ORIGINAL 14

IN THE HIGH COURT OF AUSTRALIA

LOCKWOOD

V.

RAMSAY

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at ~~Friday~~ SYDNEY

on Friday, 28th May 1965

A. C. Brooks, Government Printer, Melbourne
C.7639/60

LOCKWOOD

v.

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ORDER

Appeal dismissed with costs.

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JUDGMENT

BARWICK C.J.

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The appellant was formerly a male nurse in the employ of the Department of Public Health of the Government of New South Wales. He had been so employed for a considerable number of years, and, by the time of the events which formed the occasion of the present action, had become a senior male nurse at the Reception House, Darlinghurst. He had been working as such since 1946; his duties, whether on day shift or night shift, included the pacifying of those patients who became violent.

The evidence given at the trial of this action, if accepted, would support the following account of the facts relevant to this appeal.

The patients at the Reception House were in various states of mental ill health, some indeed, recovering. It would seem that a particular record of each patient was kept and that, in this record, tendencies to violence or actual outbreaks of violence were duly noted. When a patient became violent, the instructions to the male nurse were that the patient should be subdued without unnecessary delay so as to prevent him doing any damage to himself. The procedure to pacify a patient in an outbreak of violence was, first of all, to endeavour to persuade him by words into a quiet state of mind, but, if this did not succeed, and the state of his violence warranted it, to place him in a camisole or strait-jacket. This device, of which a sample was not actually received into evidence, though apparently one was shown to the jury, was described in the evidence as being a canvas garment in which the sleeves are stitched to the front so that, once the arms are inserted into the sleeves, and the open back of the garment

laced up behind the patient's back, the patient is unable to move his arms, and can be secured to some fixed object in the room. When in the camisole, the patient cannot do any damage to himself or to others with his arms, though he is free to kick with his legs.

During the day shift at the Reception House, when a patient was placed in a camisole the operation was carried out by the co-operation of a minimum of three nurses, one to deal with each of his arms, whilst the third, at the appropriate moment, would obtain and present the camisole in such a way that the other two could speedily force the patient's arms into the sleeves. This seems also to have been the practice at another establishment for mental patients conducted by the Department of Public Health.

However, for many years the Department had maintained only two male nurses on duty on the night shift at the Reception House. For the whole of the time the appellant had been working there, he had, either with the assistance of only one other male nurse or with the additional assistance of a police officer, successfully placed patients who showed violence at night into a camisole without having himself suffered any injury; apparently no other nurse had suffered injury whilst a violent patient was being placed into a camisole with no more assistance than that of one other male nurse.

Three nurses could place a violent patient of average strength in a camisole in five to ten minutes whereas the operation carried out by only two nurses took ten to fifteen minutes and on occasions up to half an hour.

The Reception House at the time of the events the subject of the action and during the years of the appellant's employment there, was next door to a police station, the distance between the two being said to be from 50 to 100 yards.

In cases where a patient had been recorded as having a tendency to violence or in any case in which the senior male nurse on duty at night thought that he could not manage a particular patient with the assistance of only one male nurse, it had been the practice for the senior male nurse to call on the adjacent police station to provide assistance. This had always been forthcoming, though apparently not always with promptitude. There was a resident Medical Officer at the Reception House who was always on call should it be necessary to administer a sedative to a patient, the nurses at this time not being authorised to do this. The number of patients who became violent in some degree at night at the Reception House was in the vicinity of some 200 per annum: but there were no statistics provided in evidence as to how many of those were successfully handled, and in what space of time, by only two male nurses.

On the first day of June 1958 the appellant was on night duty. Early in the evening a patient who was then in a dormitory with a number of other patients became restive and tended to annoy or discomfort the other patients. The appellant thereupon placed this patient in a single room by himself. This was a well recognised and proper procedure to have been taken in the circumstances. Later that evening, and indeed after midnight, this patient became violent and began to batter on the door of his room. Other than by the events of this evening, the appellant had no information to suggest or reason to believe that this patient was, or was likely to become, violent. In particular, there was no entry to that effect in his record.

Upon this display of violence by the patient, the appellant set about pacifying him. He decided that he and the other male nurse on duty could handle the patient without additional assistance. Consequently, he neither sought the assistance of a police officer nor the services of the resident

Medical Officer. Taking with him the other male nurse and a camisole in case it should be needed, he went to the patient's room. The appellant and the other male nurse went into the room, the camisole being left by the door, out of the vision of the patient. The appellant soon realised that it would be necessary to place the patient in the camisole. The patient was apparently a person of average strength, and the appellant a highly experienced and apparently skilful male nurse. The appellant and his assistant set about fitting the patient into the camisole. They almost had his arms in the sleeves of the camisole within a few minutes of beginning the operation when he broke free. Thereafter a physical battle between the patient and the male nurses ensued which lasted for thirty minutes, by which time the patient was physically exhausted. Whilst in that state, and apparently because of it, the nurses were able to put him into the camisole. Had the appellant had additional assistance, the initial attempt to place the patient in the camisole would have been successful and the long struggle with the patient avoided. However, during the course of this protracted struggle, the appellant's back was injured. His injury proved severe, and he commenced the present action against the defendant as the nominal defendant on behalf of the Government for breach of its duty as his employer to take reasonable care for his safety at the work which he was employed to do.

The action came to trial before a judge and jury in the Supreme Court of New South Wales. At the conclusion of the evidence, of which I have given an abbreviated narrative, the trial judge directed the jury to return a verdict for the defendant on the footing that there was no evidence adduced before them on which they could find a verdict for the plaintiff. The appellant unsuccessfully moved the Full Court of the Supreme Court to set aside this verdict and for a new trial. The Full

Court unanimously took the view that there was no evidence of any breach by the Department of Public Health of its duty to the appellant as its employee. The appellant now appeals to this Court against the decision of the Full Court and asks that its order dismissing his appeal and the verdict for the defendant be set aside and that a new trial be had.

The question is whether there was any evidence adduced at the trial upon which a reasonable mind could conclude that the Department of Public Health had failed in its duty to the appellant as its employee to take reasonable care for his safety whilst performing the work he was engaged to do.

There was evidence that to place a violent patient of average physical strength in a camisole expeditiously required the co-operation of a minimum of three trained persons: and there was the evidence that on the day shift at the Reception House and at another establishment of the Department the use of three male nurses was customary. The evidence clearly enough would support the view that expedition in placing such a patient in a camisole substantially reduced the risk of injury both to the patient and to those working to accomplish that end. Of course, the operation in any case entailed risk of injury. But, in my opinion, it could not be denied that upon the material produced at the trial, a male nurse required to place a violent patient in a camisole with the assistance of only one other male nurse was at considerably greater risk of injury than would have been the case if he had had the assistance of two male nurses or at any rate of two trained persons. This added risk of injury was derived from the longer period in which the two nurses would be exposed to the violence of the patient. It was clearly a risk of injury which it could reasonably be thought ought to have been foreseen by the employer. Nor could it be denied that it could be thought that it would be unreasonable on the part of the employer not to take any steps to avoid or

minimise that risk, and that there were practicable safeguards which the employer could reasonably be expected to take to minimise or completely avoid this added risk of injury.

The provision of a third male nurse or some instruction or routine which would avoid the attempt to place a violent patient in a camisole being made by only two nurses readily leap to mind. There was no evidence of any disproportion in these courses either of cost, convenience or efficiency. In my opinion, the jury would be entitled on this evidence to conclude that the risk of injury during the longer period of exposure to the patient's violence when only two persons were attempting to assist him into a camisole was an unnecessary risk, one which could have been foreseen and which could have been avoided or, at the least, minimised by practicable steps which it would be reasonable to expect the employer to take.

But it is claimed that the evidence did not show that the Department required the appellant in all cases to perform this operation with the assistance of only one other trained person. A resident Medical Officer was provided, and the adjacent police station could be asked for, and would in that event provide, the services of a trained person, thus making up the minimum of three required for the speedy and less risky completion of the operation.

I would like, first of all, to deal with the suggestion as to the resident medical officer. It seems to me that on the evidence a jury might well accept the view that this officer was not provided to assist, or in reality given the duty of assisting, in the manhandling of a violent mental patient. I would not imagine, and perhaps a jury would not conclude, that a medical practitioner was trained for this purpose. It was said by the resident doctor who gave evidence in this case that he was quite willing if

asked to participate in the struggle with a violent mental patient, even if called from his bed to do so in the small hours of the morning. But the jury were entitled to be sceptical of this evidence and certainly not bound to accept it. The medical officer could be called to give a sedative to a violent patient; but if the two male nurses in any given situation were unable to subdue a violent mental patient for the space of thirty minutes, and then only when the patient became exhausted, the jury might well think that it would hardly be likely that the medical officer could at the commencement of or during that period have given the patient a sedative either orally or by injection. At any rate, no evidence was given which would rule out the possibility of such a conclusion being drawn by a jury.

Then there was evidence of a long-standing practice of sending to the adjacent police station for assistance to be considered. There was no specific instruction proved to have been authoritatively given to the senior male nurse to seek such police assistance. All that the evidence showed was that there was a practice, followed over a considerable period of time by the male nurses on duty at night, of seeking such assistance when they thought the patient, either because of his recorded history or from observation of him, would prove too much for the two nurses.

But I am prepared to assume for the purpose of considering the sufficiency of the evidence that there was in fact an instruction given in the sense of the practice of which evidence was given. It was not an instruction to seek police assistance on all occasions. It was left to the decision of the senior male nurse whether or not police assistance should be sought. There was no more certain guide afforded to the senior male nurse as to what cases were appropriate for such assistance than the male nurse's own idea of the combined capacity of his assistant and of himself and, where no record of violence or of violent tendencies of the patient existed,

of his own perception of the propensities of the mental patient.

The decision had of course to be made as it were in the heat of the moment having regard to the possibility of self-injury to the patient; also it had to be made, at least in general, before any attempt to pacify the patient was made; for to do this, the patient's room must be entered. Once, as the evidence showed, the nurses entered the room with a violent patient, there might well be no opportunity for one of them to leave the room to obtain assistance because of the added peril to the other, if left alone. It was said that the violent patient would fight to leave the room, and thus make the retreat of both or either of the nurses impracticable. Also, of course, there was the possibility of the male nurse being misled by the demeanour of the mental patient, and, apart from this circumstance, there was room of course for misjudgment on his part. But the experience and training of the senior male nurse might well be thought to fit him to form a sound judgment in the matter even in the urgent circumstances which might be likely to arise.

There was no evidence of any standing arrangement between the two departments, that of police and that of public health, that the Police Department would provide an officer at call for this purpose, nor was any channel of communication shown to have been established between the Reception House and the officer in charge of the police station, nor was any instruction proved to have been given by the Police Department that the police officer in charge at the station should provide an officer to perform this duty of assisting to subdue a violent mental patient, nor was there any evidence of any priorities having been established within the police station as to whether or not this particular duty was to be preferred to any other duty upon which available officers were engaged at the time of receiving a call. Whilst no doubt the police station in question is one which normally carries a large

complement of police, the jury would be entitled to know that it is in the midst of an extremely busy police district.

Of course, if the senior male nurse formed the view that the occasion was appropriate for seeking police assistance, he would be bound to send for assistance on the assumption that the evidence made out an authoritative instruction: and, in general, he would be bound to wait whatever interval of time was necessary to obtain that assistance, without seeking in the meantime to pacify the patient. I say in general because there may be a case where it might be thought that the risk of serious injury to the patient was of such proportions as to require prompt action not brooking the delay of awaiting the arrival of a police officer.

There are two matters on which some stress was laid in argument and to which I should refer. Firstly, attention was directed to the long period of years during which no injury had befallen a nurse on duty at the Reception House at night, although only two nurses were on duty, and a large number of patients had become violent. There is no precise evidence as to the number of cases in which only two nurses co-operated in placing a patient into a camisole. But undoubtedly the jury could have inferred that there must have been a substantial number of such cases and have attributed to the department a knowledge that its staffing arrangements at night at the Reception House over a long period of time had not resulted in injury to a nurse. This is a circumstance of some weight in deciding whether the "instruction" to seek assistance was sufficient to prevent the conclusion being drawn that the department's conduct in the circumstances was unreasonable. But it is only a circumstance to be considered along with all the other circumstances, including the nature of the risk involved. The fact that there had been no injury in the past cannot in this case, in my opinion, itself make the question

as to what was reasonable or unreasonable on the part of the employer one for the Court rather than one for the jury.

The second matter which was pressed on behalf of the respondent was the appellant's conduct on this evening in deciding that he and his assistant would be able to handle the patient. If, of course, it was not unreasonable to do no more than give the "instruction" as to seeking police assistance, leaving to the senior male nurse the decision whether or not to seek it, it would be of no consequence that the nurse made a wrong decision which led to his injury. But if it was unreasonable in the circumstances to do no more than give the "instruction", then it seems to me that, so far as breach of the employer's duty is concerned, the decision, right or wrong, of the senior male nurse is irrelevant to the question whether the employer was in breach of its obligation to the appellant. If the appellant's decision to act with only the assistance of one other nurse is put forward as a matter of contributory negligence barring his right to recover for the respondent's breach of duty, this question, if there really was any evidence of it, upon which I express no opinion, was a matter for the jury.

The question therefore is whether a jury of reasonable men would be entitled on this material to find that the department had acted unreasonably in relation to its duty to the appellant in not doing more towards avoiding or minimising the added risk which might be foreseen to attend the insertion of a patient into a camisole by two rather than three persons than the giving of the instruction to seek police assistance in those cases in which a male nurse decided that such assistance was necessary.

I realise that some minds might reasonably think that such an instruction to a qualified, experienced and skilful nurse reasonably fulfilled the employer's duty, particularly having regard to the proximity of the police station and the period during which it could be said the

instruction and its observance had sufficed without injury to a nurse. But that is not enough to justify withdrawing the case from the jury. For that purpose it must be held that no reasonable mind could take or be allowed to take a contrary view. Unless that conclusion is drawn the Court usurps the jury's function when it withdraws the case from it.

The case is an unusual one, and is not made any easier of resolution because there was a point of time at which the appellant could have decided that he needed assistance, which he might well have obtained. However, I have come to the conclusion that there was evidence before the jury from which reasonable men could properly conclude that the duty which the department owed the appellant as its employee extended to taking reasonable care to avoid or reduce the added risk of injury to which it could anticipate he might be exposed in handling a violent mental patient if he had no more assistance than that of one other male nurse; that they could conclude that it was unreasonable for the department neither to have provided additional assistance on all occasions when a patient had to be placed in a camisole, nor to have given such instructions and made such arrangements as would ensure that, in all cases, there was adequate assistance available before any attempt was made to pacify a violent patient. Consequently, in my opinion, the case ought to have been left to the jury. This appeal, in my opinion, should be allowed.

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JUDGMENT

TAYLOR J.
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At the trial of this action Wallace J. directed a verdict for the defendant on the ground that the plaintiff had failed to make out a case of negligence to go to the jury. The Full Court of the Supreme Court of New South Wales unanimously dismissed an appeal made to it, and it is from the judgment of that court that this appeal has been brought.

The main contention of the appellant was that two men, of whom he was one, were required by their employer, the Government of New South Wales, to do a job - i.e. to restrain a mental patient by putting him in a strait jacket - which a jury could reasonably have found needed three men at least if it were to be undertaken without unreasonable risk. His case was that his injuries were sustained in an exhausting and prolonged struggle made necessary by the unreasonable demands of the employer upon its employees. The question, as we see it, is - could it be found to have been unreasonable for the Government to maintain at the Reception House, Darlinghurst, a night staff of but two male nurses when it was known that, in the course of their duty, it would be likely that they would have to restrain an unruly mental patient by putting him in a strait jacket?

There was evidence that during the daytime it was customary for at least three men to undertake such a task and a description was given of the method adopted by three men. From this and other evidence about the desirability of there being three or more men to confine a strong patient in a strait jacket quickly and without a struggle, a conclusion might have been drawn that, had the Government of New South Wales required two

men to perform that task, whatever the circumstances, its demands upon its officers would have exceeded what was reasonable. We think this notwithstanding that there was also evidence that over a period of twelve years two nurses only had been employed at the Reception House at night and strait jackets had been put on some two hundred times a year without mishap to the nurses. The evidence before the jury, however, did not afford any basis for a finding that at night the Government did require two men to put on a strait jacket whenever it might be necessary, whatever the circumstances. It showed that adjoining the Reception House was a large police station where policemen, also employed by the Government of New South Wales, were on duty day and night and that, on any occasion when the staff at the Reception House considered assistance was required, it could be obtained from the police station. The plaintiff was a senior and experienced attendant and his evidence about the practice at night was to the effect that if they thought they could not handle the patient themselves, they used to get assistance from the police station next door; and if they thought they could handle the patient, they did it themselves. The plaintiff also said that, on the night in question, he was the one to decide whether assistance should be called and he felt that the particular case was one which he and his assistant Giles could handle by themselves. In the light of evidence such as this, we do not think that it would have been open to the jury to find that the Government of New South Wales required the plaintiff and his assistant Giles to put a strait jacket on the patient on the night in question without other assistance. The plaintiff's own case showed that other employees of the Government were at hand whose assistance could have been obtained had the plaintiff himself thought that assistance was necessary. It is true that there was also evidence that the police did not always come as soon as they were called but that is of no importance in this case, for the evidence

was that they always came. No doubt it was their assistance from time to time which explains why over twelve years the system of employing two night nurses only at the Reception House had worked without harm to anyone. It is the plaintiff's own evidence about the availability of police assistance when necessary which satisfies us that the jury could not reasonably find that the Government's night staffing arrangements at the Reception House exposed the staff there to a risk which, as a reasonably careful employer, it should have guarded against by the employment of further staff at the Reception House itself. Furthermore, to leave the decision whether to call for police assistance on a particular occasion to a senior and experienced nurse on the spot could not, we think, be regarded as unreasonable in the circumstances which the plaintiff's case itself revealed.

Accordingly, we think that the appeal should be dismissed.

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JUDGMENT WINDEYER J.

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The only question for us is whether there was any evidence on which a jury could reasonably find that the authorities responsible for the conduct of the Reception House failed to take reasonable care for the safety of their servants there, thereby causing the appellant to suffer injury.

It is important in cases of this kind that the mere fact that an accident occurs to an employee in the course of his duties - for the consequences of which workers' compensation is designed to provide - is not taken as in itself evidence of negligence on the part of the employer merely because some measures can be imagined by which it might have been avoided. It is important too that the descriptive but potentially deceptive phrase "a safe system of work" does not beg the question Was there an absence of reasonable care? I venture to refer, without repeating it, to what I said and other members of the Court approved in Vozza v. Tooth & Co. Limited (1964), 38 A.L.J.R. 48.

The Reception House at Darlinghurst was at the time in question an institution maintained by the Government of New South Wales for the reception and temporary accommodation of insane persons. The appellant was hurt, more seriously than was at first appreciated, in the course of a struggle to subdue one of the inmates who had become violent. The appellant and another male nurse had had to overcome this man's resistance of their efforts to get him into a camisole. A camisole is a form of straight-jacket. The word is apparently French, "camisole de force" meaning a straight-jacket.

What is said is that, if the appellant had had

the assistance of two men instead of only one, he would not have been hurt; that had there been another man on duty at night time the appellant would have had his assistance; that the jury could find that there was a failure to exercise reasonable care because the night staff consisted of two men only. Each of these propositions is debatable. It is no doubt true that, generally speaking, three men can overpower one more easily and more quickly than can two. And it may be assumed that it is easier for three than for two to get a man into a camisole. It was said that with three, the ordinary procedure is for two to hold the man's arms one on each side and the third to bring the camisole. But a strong and violently resisting madman cannot be made the object of stereotyped drill movements. There is always a chance that persons seeking to subdue such a man and not to harm him in doing so may suffer some hurt whether there be one, two, three or more of them. It is, it seems to me, an unwarranted assumption that if the appellant had been aided by two men instead of by one only he would not have been hurt. But that is not the appellant's only difficulty. His work was attended by some risk. That risk might have been reduced, although not eliminated, by the presence on the premises of a third man. The question is, Were those in charge of the Reception House lacking in due care for the safety of the appellant because they did not employ a third man? For many years the night staff had consisted of two men - and refractory patients had been frequently, it might almost be said constantly, dealt with without mishap, sometimes with the help of a policeman from next door, sometimes by the two attendants alone.

There is an obvious theoretical difficulty about withdrawing from the jury's consideration any case in which it is contended that negligence lies in not taking a particular precaution that could be taken against a known risk, however

remote the risk may seem. When an issue of fact was to be tried at nisi prius the common law insisted that the jury's verdict must be had. Only pursuant to a verdict could final judgment, as distinct from a non-suit, be entered. Thus it is that even if the jury are not required or allowed to consider the matter for themselves, there being no evidence to support the plaintiff's case, yet their verdict must be had. The judge cannot withdraw from them the issue of fact committed to them. He must direct them to find a verdict for the defendant. But a verdict they must give. Moreover if there be any evidence, however slight, unbelievable or unconvincing it may seem, on which the jury might find for a plaintiff, the judge must submit the matter to them for their considered verdict, although he may feel sure that if it should be for the plaintiff the court in banc will set it aside as against the weight of the evidence and will order a new trial. If, on the other hand, there be no evidence on which the jury could find for a plaintiff, the judge must direct them to find for the defendant. "The judge", said Lord Cairns, "has a certain duty to discharge, and the jurors have another and different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred": Metropolitan Railway Co. v. Jackson, (1877) 3 App. Cas. 193 at p. 197.

I confess that I find the distinction not easy to maintain. For in an action for negligence the very question for the jury, whose task it is to consider it as reasonable men, is whether in all the circumstances the defendant has done something that a reasonable man would not do or has omitted to do something that a reasonable man would do. Thus it is that "when a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling

that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should": Holmes, The Common Law (1882) p. 120. But, unless all the circumstances be precisely the same, the ruling that there was no evidence of negligence in a given case does not become a rule of law for other cases. Undertakings, methods and precautions that would have been thought uncalled for in earlier times are taken to-day as a matter of course. Procedures that at one time conformed to the contemporary general standard of reasonable care in the community may, judged by the same standard, be seen later as indicative of a lack of care. When the question is whether, in a case such as this, there was any evidence of negligence fit for the consideration of a jury, a court must it seems to me view the evidence against the background of the time. And the relevant time here was immediately before the accident. Judgment is not to be distracted by the fact that the accident occurred. We have to ask, it seems to me, whether a reasonable man acquainted with the Reception House and the manner in which it was conducted could have said on the day before this accident that it was being conducted without reasonable care for the safety of those working there. The question is not to be answered by overworking the word "foreseeability". An event like that which in fact occurred might no doubt have been readily imagined as a possibility. But, that being so, could it reasonably be held that those responsible for the Reception House ought, as a precaution against such an event, to have three men always on duty at night time; and that because of their omission to do so the appellant was injured? Giving the best consideration I can to the whole of the circumstances, I think that the learned trial judge properly directed the jury to find a verdict for

the defendant, the appellant.

I would add a few brief observations on some matters that were discussed in the course of the argument.

The fact that there had been no similar mishap is a matter that the jury could have taken into consideration in favour of the defendant if they had had to consider the evidence. It affects the weight of the evidence of negligence if evidence of negligence there be. For that purpose its relevance is established, although the judgments in the House of Lords in Bolton v. Stone, (1951) A.C. 850, have not escaped critical comment: see Law Quarterly Review, Vol. 67 p. 460. It has, it seems to me, less significance upon the question whether there was any evidence of negligence for the jury to consider, but here too it is a relevant fact.

Before the date of the accident a request had been made to the authorities by a trade union, to which the appellant belonged, on behalf of its members that the night staff at the Reception House should be increased. The appellant relied upon this. There was some evidence that one of the grounds put forward in support of this request was that an increase in numbers would not only lighten the burden of work but would, in some unspecified way, be a safety measure. It is I think correct to say that ordinarily, when particular conduct is said to have been negligent, evidence is admissible that an express warning of the danger involved had been given to the defendant and that he had ignored the warning. But in the present case the evidence tends rather against the appellant's case. It shews that the proposal for an additional man was duly considered in the light of the representations made and for some reason was not accepted. That does not, it seems to me, provide evidence that the authorities failed to take reasonable care for their employees' safety.

Then there was evidence that at some time after

the accident the night staff was increased to three men. This, of course, is no admission that it was previously negligent not to have more than two. All that it shews is that it was practicable to have had more than two. We do not know what led to the decision to increase the staff on duty at night. It may have had nothing at all to do with the injury the appellant suffered. But supposing it did, it is common experience that after an accident measures are taken to prevent a similar occurrence in the future. When that occurs it may be that the new arrangements will become in the future a part of the accepted practice in similar undertakings. But it does not shew that their absence in the past was the result of negligence. It seems appropriate to refer to observations in the case of Hart v. The Lancashire and Yorkshire Railway Company (1869), 21 L.T. N.S. 261. There, as it happens, Kelly C.B. said of a contention that it was unreasonable not to have two men on a railway engine in case one should fall sick. "If then this be an operation usually conducted by one man, and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the company". But it is not for that that I refer to the case. It is for the remark of Bramwell B.: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before".

While I appreciate the logical difficulties of being dogmatic in a case of this kind, I have come to the conclusion that the appeal should be dismissed.