[HIGH COURT OF AUSTRALIA.]

MUMMERY . . . . . APPELLANT;
PLAINTIFF,

AND

IRVINGS PROPRIETARY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 31, *June* 5;

SYDNEY, *Aug.* 15.

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

Negligence—Invitee—Piece of wood thrown out by circular saw in factory—Statutory obligation on occupier to provide guards for "dangerous parts" of machinery—Whether obligation extends to guarding against dangerous materials ejected from machine in motion—Res ipsa loquitur—Application of principle—Whether onus on defendant of disproving negligence—Particulars of negligence—Function of—Extension of issues after evidence heard—Considerations governing—Factories and Shops Act 1928 (*No.* 3677) (*Vict.*), *s.* 59 (1).

The plaintiff entered the defendant's building to find the foreman so that he could place an order for timber. This was the usual procedure of conducting business as there was no office. The foreman was operating a power-driven circular saw; it appeared from the evidence that when the plaintiff was about fifteen feet away he was struck in the face by a flying piece of wood and suffered severe injuries. At the trial the plaintiff rested his case on these facts and invoked the doctrine of *res ipsa loquitur*. By his statement of claim the plaintiff had pleaded that the accident "was caused by reason and in consequence of the negligence of the defendant company and/or its servants or agents", and gave particulars of negligence in par. 5 as follows:—"(a) failing to take reasonable care to make the premises safe for the plaintiff (b) failing to have proper guards on a saw in order to prevent pieces of wood flying therefrom (c) carrying out sawing operations on the premises in such a position as to endanger persons lawfully on the said premises (d) failing to carry out sawing operations in an enclosed building". The plaintiff had also pleaded breach of duty imposed by the *Factories and Shops Act* 1928, sub-s. (1) of s. 59 of which provides that every occupier shall provide guards for, *inter alia*, "all dangerous parts of the machinery of the factory"; sub-s. (2) provides that contravention of sub-s. (1) constitutes an offence and that a

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fine shall be imposed for such offence. The trial was conducted on the basis that the first claim was confined to an allegation that the defendant had, as the occupier of the premises, failed in the discharge of its duty to the plaintiff as an invitee. After the judge had charged the jury the plaintiff applied for a direction to the jury in terms that would leave it open to them to return a verdict on the ground generally of negligence by the defendant or its servants. The application was refused. The defendant then applied for a further direction to the jury that their consideration was confined to the particular liability owed by an occupier to an invitee. The judge acceded to this application.

Held: (1) by *Dixon* C.J., *Webb*, *Fullagar* and *Taylor* JJ., *McTiernan* J. expressing no opinion, that the obligation imposed by s. 59 (1) is to provide guards for " dangerous parts " of the machinery and not to provide guards against dangerous materials or articles ejected from a machine in motion.

Nicholls v. *F. Austin (Leyton) Ltd.* (1946) A.C. 493, considered.

Quaere whether breach of the obligations imposed by the section resulting in personal injury to an invitee gives rise to a cause of action.

(2) by *Dixon* C.J., *Webb*, *Fullagar* and *Taylor* JJ., *McTiernan* J. dissenting. The plaintiff's application went beyond the pleadings as they stood, and par. 5 could not be regarded as a wide enough claim since the function of particulars is to limit the issue of fact to be investigated. Although there had been no application to amend the pleadings, the plaintiff's application should be treated on that basis. There was, however, no point in amending the pleadings unless there had been given evidence which would support the claim as amended. But as the foundation of the duty owed by an occupier to an invitee is different from that where the servant causes injury by a casual act of negligence, for the trial judge to have allowed the application there would need to have been evidence from which the jury might have concluded that the foreman was negligent. If there was no other evidence directed to showing negligence on his part the only ground on which the jury could have inferred such negligence was if the plaintiff was justified in invoking the doctrine of *res ipsa loquitur*. The rule itself is merely descriptive of a method by which, in appropriate cases, a prima-facie case of negligence may be made out and, as in all such cases, the defendant is not called on to prove affirmatively that he was not negligent. If the defendant's evidence, being acceptable, tends to show how the accident was caused the operation of the principle ceases, and so also if the plaintiff instead of relying on mere proof of occurrence himself adduces evidence of the cause of the accident. It then becomes a question whether, upon that evidence, the defendant was negligent or not and the defendant will succeed unless the jury is satisfied that he was. Since, then, the evidence tended to show that the wood was thrown by the saw, the doctrine did not apply on the pleadings as they stood; and in view of the fact that there was no evidence either as to the characteristics of saws, or as to the unusuality of the occurrence, or even as to the size of the piece of wood, it was difficult if not impossible

to find that the accident was due to some act of negligence on the part of the foreman: from the answers given the jury may have thought the danger obvious, but there was no ground for thinking they considered it unusual. Thus the doctrine was not applicable either on the pleadings as notionally amended, and as there was no evidence capable of supporting the allegation that the plaintiff's injuries resulted from negligence on the part of the defendant's foreman, the trial judge acted correctly in refusing the plaintiff's application, and granting the defendant's.

Observations of *Rich* J. and of *Dixon* J. in *Fitzpatrick* v. *Walter E. Cooper Ltd.* (1935) 54 C.L.R. 200, affirmed; *Woods* v. *Duncan* (1946) A.C. 401 and *Barkway* v. *South Wales Transport Co. Ltd.* (1950) A.C. 185; (1950) 1 All E.R. 392; (1950) W.N. 95, considered.

Doonan v. *Beacham* (1953) 87 C.L.R. 346, referred to.

Decision of the Supreme Court of Victoria (Full Court), affirmed.

APPEAL from the Supreme Court of Victoria.

On 11th August 1955 William Mummery commenced an action in the Supreme Court of Victoria against Irvings Pty. Ltd., a company incorporated in the State of Victoria. The relevant portions of the statement of claim were as follows:

2. At all material times the defendant company was the occupier of premises at Reid Street, Wangaratta.

3. The defendant company carried out the operation of sawing and cutting up wood on the said premises.

4. On 15th February 1954 the plaintiff lawfully entered the said premises of the defendant company for the purpose of purchasing some timber and was struck in the eye by a piece of wood.

5. The accident referred to in par. 4 hereof was caused by reason and in consequence of the negligence of the defendant company and/or its servants or agents. Particulars of negligence: (a) Failing to take reasonable care to make premises safe for the plaintiff. (b) Failing to have proper guards on a saw in order to prevent pieces of wood flying therefrom. (c) Carrying out sawing operations on the said premises in such a position as to endanger persons lawfully on the said premises. (d) Failing to carry out sawing operations in an enclosed building.

6. Further or in the alternative the said premises were a factory within the meaning of the *Factories and Shops Act* (Vict.) and the said saw was a dangerous machine and/or that part of the factory in which the said saw was located was a dangerous part of the factory within the meaning of the said Act.

7. By reason of the provisions of the said Act the defendant company owed the plaintiff a duty to provide adequate guards to

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the said machine and/or dangerous part of the factory so as to prevent as far as possible bodily injury to the plaintiff.

8. In breach of such duty the defendant company failed to provide any adequate guards.

9. By reason of the negligence and/or breach of the respective duty aforesaid the plaintiff suffered severe injury and loss. [Then followed particulars of such injury and loss.]

Save for the allegations contained in par. 1 of the statement of claim the defendant by its defence, dated 30th March 1955, did not admit any of the allegations in the statement of claim.

The action was heard before *Sholl* J. and a jury which, by its verdict, awarded the plaintiff the sum of £2,500 damages. On 12th August 1955 *Sholl* J. ordered that notwithstanding the verdict of the jury, judgment be entered for the defendant.

From this decision the plaintiff appealed to a Full Court of the Supreme Court of Victoria constituted by *Lowe*, *Gavan Duffy* and *Dean* JJ. On 16th December 1955 that court, by a majority, *Lowe* J. dissenting, ordered the appeal be dismissed.

From this decision the plaintiff appealed to the High Court of Australia. The arguments of counsel sufficiently appear in the judgments hereunder.

J. X. O'Driscoll Q.C. and *B. K. C. Thomson*, for the appellant.

P. D. Phillips Q.C. and *B. L. Murray*, for the respondent.

Cur. adv. vult.

Aug. 15.

The following written judgments were delivered :—

DIXON C.J., WEBB, FULLAGAR AND TAYLOR JJ. The respondent to this appeal is the proprietor of a business at Wangaratta in the course of which it sells timber to the public. The business is carried on in a large iron shed with a frontage to a public street. At the front end of the building there are two sets of double doors which provide access for those members of the public who desire to do business with the respondent. Inside the shed itself there were, at the relevant time, stacks of timber and various woodworking machines including a power-driven circular saw.

On 15th February 1954 the appellant came to the respondent's premises for the purpose of purchasing supplies of timber. He had been there previously for the same purpose and had conducted his business with one, Howden, who was said to be the respondent's foreman. On the previous occasions he had entered the shed and

made arrangements there for his various purchases. No particular provision was made for the accommodation of customers; there was no office and no part of the building was set apart for their reception or accommodation. Therefore, on the day in question the appellant entered the building through one of the doorways referred to and, having observed Howden working at the circular saw some little distance away, he moved towards him. This is the last the appellant remembers of the events of this visit for he was immediately struck on the face by a flying piece of wood and suffered severe injuries. The fact that he was so struck was established by interrogatories and the other evidence obtained in this fashion indicates that the piece of wood came from the circular saw. The appellant thinks that he was about twelve or fourteen yards from the saw when he was struck but the respondent's answer to an appropriate interrogatory suggests that he was somewhat closer and places the distance at approximately fifteen feet. There is no evidence concerning the size of the piece of wood which struck the appellant nor is there any evidence concerning the size or other characteristics of the saw itself. In particular there is no evidence whether the ejection of a piece of wood of sufficient magnitude and with sufficient violence to cause the appellant's injuries was a usual occurrence in the use of such a saw or, indeed, whether it was an occurrence which might reasonably have been foreseen. Nevertheless, one may feel much sympathy with the argument that if such an occurrence was usual or could reasonably have been foreseen it constituted a danger against which the respondent's customers might well have expected some protection, or, alternatively that if it was such an occurrence as " in the ordinary course of things does not happen if those who have the management use proper care " (*Scott* v. *London & St. Katherine Docks Co.* (1)), the evidence in the case constituted sufficient prima facie evidence of negligence on the part of the respondent's foreman.

The substantial difficulties in the case, however, arise both from the form in which the action was brought, the paucity of the evidence and the manner in which the trial was conducted. The statement of claim alleged that the respondent was the occupier of the premises in question, that the operations already briefly described were conducted on the premises, that on the day in question the appellant entered the premises for the purpose of purchasing timber and was struck in the eye by a piece of wood and, by par. 5, that " the accident referred to . . . was caused by reason and in consequence of the negligence of the defendant company

(1) (1865) 3 H. & C. 596 [159 E.R. 665].

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and/or its servants and agents". Particulars of the negligence alleged were appended to par. 5 and these are as follows:—"(a) Failing to take reasonable care to make premises safe for the plaintiff. (b) Failing to have proper guards on a saw in order to prevent pieces of wood flying therefrom. (c) Carrying out sawing operations on the said premises in such a position as to endanger persons lawfully on the said premises. (d) Failing to carry out sawing operations in an enclosed building." Thereafter the statement of claim went on to allege, alternatively, that the respondent's premises "were a factory within the meaning of the *Factories and Shops Act* of the State of Victoria and the said saw was a dangerous machine and/or that part of the factory in which the said saw was located was a dangerous part of the factory within the meaning of the said Act." It was thereupon alleged that the respondent had omitted "to provide adequate guards to the said machine and/or dangerous part of the factory so as to prevent as far as possible bodily injury to the plaintiff."

The action was tried before a jury and at the conclusion of his charge the learned trial judge submitted a number of questions to them but it is necessary to refer to two of these only. They were as follows: "(a) Did the accident occur by reason wholly or partly of the failure of the defendant company or any of its servants or agents whose duty it was as such servants or agents to do so, to use reasonable care to prevent damage to the plaintiff from unusual danger which such servants or agents knew or ought to have known? (b) Did the accident occur by reason wholly or partly of the failure of the defendant company or any of its servants or agents whose duty it was as such servants or agents to do so, to comply with the provisions of s. 59 of the *Factories and Shops Act* 1928 as to the guarding of dangerous machinery or the guarding of a dangerous part of the factory?" The first of these questions was answered by the jury in the negative and the second in the affirmative and they assessed damages at £2,500. Subsequently, after argument, the learned trial judge directed that judgment should be entered for the defendant. An appeal to the Full Court of the Supreme Court from this order was unsuccessful and this appeal is brought from the order of that court.

After the jury had returned their answers to the questions submitted to them one matter only remained for the consideration of the trial judge. This was whether there was any evidence to support the jury's affirmative answer to the second question above set out and it is convenient to deal with this matter before proceeding to the other difficulties in the case. Section 59 of the *Factories and*

Shops Act 1928 is as follows : " 59. (1) Every occupier of a factory shall provide guards for—(*a*) all dangerous parts of the machinery of the factory ; (*b*) all dangerous appliances used in or in connexion with the factory ; and (*c*) all dangerous parts of the factory, so as to prevent as far as possible loss of life or bodily injury, and shall keep all guards constantly maintained in an efficient state and properly adjusted.

(2) Every person who contravenes any of the provisions of this section shall be guilty of an offence against this Act and shall be liable to a penalty of not less than Five nor more than One hundred pounds."

The expression " guard " in this section is the subject of definition by s. 61 (2) of the Act which provides that in the construction of s. 59 the word " guard " shall be deemed to extend to and include a fence. It will be seen that the appellant's statement of claim intended to allege breaches of pars. (*a*) and (*c*) of sub-s. (1) of s. 59, though it should be observed that it was alleged that the circular saw was a dangerous machine and that the respondent had failed in its statutory duty of providing an adequate guard to the said machine, whereas the obligation created by sub-s. (1) is to provide guards for " all *dangerous parts* of the machinery of the factory ". The distinction, as will appear, is not without considerable significance. It is a distinction to which, however, little, if any, attention appears to have been paid at the trial but this is of little moment if, as the learned trial judge thought, there was no evidence to establish either that the machine was dangerous or that it was without a proper or sufficient guard. On the first point the learned trial judge, in his reasons for directing that judgment should be entered for the defendant, said : " If a piece of wood came from a machine which ordinarily was not liable to throw out pieces of wood in that fashion, is that enough to make the machine for the purposes of s. 59 a dangerous machine or any part of it a dangerous part ? Is it enough to make the machine a dangerous appliance, or is it enough to make the part of the factory where the plaintiff was struck a dangerous part of the factory within the meaning of the section ? I think not. I think that unless the jury was entitled to conclude on the evidence that the projection of such portions of injurious material was characteristic of the operation of the circular saw . . . there was not sufficient to enable them to conclude that there was any portion of machinery, any dangerous appliance, or any dangerous part of the factory to which the accident would be attributed within the meaning of s. 59." And on the second point he said : " In my opinion, it is not possible here for a reasonable jury to say

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on the balance of probabilities that it has been established that no guard at all was provided or maintained, or that none was provided or maintained to the extent necessary under the section. Plaintiff has not, I think, on the probabilities excluded the alternative view that the accident occurred notwithstanding the provision and maintenance of some guards such as were necessary to prevent so far as possible loss of life or bodily injury ".

We agree that the evidence was deficient in these respects and this would be sufficient to deny the appellant a new trial on this issue but there is another reason why this result should follow. As already mentioned s. 59 (1) (*a*) makes provision for the guarding of " all dangerous parts of the machinery of the factory ". The language of the section is not dissimilar from that which was under consideration in *Nicholls* v. *F. Austin (Leyton), Ltd.* (1) where Lord *Thankerton* said : " My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section. This view appears to be amply confirmed by the language used. In the first place, sub-s. (1) is dealing with fencing of dangerous parts of any machine, and not with dangerous machines, whereas the dangerous materials or articles do not necessarily emanate from a dangerous part of a machine " (2). On the same point Lord *MacMillan* said : " The circular saw was admittedly a dangerous part of the woodworking machine which the appellant was operating. It was therefore the duty of the respondents securely to fence it. They observed and indeed more than observed all the requirements of the *Woodworking Machinery Regulations* 1922, under the Act for the fencing of circular saws. But the fencing did not prevent a fragment of wood flying off while the saw was working. Was it the statutory duty of the respondents so to fence the saw as to prevent this possibility ? In my opinion the statute imposes no such duty. 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, and this obligation was in the present instance

(1) (1946) A.C. 493.

(2) (1946) A.C., at pp. 499, 500.

amply fulfilled " (1). The view of Lord *Simonds* was expressed in the following passage: " The first question is, I think, correctly stated in the appellant's case in these words: ' Whether the words " every dangerous part " referred to in s. 14 of the *Factories Act* 1937, refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury so that such parts only are required to be fenced by the said section, or whether the said words " every dangerous part " include parts which are indirectly dangerous in that they are liable to throw out material with such force that the material is liable to cause injury to the worker so that such parts also are required to be fenced by the said section.' My Lords, I have no doubt that this question should be answered by saying that the words ' every dangerous part ' in their context refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury " (2). Lord *Uthwatt* subscribed to the same view. He said: " The contention of the appellant is that the phrase ' every dangerous part ', in respect of which the obligation to fence is imposed by sub-s. (1) of s. 14, includes parts which are indirectly dangerous in that they are liable to throw out material with such force as to be liable to cause injury to the worker. Acceptance of this contention involves the view—indeed it is the substance of the contention—that the obligation imposed by the sub-section is to fence the machine, viewed as a single operating unit, so as to avoid the possibility of danger arising to the worker from its operation. My Lords, in my opinion the sub-section, whether it be read alone or be read in connexion with the other provisions of the Act relating to machinery, negatives the contention. The lines on which the Act—so far as relevant here—proceeds is, not to take into account any machinery as a whole, but to require the several parts of the machinery to be considered separately in light of their construction, position or dangerous nature " (3). In a later case—*Carroll* v. *Andrew Barclay & Sons Ltd.* (4)—Lord *du Parcq* doubted the accuracy of Lord *Simonds*' observations in *Nicholls' Case* (5), though he was completely silent concerning the other observations quoted from that case. However, none of the other noble and learned Lords who took part in the decision in *Carroll's Case* (6), threw any doubt upon the observations made in the earlier case.

It is true that the English legislation under consideration in *Nicholls' Case* (7) contained additional provisions which are not to be found in the *Factories and Shops Act* (Vict.) and which were regarded

(1) (1946) A.C., at p. 501.
(2) (1946) A.C., at p. 504.
(3) (1946) A.C., at p. 506.
(4) (1948) A.C. 477, at p. 487.
(5) (1946) A.C., at p. 505.
(6) (1948) A.C. 477.
(7) (1946) A.C. 493.

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as confirmatory of the view taken concerning the construction of the particular statutory requirement relied upon by the appellant in that case, but the absence of such provisions from the local enactment furnishes no ground for departing from the plain sense of s. 59. Upon this view the evidence relied upon at the trial by the appellant was wholly inapt to impose liability on the respondent for any breach of the duties created by the section. Accordingly this branch of the appeal must fail. But there is one other observation which should be made before finally disposing of this aspect of the case. The learned trial judge, in directing that judgment should be entered for the respondent, formed the opinion that a breach of the obligations imposed by s. 59 resulting in personal injury would give rise to a claim for damages at the suit of the injured person whether he was an employee of the occupier or, merely, upon the premises at the invitation of the occupier. No argument upon this point was addressed to us on the hearing of the appeal and we desire to reserve our opinion upon it.

The next question which calls for consideration is concerned with the manner in which the trial was conducted. From the moment the trial began until the learned trial judge had delivered his charge to the jury it was assumed both by the parties and the learned judge himself that the first claim made by the statement of claim was based upon, and confined to, the allegation that the respondent had, as the occupier of the premises in question, failed in the discharge of its duty to the appellant as an invitee present on the premises. It was upon this basis that the trial was conducted throughout and it was this circumstance, no doubt, which led counsel for the respondent, when addressing the jury after the conclusion of the evidence, to adopt a course which, after later developments, induced counsel for the appellant to ask the trial judge to amend the first question submitted to the jury. Upon the pleadings as they stood it was assumed that it was incumbent upon the appellant on this branch of the case to establish that the operation of the circular saw created an unusual danger on the premises and it was contended on his behalf that the fact that the piece of wood was violently ejected from the saw was sufficient to enable the jury to infer that this was so. This view was, of course, contested by counsel for the respondent who invited the jury to reject it. But he went further and suggested other possible causes of the mishap. The ejection of the piece of wood, he said, might have been the result of an accidental circumstance or, on the other hand, it might have been caused by some casual act of negligence on the part of the foreman. The happening was, it was suggested, consistent with

either possibility and accordingly the jury should find for the respondent. This contention involved the suggestion to the jury that if they were unable to say whether or not the mishap had been caused by some casual act of negligence on the part of the foreman—and, indeed, even if they came to the conclusion that it had been—they should answer the first question favourably to the respondent. Nevertheless, counsel for the appellant did not at this stage seek to amend his claim though he did at a later stage argue that the statement of claim as it stood was wide enough to include a claim in respect of some casual act of negligence on the part of the foreman. In charging the jury the learned trial judge might have been thought to have invited the jury to consider the question of the respondent's liability on the wider basis and this resulted in two applications being made to him when he had concluded his observations. The first, made by counsel for the appellant, was that " in view of the theories put to the jury by " counsel for the respondent and the directions given to the jury by his Honour the first question above set out should be amended by adding the words " or through the negligence of the defendant, its servants and agents ". This application was rejected on the ground that no such additional claim had ever been made. Thereupon counsel for the respondent asked his Honour to redirect the jury and make it quite clear to them that the appellant's claim could succeed only if, upon the evidence, they were satisfied that the appellant's injuries had resulted from a failure on the part of the respondent, as the occupier of the premises, to discharge its duty to the appellant as an invitee present thereon. Such a claim could not, it was said, be supported by evidence of some casual act of negligence on the part of a servant of the respondent. Ultimately his Honour acceded to this application and, in redirecting the jury, so confined this issue. Naturally enough he found it necessary to instruct the jury further on the subject of " unusual dangers ". It was in these circumstances that the jury considered and answered the first question and, as we understand the argument, it is now contended that there should have been no redirection or, in substance, that the amendment sought should have been made. These arguments assume, of course, that there was evidence before the jury from which they might have concluded that the foreman had been negligent in operating the circular saw for, unless there was, the refusal on the part of the learned trial judge to amend the first question and the nature of his redirection to the jury were of no consequence.

Assuming for the moment that there was such evidence it is material, first of all, to ascertain precisely the nature of the cause of

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action sued upon. It may, perhaps, be said that the statement of claim is inartistic and that the general allegation made by par. 5 was wide enough to embrace a failure to discharge any duty towards the appellant to observe a standard of care which the circumstances imposed upon the respondent. Indeed, it was suggested during argument that where a person has sustained injuries as the result of what may, for this purpose, be called negligence, he cannot have more than one right of action and that upon this view the general allegation in par. 5 covered the full measure of the plaintiff's claim to relief. But in spite of what was said during argument the duty which the occupier of premises, as such, owes to invitees present on the premises is a separate and distinct duty from that which is involved when the servant of such an occupier causes injury to some person present on the premises by some casual act of negligence. The first duty is founded on the occupation of premises whilst the latter is not; in the first case the occupier, except perhaps in some special circumstances, is alone liable whilst in the second the master and servant are joint tortfeasors.

If par. 5 of the statement of claim should be regarded as a compendious claim based on a breach of both of these duties the matter should have been left to the jury in a wider form for the particulars given under this paragraph could not have operated to circumscribe the causes of action sued upon. This is not the function of particulars; their function is to limit the issues of fact to be investigated and in doing this they do not modify or alter the cause of action sued upon. In an action conveniently described as a negligence action the particular duty, a breach of which is relied upon to establish negligence on the part of the defendant, may be alleged to have been transgressed in a variety of ways and if the plaintiff particularises the transgression or transgressions relied upon the defendant may, subject to the discretion of the court, hold him to the issue or issues of fact so raised. But the action is still for a breach of the duty specified and the defendant will not defeat the plaintiff's claim either by establishing that the plaintiff's injuries resulted from or were consistent with some other breach of the same duty. If the facts, as proved in the case, lead to the conclusion that the injuries resulted either from one or the other the plaintiff will succeed. This view is implicit in the decision in *Doonan* v. *Beacham* (1) and one illustration is perhaps sufficient to show the absurdity of the contrary view. Let it be assumed that a plaintiff has sued a defendant for the recovery of damages resulting from the negligence of the defendant in the control and management of a motor vehicle

(1) (1953) 87 C.L.R. 346.

on a public street and that the particular breach alleged in particulars is that the brakes of the vehicle were defective. Is it an answer to the claim if the defendant, in addition to denying that the brakes were defective, seeks to explain the mishap by asserting that he was so much under the influence of alcohol that he could not use them effectively ? Or could he escape liability by seeking to explain the accident by establishing that it really happened as a result of the inefficiency of the steering system ?

The position is, of course, different where personal injury has been caused in circumstances which give rise to doubts whether the injured person should pursue one cause of action or another. In such circumstances it would be unusual to find that the plaintiff had not based his claim for damages alternatively upon both causes of action. But if he has not his action must fail if upon the trial it appears that he has chosen to pursue, and to persist in pursuing, the wrong one.

In the present case there may, perhaps, be some doubt upon the pleadings whether the appellant, on this branch of the case, relied solely upon the alleged breaches of the duty imposed upon the respondent as the occupier of the premises in question but, on the whole, we are forced to the conclusion that he did. Apart from the particulars appended to par. 5 the statement of claim does not allege the breach of any duty on the part of the respondent and it is only by reference to the particulars in par. 5 that a cause of action is disclosed. When they are considered it is seen that the duty alleged to have been transgressed was the duty of the respondent, as the occupier of premises, to the appellant, as an invitee present thereon. Moreover, it was upon this basis that the trial was conducted throughout. Accordingly, in the absence of any amendment, the learned trial judge was bound to confine the deliberations of the jury on this aspect of the case to the question whether the respondent had failed in that duty. Further, so far as we can see, no application for leave to amend the pleadings was ever made to the learned trial judge though, no doubt, his refusal to amend the relevant question may well have been a sufficient intimation that such an application would, at that stage, have been rejected.

In all the circumstances of the case we think it proper to deal with this appeal as if an application to amend the pleadings had been made and rejected and to inquire whether such a rejection would have constituted a proper exercise of the learned trial judge's discretion. Upon such an application being made it would have been open to the appellant to submit with some force that the interest of justice required the issue of the respondent's vicarious liability

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for some casual act of negligence on the part of the foreman to be submitted to the jury. Indeed the observations made to the jury by the respondent's counsel might well have been regarded as more than sufficient provocation for such an application. No doubt the respondent might have urged in answer that the parties were engaged in a jury trial, that the manner in which the trial had been conducted had led him to refrain from calling evidence, that both counsel had addressed the jury and the trial judge had delivered his charge. But in answer to all of these considerations the appellant was in a position to say that the additional issue had been thrown into the ring by the respondent itself and that, having adopted this course, it was in no position to resist an application to re-open the case and make the question of the foreman's negligence a real issue. Why, it might have been asked, should the jury be invited to conclude that the appellant's injuries were caused by the negligence of the foreman and, thereupon, to find for the respondent when that very circumstance would, if the pleadings were in proper form, constitute a ground for awarding damages to the appellant? There is, of course, no doubt that the question of extending the issues at the trial was peculiarly within the discretion of the trial judge. But, on the assumption that there was some evidence upon which the jury could have reached a conclusion on this additional issue, there was every reason why it should have been submitted to the jury. If, as the members of the Full Court appear to have thought, the present judgment precludes the appellant from bringing any further action that was an additional reason why that course should have been adopted. We find it unnecessary to express any view upon that question but our doubts on this point do not lessen our belief that, if there was evidence upon this additional issue, a refusal to extend the issues was not, in the circumstances, justifiable.

But these observations are made on the assumption that there was evidence from which the jury might have inferred negligence on the part of the respondent's foreman. Whether or not this assumption is justified depends upon whether the appellant was entitled to invoke the assistance of the doctrine or principle of *res ipsa loquitur*. This is of vital importance, for, if he was not, the course taken by the learned trial judge is quite immaterial in the disposition of this appeal.

In the Supreme Court *Lowe* J. expressed the opinion that the facts were "almost a classic example of the operation of the principle" whilst *Dean* J. was unable to see how it could be applied on the facts proved. A sharp division of opinion on questions of this character has not been unusual and, in attempting to arrive at the true solution

in this case, it is not out of place to examine briefly the basis upon which the principle rests. It has been said that "the doctrine seems to date from about the middle of the nineteenth century and was definitely formulated in the cases of *Byrne* v. *Boadle* (1) and *Scott* v. *London & St. Katherine Docks Co.* (2) decided in 1863 and 1865 respectively" (3). Reference to the argument in the former case shows that earlier cases were not unknown in which, according to *Pollock* C.B., it might have been said *res ipsa loquitur*. But we have no doubt that, in the decision of *Byrne* v. *Boadle* (1), the members of the court were not conscious of formulating, and did not intend to formulate, any new doctrine or principle of law. The facts of that case are so well known that it is unnecessary to repeat them beyond stating that the question was whether proof of the fact that a barrel had fallen from the defendant's warehouse and injured the plaintiff constituted evidence from which negligence on the part of the defendant might properly be inferred. The argument of the defendant stressed the point that it was not possible to infer negligence from the mere proof of an accident; the happening, it was said, was quite consistent with the exercise by the defendant and his servants of reasonable care. In dealing with this submission *Pollock* C.B. said: "The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence" (4). *Channell* B. said: "I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think there was evidence for the jury" (5). With these observations *Bramwell* B. and *Pigott* B. agreed. Counsel for the plaintiff in that case was not called upon to argue, their Lordships apparently considering that the case was too clear for words. At this late stage we respectfully voice our agreement with

(1) (1863) 2 H. & C. 722 [159 E.R. 299].
(2) (1865) 3 H. & C. 596 [159 E.R. 665].
(3) (1950) 24 A.L.J. 194.
(4) (1863) 2 H. & C., at pp. 727, 728 [159 E.R., at p. 301].
(5) (1863) 2 H. & C., at p. 729 [159 E.R., at p. 301].

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their conclusions. Two years later in *Scott* v. *London & St. Katherine Docks Co.* (1) the Exchequer Chamber was faced with a case in which the facts were much the same as those of the earlier case. The only distinguishing feature was that the plaintiff's injuries had been caused, not on a public highway, but in a privately owned dockyard. This circumstance was of no consequence, and, whilst their Lordships recognised the authority of cases to the effect that a mere scintilla of evidence is not enough to justify an inference of negligence, they affirmed the rule of the Court of Exchequer setting aside the verdict initially directed for the defendant and ordering a new trial. Their Lordships' reasons were brief and may be set out in full: "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. We all assent to the principles laid down in the cases cited for the defendants; but the judgment turns on the construction to be put on the Judge's notes. As my brother Mellor and myself read them we cannot find that reasonable evidence of negligence which has been apparent to the rest of the Court. The judgment of the Court below must be affirmed, and the case must go down to a new trial, when the effect of the evidence will in all probability be more correctly ascertained" (2). Since this decision the second paragraph above-quoted has been consistently accepted as a classical statement in general terms of the circumstances which will call the doctrine of *res ipsa loquitur* into operation. But quite clearly the statement was not intended as the formulation of some new principle of law; its significance was as a general index to those special cases in which mere proof of an occurrence causing injury itself constitutes prima facie evidence of negligence. Nor was it stated as a rule the operation of which is designed to shift the onus of proof to the defendant in the sense that, once invoked, the onus lies upon the defendant to prove the absence of negligence.

The statement of the Court of Exchequer Chamber has been relied upon in a great variety of cases. It has been used in a multitude of cases to justify, or to attempt to justify, the assertion that proof of injury resulting from a falling object constitutes evidence of negligence (cf. *Briggs* v. *Oliver* (3); *Kearney* v. *London, Brighton &*

(1) (1865) 3 H. & C. 596 [159 E.R. 665].

(2) (1863) 3 H. & C., at p. 661 [159 E.R., at p. 667].

(3) (1866) 4 H. & C. 403.

South Coast Railway Co. (1); *Welfare* v. *London & Brighton Railway Co.* (2) and *Pope* v. *St. Helen's Theatre Ltd.* (3)). It has been used in cases where a plaintiff has been injured as the result of a collision between two trains on the defendant's railway line (*Skinner* v. *London, Brighton & South Coast Railway Co.* (4) and where the defendant's train struck part of the railway installation (*Burke* v. *Manchester, Sheffield & Lincolnshire Railway Co.* (5)). It has been used in some types of highway cases, for instance, where a vehicle has mounted a footpath and injured a pedestrian (*Ellor* v. *Selfridge & Co. Ltd.* (6)), or struck some obstacle on the footpath (*Barnes Urban District Council* v. *London General Omnibus Co.* (7)), and in cases where foreign substances have been found in prepared foodstuffs (*Chaproniere* v. *Mason* (8)). It would be a tedious task to attempt to traverse the whole field of cases in which the statement has been relied upon but consideration of the wide field of authority leaves no room for doubt that, once the cause of an accident has been established and the relevant circumstances proved, there is no further room for the operation of the principle. As Lord *Porter* said in *Barkway* v. *South Wales Transport Co. Ltd.* (9): "The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not" (10). In the same case Lord *Normand* said: "The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maxim *res ipsa loquitur* is of little moment" (11). With these views Lord *Morton* agreed and Lord *Radcliffe* added: "I do not think that the appellant was entitled to judgment in the action because of any special virtue in the maxim *res ipsa loquitur*. I find nothing more in that maxim than a rule of evidence, of which the essence is that

(1) (1871) L.R. 6 Q.B. 759.
(2) (1869) L.R. 4 Q.B. 693.
(3) (1947) K.B. 30.
(4) (1850) 5 Ex. 787 [155 E.R. 345].
(5) (1870) 22 L.T. 442.
(6) (1930) 46 T.L.R. 236.
(7) (1908) 100 L.T. 115.
(8) (1905) 21 T.L.R. 633.
(9) (1950) 1 All E.R. 392; (1950) A.C. 185; (1950) W.N. 95.
(10) (1950) 1 All E.R., at pp. 394, 395.
(11) (1950) 1 All E.R., at p. 399.

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an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence. In this action much more is known than the bare fact that the omnibus mounted the pavement and fell down the bank. The true question is not whether the appellant adduced some evidence of negligence, but whether on all the evidence she proved that the respondents had been guilty of negligence in a relevant particular" (1).

At this stage it is appropriate to return to the language used in *Scott* v. *London & St. Katherine Docks Co.* (2) and to observe that the vital condition for the operation of the principle is that "*the accident is such as in the ordinary course of things does not happen if those who have the management use proper care*". Indeed, to overlook or to exclude this requirement might well be thought to produce the result that mere proof of any occurrence causing injury will constitute sufficient proof of negligence in any case where an object which, physically, has caused injury to the plaintiff is under the control and management of the defendant and the actual cause is, therefore, not known to the plaintiff and is, or should be, known to the defendant. The requirement that the accident must be such as in the ordinary course of things does not happen if those who have the management use proper care is of vital importance and fully explains why in such cases *res ipsa loquitur*.

In many cases in which the principle, if it may be so called, has been applied the basis of its application is readily seen. It is not difficult to see why in cases such as *Byrne* v. *Boadle* (3) and *Scott* v. *London & St. Katherine Docks Co.* (2) the principle should be invoked. Neither barrels nor bags fall from warehouses in the usual course of events unless there has been carelessness on the part of those who have the management of them. Moreover it is not difficult to imagine acts of carelessness which could bring about such a result and much the same may be said concerning the other illustrations previously given. But what is the position in a case such as the present? In may be urged that the case is much the same as *Byrne* v. *Boadle* (3) and *Scott* v. *London & St. Katherine Docks Co.* (2) and with this we would agree emphatically if the evidence called for the appellant at the trial merely established that upon entering the respondent's premises he was violently struck by a piece of wood flying through the air. But the evidence goes further. It tends to establish—even if it does not clearly establish—

(1) (1950) 1 All E.R., at p. 403.
(2) (1865) 3 H. & C. 596 [159 E.R. 665].
(3) (1863) 2 H. & C. 722 [159 E.R. 299].

that the wood was thrown by the circular saw and in part this explains the physical cause of the accident. In these circumstances a court must ask itself, not whether negligence may be inferred from the mere fact that a piece of wood struck the appellant immediately after he had entered the respondent's premises, but whether it may be inferred from the fact that a piece of wood was thrown from the circular saw. In other words the question is whether the latter occurrence was such " as in the ordinary course of things does not happen if those who have the management use proper care ". To that inquiry in this case there cannot be an affirmative answer. We are told nothing of the characteristics of circular saws and we are not told that such an occurrence is usual or unusual or indeed highly improbable. Moreover we are told nothing concerning the size of the piece of wood in question and it is difficult, if not impossible, in these circumstances to attribute the accident to some act of negligence on the part of the operator. If the question is posed " Was the accident such as in the ordinary course of things does not happen if those who have the management use proper care ? " the answer, on the evidence in the case, must be " We simply do not know." One may but conjecture but cannot as a matter of inference attribute negligence to the respondent's foreman. As *Kennedy* L.J., speaking of the principle of *res ipsa loquitur*, said in *Russell* v. *London & S.W. Railway* (1): " The meaning, as I understand, of that phrase . . . is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody ; that is, some want of reasonable care under the circumstances. *Res ipsa loquitur* does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of " (2). Unfortunate as it may be for the appellant we are satisfied that there was no evidence capable of supporting the allegation that the appellant's injuries resulted from negligence on the part of the respondent's foreman.

(1) (1908) 24 T.L.R. 548.

(2) (1908) 24 T.L.R., at p. 551.

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We should add that upon the evidence submitted to them the jury appear to have taken the view that the operation of the machine created a state of danger on the premises and that, in one sense, the appellant's injuries resulted from this cause. In view of the directions given to them their answers to the two questions set out above would seem to indicate this. Their answer to the second question indicates that they considered that, in a relevant sense, the circular saw was a dangerous machine and that its operation created a state of danger on the premises. This conclusion would, of course, have carried the appellant part of the way to an affirmative answer to the first question and the only way in which the negative answer to this question may be explained is by concluding that they thought that the danger was obvious and not "unusual". It may be that the learned trial judge's charge on this point required some modification in view of the reasons of their Lordships in *London Graving Dock Co. Ltd.* v. *Horton* (1). Indeed if the evidence established that the operation of the saw created, in a relevant sense, a state of danger on the premises, there may be every reason for thinking that it was an *unusual* danger in spite of the fact that it may have been thought to be obvious. Further it may be that the respondent's duty to exercise reasonable care to protect the appellant from that danger was not, in the circumstances of the case, aborted by the appellant's knowledge of the obvious, or, such as might have been discharged by notice to the appellant of the existence of the danger. However, no objection on this score was taken to the directions given by the learned trial judge nor has any argument on the point been addressed to us and it is unnecessary to consider the matter further.

Before parting with the case we desire, in deference to the argument addressed to us and in view of the importance of the matter, to make a few brief observations concerning the onus of proof in cases where the principle of *res ipsa loquitur* is properly invoked. Much has been said on the question but, in our view, nothing has occurred to require us to reconsider the observations made on this point by *Rich* J. and by *Dixon* J. (as he then was) in *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (2). It was pressed upon us that the observations of some of their Lordships in *Woods* v. *Duncan* (3) and *Barkway* v. *South Wales Transport Co. Ltd.* (4) are inconsistent but, although some of the observations then made may, perhaps, be so understood we are satisfied that this is not their real import. In

(1) (1951) A.C. 737.
(2) (1935) 54 C.L.R. 200.
(3) (1946) A.C. 401.
(4) (1950) 1 All E.R. 392; (1950) A.C. 185; (1950) W.N. 95.

neither case was the point raised for decision; in one case there was evidence showing how the accident had been caused whilst, in the other, the relevant appellant had proved affirmatively that he had not been guilty of any negligence. In the earlier case the Court of Appeal had allowed an appeal against Lieutenant Woods and directed judgment against him. In reaching this conclusion the Master of the Rolls had relied both on the operation of the principle of *res ipsa loquitur* and upon inference from the whole of the evidence. He said: "Both on the principle of *res ipsa loquitur*, and, if this were not applicable, then because in my opinion an affirmative case is established, I feel constrained to hold that Lieut. Woods was guilty of negligence. He failed to give the proper order to Hambrook to put the lever in the closed position and relied in part on the evidence of the test-cock which he ought to have known was never intended to be relied on for such a purpose and was in any case wholly unreliable unless the rimer was used" (1). In dealing with these observations Lord *Russell of Killowen* said: "My Lords, assuming that the principle of *res ipsa loquitur* applies, and establishes that prima facie Lieutenant Woods must have been negligent, it is open to him to prove affirmatively (as in my opinion, he has) that he did throughout exercise reasonable care. The principle does not involve this—that, notwithstanding that affirmative proof, he must be held to have been negligent, unless he can solve the mystery and prove how the bow-cap came to be open at the critical moment" (2). The evidence of Lieutenant Woods at the trial did not account for the catastrophe; it left its real cause unexplained but it did establish, if believed, that he, personally, had not been guilty of any negligence. It was to deal with this situation that Lord *Russell's* observations were made and their remaining Lordships dealt with the same difficulty. Viscount *Simon* said: "The case against Lieutenant Woods has been put as an application of the principle known as *res ipsa loquitur*, since he was in charge of the forward compartment. Even so, that principle only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened" (3). Lord *Simonds* said: "I will add first a few words upon the question of the liability of Lieutenant Woods. I will assume against him, though I doubt whether the assumption is justified that this is a case in which the principle of *res ipsa loquitur* may be applied. But to apply this principle is to do no more than shift

(1) (1944) 171 L.T. 186, at p. 198.
(2) (1946) A.C., at p. 425.
(3) (1946) A.C., at p. 419.

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the burden of proof. A prima facie case is assumed to be made out which throws upon him the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened : it is sufficient if he satisfies the court that he personally was not negligent " (1).

It will be seen that what their Lordships were concerned with was the proposition whether credible evidence, which fell short of revealing the real cause of the catastrophe, would displace the operation of the principle of *res ipsa loquitur* and they held that it could. It is true that, in doing so, Viscount *Simon* and Lord *Simonds* expressed themselves in terms which were wide enough to suggest that once a prima facie case is made out by the operation of the principle of *res ipsa loquitur* the onus of disproving negligence is cast upon the defendant but, as far as we can see, no support is to be found for this proposition in the observations of the other noble and learned Lords who took part in the case. But although Viscount *Simon* spoke of the shifting of the onus of proof he did not say that the onus of disproving negligence rested upon the defendant ; he merely said " that the onus was *adequately* met by showing that he was not, in fact, negligent ". That is to say, as we understand it, that it was unnecessary for the defendant to explain the cause of the accident. Lord *Russell's* observations were directed to the same point and we are by no means sure that Lord *Simonds'* observations were, in the light of the special facts of that case, intended as a general statement of the operation of the principle.

Nor do the observations made in *Barkway* v. *South Wales Transport Co. Ltd.* (2) carry the matter further. No doubt when the principle of *res ipsa loquitur* is properly invoked the defendant is faced with a situation where he must elect whether the question of his liability will be determined upon the plaintiff's evidence alone or whether he will attempt to show that the accident happened without negligence on his part. This, of course, he may do only by calling evidence. If he is aware of the cause of the accident he may seek to avoid liability by proving the relevant facts ; if he is not, he may attempt, by evidence, to show that he was not negligent. But in either case the principle will continue to operate unless the facts are proved (cf. *O'Hara* v. *Central S.M.T. Co. Ltd.* (3) and *Turner* v. *Commissioner for Road Transport and Tramways* (4)). In this sense, and in this sense alone, the defendant may, perhaps,

(1) (1946) A.C., at p. 439.
(2) (1950) 1 All E.R. 392 ; (1950) A.C. 185 ; (1950) W.N. 95.
(3) (1941) S.C. 363.
(4) (1951) 51 S.R. (N.S.W.) 145 ; 68 W.N. 155.

be said, to carry an onus and, it may be, that this was the meaning intended by Viscount *Simon* and Lord *Simonds*. But if the defendant's evidence, being acceptable, shows how the accident was caused the operation of the principle ceases and it becomes a question whether, upon that evidence, the defendant was negligent or not and the defendant will succeed unless the jury is satisfied that he was. In cases such as *Woods* v. *Duncan* (1), where the defendant is unaware of the real cause of the accident, it will be for the jury to say whether, in the first place, his evidence is acceptable to them and, if so, whether notwithstanding that evidence they are satisfied that he was negligent. The contrary view would, it seems to us, create a state of affairs entirely anomalous and completely foreign to the grounds upon which the principal is based. The rule itself is merely descriptive of a method by which, in appropriate cases, a prima facie case of negligence may be made out and we can see no reason why a plaintiff, who is permitted to make out a prima facie case in such a way, should be regarded as in any different position from a plaintiff who makes out a prima facie case in any other way. The view which we have expressed is, we think, in accordance with Lord *Porter's* statement in *Barkway's Case* (2) that "if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not" (3) and with Lord *Radcliffe's* observations which have already been quoted. Lord *Normand's* statement that "the maxim is no more than a rule of evidence affecting *onus*" (4) must be read subject to his observation that "if the cause of the accident is proved the maxim *res ipsa loquitur* is of little moment" (4) and can only mean that the onus, in a broad sense, of displacing the *operation* of the principle, once properly invoked, by calling credible evidence, will rest upon the defendant. Such an understanding of his observations would be in keeping with his declaration in *O'Hara* v. *Central S.M.T. Co. Ltd.* (5) that "'if the defence can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears'" (6).

One other observation perhaps should be made. In a typical case of *res ipsa loquitur* the plaintiff, frequently, may have two alternative courses open to him upon the trial. He may be aware of the defendant's explanation of the accident by reason, for instance, of a

(1) (1946) A.C. 401.
(2) (1950) 1 All E.R. 392.
(3) (1950) 1 All E.R., at p. 395.
(4) (1950) 1 All E.R., at p. 399.
(5) (1941) S.C. 363.
(6) (1941) S.C., at p. 377.

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coronial inquiry or as a result of subsequent investigation, and yet he may simply prove the fact of the occurrence leaving it to the defendant to prove the explanatory facts. In such circumstances those who contend that the principle operates to cast upon the defendant the onus of disproving negligence will maintain that the plaintiff will succeed unless the defendant satisfies the jury affirmatively that he was not negligent. On the other hand, those who take the view that no such onus is cast on the defendant, whilst admitting that, if the defendant does not choose to call credible evidence, the principle will continue to operate, will maintain that once such evidence is given the plaintiff will fail unless the jury are satisfied that the defendant was negligent. In other words this contention involves the notion, as it has so often been put, that once acceptable evidence explaining the accident has been given the principle will cease to operate. But what is the position where the plaintiff, instead of relying on mere proof of the occurrence, himself adduces evidence of the cause of the accident? It is, of course, beyond doubt that the doctrine of *res ipsa loquitur* will have no place in the case. This, of course, is precisely the same situation when the explanatory matter is proved by the defendant. If his evidence is acceptable to the jury the question will be whether, upon that evidence, the jury is satisfied that he was negligent. To hold otherwise would mean that, in cases where the onus of proof is of importance, the result will be determined according to whether the explanatory matter is put before the jury by the plaintiff or the defendant. We cannot think the principle of *res ipsa loquitur* can produce such a capricious and anomalous result.

For the reasons given the appeal should be dismissed.

McTIERNAN J. The plaintiff sued the defendant for damages for personal injuries. The causes of action were laid respectively in negligence and under s. 59 of the *Factories and Shops Act* 1928 (Vict.). The defendant denied liability and set up the defence of contributory negligence. The only witnesses called were the plaintiff, and a doctor who spoke only of the injuries sustained by the plaintiff. The plaintiff put in evidence answers given on behalf of the defendant to interrogatories. The defendant adduced no evidence. In addressing the jury its counsel abandoned the defence of contributory negligence.

The short facts proved by the plaintiff's evidence and the answers to interrogatories were as follows. On 15th February 1954 the plaintiff went to premises on which the defendant carried on the business of selling joinery to give an order for some timber. The

plaintiff had been there previously to buy timber and on those occasions he was referred by the employees of the defendant to its foreman. His name was Howden. Customers had to place their orders with him. He was not stationed in an office but customers interviewed him wherever they saw him on the premises. On 15th February 1954 the plaintiff went into the premises by a door facing the street, evidently during business hours. He saw Howden at a circular saw which was on the opposite side of a partition which ran across the premises. It appeared in the plaintiff's evidence that Howden could be seen over the partition or through an opening in it. All that the plaintiff said about the saw was that it was driven by power. No other evidence was given about it. The plaintiff began to go towards Howden. Some object, which was admitted by the defendant in its answers to interrogatories to be " a piece of wood ", struck him a violent blow in the face. He was removed in an unconscious state to a hospital. The doctor's evidence showed that the " piece of wood " broke the plaintiff's malar bone, lacerated the lid of his right eye and did other severe damage to that eye. There was no evidence describing the piece of wood. The evidence of the injuries it inflicted on the plaintiff suggests that it was not unsubstantial. The defendant admitted in the answers to interrogatories that, when the plaintiff entered the premises, Howden was cutting a piece of timber with the circular saw. Nowhere was it said in the interrogatories or the evidence that the plaintiff was hit in the face by a piece of the timber which Howden was cutting with the circular saw.

The statement of claim alleged facts which were capable of establishing that the plaintiff was an invitee of the defendant and was on the premises in that right when he was injured. It also alleged negligence on the part of the defendant and its servants and gave particulars of the negligence. These were : failing to take reasonable care to make the premises safe ; failing to have proper guards on a saw to prevent pieces of wood flying from it ; and failing to have an enclosed building on which to carry on the sawing of timber. Another particular was : carrying on sawing in a position which caused it to be dangerous to persons who were lawfully on the premises.

The gist of the cause of action, framed in reference to s. 59 of the *Factories and Shops Act*, was that the circular saw was dangerous and the part of the premises where it was situated was also dangerous but the defendant failed to provide guards as required by the section. The answers to interrogatories contained an admission that the premises in question were registered as a factory under the Act.

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The substance of the particulars of contributory negligence was that the plaintiff failed to take care for his own safety having regard to the fact that the area of the premises in which he found himself when he entered the premises, was potentially dangerous because it was the scene of the sawing operations which Howden was carrying out.

The learned trial judge invited the jury to answer a number of questions. The questions which are now directly material were: "(3) Was the plaintiff at the time he was injured an invitee of the defendant?" "(4) Did the accident occur by reason wholly or partly of the failure of the defendant company or any of its servants or agents whose duty it was as such servants or agents to do so, to use reasonable care to prevent damage to the plaintiff from unusual danger which such servants or agents knew or ought to have known?" "(5) Did the accident occur by reason wholly or partly of the failure of the defendant company, or any of its servants or agents whose duty it was as such servants or agents to do so, to comply with the provisions of s. 59 of the *Factories and Shops Act* 1928 as to the guarding of dangerous machinery or the guarding of a dangerous part of the factory?"

The jury answered these questions respectively: "Yes", "No" and "Yes". Accordingly the plaintiff failed on the cause of action with respect to negligence and succeeded on that with respect to breach of statutory duty. The jury assessed the damages at £2,500.

Pursuant to leave reserved, counsel for the defendant applied to the learned trial judge for judgment notwithstanding the verdict for the plaintiff. The application succeeded and judgment in the action was entered for the defendant.

When the jury retired to consider the answers to the questions and their verdict, counsel for the plaintiff asked the learned trial judge to widen question (4) by adding to it the words, "or through the negligence of the defendant, its servants and agents." His Honour refused the application.

The plaintiff brought an appeal to the Full Court of Victoria, which, by a majority, dismissed it. The present appeal is brought by the plaintiff against the order of the Full Court.

First, we are asked to restore the verdict for the plaintiff on the cause of action with respect to breach of statutory duty. Upon the motion for judgment, the learned trial judge decided these matters. First, that the protection given by s. 59 extends to persons who enter a factory to do business with the occupier. Secondly, that a machine which occasions danger, by throwing out materials, can be said to fall within sub-par. (b) of s. 59, if not sub-par. (a); and the area

which is made dangerous by the throwing out of materials can be said to fall within sub-par. (c).

His Honour was of the opinion that *Nicholls* v. *F. Austin (Leyton), Ltd.* (1) is not a sound guide to the interpretation of s. 59, because it was a decision upon substantially different provisions, namely, s. 37 of the English *Factories Act* 1937. He referred to a statement by Lord *du Parcq* in *Carroll* v. *Andrew Barclay & Sons Ltd.* (2), and a statement (3), by Lord *Morton* in the same case.

The third question in the motion for judgment was whether there was any evidence upon the cause of action pleaded under s. 59 fit to be left to the jury. The learned trial judge decided that question adversely to the plaintiff. I agree that the facts which appeared in the evidence and in the answers to interrogatories were not sufficient to support the cause of action in question. The learned trial judge gave powerful reasons for his conclusion on each of the two questions relating to the construction of s. 59. I agree in the conclusion that the evidence was insufficient. It follows that it is not necessary, in this case, to express an opinion on either of the questions relating to the construction of s. 59.

The facts which appeared in the evidence and answers to interrogatories pointed to the conclusion that the plaintiff was struck by a piece of the timber which Howden was sawing. Counsel for the defendant cross-examined the plaintiff to establish that, if the saw threw out a piece of that timber, its flight in the direction of the plaintiff would have been obstructed by the partition. If the jury found that a piece of wood which was thrown out by the saw struck the plaintiff, it was the only fact which could possibly have any relevance to the issue whether the saw and the part of the factory within range of it were dangerous within the meaning of s. 59. It is true that it is possible to say that a circular saw driven by power is a dangerous machine. But, in my opinion, there was no fact proved in this case sufficient in law to prove that this circular saw was dangerous. It is as consistent with the fact that the piece of wood was thrown out by the saw, if indeed it was, that what caused the motion of the saw to do this was not something normally incidental to the operation of sawing wood, as that it was. Furthermore, there was evidence that the plaintiff had been on the premises on previous occasions but he gave no proof of having seen any hazards due to the mechanical cutting of timber in the defendant's works.

(1) (1946) A.C. 493.
(2) (1948) A.C. 477, at p. 487.
(3) (1948) A.C., at p. 494.

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The particulars of negligence conveyed that negligence was alleged only in respect of the condition of the premises. The allegation of negligence in the statement of claim meant that the defendant failed to exercise the care owed by an occupier of premises to an invitee. But if the allegation had not been limited by the particulars of negligence, it would have covered a negligent act or omission committed on the premises by a servant. "Closely connected with the question of liability for the condition of premises is the question of liability for negligent acts on the premises. Neither the occupier nor any person is entitled to act negligently towards persons whom he knows or ought reasonably to know will be on the premises": *Charlesworth's Law of Negligence*, 2nd ed. (1947), p. 210. Questions (3) and (4), which the learned trial judge invited the jury to answer, are based upon the particulars of negligence. These questions are framed in reference to *Indermaur* v. *Dames* (1). The jury were properly directed as to the issues involved in those questions and the answer to question (4) cannot be set aside. As already stated, they answered question (3) in the plaintiff's favour. *Indermaur* v. *Dames* (1), said Lord *Wright* in *Glasgow Corporation* v. *Muir* (2), "does no more than lay down a special subhead of the general doctrine of negligence" (3).

When the jury retired to consider the questions which the learned judge invited them to answer and their verdict, Mr. *Thomson*, counsel for the plaintiff, applied to the learned trial judge to widen question (4) by adding the words, "or through the negligence of the defendant, its servants or agents." The question would, if so widened, cover the issue whether the defendant, its servants or agents took reasonable care to avoid acts or omissions which an ordinary prudent man could reasonably foresee would be likely to injure a person entering the premises. Counsel for the defendant put to the jury hypotheses, which he said could account for the accident, involving no negligence in respect of the condition of the premises, but a negligent act or omission on the part of a servant. The application to widen question (4) derived strength from the consideration that if the jury accepted any of these hypotheses they would be bound to answer "No" to the question. The learned trial judge refused the application for the reason, as I understand, that from the beginning to the end of the trial the plaintiff's case was conducted solely upon the basis that what was in issue was a question of liability for the condition of the premises but not for negligent acts done on the premises. With respect, I

(1) (1866) L.R. 1 C.P. 274.
(2) (1943) A.C. 448.
(3) (1943) A.C., at p. 461.

think that, in the circumstances of this case, the reason was not sufficient. A more important consideration was whether there was a case fit to be left to the jury upon the wider basis. If there was, I think that it would have been just and right to widen question (4), especially because of the use which, it is said, counsel for the defendant made of the narrow basis upon which the plaintiff placed the defendant's liability for negligence. The defendant could have been given leave to call evidence, if he asked for it, and fair terms as to costs and otherwise could have been imposed. No hardship or surprise would have been occasioned to the defendant. It appeared, from the particulars of the defence of contributory negligence that the defendant contemplated that the plaintiff might prove that the circular saw was being operated negligently and the injuries were caused by that negligence.

In *Blomley* v. *Ryan* (1) the defendant was given leave to add a counterclaim for rescission after the evidence was taken, although throughout the trial he had done no more than resist specific performance. The justification for giving the leave was that there was evidence that the contract was an unconscionable bargain. Upon appeal the order of the trial judge (*Taylor* J.) was upheld.

In the present case there was, in my judgment, a substantial case fit to go to the jury that a negligent act or omission by a servant of the defendant caused the piece of wood which hit the plaintiff to be thrown violently from some position in the defendant's premises. The learned trial judge expressed surprise that the counsel for the plaintiff had confined himself to an occupier-invitee case of negligence. Counsel acted very wisely in the interests of his client by endeavouring, even at such a late stage, to have the liability of the defendant determined upon a more promising basis. In my judgment it was not a good exercise of discretion to refuse the application to widen question (4).

The evidence and answers to interrogatories showed that the defendant conducted a joinery shop on the premises and used it as a shop for the sale of timber and joinery, and that, when the plaintiff was hit by a piece of wood, he was on a part of the premises to which the defendant admitted its customers who come to buy timber from it. The defendant was under a duty to carry on all its work on the premises with due precautions for the safety of persons whom it knew or ought reasonably to know would be lawfully on the premises.

(1) (In course of report).

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The plaintiff adduced no affirmative evidence of negligence consisting in some breach of the duty owed in this respect to him. It follows that there was no case to be left to the jury on the basis that the defendant was liable for such negligence, unless the maxim, *res ipsa loquitur*, applied to the case. In my opinion the maxim did apply to it.

The premises were, according to the evidence of the plaintiff, a large tin shed. The jury would have been entitled to find that the piece of wood, which caused hurt to the plaintiff, was thrown from some place within the premises and the cause of this was some operation there carried on for the defendant by one or more of its servants. It would be reasonable for a jury to consider that, in the ordinary course of things, the plaintiff would not be hit by a piece of wood, when he was in a part of the premises to which customers who came to give orders for timber had access. If the jury entertained that view, it would be open to them, in the absence of an explanation by the defendant, to find that due precautions were not taken for the safety of the plaintiff. In *Bridges* v. *North London Railway Co.* (1) *Channell* B. said : " Again, there may be cases, as in *Scott* v. *London & St. Katherine Docks Co.* (2), where it is shewn that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowlegde of the defendant, and not within the knowledge of the plaintiff. In such cases the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant " (3). The circumstances proved by the plaintiff, in the present case, afforded prima facie evidence of negligence, in the same way as the circumstances did in *Scott* v. *London & St. Katherine Docks Co.* (2). Cases of the same type were, of course, *Byrne* v. *Boadle* (4) and *Kearney* v. *London, Brighton & South Coast Railway Co.* (5).

Reliance is placed for the defendant upon evidence, that when the plaintiff was hit by the piece of wood, Howden was standing at the circular saw, and upon the answers to the interrogatories stating that Howden was then cutting timber with the saw. These matters

(1) (1871) L.R. 6 Q.B. 377.
(2) (1865) 3 H. & C. 596 [159 E.R. 665].
(3) (1874) L.R. 6 Q.B., at pp. 391, 392.
(4) (1863) 2 H. & C. 722 [159 E.R. 299].
(5) (1871) L.R. 5 Q.B. 411.

are relied upon as affording an explanation of the cause of the accident and proving that it did not happen by reason of want of care on the defendant's side. The explanation which the defendant based upon these matters is that the piece of wood which struck the plaintiff was a piece of the timber which Howden was cutting with the circular saw. A finding by the jury would be necessary to support the explanation. It was an issue of fact whether the piece of wood was thrown out by the motion of the circular saw. The jury trying the case would have to decide this issue. It would be possible for them to make an affirmative finding. They would, of course, have to take into consideration all the circumstances which appeared in the plaintiff's evidence, including the relative positions—elicited in cross-examination—of the circular saw, the partition and the plaintiff. It would, of course, be reasonable for the jury to find, in view of these, that the piece of wood was not ejected by that circular saw. But, if the fact were that the saw did so, it would not be sufficient to show that there was no negligence, because there was no evidence that the defendant used reasonable care, or any care at all, to avoid danger to customers from pieces of wood flying from the circular saw when in action. The evidence showed that piece of wood was thrown with almost lethal violence across the premises. The distance was about thirty feet, according to the defendant's answer to an interrogatory. In any reasonable view of the circumstances, it must be said that this is not a usual occurrence to take place in a shop when customers are present, and that, in the absence of an explanation by the defendant, its real cause may have been negligence : *res ipsa loquitur*. Surely it is reasonable to assume that the kind of circular saw which a prudent shopkeeper would permit to be operated in his shop would not throw out a piece of wood with such violence, if due care were taken by him to see that customers would not be hurt by carrying on sawing operations on the premises. If a customer in a grocery shop were to be hit in the eye by a piece of bone thrown out by a mechanical bacon cutter or, likewise, a missile from a mechanical coffee grinder, an occurrence of that kind, unless explained by the shopkeeper, would afford reasonable evidence of negligence. Why is the present case different and the plaintiff bound to adduce affirmative evidence that the accident was caused by negligence on the part of the defendant or its servants ? The mere happening of the accident affords prima facie evidence of negligence against the defendant. It lay on the defendant to rebut this by showing it had used all due care. The defendant might have shown, if it was able, that the circular saw was properly maintained, that the piece of timber which was being

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sawn had been inspected and did not appear to be intractable, or that there were causes beyond its control, which might have caused a defect in the saw that it had no reasonable opportunity of correcting. But the defendant chose to call no evidence. On the state of facts proved by the plaintiff the accident which caused the injuries to the plaintiff affords prima facie evidence of negligence.

For these reasons I think the appeal should be allowed on the ground that the learned trial judge ought to have added to question (4) the words which are quoted above, but on no other ground. It follows that the judgment for the defendant in the action should be set aside and a new trial be had on the issue only of negligence. I would order the defendant to pay the plaintiff's costs in the Full Court and in this Court. I would make the costs of the first trial the defendant's costs in the action.

Appeal dismissed.

Solicitors for the appellant, *Murdoch, Living & McCracken*, Wangaratta, by *McCracken & McCracken*.

Solicitors for the respondent, *Connell & McKenna*, Wangaratta, by *D. Bruce Tunnock & Clarke*.

R. D. B.