raising the bucket by means of a rope to the sixth floor and then passing it by hand to the roof of the motor generator room. A fixed vertical ladder of iron gave access to this roof from the roof of the sixth floor. The iron shed was built next to the ladder. The course preferred was to carry the bucket of hot bitumen up the ladder, place it on the roof of the iron shed and thence pass it by hand up to a workman on the roof of the motor generator room. The roof of that room was twelve feet six inches above the roof of the sixth floor and the roof of the iron shed was five feet eight inches lower. The work began on the day the plaintiff received his injuries, 17th May 1954, and it was only on that day the plaintiff, who describes himself as a labourer, was taken into the employment of the defendant. The foreman conveyed the plaintiff and a leading hand, together with the gear required, to the scene of operations, where he left them, telling the plaintiff to take instructions from the leading hand. When the bitumen was heated, the leading hand ladled from the cauldron about three gallons into a four gallon bucket or drum having an improvised looped handle of wire of heavy gauge. He attached a rope to the bucket and hauled it up by hand to the sixth floor to which he had ascended by another fixed ladder. Under the directions of the leading hand the plaintiff took up a position on the roof of the shed. The leading hand then lifted the bucket of hot bitumen to the level of that roof by climbing

the adjacent ladder holding the bucket by the handle. Then he handed it to the plaintiff and climbed on up the ladder to the roof of the motor generator room. The plaintiff then lifted the bucket in front of him holding the sides of the handle by his hands. The leading hand, from the roof of the motor generator room, took the centre of the handle and lifted the bucket to the roof where he stood. That roof projected from, or overhung, the wall about six or seven inches. The bucket having been lifted to the roof by the leading hand, the plaintiff climbed up there by the ladder and helped him spread the bitumen it contained. Two buckets of hot bitumen were lifted by this procedure in safety from the fifth floor where the cauldron stood to the roof of the motor generator room. But as the plaintiff stood on the roof of the iron shed and raised the third bucket of hot bitumen in front of him disaster came. The bitumen spilt over the side of his face, from above the ear drum, and over his hands and forearms. His injuries were very severe. How it happened is uncertain. On this third occasion the plaintiff had himself lifted the bucket of bitumen up the ladder to the roof of the shed, because the leading hand had something to attend to on the roof of the motor generator room. In his evidence the plaintiff said that after placing the bucket on the roof of the shed he called out to the leading hand asking him if he was ready. On his answering yes, the plaintiff lifted the bucket as he had done before but it was not taken from him at once. His arms ached from the weight; he thought he got a splash of bitumen in his eye, the shock made him jump and splash the bitumen all over him; he remembered no more till he found himself in hospital. To an insurance adjuster he gave a not very different account: "My arms ached with the strain and, in readjusting the weight overhead, the hot bitumen splashed on my face. The resulting shock made me sway still more with more bitumen splashing over me and I dropped the bucket in extreme pain." A letter from his solicitors spoke of his "lifting the tin above his head" and of its being upset in the course of his doing so; and the plaintiff's pleading stated that "a tin containing molten bitumen which he had lifted above his head became upturned." In cross-examination the plaintiff said that he did not remember swaying but he got a splash and the shock was so severe that he jumped. The wall above the tin shed shows an extensive stain from and including the projecting ledge of the roof down. *Wolff* J., who caused some bitumen to be heated so that its tendency to splash could be ascertained by experiment, found himself unable to account for the plaintiff's receiving, as the plaintiff described it, a splash of bitumen in his eye or on his face, and his Honour said that on the

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evidence he was unable to find precisely how the accident did occur. The difficulty of ascertaining exactly why the bitumen was poured over the plaintiff was not lessened by the failure of the plaintiff and of the defendant to call the leading hand as a witness. There can, however, be no doubt that somehow in his effort to transfer the bucket from the roof of the shed to the roof where the leading hand stood the contents were spilled and the plaintiff's face and arms were seriously injured by the hot bitumen. It is, however, by no means certain that it was necessary for him to lift the bucket above his head or that he did so. He is a man about six feet in height; if the leading hand bent low he might have grasped the handle when it was level with the roof, and that was only five feet eight inches above the roof on which the plaintiff stood.

But conceding all this in favour of the defendant, it remains clear that the plaintiff received his injuries because in raising by hand a bucket of molten bitumen in front of his body high enough for a man above the level of his head to reach it the bitumen was spilled over him. The exact immediate cause of the bucket overturning or of the bitumen spilling from it might, if it were precisely ascertained, have some bearing on the question whether the plaintiff was guilty of contributory negligence. But so far as the primary cause affecting the liability of the defendant goes, it seems clear enough that the accident arose out of the method adopted for handling the hot bitumen from the roof of the sixth floor to the roof of the motor generator room and if to adopt that system implied a failure on the part of the employer to exercise reasonable care for the safety of the workman, the defendant's liability must ensue.

Now two things appear to be undeniable. In the first place there can be no denial of the extremely injurious properties of molten bitumen if it is spilt over any part of the human body. In the second place when a vessel containing forty pounds weight of molten material is raised by hand in front of the body high enough for a handle to be seized by a man above, there must be a greatly increased risk of its spilling whether through mishandling or mistake or mischance and the prospect of serious injury if that happens must be much greater also. After full consideration we find ourselves unable to agree in the view that these are not dangers which are both real and evident and in the view that it is consistent with due care for an employer to disregard the likelihood of their occurrence. If no alternative method was at hand of performing the task and at the same time ensuring greater safety, the dangers might be considered an unavoidable incident of the work to be done. But it was clearly possible to raise the bucket of molten bitumen from the

sixth floor by the use of the rope in the same manner as it was raised from the fifth floor. It may have been necessary to do it in two stages, namely first to hoist it by hand to the roof of the shed and thence to the roof of the motor generator room. There may have been too many obstructions to permit of pulling it up directly; though that is not shown by the evidence to have been the case. Indeed photographs of the place suggest that the bucket might have been readily pulled up from the stair-head on the sixth floor roof, but be that as it may, the leading hand clearly could have hauled up the bucket from the roof of the shed by the rope. The objections made to this, viz. that he might have splashed the wall, that the edge of the bucket might have got under the projection of the roof, that the plaintiff might have been in danger below from splashes or outpourings of bitumen, these seem to have no substance. The defence of common employment has been abolished by statute (*Law Reform (Common Employment) Act* 1951 (No. 29) (W.A.)) and there is no longer any point in the distinction between on the one hand the liability of an employer if reasonable care is not exercised to establish and maintain a safe system of work whether it is his failure to exercise due care or that of a servant to whom he has delegated fulfilment of the responsibility, and on the other hand the vicarious liability which formerly he did not, but which he now does, incur for the casual acts of negligence of a fellow servant, although in superintendence of the operations. Cf. *Speed* v. *Thomas Swift & Co. Ltd.* (1), and *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* (2). In the present case the defendant is on any footing answerable for a failure in due care on the part of the leading hand or of the foreman who left the plaintiff under his orders. The duty, to whomever it falls to discharge it, is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury. The degree of care and foresight required from an employer must naturally vary with the circumstances of each case. Cf. *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* (3) per Lord *Tucker*.

This is a simple case concerning an unmechanised operation. But care and foresight could not easily ignore the danger of the hot liquid doing the plaintiff very serious injury if it escaped while he manually lifted it upwards in front of his body and care and foresight could not overlook the hazard of the liquid spilling as a result of any of the chances to which the operation involving the raising of the heavy bucket was exposed. It is the sort of thing you

(1) (1943) K.B. 557.
(2) (1945) A.C. 197.
(3) (1956) A.C. 552, at p. 577.

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would think might well arouse some degree of apprehension in any spectator of the operation, to say nothing of an experienced employer.

It has been said that a reasonable and prudent employer is (i) bound to take into consideration the degree of injury likely to result; (ii) bound to take into consideration the degree of risk of an accident; (iii) entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures: per *Parker* L.J. as cited by Lord *Cohen*, *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* (1). On the facts of the present case it may fairly be said that (i) the degree of injury likely to result would be grave; (ii) the degree of risk of an accident was real and not fanciful or inconsiderable; (iii) there was no degree of risk to any person in taking precautionary measures and the degree of risk of defacing the wall was not great and could be met completely by the exercise of ordinary care.

But counsel for the defendant placed most reliance, and not unnaturally, on the language which Lord *Dunedin* used as Lord President in *Morton* v. *William Dixon Ltd.* (2): viz.: "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it" (3). Upon this passage Lord *Normand* observed in *Paris* v. *Stepney Borough Council* (4): "The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man" (5).

Trenchantly lucid and very useful as Lord *Dunedin's* emphatic warning may be it is not the language of the common law, which does not speak of "folly", but of a failure in reasonable care for the safety of the workman and does not attempt in advance to reduce possible situations "absolutely" to two categories.

The word "folly" as used by Lord *Dunedin* has been accordingly interpreted as meaning "imprudent" or "unreasonable": *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* (6), per Lord *Porter*, quoting *Parker* L.J., and see per Lord *Reid* (7), and per Lord *Cohen* (8).

(1) (1956) A.C., at p. 579.
(2) (1909) S.C. 807.
(3) (1909) S.C., at p. 809.
(4) (1951) A.C. 367.
(5) (1951) A.C., at p. 382.
(6) (1956) A.C. 552, at p. 568.
(7) (1956) A.C, at p. 571.
(8) (1956) A.C., at pp. 578, 579.

For the reasons we have given we are not able to agree in the conclusion reached by *Wolff* J. We think that the plaintiff's injuries were attributable to a failure in the fulfilment of the defendant's duty of care for the plaintiff's safety.

It was suggested on behalf of the defendant that such a view would make it necessary to consider whether the plaintiff was guilty of contributory negligence. But there is no affirmative evidence justifying an inference of contributory negligence. It is one thing to say that the precise manner in which the accident happened remains uncertain. It is quite another to infer contributory negligence and there is no ground for doing so.

In our opinion the appeal should be allowed and judgment entered for the plaintiff for damages to be assessed.

WILLIAMS AND TAYLOR JJ. This is an appeal from the dismissal of the appellant's claim for damages in respect of injuries caused to him whilst employed by the respondent as a labourer. The claim was based upon allegations that the respondent neglected " to provide a safe system of work " or " effective supervision " and failed to give " proper instructions for the carrying out " of the work in which, at the time, the appellant was engaged.

The evidence shows that on the day in question the appellant, with another employee of the respondent, one Wyczecki, was engaged in repairing the roof, or part of the roof, of Shell House in Perth. The building itself is six storeys high and the roof is at three different levels. The sixth storey is smaller in area than those below it so that on top of the fifth floor there is substantial roof space from which the roof of the sixth floor may be reached by an external steel staircase. Projecting above the roof of the sixth floor is what has been referred to as an engine house, or penthouse, and it was whilst the roof of this last-mentioned structure was being repaired, or treated, that the appellant was injured. From the roof of the sixth floor a vertical steel ladder leads to the roof of the engine house.

In the work of repairing the roof of the building hot bitumen was used. This was heated by a fire made on the roof of the fifth floor and from there a few buckets of bitumen were taken to the roof of the sixth floor and from there, ultimately, to the roof of the engine house. On each occasion the bucket employed was from two-thirds to three-quarters full and in this condition, we are told, it weighed approximately forty pounds. From the roof of the fifth floor the bucket was hauled by a rope to the roof of the sixth floor but this method was not used for the remaining part of its journey to the roof of the engine house. The wall of the engine house rising from

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the roof of the sixth floor was occupied by a number of obstructions. At the left-hand end there were a few steps leading through a doorway to the interior of this structure and these were surrounded by a guard rail some distance from the wall. The return of this rail was affixed to the wall immediately adjacent to the left of the vertical ladder already referred to and immediately to the right of the ladder was a shed which joined the wall and extended along it to a position adjacent to a tank which covered the remaining portion of the wall for a considerable height. From the iron roof of the shed to the flat roof of the engine house is five feet eight inches. We are not told the height of the shed from the roof of the sixth floor but from the photographs in evidence it appears to be a little more than half the height of the engine house itself. In transporting the bitumen to the roof of the engine house the bucket was first of all placed on the roof of this shed. This was accomplished by carrying it a few steps up the vertical ladder and then placing it on the roof. Thereupon the appellant climbed further up the ladder and stepped on to the roof of the shed. From this position he then lifted the bucket by the lower parts of the handle on either side so that Wyczecki, then on the roof of the engine house, could take it and carry it to the required position. This task was accomplished in safety on two occasions but on the third occasion the appellant, according to his evidence, looked up and, seeing that Wyczecki was not in position, called out to him inquiring if he was ready and, upon receiving an affirmative answer, lifted the bucket as he had done twice previously. But Wyczecki did not immediately take it from him whereupon his arms commenced to ache and he " got a splash of bitumen in the eye ". The shock, he says, caused him to jump and " splash the bitumen all over " him. It is of importance to observe that at no stage in the proceedings has the appellant claimed or suggested that there was negligence on the part of Wyczecki. By his statement of claim and the particulars given thereunder and at the trial it was made clear that the appellant based his claim to damages upon negligence of the character already mentioned. We mention these matters because it may be thought that the appellant's evidence may give rise to the inference that there had been some carelessness on the part of Wyczecki. But since no such claim has been made and there was no issue between the parties on this aspect it is beyond our province to explore the matter further. And indeed since this issue was not investigated and Wyczecki was not called to give evidence it would be futile to attempt to deal with the matter.

It is clear from a perusal of the reasons of the learned trial judge that he was not satisfied that the accident happened in the manner

deposed to by the appellant. In particular his Honour observed that he could not " account for sufficient turbulence being created in the bitumen in the bucket sufficient to release a drop in the way the plaintiff described ". The happening, he thought, was " just as consistent with the plaintiff's having clumsily knocked the bucket on the projecting ledge of the flat roof of the penthouse, or perhaps having got tired of holding it up he attempted to stand it on the ledge of the penthouse and upset it in doing so." After a review of the evidence his Honour intimated that he was " unable to find precisely on the evidence how it (the accident) did occur." We share the learned judge's difficulty in determining upon the whole of the evidence just how the accident happened. The plaintiff's evidence in chief on the point has already been referred to. It is brief and throws little light on the matter. During the period of four or five seconds during which he says he was waiting for Wyczecki to take the bucket he " got a splash of bitumen in the eye " and this caused him to " jump and splash the bitumen all over " him. How the initial splash was caused—if there was one—we do not know. The appellant, in cross-examination, said that he did not think that he had started to move his grip on the handle yet in a statement made some six weeks or so after the accident he said that his " arms ached with the strain and in readjusting the weight overhead the hot bitumen splashed on to my face. The resulting shock made me sway still more with more bitumen splashing over me and I dropped the bucket in extreme pain." To the medical practitioner who attended him following his admission to hospital he said that he had " slipped and it came over his hands and fore-arms and left side of his face ". No doubt the accident happened so suddenly and its results were so serious and painful to the appellant that it is not surprising that he was, and still is, unable to say precisely how it happened and it may not be of great importance that there has been some divergence between the accounts given by him from time to time. It was not, we should think, incumbent upon him to prove the precise manner in which the accident occurred if the correct inference from the proved facts is that it resulted from negligence for which the respondents would be liable. But if upon the evidence that inference is not permissible the appellant must, of course, fail.

The learned trial judge appears to have thought that the occurrence of the accident was equally consistent with negligence on the part of the appellant himself yet, nevertheless, he found it necessary to consider whether the respondent had been negligent in any of the respects alleged and, having done so, made a finding adverse to the appellant. Perhaps the more logical approach to the

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question of the respondent's liability is to determine first of all whether the respondent had been negligent in any of the respects alleged and, if so, thereafter to determine whether the plaintiff's injuries resulted from that negligence. The resolution of the first question in favour of the appellant would provide a background against which the latter's evidence may be viewed and it might be no answer to the claim that his injuries had been caused by the negligence of his employer in failing to provide proper safeguards in the carrying out of work which involved a risk of serious injury to say that the appellant had not proved with particularity the manner in which the accident had occurred. It would be otherwise of course if the evidence should lead to the conclusion that the appellant's injuries had resulted from his own negligence or if that conclusion should be equally open upon the evidence. But in our view the latter questions cannot be resolved merely by an examination of the appellant's brief description, or descriptions, of the manner in which his injuries were caused. If the method employed to raise the bucket to the roof of the engine house involved an unreasonable risk there can be little doubt that the respondent should be held liable, for it is beyond question that the appellant was injured in the course of this operation and that, upon the stated hypothesis, the risks involved in the method employed must, in the circumstances of the case, be taken to have been the cause of his injuries. To say, in the one breath, that the operation then being performed by the respondent required him to undertake unreasonable risks of the nature indicated and then to reject his claim because he is not able to specify exactly how the accident happened would do less than justice to his case. The real question on the facts of this case is whether the appellant was required to submit himself to any unreasonable risk.

This was a question of fact to be determined in the light of all the circumstances. Essentially its resolution involved an appreciation of the risk involved and investigation whether that risk might have been obviated or diminished by the employment of some other means of raising the bucket to the roof of the engine house. The degree of risk which was involved depended upon a number of factors but it is not ascertainable merely by saying that hot bitumen is a potentially dangerous substance. That is, of course, beyond doubt and this is a material matter for consideration. But unless one is to subscribe to the bare proposition that the handling of potentially dangerous substances by an employee is an operation which exposes him to an unnecessary or unreasonable risk—and this is not suggested—it is necessary to look further. The question is whether, bearing in

mind the vice of the commodity, the method of handling does, in all the circumstances, expose the employee to such a risk.

For the appellant it was said first of all that the method employed should not have been used. The operation, conducted as it was, exposed the appellant, it was contended, to an unreasonable and unnecessary risk. We do not understand this contention to depend upon the view that the lifting of the bucket in the manner described was so hazardous that the risk involved was unreasonable but rather upon the suggestion that some other and safer method might have been employed or that safeguards of some kind might have been provided. The suggestion was made that the rope should, again, have been employed to haul the bucket to the roof of the engine house but this suggestion was rejected by the learned trial judge as not feasible in the circumstances. There were, it seemed to him, too many obstructions in the way. Moreover it is by no means beyond question that the adoption of this method would not have resulted in the creation of new dangers particularly to the person hauling the rope and seeking to keep the bucket far enough out from the wall to clear the overhang of the roof. The only other suggestion that was made was that the bucket should have been provided with a lid. But this would have carried the matter no further for the provision of a lid would, as the learned trial judge indicated, have introduced new risks and there is nothing to indicate that if a lid had been provided there would have been any greater margin of safety.

It is proper to observe that these suggestions were not based upon or supported by any evidence in the case ; they came from the bar table and, for acceptance, depended necessarily upon what view the learned trial judge, otherwise uninstructed, should form concerning both the suggestions made and the method actually employed. And if the learned trial judge was of the opinion that the latter method did not expose the appellant to any unreasonable risk there was not the slightest reason why he should have thought that some other suggested method should have been employed. As already appears his Honour did not think that the method employed did expose the appellant to any unnecessary risk. Whilst agreeing to the full with the submission made on behalf of the appellant that hot bitumen is a potentially dangerous substance we can see nothing in the circumstances of this case which should induce the court to differ from the finding of the learned trial judge. The plain fact of the matter is that the appellant was engaged in a task, the safe performance of which, whilst it called for the exercise of care, did not call for the exercise of any degree of skill. The appellant was a man of thirty years of age and six feet in height. The bucket

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which he was handling had been constructed from a four gallon drum and it contained three gallons, or slightly less, of bitumen. It was of course of considerable weight—approximately forty pounds—and the process of raising it from the roof of the shed by grasping the lower parts of the handle on either side was not calculated to make it feel any lighter. But no complaint is made that it was too heavy to handle safely in this manner. Indeed it was the third occasion on which the bucket had been handled in this fashion and, according to the evidence, it was the appellant who had ladled the bitumen into it on this occasion. If three gallons were too heavy the remedy was a simple one—something less than that quantity could, and, probably, would have been ladled into the bucket. But the evidence does not suggest that the raising of the bucket in the manner indicated so that Wyczecki might take it was not well within the capacity of an ordinary workman; nor does it appear that the performance of the task required the appellant to raise his hands to any unduly high level. Of course if the task had called for constant repetition unremitting care over long periods would have been necessary and in those circumstances an employer might reasonably be required to devise a method which would guard against casual, though, no doubt, inevitable inadvertence or carelessness. But this was not the case. Only a few buckets—estimated at about a half a dozen—were required to complete the repairs to the engine house roof and there was no reason to think that the operation might not have been completed with the requisite amount of care. Moreover it was not suggested that experience showed that the method which was employed was unsafe; on the contrary it appears to have been used safely in like circumstances for a number of years. In these circumstances it cannot be said that the appellant's injuries resulted from any breach of duty as alleged; still less can it be said that the finding of the learned trial judge on this point in favour of the respondent should be disturbed.

FULLAGAR J. In this case I have had the advantage of reading the joint judgment of the Chief Justice and of *Kitto* J. I agree entirely with it, and there are only one or two observations that I desire to make.

The learned trial judge, who considered the case with great care and witnessed a demonstration, said that he was unable to find precisely on the evidence how the accident did occur. But no reason is suggested for doubting the credibility of the plaintiff. We have a photograph showing the marks made on the wall by the bitumen. And we have the medical evidence, which shows that the burns suffered by the plaintiff involved his left eye and ear, the

left side of his face, both hands and both forearms. While it may be difficult to reconstruct the accident in accurate detail, one may, I think, feel quite confident that it happened because the plaintiff was required to lift a bucket of molten bitumen, weighing about forty pounds, by its handle to a point where the top of it was level with, or above, his eyes. I would think it not improbable myself that he jarred the bucket against the projecting edge of the roof of the generator room. He may have lifted the bucket above the level of his eyes, and then simply lost his grip with one hand. But, however this may be, the substance to be handled seems to me to have been obviously dangerous in the sense that, if it came in contact with any part of the human body, it would cause serious and painful injury. And it seems to me equally obvious that the method of handling it—the method which the plaintiff was instructed by Wyczecki to employ—was dangerous in the sense that it involved a real risk of some such thing happening as did in fact happen. It follows that, if there was any other reasonably practicable " system of working ", which could be expected to occur to a reasonable person as involving less danger to the worker, that system ought to have been adopted.

It is, of course, easy to be wise after the event, and not so easy to be wise before it. But a very strict view has for many years been taken in England of the common law duty of an employer to provide a reasonably safe system of working. I think, indeed, myself that the courts have gone too far, and that there are reported decisions which it is impossible really to justify on the footing that the ultimate basis of liability in such cases is negligence. In the present case, however, there seems to me to have been an alternative method of handling the buckets, which would have involved very considerably less risk, and which might very readily have suggested itself to those responsible. I cannot see that any serious difficulty presented itself in the way of using a rope for the purpose of raising the buckets to the roof of the generator room. Mr. Griffith, a foreman employed by the defendant, said : " We use a rope wherever possible. That is because we are appreciative of the risk in handling this material."

He offered reasons for not using a rope in the particular case, and other reasons were suggested by counsel for the defendant. But none of these appears to me to carry any weight. One of them almost seems to imply that it was more important that a wall should not be splashed than that a workman should not be splashed. Mr. Griffith said that, if a rope were used, there would be danger to a man standing under a bucket. But why should a man go out of

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his way to stand under a bucket that was being raised by a rope? It was suggested that a bucket might sway in a wind and cause some person to be splashed who was some distance away. But it seems impossible that such a thing should happen while a bucket, weighing forty pounds is being hauled up a distance of six feet. *Wolff* J. observed that, whatever method were adopted, a stage would come when the bucket would have to be manhandled. That is true, but the whole point about the use of a rope is that it would have obviated the necessity of a man's raising the bucket with his hands to the level of his face.

The plaintiff said that, before he raised the bucket, he called out to Wyczecki, who was above: "Are you ready?", and that Wyczecki replied: "Yes". Wyczecki, however, did not immediately take the bucket. If this evidence were accepted, the case might be put on the basis of negligence by Wyczecki in the actual doing of the work. For such negligence, since the doctrine of common employment has been abolished by statute in Western Australia, the defendant would be vicariously liable. No such cause of action, however, was pleaded. The plaintiff has relied solely on a breach of the duty of an employer to provide a safe system of working. That duty, as has often been said, is a duty that rests on an employer personally, and, if a safe system is not provided, his liability—even though the actual fault be that of a servant or agent, as, of course, it must be, if the employer is a company—is for a breach of his own duty and not for a breach of duty of a servant or agent. But there is no liability unless there is negligence either on the part of the employer himself or on the part of a servant or agent. The employer's duty may perhaps be stated as a duty to ensure that all reasonable steps are taken to provide a safe system of working. I am of opinion that a breach of this duty was proved in the present case, and that the appeal should be allowed and judgment given for the plaintiff for damages to be assessed.

Appeal allowed with costs. Judgment of the Supreme Court of Western Australia discharged. In lieu thereof order that judgment in the action be entered for the plaintiff for damages to be assessed and costs. Remit the cause to the Supreme Court for the assessment of damages.

Solicitors for the appellant, *Boultbee, Godfrey & Virtue*, Perth, by *Aitken & Pluck*.

Solicitors for the respondent, *Dwyer, Durack & Dunphy*, Perth, by *Colreavy & O'Leary*.

R. A. H.