[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR RAILWAYS (N.S.W.) APPELLANT;

AND

O'BRIEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Apr.* 10, 11; *May* 1.

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

Negligence—Employer—Safeguard employees from injury—Reasonable precautions—System of work—Safe system—Duty to provide—Breach—Painter—Means for carrying out employee's work—Provision—Adequacy—Performance of work—Instruction—Railway station—Roof—Corrugated asbestos cement sheets—Painting equipment—Removal risk—Injury sustained by employee.

The plaintiff, the respondent, was employed by the defendant as a painter. He and another employee, also a painter but slightly senior in the service, were told to remove some equipment from the roof of a platform to a store by another platform. The heads of the platforms were joined by an open pavement which was covered by an asbestos cement roof. Other and safe methods of transporting the equipment existed but the plaintiff and his fellow employee adopted the method of carrying it along the iron roof of the platform, across the asbestos roof and along the iron roof of the other platform. The plaintiff was aware that the brittle nature of the roofing made this dangerous. On his third trip across the asbestos roof he fell through and was injured. He brought an action for damages against the defendant, at the hearing of which the only issue left for the consideration of the jury was whether the defendant had committed a breach of its obligation to take reasonable care for the plaintiff's safety by failing to provide wire mesh below the asbestos roof or by failing to provide a catwalk across the roof itself. The jury returned a verdict in favour of the plaintiff and the defendant's appeal to the Full Court of the Supreme Court of New South Wales was dismissed. On appeal,

Held (1) by *Dixon* C.J., *Fullagar* and *Taylor* JJ. (*McTiernan* J. dissenting) that there was no evidence capable of justifying the conclusion that the omission to provide safeguards of the nature suggested constituted negligence on the part of the defendant and, accordingly, the appeal should be allowed, the verdict set aside and judgment entered for the defendant.

(2) by *Webb* J., that the appeal should be allowed and a new trial ordered.

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Per Dixon C.J.: An employer is under a duty, by himself his servants and agents, to take reasonable care for the safety of the employee by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury: this was the aspect of an employer's duty that was material upon the facts, not the failure to provide means of using the roof as a passage way with greater safety. But in any case there was no evidence of breach of the duty on this aspect.

O'Connor v. *Commissioner for Government Transport* (1954) 100 C.L.R. 225, referred to.

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

APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales, the plaintiff, Neville Charles O'Brien, claimed from the defendant, the Commissioner for Railways, damages for personal injuries alleged to have been sustained by him. It was alleged that the plaintiff was employed by the defendant to work in and about and upon the premises known as Newcastle railway station, of which at the material time the defendant was possessed of and had the care, control and management. It was further alleged that the defendant, its servants and agents, negligently, carelessly and unskilfully conducted itself in and about: (a) the construction, maintenance and repair of a certain roof upon the abovementioned premises; and (b) allowing them to become and remain in a dangerous and unsafe condition; and (c) failing to warn the plaintiff of the dangerous and unsafe condition of that roof; and (d) failing to adopt and maintain a safe system of work; and (e) failing to provide a safe place for the plaintiff to work in the course of his said employment. It was further alleged that whilst the plaintiff was working on the roof it collapsed and the plaintiff fell to the ground and as a result he was seriously wounded and permanently injured and had suffered and would continue to suffer considerable pain and, being unable to attend to his usual occupation had lost and would continue to lose moneys he otherwise could and would have earned and he had incurred and would continue to incur medical, surgical and other like expenses. The defendant pleaded that it was not guilty and referred to several "departmental" statutes.

The jury returned a verdict for O'Brien in the sum of £14,800 and judgment was entered accordingly.

The defendant appealed to the Full Court of the Supreme Court to have that verdict set aside and in its stead a verdict entered for the defendant, or, alternatively, a new trial of the action.

The Full Court (*Owen* and *Herron* JJ., *Kinsella* J. dissenting) dismissed the appeal.

From that decision the Commissioner for Railways appealed to the High Court.

N. A. Jenkyn Q.C. (with him *A. H. S. Conlon*), for the appellant. The case made at the trial and the way in which it was allowed to go to the jury was that the defendant commissioner was guilty of a breach of duty to the plaintiff in failing to have the place of employment—the roof was so classified—as safe for the use of the plaintiff as reasonable care and skill could make it. No case was made that the commissioner was liable vicariously for the negligent behaviour of Seckold who was allegedly in charge of the operation causing injury to the plaintiff. The defendant's duty to see that its premises were safe for the use of its employee, the plaintiff, extended only to those parts of the premises to which he as a painter might reasonably be expected by the defendant to go; and that such a place did not include the asbestos roof. There was no reason why the defendant commissioner, or any responsible officer, should anticipate that a painter would be using an asbestos roof, not as a roof but as a passage-way, which as a matter of convenience, he was using to carry some goods from one place to another place. It is wrong to say that an employee employed on premises to work for an employer having a large area under his control, is owed a duty by the employer that reasonable care will be taken for the safety of that employee irrespective of what part of those premises, roof or otherwise, he happens at a particular moment to be frequenting. There is a similarity in principle, and the authorities show a similarity, between invitor and invitee cases and master and servant cases in relation to the area of invitation.

[FULLAGAR J. referred to *Jury* v. *Commissioner for Railways (N.S.W.)* (1).]

The true test is whether an employer should reasonably have anticipated that the employee would be likely to be at the place where he met with his injury and therefore be exposed to danger at that particular source. The duty only extends while the employee is at or upon some portion of the premises to which his employer should reasonably have anticipated he would go. The employer's obligation to his employee is to take reasonable care to see that his premises, his equipment, are reasonably suitable for use by his employee; to see that his system of work is a good and safe one, and not to expose him to unnecessary dangers. In

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

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addition, doubtless, the employer also has an overriding duty, as everybody in the community has, of not deliberately or by a careless positive act, endangering his employee or anybody else. But that is not ordinarily expressed in the terms of an employer's duty *qua* employee.

[McTIERNAN J. referred to *Indermaur* v. *Dames* (1).]

It is consistent with decisions of this Court including *O'Connor* v. *Commissioner for Government Transport* (2). To impose an obligation on employers to have every part of their premises as safe as reasonable care and skill can make them for everyone of their employees, in all circumstances, is to state the duty too highly. There is no evidence that Seckold, with authority from the defendant, directed the plaintiff to use this particular method of carrying out his work. What happened was not the result of Seckold exercising authority over the plaintiff. The defendant's duty does not extend to the protection of the plaintiff, once on the roof, from the insecurity of the roof. The law imposes a duty upon an employer to take reasonable care for the safety of his employee, and that remains a continuing duty while the employee remains, at any rate, at his place of work. In a particular case that duty is breached if the injury to the employee, in the circumstances, and at the place where it was occasioned to him, was reasonably foreseeable by the employer and he failed to take reasonable steps to guard against that risk of injury. The trial judge was in error in refusing to direct the jury as requested by the defendant.

[McTIERNAN J. referred to *Smith* v. *Broken Hill Pty. Co. Ltd.* (3).]

A. Larkins Q.C. (with him *C. A. Cahill*), for the respondent. This case was brought as an action at common law and also for breach of statutory duty. The case on behalf of the plaintiff was put to the jury in two ways ; firstly, that the defendant had not adopted a safe system of working. The system generally was unsafe and there was a breach of reg. 158 under the *Scaffolding and Lifts Act* 1912, as amended. These matters were put to the jury. Authority would be implicit in the senior man on the job to give instructions. The roof itself was unsafe and there was a duty on the defendant to make it safe. [He referred to *Paris* v. *Stepney Borough Council* (4) ; *Morton* v. *William Dixon Ltd.* (5) and *Hamilton* v. *Nuroof (W.A.) Pty. Ltd.* (6).] Secondly, apart from an unsafe system, it was put that the defendant failed to provide a safe place to work. If there be no objection taken on that aspect of the matter by the

(1) (1866) L.R. 1 C.P. 274.
(2) (1954) 100 C.L.R. 225.
(3) (1957) 97 C.L.R. 337.
(4) (1951) A.C. 367, at p. 382.
(5) (1909) S.C. 807.
(6) (1956) 96 C.L.R. 18.

defendant the plaintiff is entitled to take the jury's verdict on that matter put in the narrow way. [He referred to *Thompson* v. *Bankstown Corporation* (1) and *Bourhill* v. *Young* (2).] The direction given by the trial judge on reasonable foreseeability was in accordance with that authority. The other direction sought was in such narrow terms that it was properly rejected. The true test was laid down in *Thompson's Case* (3). The only direction which was asked for, not being a proper one, the defendant assented to the issue being left to the jury in the form in which it was. This Court, even though it might form the conclusion that it was a misdirection, had it not been a point taken on the appeal, would take the view that the matter was concluded by O. XXII, r. 15 of the *Supreme Court Rules*. The evidence is capable of supporting the inference that the use of the roof of the covered way was not an unusual circumstance at the railway station. There was, therefore, evidence fit to be considered by the jury that the defendant owed a duty to the plaintiff to make the roof as safe as reasonable care and skill could make it and, on this aspect, the jury were entitled to find as they did for the plaintiff. Where facts are peculiarly within the knowledge of the defendant, a mere scintilla of evidence will suffice where, in other circumstances, it would not (*Hampton Court Ltd.* v. *Crooks* (4) and *Parker* v. *Paton* (5)). *O'Connor* v. *Commissioner for Government Transport* (6) is distinguishable on the ground that the plaintiff in that case went to the scene of the accident for the purpose of demolition. The view suggested by *Herron* J. in the Full Court below was a proper one. The defendant stood by and assented to the matter going to the jury in the way it did. It stood by and let it go, content to get a verdict for itself if it could. The defendant then appealed for many reasons but was unsuccessful, and now there is a suggestion that this was a misdirection, and because of a misdirection of which it never complained as such, a new trial should be granted. The authorities show that where the verdict is clearly capable of being sustained by the evidence had the jury been directed in the manner in which this Court thinks it might have been directed more accurately, where the evidence is nearly all one way, and that the verdict was capable of being sustained, in those circumstances the Court would not exercise the discretion that it has under O. XXII, r. 15.

(1) (1953) 87 C.L.R. 619, at p. 630.
(2) (1943) A.C. 92, at p. 104.
(3) (1953) 87 C.L.R. 619.
(4) (1957) 97 C.L.R. 367.
(5) (1941) 41 S.R. (N.S.W.) 237; 58 W.N. 189.
(6) (1954) 100 C.L.R. 225.

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N. A. Jenkyn Q.C., in reply. Order XXII, r. 15, cannot be applied so as to preclude any rights the defendant may have on this appeal. The defendant is entitled to have each and every approach put to the jury so that they can find either common law liability or statutory liability. There was no evidence to support the issue of negligence which was allowed to go to the jury, that is that the defendant employer was negligent in having failed to provide mesh and ladders in relation to this roof. The defendant owed to the plaintiff a duty in relation to the place where he met with his injury ; and there was no evidence of a breach by the defendant of any duty owed to the plaintiff. There was no finding by the jury in the plaintiff's favour on any alternative head of negligence at all. If there is no evidence to support the heading of negligence left by the trial judge, then there should ordinarily be a verdict entered for the defendant—the appellant. It was relevant for the jury to be told that they had to consider whether the going by the plaintiff on to the roof in the circumstances in which he did was a foreseeable event. That was a direction to which the defendant was entitled. In the circumstances, foreseeability should be put as a test of liability. There is no question of O. XXII, r. 15 operating against the defendant because the very direction was sought at the time from the trial judge. This was, originally, a case which savoured more of absence of duty rather than breach of duty (*Key* v. *Commissioner for Railways* (1) ; *Cotter* v. *Huddart Parker Ltd.* (2)).

Cur. adv. vult.

May 5.

The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the judgment prepared by *Fullagar* and *Taylor* JJ. I agree in their Honours' reasons and conclusion but I desire to add the following observations for myself.

It has appeared to me to be a misconception to treat this case as one depending upon the duty of an employer of care in providing for the safety of premises for his workmen. The duty which is relevant to the facts of this case is another sub-division or aspect of the employer's general duty to take reasonable precautions to safeguard his men from injury. It was formulated, with some regard for precision, three or four years ago in this Court in a case which unfortunately did not find its way into the reports.* We said that

(1) (1941) 41 S.R. (N.S.W.) 60, at pp. 66, 67 ; 58 W.N. 72.
(2) (1941) 42 S.R. (N.S.W.) 33, at p. 37 ; 59 W.N. 37.

* Now reported at p. 225 of this volume—Ed.

the employer was under a duty, by his servants and agents, to take reasonable care for the safety of the employee by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury: *O'Connor* v. *Commissioner for Government Transport* (1).

If I were able to arrive at the conclusion that the evidence discloses a case fit to be submitted to a jury of a breach of this duty I should think it proper to order a new trial. But I am of opinion that on the evidence a finding that a breach of this duty occurred would be unreasonable. The task of moving the trestles and planks was a simple one, a familiar part of a painter's duty. No instructions how to perform it were required. It was only necessary to wait for the departure of the train to lower the gear safely from some part of the iron roof. There is indeed no very adequate reason for thinking that the gear could not have been taken back through some window, in the same way as it had been put out on the iron roof of the verandah. There was only the reported dictum of a housemaid. It seems to me a far-fetched idea that Seckold became, in the absence of Dix, a superior whose authority O'Brien became bound to obey and for whose negligent direction the commissioner would be vicariously liable. Obviously the men were both engaged on the same job and even if Seckold's assertion that automatically because of his brief seniority he took charge could be accepted as evidence of a usage or rule of the commissioner's service, it by no means follows that he was invested with authority from the commissioner to direct the plaintiff to traverse the asbestos roof bearing the trestles. It is, moreover, only too clear that it was a course which the two in combination adopted for themselves. The asbestos roof was constructed for no such purpose and to treat it as a way or path improperly or inadequately safeguarded appears unreal and impossible. Indeed if the commissioner had fitted it up, for example, with a catwalk for the purpose of carrying gear from one side of the station to the other, he might well have been charged with employing a most negligent system of working, had a man fallen therefrom and suffered injury. The fact is that to treat the roof as an appointed path or way for the carriage of the trestles and then to charge the commissioner with negligence in failing to provide a catwalk or net is to place the case in an altogether erroneous, if not absurd, light. But that is how it went

(1) (1954) 100 C.L.R. 225.

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to the jury. For the plaintiff it is said that it was no fault of his, he took wider ground. He suggests that the defendant commissioner was well content with the narrower and, as we think, erroneous ground. Be it so. The defendant at all events objected that there was no evidence to support the issue. Clearly the verdict could not stand. The only question is whether the plaintiff is entitled to have the case submitted to another jury. To that question I agree a negative answer must be given, because there is no view of the facts appearing in evidence which would support a verdict for the plaintiff.

The appeal should therefore be allowed and a verdict and judgment entered for the defendant.

McTIERNAN J. In my opinion this appeal should be dismissed.

The grounds of appeal were all included in the appeal to the Supreme Court. The reasons of *Owen* and *Herron* JJ. for rejecting them are, in my opinion, correct. Their Honours' reasons, in my opinion, are convincing and I feel that it is unnecessary to add anything to them.

WEBB J. I agree with the conclusion reached in the judgment of *Fullagar* and *Taylor* JJ. that the verdict of the jury should be set aside and with the reasons given by their Honours for that conclusion. But I would order a new trial.

The evidence of Seckold in examination-in-chief was as follows: "Q. Who was in charge at the time? A. I was in charge . . . It is automatic, when any senior officer is away for the next man to take his place.

Q. Did you say something to Mr. O'Brien in connection with the trestles? A. I said 'These have to be shifted below. Get them down . . . '.

Q. Where did you go to? A. I went to the back of No. 4 platform to take the planks and trestles off him . . . .

Q. From the position where you were standing could you see the junction of the awning over No. 1 platform and the awning that runs along over the ramp leading from platform No. 1 to platform No. 4? A. Yes. I could see it clearly.

Q. Following your taking up the position there would you notice anything that happened? A. Mr. O'Brien went round. He brought one of the trestles round and I said bring the plank next. He brought it to me. He had made four trips. He went to pick up the trestle on the third trip.

Q. Which way did he bring the first trestle round ? A. The same way as the lot—from the window and along the top of No. 1 platform, round the ramp and down to No. 4 platform roof and passed them down to me at the back of the platform."

During his cross-examination Seckold said that he had the key of the job.

This evidence was uncontradicted.

On this evidence it would, I think, be open to a jury of reasonable men, properly instructed, to find that Seckold was in charge of the operation according to the practice obtaining at the Newcastle railway station and further that at the time the respondent was injured he was taking a route along the asbestos roof under Seckold's direction and that the appellant commissioner was vicariously liable.

FULLAGAR AND TAYLOR JJ. On 16th December 1954 the respondent, who was employed by the appellant as a painter, sustained serious injuries at Newcastle railway station when he fell through a corrugated asbestos cement roof which constituted the covering to an otherwise open pavement which extended in a northerly direction from the head of No. 1 platform to the head of No. 4 platform. Adjacent to and adjoining No. 1 platform on the southern side was a two-storey building in which facilities were provided for railway personnel and the travelling public. From this building there extended over No. 1 platform a sloping corrugated iron roof. A similar covering was provided for No. 4 platform and the asbestos cement roof previously referred to extended from a position adjacent to but slightly below the corrugated iron roof of No. 1 platform to a not dissimilar position in relation to the roof of No. 4 platform.

At the time of the accident which caused the respondent's injuries he was engaged in removing painting equipment, consisting of trestles and planks, from the roof of No. 1 platform to the store in the vicinity of No. 4 platform. It is unnecessary to relate the circumstances in which, on the previous day, the equipment had been placed on the roof but it is necessary to mention that on the evening of that day one, Dix, who was the foreman painter, had been instructed that the equipment should be moved from the roof of No. 1 platform and placed in the store previously mentioned. This instruction he passed on to one, Seckold, another painter, and to the plaintiff. He told them that the equipment was to be moved " the first thing to-morrow morning " and there seems little doubt that he intended to be present to supervise the operation.

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But on the following morning Dix met with some misfortune and did not appear and, in his absence, Seckold and the respondent proceeded to remove the equipment to the store. They commenced work shortly after 7.00 a.m. and decided apparently that they would remove the equipment forthwith.

There were, it seems, three possible methods of removing the equipment to ground level. But it appears that all were not immediately available. The first method which might have been adopted was to pass the equipment through a window on the first floor of the building adjacent to No. 1 platform and return it to ground level by carrying it down the internal stairway to the level of No. 1 platform and thence to the store. This could not, however, be done at the time because there was no spare room available on the first floor into which the equipment could be passed. The second method was to pass the equipment over the edge of the galvanised iron roof to a position near the head of No. 1 platform. Apparently it had been the intention of Dix to carry out the task in this way but this could not be done before 7.30 a.m. since an express train which was due to depart at that time was at No. 1 platform. But there was a third possibility and that was to carry the equipment, piece by piece, along the roof of No. 1 platform, and thence on to and along the asbestos cement roof to the roof of No. 4 platform where it could be lowered to the ground level in the vicinity of the store. This method Seckold and the respondent proceeded to employ though, theretofore, nobody had envisaged that the task would be carried out in this way. It was, it seems, employed at the suggestion of the respondent though Seckold, who claimed to be " automatically " in charge of the operation in the absence of Dix, readily assented. Seckold thereupon took up a position on No. 4 platform in the vicinity of the store and the respondent made two journeys with equipment before the accident. On the first trip he carried a trestle, on the second a plank or planks and on the third, whilst carrying a trestle, he fell.

It was established that asbestos cement sheeting, as it ages and weathers, becomes brittle. This, as the respondent readily admitted, was known to him and it was for this reason that on each of his journeys he walked along a line of nail heads which indicated where the sheets of asbestos cement were nailed to the underlying purlins. But on the third occasion he tripped as he attempted to cross and having lost his balance fell through the roof.

Certain other evidence was given in the case and it is necessary to make some reference to it before mentioning the issue of fact which was submitted for the determination of the jury. It may,

however, be mentioned at this stage that the issue of fact was determined by the jury in favour of the plaintiff and they returned a verdict in his favour for £14,800. A subsequent motion to the Full Court for an order setting the judgment aside and directing judgment for the defendant was dismissed by a majority of the court and this appeal is now brought from the order of dismissal.

In the course of the hearing a consulting engineer was called to give evidence concerning the characteristics of asbestos cement sheets and he appears to have given evidence, without objection, that the roof through which the respondent fell was not " safe for employees to pass over it ". He seems to have formed this opinion because sheeting of this nature is brittle and because he was aware of the fact that a number of accidents had occurred when people were passing over roofing material of this character. He was then asked whether there was any way of making asbestos cement roofs more safe for " people passing over them if necessary ". His answer was that wire mesh could be fastened below the roofing material or, alternatively, catwalks or walkways, that is to say planks with cleats nailed to them to prevent slipping, could be provided. There was also evidence in the case that on previous occasions portions of the asbestos cement roof in question had given way under railway employees but there is no evidence whatever as to the circumstances in which these accidents had occurred. In particular it does not appear whether on these previous occasions employees were walking across the roof or merely performing some isolated task on the roof, or, whether when so doing, any safeguards of any description had been provided. Finally it was established that by regulations made under the *Factories and Shops Act* it is obligatory upon the owners of buildings furnished with asbestos cement roofs to provide warning notices of a specified character upon such roofs. No such notices were in fact provided by the appellant but, in view of the respondent's knowledge of the character and qualities of the roof, no question arose concerning this neglect on the part of the appellant and no issue in relation to it was left for the consideration of the jury.

The allegations of negligence in the respondent's declaration were couched in the widest terms but at the conclusion of the evidence the only issue which was left for the consideration of the jury was whether the appellant had committed a breach of its obligation to take reasonable care for the respondent's safety by failing to provide wire mesh below the asbestos sheeting or, alternatively, a catwalk or walkway of the nature previously referred to upon the roof itself. The question for the jury on this issue, as

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the learned trial judge said, was " Would a reasonable man in the circumstances think that such additional precautions were reasonable and necessary ? "

This issue was made the criterion of the appellant's liability without objection on the part of the appellant and it will be seen that the case was made to depend, in some substantial measure, upon the evidence of Mr. Ranch, the consulting engineer previously referred to. Some attempt was made upon the appeal to suggest that his evidence was capable of establishing that it was common and general practice, as a safety precaution, always to provide wire mesh below or cat walks upon roofs of asbestos cement. But it is beyond question that the exercise of reasonable care by an employer could never require the provision of such safeguards in relation to any roof the surface of which would never be used by his employees. In such cases the suggested safeguards could serve no purpose whatever. Nor does the evidence of the consulting engineer suggest otherwise ; quite clearly he was dealing with the provision of safeguards for persons whose duties required them to traverse or walk upon roofs of this character. It is, we think, quite clear that the question whether the appellant failed in his duty to take reasonable care for the safety of the respondent cannot be resolved upon any other view of Mr. Ranch's evidence and must be considered in the light of the circumstances disclosed by the evidence in this case.

It may be said at once that the manner in which Seckold and the respondent chose to perform the task of removing the equipment to the store involved some undue degree of risk. Further, it may be said that, if the respondent's duties had required him to perform his share of the task in this fashion, it would be quite competent for a jury to find that the appellant had failed to exercise reasonable care for his safety. But one may well think that, in those circumstances, liability would attach to the appellant not because he had omitted to provide wire mesh or cat walks but because he had required the respondent to perform a task in circumstances which involved an undue degree of risk. So much the respondent was prepared, ultimately, to concede and, accordingly, it was not finally contended that merely because this particular task was performed in this fashion such an omission constituted negligence on the part of the appellant. Rather reliance was placed upon the fact that other accidents had happened and this, it was said, indicated that on occasions and, not infrequently, the employees of the respondent were required to and did walk on the roof. That being so, it was asserted, the exercise of reasonable care required the provision of some such safeguards as suggested.

There is, however, a ready and complete answer to this contention. That is, that there is nothing in the case which could justify the conclusion that employees of the appellant were required in the course of their duties to walk upon or traverse the asbestos cement roof. We are simply told that " other men had fallen through the roof . . . in the course of their work ". But as already appears there is no evidence to show how, or in what circumstances any of the previous accidents occurred. Indeed, there is nothing even to indicate the nature of the task which was being performed on the roof on any such occasion or by what class of tradesman any such task was being carried out. Nor, it should be said, is there anything to indicate whether on any of those occasions any form of safeguard was provided and, accordingly, whether or not these accidents occurred in spite of the provision of reasonable and proper safeguards. In the result the conclusion is inescapable that there was no evidence capable of justifying the conclusion that the omission to provide safeguards of the nature suggested constituted negligence on the part of the appellant and accordingly the verdict of the jury should be set aside.

The question which then arises is whether we should direct that judgment should be entered for the appellant or whether the case should go down for a new trial. The respondent suggests that the latter course is the more appropriate in the circumstances of the case and this suggestion is made on the ground that the evidence discloses that Seckold was in charge of the operation and that he implicitly instructed or authorised the respondent to carry the equipment across the asbestos cement roof. As already appears, Seckold claimed that in the absence of Dix he was " automatically " in charge of the operation as a person senior in employment to the respondent and, inferentially that he was in a position to direct the manner in which the task should be performed. It is apparent from the evidence, however, that both Seckold and the respondent were employees of the same classification and in receipt of the same wages and that Seckold's claim to seniority depended upon the tenuous circumstance that he had been employed by the appellant for a slightly longer period than the respondent. Neither, it appeared, had been employed for a very long period. It is, we think, reasonably clear that this evidence would not justify us in directing a new trial. There is nothing in the evidence which could justify the conclusion that, as regards the respondent, Seckold was in a position to give directions or instructions with respect to the performance of a task of this character which would involve the

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appellant in vicarious liability. That being so, the appropriate course is to allow the appeal, to set aside the verdict and direct that judgment be entered for the appellant.

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the appeal to that court be allowed with costs and that a verdict and judgment in the action be entered for the defendant with costs.

Solicitor for the appellant, *Sydney Burke*, Solicitor for Railways (N.S.W.).

Solicitor for the respondent, *M. A. Simon.*

J. B.