IN THE HIGH COURT OF AUSTRALIA

CHAMBERLAIN INDUSTRIES PTY. LTD.

V.

MILLS & ANOR.

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 18TH FEBRUARY, 1957.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

CHAMBERLAIN INDUSTRIES PROPRIETARY LIMITED

v.

MILLS & ANOR.

ORDER

Appeal allowed with costs. Set aside so much of the judgment or order of the Supreme Court dated 9th February 1955 as recites the order that the defendants Mills recover against the defendant Chamberlain Industries Pty. Ltd. in respect of the sum of £1500 and certain costs and as adjudges such recovery accordingly.

In lieu thereof order that the claim of the defendant Mills against the defendant Chamberlain Industries Pty. Ltd. commenced by the notice dated 30th August 1955 be dismissed with costs.

CHAMBERLAIN INDUSTRIES LTD.

v.

MILLS & ANOR.

JUDGMENT DIXON C.J.

In my opinion this appeal should be allowed and the judgment for the defendants respondents Mills against the defendant appellant company for £1500 should be discharged.

I have had the advantage of reading the reasons of Fullagar J. and agree in them.

I am not prepared to assume that before the accident a contract of sale, conditional or otherwise, in respect of the plough had been made between these parties. I think that such evidence as there is on the subject not only fails to support such an assumption but points rather to the opposite conclusion. On the footing, however, of such an assumption I would concur too with the observations concerning the respondents' case contained in the judgment of Taylor J., which I have also had the benefit of reading.

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WILLIAMS J.

CHAMBERLAIN INDUSTRIES PROPRIETARY LIMITED

v.

MAURICE DUCKETT MILLS and ERNEST DUCKETT MILLS

JUDGMENT

This is an appeal by one of the defendants, Chamberlain Industries Pty. Limited, hereinafter called "Chamberlain", from part of a judgment of the Supreme Court of Tasmania which adjudged that the other two defendants, Maurice Duckett Mills and Ernest Duckett Mills, should recover from Chamberlain the sum of £1500 which the Mills brothers had been ordered to pay to the plaintiff. In order to understand the nature of the appeal it will be convenient to refer to the facts. The Mills brothers own a pastoral property in the north of Tasmania 20 miles from Launceston known as "Panshanger". Chamberlain is a Western Australian company which manufactures ploughs. It had manufactured a plough which it claimed could be towed at a high speed when ploughing or when travelling from one place to another. The plough has three wheels, two leading wheels and to one side a third trailing wheel, and all three wheels are interconnected by the steering linkage so that when the towing medium makes a turn to the right or left the wheels of the plough will turn in sympathy. It had sold a large number of these ploughs in Western Australia and had not found it necessary there to insert a split pin through the bottom of the link pins of the steering linkage of the plough in order to prevent them from coming out. There are five of these link pins in the steering linkage but the particular link pin with which we are concerned is the one at the right hand end of the linkage. The effect of this pin coming out would be to cause the right wheel of the plough to veer sharply to the right and this would cause the rear wheels of a towing medium such as a tractor to veer in the same direction

and to slew its front to the left. The link pins of the first 1700 ploughs were not fitted with holes for split pins and in none of these ploughs did the link pins come out. But the ground in the eastern States is much harder than the ground in Western Australia and when Chamberlain commenced to market its ploughs in the eastern States it fitted the ploughs with a greater range of adjustment to their draw bar and steering linkage and also fitted the link pins with holes for split pins.

Of the two Mills brothers Ernest is the one who looks after the machinery. He attended the Melbourne Show in 1953 and there made an arrangement with Chamberlain (to use a neutral term) with respect to one of these ploughs. The evidence of the exact nature of this arrangement is microscopic. It is all contained in the evidence of Ernest Mills and all that he said was that he had arranged with Chamberlain to buy the plough subject to satisfactory trial and that part of the arrangement was that Chamberlain would send someone to assist with the assembly and be present at the trial. The plough arrived at Panshanger about the beginning of January 1954 partly assembled. It was placed in the machinery shed awaiting complete assembly. The representative of Chamberlain, Harry Hawker, an expert in machinery, arrived at Panshanger on 5th January 1954 to assemble it. He was at that time the foundry representative of another company associated with Chamberlain but he had previously been associated with Chamberlain for about ten months and had travelled many thousands of miles in Western Australia where the ploughs were in operation and had attended demonstrations in Victoria and New South Wales. At the beginning of January 1954 one Markelow was employed at Panshanger by the Mills brothers. He was an experienced tractor driver and was detailed by Ernest Mills to assist Hawker in assembling and testing the plough. The plough that had been sent to Panshanger was an 18 disc plough. It had link pins fitted with holes for split pins and split pins had been sent for these holes. But in assembling the plough for trial Hawker did not

insert the split pins in the holes. He said that he did not do so because it was not usual to insert them and lock the link pins until the final adjustments were made. During the tests the plough was towed by one of the Mills brothers' tractors driven by Markelow. It was tested on easy ground on the afternoon of 5th January 1954 and for that purpose was towed from the machinery shed and back to that shed after the trial. The link pins stayed in position without the split pins. It was tested on rougher ground on the morning of 6th January and again the link pins remained in position whilst it was being towed to this ground and during the ploughing. But when the plough was being towed back to the machinery shed along the road for some further adjustments in the middle of the day, it suddenly veered to the right into the table drain of the road and shortly afterwards the tractor, which veered to the left, turned completely over with its four wheels in the air and caught fire and Markelow was burnt to death. The plough was at the time being towed at about 16 miles an hour which is a fast rate at which to tow an ordinary plough, the usual speed being about four to five miles an hour, but it was usual to tow the Chamberlain ploughs at 22 miles an hour behind their own diesel tractors and Hawker said that he considered that it should have been quite safe to transport the plough over the road in question at 15 to 16 miles per hour.

Markelow's widow sued the defendants, the Mills brothers and Chamberlain, for damages for negligence under the Fatal Accidents Act 1934 (Tas.) and alternatively sued the Mills brothers for workers' compensation under the Workers' Compensation Act 1927 (Tas.). The Mills brothers gave Chamberlain notice that, if the plaintiff recovered damages or workers' compensation from them, they would claim against Chamberlain damages for its negligence in providing a plough which was not safe to be driven and in the alternative for damages for breach of an implied condition under sec. 19 of the Sale of Goods Act 1896 (Tas.) that the plough should be reasonably fit for the particular

purpose for which it was required. Pursuant to this notice the Mills brothers delivered a statement of claim to Chamberlain and Chamberlain delivered a defence to them. The statement of claim at first alleged negligence, then it was amended so as to omit negligence and allege breach of this implied condition and then it was re-amended during the hearing so as to allege both negligence and breach of this implied condition. It is the re-amended statement of claim that is now before us. It alleges an agreement between the Mills brothers and Chamberlain that the company should demonstrate a plough at Panshanger and that if the demonstration was satisfactory the Mills brothers would purchase the plough. In its defence Chamberlain alleges that the agreement was not as pleaded but that it was that the company should deliver the plough to the Mills brothers at Panshanger for trial and testing by them and if they were satisfied with such trial and test they would purchase the plough.

It would not appear that the agreement as pleaded in either the statement of claim or the defence exactly fits the evidence of Mills. As his evidence is the only evidence of the arrangement made between the Mills brothers and Chamberlain, its exact nature so far as this is material will have to be inferred from what he said. The statement of claim alleges that Hawker was the servant or agent of Chamberlain, that he was negligent in not ensuring that split pins were inserted in the link pins of the steering assembly of the plough before the demonstration commenced and that Chamberlain was also negligent in not supplying a direction that the split pins should be inserted. It alleges that the plough was demonstrated under the supervision of Hawker on the 5th and 6th January 1954 and that before the demonstration was concluded on the 6th January 1954 by the negligence of Chamberlain a link pin of the steering assembly came out whereby the tractor towing the plough overturned and Markelow a servant of the Mills brothers was killed. It also alleges that there was

an implied condition that the plough should be reasonably fit for the particular purpose for which it was required namely ploughing and travelling and that the Mills brothers had made known to Chamberlain the particular purpose for which the goods were required so as to show that they relied on the company's skill and judgment.

Green J. who tried the action found for the defendants on the issue of negligence. He said that he accepted completely the evidence of Ernest Mills who said that it was not usual to insert split pins in the link pins of the steering linkage of ploughs and that he had not known a link pin to come out of an agricultural implement although he had known them to come out of two-wheeled trailers towed behind tractors. His Honour said that he thought that the provision of a split pin was, as Mills said, a mere refinement and that no reasonable person would have thought that it was necessary for safety. He said that this evidence was borne out by that of Mr. Hawker who said that in his experience no case of a link pin coming out had been known. He said that he would not accept the evidence of Mr. McArthur, an inspector of machinery in the Department of Labour and Industry, that an experienced mechanic in the case of a link pin in a new plough would have expected it to come out. Ernest Mills said that he only discovered that split pins had been provided when he found them in the tool box of the plough after the accident. His Honour said that it was the duty of the Mills brothers to use reasonable skill and care to provide adequate materials for their employees to use but they had discharged this duty in the case of the plough which was on their property only so that it could be demonstrated to them when they relied on the skill and experience of Hawker a competent person sent by Chamberlain to assemble the plough and supervise its demonstration. He dismissed the action for negligence but on the alternative claim ordered the Mills brothers to pay workers' compensation to the plaintiff which he assessed at £1500. With respect to the claim of the Mills brothers against

Chamberlain to be recouped this sum he said that Ernest Mills saw the plough and its characteristic was that it could both plough and be towed at high speed. He wanted such a plough and bought it subject to the condition that it would on demonstration reasonably satisfy his requirements. It therefore appeared by necessary implication that he relied on the skill and judgment of Chamberlain to provide him with a plough which would plough and be towed at speed and it was the seller's business to sell such a plough. He said: "It thus, in my opinion, became an implied condition by virtue of the Sale of Goods Act that this plough could be towed at speed but, in fact, it could not and the accident happened. Accordingly the condition is broken and, as a consequence of the breach, the first defendants have been compelled to pay Workers' Compensation and I think they are entitled to recover that from the second defendant". He added: "To make it plain, I should perhaps say this: The contract was to buy and sell a plough which could be towed at speed. The second defendants supplied and assembled this plough and, as they supplied it in the way they had assembled it, it could not be towed at speed. It could have been made quite safe if they had inserted split pins".

From that part of the judgment which orders Chamberlain to pay the sum of £1500 to the Mills brothers, Chamberlain has appealed on a number of grounds. One ground is that his Honour ought not to have held that the accident was caused by the link pin of the steering assembly falling out. There was a shallow table drain on the right side of the road where the accident occurred, there is evidence that the link pin was found a short distance beyond the point where the right wheel of the plough veered to the right into this drain, and his Honour was asked to infer that the plough must have veered in this direction before the link pin fell out and that the cause of its falling out was the impact of the plough dropping into the table drain. But this ground need not be seriously considered. His Honour's finding

that the accident was caused because the link pin came out cannot be seriously attacked. The effect of the link pin coming out would be, as Ernest Mills said, to cause the plough to veer to the right instead of following in the wake of the tractor and this would cause the tractor to veer to the left. All the probabilities suggest that the link pin came out before and not after the plough behaved in this way. At the speed at which the tractor was travelling, especially along a narrow country road, it was a natural and probable consequence of this behaviour that the tractor would be thrown off the road and overturned.

The crucial question that arises on the appeal is whether his Honour's opinion that there was an implied condition or warranty under sec. 19 of the Sale of Goods Act that the plough was reasonably fit for towing at speed can be supported. With respect to this ground Mr. Campbell for the appellant contended that no such condition or warranty could be implied because the plough had not been supplied under a contract of sale. This contention makes it necessary to refer to some of the sections of the Sale of Goods Act. By sec. 3 "Contract of sale" is defined to include an agreement to sell as well as a sale. Sec. 6 provides: "(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price ... (2) A contract of sale may be absolute or conditional. (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred". Sec. 19 provides that "Subject to the provisions of this Act ... there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods

supplied under a contract of sale, except as follows:- I. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:".

It was contended for the respondents that the plough was supplied under an agreement for sale and that the requisites of Rule I were present to make Chamberlain liable. The evidence proves, as his Honour found, that Ernest Mills made known to Chamberlain the particular purpose for which he required the plough, that is a plough that would plough and travel at speed, that he relied on the seller's skill and judgment to supply him with such a plough and that the plough was of a description which it was in the course of Chamberlain's business to supply. The question is whether it was supplied under a contract of sale. That depends upon the effect of the arrangement regarding the plough made between Ernest Mills and Chamberlain at the Melbourne Show. With respect to this arrangement there are three passages in his Honour's judgment. He said that the plough was at Panshanger only so that it could be demonstrated to the Mills brothers, that Ernest Mills bought the plough subject to the condition that it would on demonstration reasonably satisfy his requirements (that is that it would have to be a plough that would both plough and could be towed at high speed) and that the contract was to buy and sell a plough that could be towed at speed. Subject to one possible exception there is no reason to doubt that in these passages his Honour has correctly interpreted the true nature of the arrangement to be inferred, as it must be, from the evidence of Ernest Mills. It constituted an agreement by Ernest Mills o n behalf of himself and his brother to purchase the plough provided they were satisfied with it on trial.

The condition that the Mills brothers should be so satisfied was a condition precedent to their obligation to take delivery of the plough. But they could not have rejected the plough for a mere whim. They could not have rejected it because, for instance, they did not like its colour. It was not sent to them on sale or return or other similar terms in which case they could in their absolute discretion have given Chamberlain notice that they rejected the plough within a reasonable time. It was sent to them on the terms that they could reject it only if they were not satisfied with its suitability on trial for the purpose for which it was sent. It was subject to their approval in this respect, but, if they disapproved, it had to be an honest disapproval in fact. They were bound to decide bona fide that the plough was not a satisfactory plough for ploughing and towing at speed. It was not a mere option to reject the plough. It was a conditional agreement for the purchase and sale of the plough. Moss v. Sweet 16 Q.B. 493 at p. 495, 117 E.R. 968 at p. 969; London Jewellers Ltd. v. Attenborough (1934) 2 K.B. 206 at p. 224; Marten v. Whale (1917) 2 K.B. 480. The plough was sent to the Mills brothers under that agreement and was therefore supplied under a contract of sale because the Sale of Goods Act includes a conditional agreement to sell as well as a conditional sale. His Honour considered that the goods supplied under the conditional agreement of sale was the plough as it was assembled by Hawker for the purposes of the demonstration and that it was not reasonably fit for the purpose for which it was required, that is for a plough which would work and travel at speed, because as so supplied it was supplied without the split pins being inserted in the holes in the link pins provided for them. This must be right. The trial which had to prove satisfactory to the Mills brothers was a trial of the plough properly assembled so that it would plough and travel at speed. The agreement was for the trial and sale of a plough for that purpose. It is a little uncertain what his Honour meant when he said that the condition was that the demonstration would

reasonably satisfy the Mills brothers' requirements. It may be doubted whether the Mills brothers were under a duty to act reasonably. But they could not have refused to accept the plough without a trial at all. They had promised that they would give the plough a trial and they could only have refused to accept it if in their honest opinion the trial proved that the plough was not satisfactory. Repetto v. Friary Steamship Co. Ltd. 17 T.L.R. 265; Marten v. Whale (supra); Cammell Laird & Co. v. The Manganese Bronze and Brass Co. (1934) A.C. 402 at p. 416. The crux of the matter is that the plough, if it had been completely assembled by using all the parts that were forwarded including the split pins for the link pins, would have been reasonably fit for the purpose for which it was required. It was just as essential that it should be fit for that purpose at the time of its trial as subsequently. The plough had no motive power of its own. It had to be towed by a tractor supplied by the Mills brothers and driven by one of their employees. If it was not reasonably fit to be towed at speed at the time of the trial the danger to the Mills brothers and their property and employees would be just as great as if it was not reasonably fit for this purpose after delivery. If sec. 19 of the Sale of Goods Act is inapplicable, there is nothing to prevent the Mills brothers relying upon the condition implied at common law that goods supplied for a particular purpose are reasonably fit for that purpose. Sec. 19 of the Sale of Goods Act did no more than crystallise and consolidate the common law. Frost v. The Aylesbury Dairy Co. (1905) 1 K.B. 608 at p. 613; Manchester Liners Ltd. v. Rea Ltd. (1922) 2 A.C. 74 at pp. 79, 86. The plough was at least placed in the possession of the Mills brothers so that it could be tested. This was a bailment of the plough with them for a particular purpose. It was assembled by Hawker for this purpose and it was the duty of the Mills brothers to test it by towing it behind their tractor in order to decide whether it would plough satisfactorily and travel satisfactorily at speed. Completion of the agreement depended upon whether the trial of that plough, and not of a plough from which some of the

parts sent for assembly were missing, was satisfactory. It was the duty of Chamberlain to supply a plough that was reasonably fit for the purpose for which it was to be used or in other words a plough that was in as safe a condition for that purpose as care and skill could render it. Cases relating to this implication include cases where the article has been sold or hired for a particular purpose but there is no reason in principle why the implication should not also apply where the article is supplied for the purposes of trial with a view to its being purchased or hired for such a purpose. The life or property of the person to whom a defective article is supplied and of those for whose safety he is responsible would be in jeopardy to the same extent whether the article was supplied for trial or under a contract of sale or hire. In each case the article would be supplied by one person to another to be used by that other under such circumstances that the other would be likely to suffer damage if it is not reasonably fit for the purpose for which it is to be used. The implied condition is that the article will be as fit for the particular purpose as it can be made by the exercise of reasonable care and skill. If there are defects in the article that make it less than reasonably fit for the purpose, the condition will be broken even though those defects be Latent. Jones v. Page 15 L.T. 619; Randall v. Newson 2 Q.B.D. 102; Hyman v. Nye 6 Q.B.D. 685; Vogan v. Oulton 79 L.T. 384, 81 L.T. 435; G.H. Myers v. Brent Cross Service Co. (1934) 1 K.B. 46; Stewart v. Reavell's Garage (1952) 2 Q.B. 545. It was contended by Mr. Campbell that the bailment, if any, under which the plough was supplied to the Mills brothers was at most voluntary and that in the case of a voluntary bailment the supplier is only liable if he fails to give warning of a defect of the article with reference to the use to which it is to be put of which he is aware and if, wilfully or by gross negligence, he does not discharge this duty. Coughlin v. Gillison (1899) 1 Q.B. 145. He is then liable for any injury to the borrower from the defect. But the bailment

under discussion was not voluntary. It was a bailment under which the Mills brothers were bound to accept and pay for the plough if in fact they were satisfied with the trial. It was therefore a bailment for valuable consideration. Because Hawker failed to insert the split pins in the link pins the right hand link pin came out and the plough did what it could be expected to do in this event, that is, veer to the right and fail to follow in the track of the tractor and this was bound to have an effect on the course of the tractor by which it was being towed and to place the safety of the tractor and its driver in jeopardy. This danger to the tractor and its driver was the natural and probable consequence of the plough not being reasonably fit to be towed with safety behind the tractor without split pins in the link pins. As a result of the accident the Mills brothers were ordered to pay £1500 as workers' compensation to Markelow's widow and in accordance with the principle discussed in Mowbray v. Merryweather (1895) 2 Q.B. 640 they would be entitled to claim this amount from Chamberlain. It could not be said that it was not reasonably within the contemplation of the parties when the conditional agreement for sale was entered into between Ernest Mills and Chamberlain that, if the plough did not steer properly, the tractor towing it and the driver of the tractor would probably suffer damage.

It was also contended by Mr. Campbell that as the only implied condition pleaded was the condition implied by sec. 19 of the Sale of Goods Act, the respondents should not on this appeal be allowed to rely in the alternative on the condition of fitness implied at common law. But the two conditions are in essence the same. It is a principle of practice that a party should not be allowed on appeal to raise a new point not raised at the hearing where, if it had been raised at the hearing, it might have been cured by further evidence; but the point under discussion is not in substance a new point at all. The real question is whether there was a condition or warranty that the

plough should be reasonably fit for the purpose required and it is immaterial whether the condition or warranty arises under the Sale of Goods Act or at common law. The question is whether on the evidence the condition or warranty should be implied, and there is no suggestion that Chamberlain's case would be different whether the Mills brothers sought to establish the implication under the Statute or at common law.

Finally Mr. Crawford submitted that if no such implication should be raised the Mills brothers could still recover the £1500 from Chamberlain as damages which they had suffered from the negligence of Chamberlain and relied upon the vicarious responsibility of Chamberlain for the failure of their agent Hawker to insert the split pins in the link pins. The plaintiff sued the Mills brothers and Chamberlain for negligence and his Honour dismissed the action against all the defendants. He ordered the plaintiff to pay two-thirds of Chamberlain's costs. In his reasons for judgment his Honour does not specifically state why he dismissed the action against Chamberlain but it was presumably because he did not consider that Hawker failed in his common law duty to take reasonable care in assembling the plough when he left the split pins out of the link pins. The implied term that the plough should be reasonably fit for the purpose required was, as has already been stated, an absolute condition or warranty to that effect and not merely a promise to use reasonable care and skill to see that it was reasonably fit for that purpose. Thus it was an obligation of a higher character than the common law duty to use due care. It may be that it was on this ground that his Honour dismissed the plaintiff's action against Chamberlain for negligence at common law but upheld the Mills brothers' claim against the company for breach of contract. The only contract relating to the plough was between the Mills brothers and Chamberlain and only the Mills brothers could sue on this contract. Be that as it may it could not be contended

since Donoghue v. Stevenson (1932) A.C. 562 that Chamberlain did not at common law owe a duty of care to the driver of the tractor as coming within the range of persons who might be injured from a breach of that duty. Presumably his Honour dismissed the plaintiff's action against Chamberlain on the ground that, although Hawker omitted to insert the split pins in the link pins, the risk of danger from his not doing so was too remote to amount to a breach of his duty to any of them. Naturally neither the Mills brothers nor Chamberlain have appealed from the dismissal of the plaintiff's action against them. But this would not prevent the Mills brothers, in seeking to uphold that part of the judgment under appeal, from contending that Chamberlain had been negligent. They have pleaded negligence so that no question arises of this point being taken for the first time on appeal. It is always the duty of the Court of Appeal to examine the facts for itself. The principles to be applied in deciding whether or not it should reverse a finding of fact by the Court below are well known. They were recently discussed by this Court in Paterson v. Paterson 89 C.L.R. 212 and by the House of Lords in Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. The present case is one in which the question that arises relates to the proper inference to be drawn from the evidence accepted by the trial judge. On that question the Court of Appeal is generally willing to form an independent opinion giving due weight to the opinion of the learned judge. The evidence his Honour accepted is to the effect that until the present accident it had not been usual to insert split pins in the link pins, that it had been usual to rely on their being kept in position by their weight and that no instances had occurred where the link pins had come out. But Chamberlain as the manufacturer of the plough must have concluded that the provision of split pins was a wise precaution. His Honour does not appear to have paid sufficient attention to this important circumstance. It has been said so often that it is so easy to be wise after the event. But this is not that case but the converse case because

Chamberlain was wise before the event. The company had supplied split pins for the link pins but their agent Hawker omitted to insert them. He said that the directions for assembly did not specifically state that split pins should be inserted although these directions have been altered since the accident so that they now do so. But it seems to be impossible to escape from the conclusion that Hawker's omission to insert the split pins was a failure of duty on his part to exercise due care. They were supplied to ensure that the link pins would remain in position. This was essential if the plough was to steer properly. They were supplied as a precaution which the manufacturers evidently thought it prudent to take. The risk of a link pin jumping out was just as great during the trial of the plough as it was after it had been tested and adjusted and to omit to use the whole of the material sent for the assembly of the plough, especially a portion that formed part of the steering linkage, seeing that if the steering went wrong the safety of the tractor towing the plough and its driver would almost inevitably be endangered, is strong affirmative evidence of a failure of duty on Hawker's part to exercise due care.

The appeal should be dismissed with costs.

CHAMBERLAIN INDUSTRIES PROPRIETARY LIMITED.

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and
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JUDGMENT. WEBB J.

I would allow this appeal.

The plough had been running for about 30 chains along a good road with a very hard surface when the accident occurred, and the proper conclusion is that the link pin was in its right position over that distance. Then there is no explanation of how the link pin became dislodged other than that this was due to the furrow wheel of the plough coming into contact with the table drain. If that was the explanation then it was due to the faulty driving of the tractor for which the appellant was not responsible, and not to the faulty assembly of the plough. The furrow wheel could have reached the drain either because of faulty driving or because that wheel had become free as a result of the link pin falling out. Naturally the marks across the drain do not indicate one thing or the other; and owing to the fact that the wheels had pneumatic tyres which left no impression on the hard road surface no help is afforded by marks on the road surface. Then one explanation is as likely as the other, and we are not warranted in preferring the explanation that favours the party having the burden of proof. There is no presumption against faulty driving, on private property at all events.

It becomes unnecessary for me to deal with the other questions argued. But there are four observations I desire to make; (1) That if the link pin fell out before the drain was reached and while the tractor and plough were travelling at a proper speed on the good but very hard surfaced road, and fell out for the sole reason that a split pin had not been inserted in it, then such a simple

occurrence must have been a natural consequence of the absence of the split pin, even when the plough was running on a good but very hard surfaced road, and so must have been anticipated by the appellant as likely to occur in those circumstances, and for that reason the appellant should be taken to have provided the split pins which it then was negligence to discard; (2) that the purposes of a trial are not included in "the purposes for which the goods are required" within s.19 of the Tasmanian Sale of Goods Act 1896. The warranty operates, I think, from the time the goods become the property of the purchaser and not before: the term "warranty" implies in itself the permanent retention of the goods by the purchaser. But if the trial fails the goods are rejected by the prospective purchaser; and if it succeeds the warranty is not necessary; (3) There was no hiring of the plough for the purposes of the trial and so no warranty of fitness: the obligation of the respondents to purchase the plough if it proved satisfactory, even if that had to be determined objectively, which is arguable, did not constitute a consideration making the bailment a hiring. At all events I am not aware of any authority that warrants such a conclusion. It is true that Collins L.J. in Goughlin v. Gillison, 1899 1 Q.B. 145 at 149 observed that it was quite possible that a gratuitous bailment might be with some benefit to the bailor, and in such a case there might be a greater liability on the bailor than where the bailment was for the benefit of the bailee only. In that case it was held by the whole court that the duty of a gratuitous lender was to communicate defects in the article but with reference to the use to which it was to be put, of which defects the lender was aware, and if, wilfully or by gross negligence, he did not discharge the duty he was liable for injury resulting to the borrower from such defect. Collins L.J. did not say, however, that the greater liability that he had in mind was the same as that which arose from a warranty of fitness; and (4) If, as I think was the case, there was a gratuitous

bailment here for the purposes of the trial, and if, contrary to my view of the evidence, there was negligence on the appellant's part causing the accident in the failure to insert the split pins in the link pins, or to notify the respondents that these split pins should be inserted to render the plough fit for the trial, then that negligence was gross, and the appellant was liable as found by the learned trial judge for other reasons. I think there was a bailment because the arrangement was for a trial by the respondents and not for a demonstration by the appellant: the appellant would give a demonstration but not a trial of its own plough. For the purpose of the trial the respondents had to assemble the plough but with the assistance of the appellant. That assistance extended to seeing that all those parts which were required for safe working were in their proper place in the plough as assembled. But the respondents had possession of the plough and so were the bailees.

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FULLAGAR J.

CHAMBERLAIN INDUSTRIES PTY. LTD.

v.

MILLS & ANOR.

This is an appeal from a judgment of the Supreme Court of Tasmania (Green J.) in an action brought in that Court. The plaintiff was Gertrude Markelow, the widow of Gustav George Helmut Markelow. The defendants were Maurice Duckett Mills and Ernest Duckett Mills, who carry on a farming business in partnership on a property near Longford in Tasmania, and Chamberlain Industries Pty. Ltd., a company incorporated in Victoria, which carries on a business of manufacturing (inter alia) ploughs. Markelow was employed by the Mills Bros., and on 6th January 1954 was killed as the result of an accident arising out of and in the course of his employment. He was at the time driving a tractor, to which was attached a plough manufactured by the defendant company, on a road in the vicinity of Mills Bros.' property. The plough was being "demonstrated" under the supervision of a man named Hawker, who was a servant of the defendant company. The Mills Bros. proposed, if the performance of the plough proved satisfactory, to purchase it from the company. It would appear that the accident happened because a link pin in the steering assembly of the plough came out, with the result that the tractor was overturned. It would also appear that the link pin could not have come out if a split pin, provided for the purpose, had been inserted in a hole in the lower end of the link pin. The plough had arrived at the Mills Bros! property in a partly dismantled condition, and had been assembled by Hawker for the purposes of the demonstration. The evidence as to the actual happening of the accident was unsatisfactory and was far from clear, but I think that, for the purposes of this appeal, the position must be taken to be that which I have indicated. It was on this basis that Green J. dealt with the case, and it was on this basis that it was argued before this Court.

The plaintiff's claim against Mills Bros. was for damages under the Tasmanian Fatal Accidents Act, or alternatively for compensation under the Tasmanian Workers' Compensation Act. The former claim may be ignored, because no case of negligence could be made against the Mills Bros. Mills Bros. served a third party notice on their co-defendant, the company, and later they delivered a statement of claim, in which they claimed to be indemnified by the company in the event of the plaintiff's recovering compensation from them under the Workers' Compensation Act. The claim to be indemnified was of some complexity, and requires analysis. It was really based on three alternative grounds. In the first place, alleging negligence on the part of Hawker, or his master, the company, they claimed by way of damages the amount of any compensation payable by them to the plaintiff. This was a common law claim in tort. Its basis was an alleged common law duty of care owed to them, Mills Bros., for breach of which the company, either directly or as Hawker's master, was alleged to be responsible, the damages being the amount which, it was said, a breach of that duty had rendered Mills Bros. liable to pay to the plaintiff. The second alternative ground of claim was thus stated in the statement of claim: "There was an implied condition that the plough should be reasonably fit for the particular purpose for which it was required, namely ploughing and travelling, and the defendants Maurice Duckett Mills and Ernest Duckett Mills had made known to the defendant company the particular purpose for which the goods were required so as to show that they relied on the defendant company's skill or judgment. The plough was not reasonably fit for the purpose of ploughing and travelling by reason of the absence of the split pins, whereby the deceased was killed." The condition alleged is the condition implied in a contract for the sale of goods by virtue of sec. 19 of the Sale of Goods Act 1896 (Tas.). This claim also was a common law claim, but for breach of contract and not for a tort. Its

basis was a contractual duty owed by the company to Mills Bros., the damages being the amount which, it was said, a breach of that duty had rendered Mills Bros. liable to pay to the plaintiff. The third alternative ground of claim was made under sec. 10 of the Workers' Compensation Act, which provides, in effect, that an employer, who has to pay compensation to a worker injured by the fault of a third party, may recover from the wrongdoer the amount of compensation payable by him. This was a claim not at common law but under a statute. Its ultimate basis, however, was an alleged common law duty of care owed not to Mills Bros. but to the deceased - a duty for breach of which the company, either directly or as Hawker's master, was alleged to be responsible.

Green J. awarded to the plaintiff widow against Mills Bros. the sum of £1500 by way of compensation under the Workers' Compensation Act, and gave judgment for the defendant company as against the plaintiff. With regard to Mills Bros.' claim for indemnity, his Honour found that Hawker had been guilty of no negligence. This finding, of course, eliminated the first and third of the three grounds on which Mills Bros. based their claim to be indemnified. His Honour held, however, that there had been a breach by the company of the condition implied in contracts for the sale of goods by virtue of sec. 19 of the Sale of Goods Act, and he gave judgment for Mills Bros. for the sum of £1500, being the amount payable by them to the plaintiff, as damages for breach of this condition.

The judgment based on breach of contract cannot, in my opinion, be supported. The condition referred to in sec. 19 of the Sale of Goods Act is implied only where goods are "supplied under a contract of sale". It is not established that at the material time there was in existence any contract for the sale of goods between Mills Bros. and the appellant company. There is indeed no evidence of any such contract. What the statement of claim alleges is that: "At or about the time of the Melbourne Show 1953 the defendant Ernest Duckett Mills verbally agreed with the Victorian Manager of the defendant company that the defendant

company should demonstrate a plough at 'Panshanger' Longford and that if the demonstration was satisfactory, the defendants Maurice Duckett Mills and Ernest Duckett Mills would purchase the said plough." The only evidence on the subject is a short passage in the evidence of Ernest Duckett Mills, who said: "I had arranged to buy plough subject to satisfactory trial." The statement of claim alleges that "the demonstration was satisfactory, and the defendants M.D. Mills and E.D. Mills later completed the purchase of the plough", but there is no evidence as to this, and it would seem to be irrelevant anyhow. There being no contract of sale at the material time, there could be no "implied term".

It was said that there was a conditional contract of sale, and that sec. 6(2) of the Sale of Goods Act says that a contract of sale may be absolute or conditional. Sec. 6 appears to me to have no bearing on the case. Any contract may, of course, be absolute or conditional. Sec. 6 is concerned with conditions precedent. Sec. 19 imports in certain cases certain conditions subsequent. If a contract is subject to a condition precedent, and the condition is not fulfilled, no contract into which the conditions imported by sec. 19 can enter ever really comes into existence, and a non-existent condition obviously cannot be treated as a warranty and made the subject of an action for damages. In other words, sec. 19 cannot operate at all unless and until there is an "absolute" contract. But, in the present case, all this is neither here nor there, because the evidence goes nowhere near establishing any contract absolute or conditional. The making of a contract is a matter of some seriousness. It involves rights and duties and potential liabilities. It must be properly proved, and its terms must be properly proved. If it was in writing, the writing must be produced, or secondary evidence shown to be admissible and such evidence adduced. If it was made orally, what the parties said must be proved, and its making and its effect are questions of fact for the Court - or for the jury, if there is a jury. No court ought to hold that a contract of any kind was

made merely because a witness says that he had an "arrangement" to such and such an "effect" with somebody. In the present case, the Court was simply not given any material on which it could be justified in saying that there was a contract - still less, of course, what was the effect of any contract that may have been made. And the burden of proof was, of course, upon the defendants, Mills Bros. Even if the fullest face value be given to the single sentence on which the defendants rely, it does not indicate that there was anything binding on either party. The Mills Bros. might or might not be satisfied with the proposed demonstration. If they said that they were not, there could be no question of inquiring into the genuineness or reasonableness of their dissatisfaction. No more is shown to be intended than that the Mills Bros. will decide whether or not to buy the plough after witnessing the demonstration, it being expected that they will be satisfied with it and will buy the plough.

The respondents also sought to support the view that a contractual obligation subsisted between the parties on the basis that there was a bailment of the plough by the company to them. No bailment was pleaded, but in any case the evidence does not support a bailment. The plough was, so far as the evidence goes, in charge of the company's servant, Hawker, for the purposes of the demonstration, and it is not shown to have passed out of the possession of the company at the material time.

From what has been said it follows <u>prima facie</u> that this appeal should be allowed and the judgment against the appellant company discharged. The absence of a contract, however, does not mean that no duty was owed in respect of the plough by Hawker or by the company to Markelow or to Mills Bros. It merely means that the liability of the company, if it exists, is in tort and not in contract. I have no difficulty in saying that the company and Hawker did owe to Markelow and to Mills Bros. a duty of care in respect of the plough, and that the company would be liable

for any relevant negligence. The only real question in the case, as it was presented to Green J. was, in my opinion, whether the death of Markelow had been caused by any negligence for which the company was responsible.

Apart from the assembling of the plough by Hawker on Mills Bros.' property, there was no evidence of any negligence on the part of the company or any servant or agent of the company. It had forwarded the plough to that property, partly dismantled for the purposes of travel but complete with all its parts and equipment, including split pins for insertion in the link pins, and placed it in charge of Hawker, an experienced and competent person, who was to assemble it for the purposes of the demonstration. The defendants' case was that Hawker had been negligent in failing to insert the split pins in the end of the link pins. Green J. declined to find that Hawker had been negligent in omitting to insert the split pins. The respondents, however, attack this finding, and ask this Court to hold that Hawker's omission did amount to negligence on his part. If the attack succeeds, the judgment, of course, stands.

There is force in the respondents' argument, but I think that it would be quite wrong for us to reverse his Honour's finding. It turned partly on his Honour's view of the evidence of witnesses whom he had seen and heard, and, apart from that, I think, on the whole, that it was a sound and just finding. The plaintiff (in order to support her case against the company) called an "expert" witness, Mr. R.S. McArthur, whose evidence tended to support, but not strongly, the view that Hawker's omission was negligent. The other witnesses who gave evidence bearing on the issue were Ernest Duckett Mills himself and Hawker himself. Both had had much experience of farming machinery, and they were in substantial agreement. Hawker was, of course, an interested witness. The interest of Mills was (on the face of things,

at any rate) opposed to that of Hawker. Green J. expressed a strong preference for the evidence of Mills and Hawker in so far as it might be said to conflict with that of McArthur. It appeared that the provision of a hole in the end of the link pin and of a split pin for insertion therein had been a very recent innovation. About 1700 ploughs had been made and sold by the company without split pins, and Hawker, in the course of a long experience, had never heard of a link pin coming out before. Mills said that, if he had been assembling the plough himself, and had seen the holes in the link pins and the split pins provided, he would possibly have inserted the split pins. But he said, in effect, that it would not have occurred to him that they were a "safety requirement": he would have regarded them as a refinement designed to guard against the inconvenience of losing a link pin. He would have thought that the possibility of a link pin coming out was "a remote one". Green J. said: "I find that no reasonable man would have expected the link pin to come out, or, if it did, that it would cause this damage. I accept completely the evidence of Mr. Mills. I think that the provision of a split pin, as he puts it, was a mere refinement, and that no reasonable person would have thought it was necessary for safety." It is to be noted that his Honour here goes further than it was necessary for him to go in order to exonerate Hawker and the company. It was enough for him to find that a reasonably careful man in the position of Hawker might not have adverted to the possibility that the plough would be unsafe to drive if the split pins were not inserted in the link pins.

The view of the learned trial Judge does not appear to me to be open to successful attack. I regard it as a sound view. If his Honour had taken the contrary view, I do not think that it could have been upset, but I should not have felt satisfied with it. Where very serious damage has ensued from the omission of a precaution extremely simple in itself, one has to be

on one's guard lest one apply too high a standard of care to the person who has omitted to take that precaution. The standard (criticised and satirised, as it has been) is the standard of the ordinary reasonable prudent man. It is not enough that a wiser or more thoughtful or more far-seeing person might or would have taken the precaution. Applying the established standard, I do not think that Hawker could fairly or properly be said to have fallen short of it or held to be blameworthy in respect of the death of Markelow.

The appeal should, in my opinion, be allowed.

CHAMBERLAIN INDUSTRIES PROPRIETARY LIMITED.

v.

MAURICE DUCKETT MILLS AND ERNEST DUCKETT MILLS

JUDGMENT. TAYLOR J.

CHAMBERLAIN INDUSTRIES PROPRIETARY LIMITED.

v.

MAURICE DUCKETT MILLS AND ERNEST DUCKETT MILLS

JUDGMENT.

This is an appeal from an order of the Supreme Court of Tasmania directing judgment for the present respondents in the sum of £1,500. The claim upon which the respondents succeeded was for damages for breach of a condition upon the sale to them by the appellant of a plough.

It is clear that the learned trial judge found that the parties made a contract for the sale and purchase of the plough in question and that the agreement incorporated two conditions to which reference should be made. The first was that the sale was subject to the condition that a demonstration should take place, apparently on the respondents' property, and that the plough should "on demonstration reasonably satisfy" the respondents. The second was that the plough should be capable of ploughing and of being "towed at speed". No breach of the first condition is alleged. Indeed the respondents' statement of claim, which alleges the existence of this condition, also alleges that the demonstration was satisfactory and that the respondents' "later completed the purchase of the plough". A breach of the second condition was, no doubt, thought to be established by proof of the fact that whilst being towed by a tractor along a roadway at a speed of approximately 15 miles an hour it suddenly veered to the right and caused the tractor to overturn with the consequence that the driver, one Markelow, was killed. As appears from what has been said previously his widow obtained an award of £1,500 against the respondents pursuant to the Workers' Compensation Act 1927 (Tas.) and they, in turn, secured judgment against the appellant in that sum for damages for breach of contract.

The first thing which should be said about the

case is that the evidence concerning the alleged contract of sale is quite unsatisfactory. But if such a contract was made it is clear/it was made between Ernest Mills and an unnamed representative of the appellant at the Melbourne Agricultural Show in 1953 and, further, that if, in the terms of Section 19 of the Sale of Goods Act 1896 (Tas.), the plough was supplied to the respondents under a contract of sale, it was supplied pursuant to that contract. I should, perhaps, interpolate that I am unable to see how the Tasmanian Sale of Goods Act, upon which the respondents relied, could control the conditions of such a contract, but, in view of the fact that the corresponding Victorian Act contains a similar provision and that there are other difficulties in the way of the respondents on this branch of the case, it is unnecessary to pursue this matter.

The first of these difficulties is whether the evidence is sufficient to establish that Ernest Mills bound himself and his brother, the other respondent, to purchase a plough if a demonstration should prove satisfactory. The evidence is brief and it is contained in the following passage from the transcript:

> "Plough arrived some days before accident, partly broken down for shipping. I had arranged to buy plough subject to satisfactory trial. Arrangement with Chamberlain Industries - I think at Melbourne Show. It was part of the arrangement that they would send someone to assist with the assembly and be present at the trial. Chamberlain Industries had good reputation in my limited knowledge as suppliers of agricultural machinery."

One may be pardoned for thinking that such exceedingly meagre evidence fails to establish the making of a conditional contract of sale, or, that it discloses nothing more than an informal arrangement that the plough should be demonstrated and an expression of willingness on the part of Ernest Mills to make a purchase when and if the demonstration should prove satisfactory. However, for the purposes of the case, I am prepared to ignore the complete absence of formality and certainty and to assume that there was evidence upon which the learned trial judge was entitled to conclude that a conditional contract had been made.

The condition expressly agreed upon was, it will be observed, that a future demonstration, apparently upon the respondents' property, should prove satisfactory. But there was no evidence that, at this stage, Ernest Mills made any enquiry concerning the capacity of the plough to travel at speed or that the appellant's representative made any statement in relation to this supposed characteristic. Nor, in view of the express condition found by the learned trial judge to have been agreed upon, is it by any means certain that the circumstances in which the contract was made show that the respondents relied upon the appellant's skill and judgment to ensure that the plough should be reasonably fit for any particular purpose. It would be, at the least, difficult for the respondents, after having witnessed a thorough demonstration and having satisfied themselves of the suitability of the plough for the purposes for which they required it, to maintain that they had relied, not upon their own skill and judgment, but rather upon that of the appellant to satisfy them of the fitness of the plough for those purposes. This, however, is by the way for the condition which was found to be broken was that the plough was capable of ploughing and of being "towed at speed". It was the latter characteristic which was important on this branch of the case and there is no evidence to suggest that anything was said concerning it at the time when the contract is said to have been made.

The plough, it will be observed, was despatched to the respondents' property and it arrived there a few days before the accident which caused Markelow's death. It was then in an unassembled state and when the representative of the appellant who had been chosen to conduct the demonstration, one, Hawker, arrived he commenced to assemble it. He arrived on the 5th January 1954 and, the work of assembly was completed during the morning of that day. The demonstration began during the afternoon and it was continued on the following morning. It was about midday on the 6th January when Markelow was killed. This occurred whilst the plough was being towed to a shed on the

respondents' property for the purpose of adjustment during the afternoon and it is reasonable to conclude that the cause of the mishap was the omission to insert a split pin in the link pin at the right hand end of the steering lingage. The link pin was a substantial piece of equipment seven-eighths of an inch in diameter and one and a quarter pounds in weight. There were other link pins in the assembly and from these split pins also had been omitted when the plough was assembled.

Ernest Mills was present when Hawker commenced to assemble the plough and, no doubt, some conversation then took place concerning its capabilities. Mills said that he knew of Hawker's impending arrival on the 5th January, that he detailed Markelow to assist him and that he was present with Hawker for the first hour of the four hours required to assemble the plough. It was on this occasion, it appears, that the first discussion took place concerning the capacity of the plough to travel at speed. According to his evidence Mills said that Hawker told him that the plough was "capable of travelling at high speed for a plough". This evidence does not appear to have been denied but it is impossible to regard it as a basis for concluding that Hawker's statement resulted in the incorporation of a new condition in a contract of sale which had been made during the previous year, or, in the making of a new contract that day.

The facts of the case have already been traversed generally and it is now possible for me to state more or less briefly the reasons which lead me to the conclusion that, even if upon the evidence it is legitimate to conclude that a contract of sale was made sometime before the accident, the respondents' claim on this branch of the case must fail.

In the first place the plough was not <u>supplied</u> to the respondents under the contract of sale. It is true that it was sent to the respondents' property but it was sent there merely for the purpose of demonstration and to await the arrival of Hawker who was to assemble and demonstrate its capabilities.

To speak of the transport of the plough to the respondents' property as constituting the supply or delivery of the contract goods to the purchasers is, in my opinion, completely artificial; this was not done in pursuance of a contractual obligation to supply or deliver goods to a purchaser or purchasers but, on the contrary, to await the arrival of Hawker who was to assemble and have complete control of the plough during the demonstration. But, in any event, if the arrival of the plough at the respondents' property constituted a supply of it to them, what was supplied was a plough, complete with all necessary equipment including split pins, and what was supplied has not been proved to have been unsuitable or defective in any way. I should add that I am unable to see that the omission by Hawker of the split pins when assembling the plough can have any bearing whatever upon the question of what was supplied, or, as was suggested, bailed to the respondents if, indeed, anything can be said to have been supplied or bailed to them.

In the second place I can see no evidence to support the learned trial judge's finding that it was a condition of the contract that the plough should be capable of being towed at speed. On this point his Honour said:

> "As to the indemnity claimed by the first defendants from Chamberlain Industries Pty. Ltd., in my view it succeeds. Mr. Ernest Mills saw this plough and its characteristic was that it could both plough and could be towed at high speed. He wanted such a plough and he bought it subject to the condition that it would on demonstration reasonably satisfy his requirements. I think it appears by necessary implication that he did rely on the skill and judgment of the defendant company to provide him with a plough which would plough and be towed at speed and it was the seller's business to sell such a plough. It thus, in my opinion, became an implied condition by virtue of the Sale of Goods Act that this plough could be towed at speed but, in fact, it could not and the accident happened. Accordingly the condition is broken and, as a consequence of the breach, the first defendants have been compelled to pay Workers' Compensation and I think they are entitled to recover that from the second defendant."

As I have already said the evidence is that the capacity of the plough to travel at speed was first mentioned at the respondents' property on the 5th January 1954 and the discussion deposed to constitutes no basis for such a finding. It should, perhaps,

be observed that no such condition was alleged by the respondents' statement of claim; the only relevant allegation then made was that it was an implied condition of the contract of sale "that the plough should be reasonably fit for the particular purpose for which it was required, namely, ploughing and travelling". However it is sufficient to say on this aspect of the case that the evidence is quite inadequate to establish the existence of the condition for breach of which the learned trial judge awarded damages to the respondent..

In addition to resisting the arguments of the appellant on the points which have already been dealt with, the respondents sought to retain their award for damages on the ground that the evidence disclosed negligence on Hawker's part in omitting to insert a split pin in the critical link pin when assembling the plough. This claim, which was rejected by the learned trial judge, appears to me to have involved no more than a question of fact and upon a consideration of the evidence I can see no reason for disagreeing with his conclusion.

For the respondents it was, of course, contended that the very fact that provision was made for the insertion of a split pin in each link pin is sufficient to enable the conclusion to be reached that their omission by Hawker, when assembling the plough, constituted a failure on his part to take proper care. Indeed there was, as was pointed out, express evidence to the effect that their omission made it likely that the link pins would work free. This evidence was given by an inspector of machinery in the Department of Labour and Industry, one, McArthur. Otherwise uninstructed I should be inclined to think that there was considerable force in the evidence of this witness but it is inconsistent with other cogent evidence which the learned trial judge preferred to accept. Hawker's evidence was to the effect that the provision of split pins was a recent innovation. Previously, approximately 1,700 ploughs had been made and sold by the appellant without any such provision and in the course of Hawker's experience he

had never known a link pin to come out. But in 1953, when the appellants commenced to market this type of plough in the eastern states, provision was made for split pins. Nevertheless split pins had never been inserted when ploughs were being assembled for demonstration purposes; it was not until a purchaser had finally accepted a plough that this was done and final adjustments made. Ernest Mills, who, apparently, had had considerable experience with agricultural machinery, said that it was not usual to use split pins in agricultural machines and that he had never had any trouble with link pins working free in such machinery. On this part of the case the learned trial judge said:

> "The accident happened because the link pin came out. I find that no reasonable man would have expected that link pin to come out or, if it did, it would cause this damage. I accept completely the evidence of Mr. Mills. I think that the provision of a split pin, as he puts it, was a mere refinement and that no reasonable person would have thought it was necessary for safety. I say this because I accept Mr. Mills' evidence completely and because it is borne out by the experience of Mr. Hawker. I accept his evidence as to his experience in Victoria and New South Wales when he was there on demonstrations in Victoria and New South Wales and also because in Western Australia no similar case or no case of a link pin coming out had ever been known. As against the evidence of Mr. Mills and Mr. Hawker I do not accept opinion of Mr. McArthur that an experienced mechanic in the case of a new link pin in a new plough would have expected it to come out."

In the light of the evidence of Hawker and Mills it would not be proper to assume that the provision of split pins was intended as a safeguard to the person operating the plough or that their omission during a demonstration of comparatively short duration constituted a failure to take reasonable care to prevent injury to the operator. It may be that, as was suggested, the provision of such pins was designed to protect the machinery itself from possible injury or to prevent the possible loss, in the course of ploughing, of a link pin which would not be replaceable without delay and inconvenience. But whether this was so or not once Hawker's evidence is accepted there is no room for the conclusion that their omission on this occasion constituted a failure to exercise due care in assembling the plough for demonstration purposes. Hawker,

of course, was completely familiar with this type of plough and I can see no reason why his evidence should not be accepted in preference to that of the machinery inspector referred to. It is true that Hawker was, in one sense, an interested party but nothing emerges from his evidence to suggest that he was not honest and frank concerning his experience with this type of plough. In all the circumstances I am not prepared to disagree with Green J. on this part of the case; once Hawker's evidence was accepted the conclusion which his Honour reached was, in my opinion, inevitable and the appeal, accordingly, should be allowed.