CORK *v.* KIRBY MACLEAN, LTD.

[COURT OF APPEAL (Singleton, Denning and Romer, L.JJ.), June 27, 30, 1952.]

Building—Safety regulations—Working platform—Inadequate width—Failure to provide guard-rails or toe-boards—Workman's fall through epileptic fit—Onus of proof—Apportionment of liability—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.*, 1948, *No.* 1145), *reg.* 22 (*c*), *reg.* 24 (1).

Negligence—Contributory negligence—Apportionment of liability—Breach of building regulations—Fatal accident—Employee's fall from platform—Employee failing to disclose liability to epileptic fits—Law Reform (Contributory Negligence) Act, 1945 (*c.* 28), *s.* 1 (1).

A workman entered the defendants' employment as a painter, without informing them that he was subject to epileptic fits and that his doctor had forbidden him to work at a height above ground. While working on a platform some twenty feet above ground which, in breach of the duty imposed on the defendants by regs. 22 (*c*) and 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, was less than thirty-four inches wide and was not provided with guard-rails and toe-boards, he had a fit, fell to the ground, and was killed. On a claim by the workman's widow, as administratrix of his estate, for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, for breach of statutory duty,

HELD: there was no burden on the defendants to prove that the workman would have fallen from the platform even if the regulations had been complied with; the true inference from the evidence was that there were two causes of the accident, the defendants being at fault in not complying with the regulations and the workman being at fault in not disclosing that he was subject to epileptic fits; the responsibility for the accident fell equally on the workman and on the defendants; and, therefore, under s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, the damages recoverable by the plaintiff in respect of the accident must be reduced by one half.

Observations of SCOTT, L.J., in *Vyner* v. *Waldenberg Bros., Ltd.* ([1945] 2 All E.R. 549), explained.

Decision of DONOVAN, J. ([1952] 1 All E.R. 1064), reversed in part.

AS TO CONTRIBUTORY NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-689, paras. 963-973; and FOR CASES, see DIGEST, Vol. 36, pp. 109-121, Nos. *726-809*.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 22 (*c*), reg. 24 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 218, 220.

Cases referred to:

(1) *Vyner* v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.

(2) *Lee* v. *Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.

(3) *Mist* v. *Toleman & Sons*, [1946] 1 All E.R. 139; 110 J.P. 149; 38 B.W.C.C. 150; 2nd Digest Supp.

(4) *Blyth* v. *Birmingham Waterworks Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 156 E.R. 1047; 43 Digest 1098, *275*.

(5) *Nance* v. *British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E.R. 448; [1951] A.C. 601; 2nd Digest Supp.

(6) *Jones* v. *Livox Quarries*, [1952] 1 T.L.R. 1377.

(7) *Minister of Pensions* v. *Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 2nd Digest Supp.

(8) *Watts* v. *Enfield Rolling Mills (Aluminium), Ltd.*, [1952] 1 All E.R. 1013.

APPEAL by the defendants from an order of DONOVAN, J., dated Apr. 7, 1952, and reported [1952] 1 All E.R. 1064, awarding the plaintiff £1,500 damages under the Fatal Accidents Acts, 1846 to 1908, and £294 3s. 6d. under the Law Reform (Miscellaneous Provisions) Act, 1934.

The learned judge found that the defendants had been in breach of their statutory duty under reg. 22 (*c*) of the Building (Safety, Health and Welfare) Regulations, 1948, in allowing the deceased workman to work on a platform which was less than thirty-four inches wide, and under reg. 24 (1) in failing to provide guard-rails and toe-boards. He also found that the defendants were liable in full for the damage resulting from the workman's fall, as they had failed to discharge the onus of proving that the fall would have occurred even if guard-rails and toe-boards had been provided.

Bowen, Q.C., and *H. J. Davies* for the defendants.
F. H. Lawton for the plaintiff.

SINGLETON, L.J.: This is an appeal by the defendants from a judgment of DONOVAN, J., who held that the administratrix of the estate of Albert Edward Samuel Langhorn Cork was entitled to damages owing to breaches of statutory duty on the part of the defendants who were his employers when he met with his death. The submission made on behalf of the defendants is that judgment should have been given in their favour, or, alternatively, that they should not have been held wholly to blame. After hearing full argument on the matter, I am of opinion that there are elements for consideration which were not present to the mind of the learned judge at the time when he gave his judgment.

On Jan. 14, 1950, Mr. Cork was working for the defendants as a painter on the re-decoration of the factory premises of Davey Paxman, Ltd., in Colchester. With others he had to paint the inside of the roof of a part of the factory. It might have been possible to have had some sort of cradle for the painters to stand in, but instead of that, for reasons which were considered good, a sort of scaffolding or platform was erected on a crane which ran from one end of the building to the other. That platform was about twenty feet above ground. While Mr. Cork was working on it he fell to the floor of the factory and was killed. The case for the plaintiff, the widow, who brought the action on her own behalf and on behalf of her child, was that the defendants were in breach of the statutory duty which they owed to their workpeople under and by virtue of the Building (Safety, Health and Welfare) Regulations, 1948. It was said there were breaches of those regulations in three respects. One arises under reg. 22:

> " Every working platform from which a person is liable to fall more than six feet six inches shall be . . . (*c*) at least thirty-four inches wide if the platform is used for the deposit of material."

A question arose on the trial whether the platform was used for the purpose of the deposit of material. The learned judge was satisfied that it was so used, and he came to the conclusion that there was a breach of the regulation, the platform not being as wide as it should have been. The other regulation is reg. 24 (1):

> " Subject to paras. (3), (4) and (5) of this regulation, every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength, to a height of at least three feet above the platform or place and above any raised standing place on the platform, and with toe-boards up to a sufficient height being in no case less than eight inches and so placed as to prevent so far as possible the fall of persons, materials and tools from such platform or place."

DONOVAN, J., found that there were breaches of that regulation in two respects: first, that there was no guard-rail, and, secondly, that there were no toe-boards,

and he found, too, that the exceptions to that regulation dealt with in paras. (3), (4) and (5) did not apply. Thus, on his findings there were three breaches of the regulations on the part of the defendants.

One difficulty which arises is that Mr. Cork suffered from epilepsy. He was thirty-nine years of age at the time of his death and had been under treatment for epilepsy for many years. He was in a condition in which a fit might come on at any time, and he had been told by his doctor that he must not work at any height above ground. He had been employed by the defendants for only two days before the day on which he met with his death. He had not told them that he was subject to fits. On the findings of the learned judge he had a fit and fell when he was working on this platform which was twenty feet above the ground, and so DONOVAN, J., came to the conclusion in one sense that there were two causes of his death—an epileptic fit which caused him to fall and the fact that the defendants were in breach of their statutory duties in one or all of the respects I have mentioned.

Having found that there was no guard-rail, DONOVAN, J., said ([1952] 1 All E.R. 1066):

> " The immediate cause was the workman's fall from the platform and the effect of what the Court of Appeal said in *Vyner* v. *Waldenberg Bros., Ltd.* (1) seems to me to be that I must treat the breach of the statutory regulations as occasioning that fall, unless the defendants establish the opposite."

Later in his judgment he said (ibid.):

> " The defendants say, therefore, as I think they must, that, had the workman told them of his affliction, he would never have been on the platform at all. In my view, they must go further. They must establish that the workman would have fallen off the platform even had hand-rails and toe-boards been provided. But this is pure speculation. There is an obvious chance that toe-boards might have saved him. It is also possible that he had some sudden, if short, warning of the fit, sufficient to enable him to grip a hand-rail."

I do not regard the learned judge's statement of the law as wholly accurate. He based it on the words of SCOTT, L.J., in *Vyner* v. *Waldenberg Bros., Ltd.* (1), in which the learned lord justice cited a passage from the judgment of LORD GODDARD, sitting in this court, in *Lee* v. *Nursery Furnishings, Ltd.* (2). In the course of his judgment in that case (a dangerous machinery case) LORD GODDARD said ([1945] 1 All E.R. 390):

> " In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident. I think here that the evidence is clear enough on one point."

In *Vyner* v. *Waldenberg Bros., Ltd.* (1), which arose out of an accident in using a circular saw, SCOTT, L.J., giving the judgment of the court, said ([1945] 2 All E.R. 549):

> " . . . the judge [at the trial] indicated that, if the case stopped there, it would mean judgment for the plaintiff. We agree with him. But we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

The learned lord justice repeated that which LORD GODDARD had said in *Lee* v. *Nursery Furnishings, Ltd.* (2). I am satisfied that those words of SCOTT, L.J., in *Vyner* v. *Waldenberg Bros., Ltd.* (1) go a little further than was necessary for the judgment in that case and that they cannot be accepted as a true statement of the onus in every case arising under the Factories Act. Indeed, in *Mist* v. *Toleman & Sons* (3) MACKINNON, L.J. (who was a member of the court in all three cases) said, after reference to the words of SCOTT, L.J. ([1946] 1 All E.R. 141):

" Counsel for the plaintiff argues that that is a pronouncement as regards any breach of any of the provisions of the Factories Act and that, therefore, inasmuch as it is established that there was a breach of s. 47 (1) of the Act of 1937, as regards the ventilation to be provided where dust is produced, and since the activation of tuberculosis could result from that breach, the onus of proving that it did not result from that breach is cast upon the employer. In my view, that is a misapplication of the words of SCOTT, L.J., which were directed to the particular case then under consideration. The statutory regulations, which were under consideration in that case, directed that a guard must be provided and kept properly adjusted to prevent a workman from cutting his fingers off by the circular saw. There was no possibility that his fingers could be cut off by any other cause than the circular saw and, therefore, when SCOTT, L.J., said, ' If there is a definite breach of a safety provision . . . and a workman is injured in a way which could result from the breach ', his mind was directed to the breach of the regulations regarding the adjustment of the guard to the circular saw to prevent the workman from cutting his fingers and the workman cutting his fingers by reason of the incorrect adjustment of that guard. That that is clearly what SCOTT, L.J., had in mind is, I think, shown by the sentence which he then quoted ([1945] 2 All E.R. 547, at p. 549) from the judgment of GODDARD, L.J., in *Lee* v. *Nursery Furnishings, Ltd.* (2) . . . "

In the present case there was no need to search for another cause, or to be astute to find one. It was there, as DONOVAN, J., found. He found that it was a fit which caused Mr. Cork to fall, and there was evidence on which he could so find.

The next question which arises (and there was evidence on it) was whether, if there had been a proper guard-rail, or if the platform had been wider, and, perhaps, I should say if there had been toe-boards, the accident would have resulted in a fall to the ground, or whether it is not more likely that Mr. Cork would have been saved from falling to the ground twenty feet below ? That, like the first question, was largely a matter of inference. I do not think the question of onus of proof really comes into this case as between the two conflicting contentions. Two causes were in operation—one the fit which came on Mr. Cork when he was on the platform, and the other the fact that the defendants had not complied with their statutory duties. If two people had met after the death of Mr. Cork and discussed the accident, and one had asked the other whose fault it was, one might well have said: " It was his own fault. He ought not to have been there after he had been warned by his doctor of the risk. What happened was the very thing which the doctor had feared might happen if he worked above ground." The other person might have said: " They ought to have had a guard-rail there. The law says there should have been one, and, if there had been one, quite likely he would not have been killed. I think the employers were at fault." In one sense both those views may be said to be right.

I turn to the Law Reform (Contributory Negligence) Act, 1945, which counsel for the defendants told this court was mentioned by the learned judge, though the precise terms of s. 1 were not brought to his attention. Section 1 (1) is in these terms:

" Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect

of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Sub-section (4) applies the provisions of sub-s. (1) to an action which is brought under the Fatal Accidents Acts, 1846 to 1908, as this action is. On the judge's findings I regard this accident as due partly to Mr. Cork's own fault and partly to the fault of his employers, and I see no reason for saying that the fault is more on one side than it is on the other. The use of the word "fault" in s. 1 (1) of the Act aptly covers this case. Section 4 defines "fault" in this way:

"'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

In *Blyth* v. *Birmingham Waterworks Co.* (4) ALDERSON, B., said (11 Exch. 784):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

I take that definition of negligence as, again, it seems to me to cover this case in every sense. A man who knew himself to be in the condition in which Mr. Cork knew that he was ought to have told his employers. However anxious he was to get work, he owed a duty to his employers and to his fellow workmen as well as to himself, and failure to inform the employers, followed by instructions from them to work at some height above ground, involved risk to other workmen as well as risk to himself. I am satisfied that that is "fault" within the definition in s. 4 of the Act of 1945, and within the natural and ordinary meaning of the word in s. 1. Counsel in argument said that in certain respects it was speculation to say that a guard-rail would or would not have saved this man. It seems to me that on each issue raised in this case the real question is: What is the true and proper inference from the facts? DONOVAN, J., was satisfied that the fit was the cause of the fall. He must also have been satisfied that the absence of a guard-rail was a cause of the death, or else he could not have found for the plaintiff. In my judgment, both causes were operating together. When the plaintiff seeks to recover damages from the defendants, the defendants may properly say that Mr. Cork was guilty of contributory negligence. VISCOUNT SIMON, in *Nance* v. *British Columbia Electric Ry. Co., Ltd.* (5), said ([1951] 2 All E.R. 450):

"But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

It seems to me that this is a case which can properly be dealt with under the Law Reform (Contributory Negligence) Act, 1945. I do not see that it is possible to say that the responsibility for the damage is more on one side than it is on the other, which means that the damages awarded to the plaintiff ought to be reduced by one-half. I would allow the appeal to that extent.

DENNING, L.J.: In this case we are again involved in the troublesome question of causation. Nowadays in tort we do not search, as previously, for the effective or predominant cause of the damage. We recognise that there may

be many causes of one damage, and we ask: What were the causes of it? What faults were there which caused the damage? Since the Act of 1945 the law says that every person who is guilty of a fault which is one of the causes of the damage must bear his proper share of responsibility for the consequences.

In the present case there were, on the judge's findings, two faults: (i) The employers' fault in not providing a guard-rail or toe-boards in accordance with the regulations; (ii) the man's fault in not telling his employers that he was an epileptic and had been forbidden to work at heights. But the judge has not found that both those faults were causes of the accident. He has found that the employers' fault was a cause of the accident, but the man's fault was not. The man's fault was, he said, only a causa sine qua non.

Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage. It often happens that each of the parties at fault can truly say to the other: "But for your fault, it would not have happened." In such a case both faults are in fact causes of the damage.

In this case, on the facts, I am clearly of opinion that both faults were causes of the damage. The man's fault (in not telling his employers he was forbidden to work at heights) was clearly one of the causes of his death. But for that fault on his part, he would never have been on this platform at all and would never have fallen. The employers' fault (in not providing a guard-rail or toe-boards) is more doubtful a cause. One cannot say that but for that fault the accident *would* not have happened. All that can be said is that it *might* not have happened. A guard-rail and toe-boards *might* have saved him from falling. If this was a very remote possibility, it could not be said to be a cause at all. But the judge did not so regard it. He thought that it probably would have saved him. On that view the employers' fault was also one of the causes of the man's death.

There remains the question of remoteness. Were either of these causes too remote to be regarded by the law as causes of the damage? This is a question of law. The judge has held that the man's fault was too remote to be regarded as a cause, but the employers' fault was not. There is, of course, as the judge said, a distinction between a remote cause and a proximate cause or, as it is sometimes put, between a causa causans and a causa sine qua non—and this distinction is a very real one. But, so far as I know, no one has been able satisfactorily to define the difference. It is, I believe, a question of degree which must be decided according to "the ordinary plain common sense of the business" (*Jones* v. *Livox Quarries* (6)). All that can be said is that, if the damage might reasonably have been foreseen by the wrongdoer, or if there was no intervening or concurrent cause, then the cause is not too remote. But the converse is not true. A cause does not necessarily become too remote because the damage could not have been foreseen, or because there intervened or concurred the deliberate, or wrongful, or negligent act of another. It is always a matter of seeing whether the particular event was sufficiently powerful a factor in bringing about the result as to be properly regarded by the law as a cause of it: see *Minister of Pensions* v. *Chennell* (7).

In this case I think the employers' fault was not too remote a cause. The regulations were intended to guard the workman from the very thing that happened—a fall. The breach, therefore, was a cause of it. It would have been different if he had been injured by something with which the regulations had nothing to do: see *Watts* v. *Enfield Rolling Mills (Aluminium), Ltd.* (8) explaining *Vyner* v. *Waldenberg Bros., Ltd.* (1).

I take the view also that the man's fault was not too remote a cause. One reason alone is sufficient—the consequences might reasonably have been foreseen by him. He had indeed been warned of the very thing which befell him. In

any case, according to ordinary plain common sense, it was one of the causes of his death.

There were, therefore, two faults which caused this man's death—one his own fault; the other his employers' fault. The damages fall to be apportioned according to the causative potency and blameworthiness of the respective faults. I agree that they should be borne half-and-half, and that the appeal should be allowed accordingly.

ROMER, L.J.: I agree with the conclusions which my brethren have expressed and the reasons on which those conclusions are based, and I only desire to add a word or two as we are varying the order that the learned judge made in the court below.

There is one short passage in the judgment which, if it means what I think it means, is, I respectfully think, inaccurate. The learned judge says ([1952] 1 All E.R. 1066):

> "One cannot help feeling some sympathy with the defendants for they knew nothing of the workman's complaint, but the consequences of disobedience to these statutory regulations cannot depend on whether or not the workman discloses all or some of his infirmities."

If the word "consequences" in that context means results and includes the liability, or freedom from liability, of the workman concerned in respect of contributory negligence, then I do not think it is right, and I cannot agree with it.

In the present case the deceased workman, Mr. Cork, not only knew that he was unfitted for the kind of job that he was engaged on at the time of the accident, but he had gone so far as to promise his doctor, who took a very strong view about it apparently, not to undertake work of that description. With full knowledge of all that he refrained from informing his employers of his trouble, and the reason for his reticence is reasonably obvious, namely, that he was afraid that they would not employ him if they knew the facts, and, for my part, I am sure that his fears were justified and that the defendants would not have given him employment had they known of this unfortunate tendency to epilepsy, and it was very wrong of him not to have told them. He was neglectful of his own personal safety in keeping it to himself, and so the position really in brief is this: Had the defendants known the facts they would not have employed him, at all events on this kind of job, and, therefore, no accident would have occurred. Certainly this accident would not have occurred, because there would have been no opportunity for it to happen, and in those circumstances it seems to me quite impossible to say that the silence on this matter of the workman was not at least a contributory cause of the accident within the ambit of the principles as formulated by VISCOUNT SIMON in giving the judgment of the Judicial Committee of the Privy Council in the case of *Nance* v. *British Columbia Electric Ry. Co., Ltd.* (5), to which SINGLETON, L.J., has referred. Accordingly, it appears to me that we are compelled to the view that the unfortunate workman did contribute to his own misfortune, and I agree that the proportion of his contribution was the same as that of his employers, with the result that SINGLETON, L.J., has indicated.

Appeal allowed.

Solicitors: *Kimber, Williams, Sweetland & Stinson* (for the defendants); *Ellison & Co.* (for the plaintiff).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]