1982 December 21

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

THE CYPRUS PALESTINE PLANTATIONS CO. LTD.,
Appellants-Defendants,

v.

KALLIOPI LEANDROU,
Respondent-Plaintiff.

(Civil Appeal No. 5715).

Negligence—Master and servant—Safe system of work—Subsequent improvement or abandonment of a system does not necessarily imply that previous system was not safe—Compliance with provisions of the Law by the employer regarding safety of employers does not exonerate him from failure of his common law duty to maintain a reasonably safe system of work—Unfenced level crossing—Gap between the two sides of the level crossing—Existence of danger due to the unfenced gap reasonably foreseeable—Failure of employer to take precautions for eliminating danger amounts to negligence.

Negligence—Contributory negligence—Apportionment of liability—Appeal—Principles on which Court of appeal acts where it accepts the same view of the law and facts as that taken by trial Court—Standard of negligence not an absolute standard but is dependent upon the attendant circumstances—Degree of care that may be expected from factory workman may be different from that which might be taken by an ordinary man not exposed continually to the noise—Master and servant—Factory labourer injured whilst passing over unfenced gap—In the circumstances of this case guilty of contributory negligence to the extent of 20%.

The respondent-plaintiff was employed by the defendant company as a packer of fruit in their packing factory which is situated at Fassouri. She was an experienced fruit packer and was in the employment of the company for the last 20 years. Whilst employed by the appellant company on the 16.1.1973 and in the course of her employment, she tried to pass over

a level crossing, in order to go and get some labels, and whilst stepping from the one side of the level crossing to the other, she fell into the conveyor passing underneath the said level crossing and she sustained injuries for which these proceedings arose. The said level crossings were stairs with 4 steps on each side of the conveyor, 3 ft. wide and they reached up to a height of 3-4 inches above the conveyor (there was no bridge over the conveyor). The labourers had to step over the conveyor, and the distance from one side of the crossing to the other, which was open space, was 16 inches. The said level crossings had hand rails as handle bars 80 cm. high.

In an action by the respondent against her employers the trial Judge found that the system of work used by the employers was defective and unsafe because a gap existed between the two sides of the level crossings which was unfenced and exposed the labourers to the risk of an accident. Because of this finding the trial Judge did not consider it necessary to indulge into the breach of any statutory duty on the part of the employers. It also found that the system of work which existed at the time of the accident was eventually abandoned and a safe system was used at the time of the trial. The trial Judge further held that the respondent was not guilty of contributory negligence because she acted as a reasonable labourer under the circumstances and complied with the instructions given to her by the employers.

Upon appeal by the employers it was contended:

(a) That the inference drawn by the trial Court that the improved system which was provided after the occurrence of the accident ought to have been used from the very beginning was wrong because the change of system is not a proof of the fact that the previous system was not reasonably safe.

(b) That the trial Judge made no finding on the breach of any statutory duty and decided the case on the breach of the common law duty.

(c) That the finding of the trial Court that the employers did not provide a safe system of work for their employeers at the time of the accident in breach of their common law duty to do so was wrong.

(d) That the trial Court wrongly found that there was no contributory negligence on the part of the respondent.

Held, (1) that though when the question as to whether a system of work is safe or not is in issue the particular system and all surrounding facts pertaining to the accident as prevailing at the time of the accident, have to be taken into consideration and that a subsequent improvement or abandonment of such system does not necessarily imply that the previous system was not safe, in the present case the trial Judge reached his conclusion that the system of work employed by the appellants at the time of the accident was not a safe system of work and explained the reasons why such system was not safe; that it was after he had concluded on this point that he remarked that the old system was abandoned and a new system employed which was definitely the safe system of work that ought to have been used from the very beginning; that he did not reach his conclusion as to the unsafety of the system by relying on the abandonment of the system as a fact from which he could draw his inference but he found the breach of the duty from the condition of the system operating at the time of the accident; accordingly contention (a) should fail.

(2) That where a statutory duty is imposed upon the employer to take certain steps for the protection of the employee and provide for the safety of the employee, compliance with the provisions of the law by the employer does not exonerate him from failure of his common law duty to maintain a reasonably safe system of work; that once the trial Judge found that there was a breach of the duty of care cast upon the appellants by common law, the fact that he did not proceed to examine whether there was any breach of the statutory duties imposed upon the appellants by the Factories Law, Cap. 134, was not a wrong approach, as compliance with the statutory duty did not exonerate the appellants from any liability to the respondent at common law; accordingly contention (b) should fail.

(3) That on the totality of the material before this Court the findings of the trial Judge that the appellants failed in the discharge of their duty at common law to provide a safe system of work is correct; that this Court agrees with the reasoning of the trial Court in reaching such finding in that "a gap existed

between the two sides of the level crossing which was unfenced and exposed the labourers to the risk of an accident, such as the present one; that the above finding of the trial Court was warranted by the evidence before it and this Court has not been convinced that the inference drawn by the trial Court that the system of work was not safe was not reasonably open to it; that the existence of danger due to the unfenced gap over the conveyor was reasonably foreseeable and that the failure of the appellant to take any precautions for eliminating danger amounts to negligence; and that accordingly contention (c) must fail.

(4) That it is a well established practice both in England and in Cyprus that there would have to be a very strong case to justify any review of apportionment if an appellate Court accepted the same view of the law and facts as that taken by the trial Court or unless "some error in the Judge's approach the clearly discernible" that on the totality of the evidence and the material before the trial Court, this court is unable to agree with the trial Judge that in the circumstances of the case the respondent is not to blame at all for her misfortune; that there is no doubt that the only means available for passing from the one side of the conveyors to the other, was to climb the steps on the sides of the conveyors and when reaching the top step then she had to step over the conveyor whilst such conveyor was operating to the steps on the other side; that she was in the employment of the appellants for the last twenty years prior to the accident and she was well acquainted with the system of work operating in the store; that it is correct that the degree of care that one may expect from a workman in a factory, may be different from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of a factory. but in the circumstances of the case, the plaintiff when passing over the unfenced gap, stepping from the top step on the one side to that on the other side, the distance being only 16 inches, should have exercised due care, knowing that an inadvertent step might cause her foot step and be caught by the moving conveyor; that in having to assess the percentage of respondent's negligence, this Court has reached the conclusion that in the circumstances of the case the respondent is guilty of contributory negligence to the extent of 20 per cent.

Appeal partly allowed.

Cases referred to:

Pipe v. *Chambers Worf and Cold Stores* [1952] 1 Ll.L.R. 194;

Davies v. *Manchester Ship Canal Company* [1960] 2 Ll.L.R. 11 at p. 15;

Gray v. *The Admiralty* [1953] 1 Ll.L.R. 14 at p. 18;

Athanassiou v. *Attorney-General of the Republic* (1969) 1 C.L.R. 160 at p. 165;

Kakou v. *Adriatica and Another* (1980) 1 C.L.R. 357;

Perentis v. *General Constructions* (1981) 1 C.L.R. 1;

Kyriacou v. *Eliades* (1981) 1 C.L.R. 373;

Charalambous v. *Metalco Ltd.* (1982) 1 C.L.R. 636;

Elia v. *Progress Shipping and Others* (1978) 1 C.L.R. 327;

Bux v. *Slough Metals Ltd.* [1974] 1 All E.R. 262;

Ekrem v. *McLean* (1971) 1 C.L.R. 391;

Brown and Another v. *Thompson* (1968) 2 All E.R. 708 at p. 710, 712, 713;

Baker v. *Willoughby* [1969] 3 All E.R. 1528 at p. 1530 (H.L.).;

Ioannou and Another v. *Michaelides* (1966) 1 C.L.R. 235;

Caswell v. *Powell Duffryn Associated Collieries Ltd.* [1939] 3 All E.R. 722;

Christodoulou v. *Menicou* (1966) 1 C.L.R. 17 at pp. 31-32.

Appeal.

Appeal by defendants against the judgment of the District Court of Limassol (Hadjitsangaris, S.D.J.) dated the 23rd April, 1977 (Action No. 1789/73) whereby they were adjudged to pay to the plaintiff the sum of £1,608.- as special and general damages for injuries suffered by her as a result of an accident which was solely attributed to the negligence of the defendants.

St. McBride, for the appellants.

A. Neocleous, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment in this appeal will be delivered by Mr. Justice L. Savvides.

SAVVIDES J.: This is an appeal from the judgment of the District Court of Limassol whereby appellants-defendants were adjudged to pay to the respondent-plaintiff, the sum of

£1,608.– as agreed special and general damages on a full liability basis, for injuries suffered by the respondent as a result of an accident which, according to the findings of the trial Court, was solely attributed to the negligence of the appellants.

The facts of the case which, according to the learned trial Judge were mostly undisputed and uncontested, as found and briefly set out by him in his judgment, are as follows:

"The plaintiff, who was at the time of the accident a labourer aged 42, was employed by the defendant company as a packer of fruit in their packing factory which is situated at Fassouri within the S.B.A. She was an experienced fruit packer and was in the employment of the company for the last 20 years. Whilst employed by the defendant company on the 16.1.1973 and in the course of her employment, the plaintiff tried to pass over a level crossing similar to the one appearing in exh. 5 and 6 in order to go and get some labels, and whilst stepping from the one side of the level crossing to the other, she fell into the conveyor passing underneath the said level crossing and she sustained injuries for which this action arose. Be it noted here that no fencing existed between the gap which was created from the one side of the level crossing to the other.

Before proceeding any further I think that the system of work as regards the passage of labourers over the level crossings should be described in more detail. From the evidence of D.W.4 it appears that the said level crossings were installed by the defendant company in 1969; the said level crossings were stairs with 4 steps on each side of the conveyor, 3 ft. wide and they reached up to a height of 3–4 inches above the conveyor (there was no bridge over the conveyor). The labourers had to step over the conveyor, and the distance from one side of the crossing to the other, which was open space, was 16 inches. The said level crossings had hand rails as handle bars 80 cm. high".

The learned trial Judge then proceeded to consider the following issues:

(a) Whether the system of work used by the appellants for the crossing of their labourers at the time of the

accident, over the conveyors by means of the level crossings described above was a safe system of work or not, and

(b) if the plaintiff contributed in any way to the present accident,

and he concluded as follows:

"I have carefully considered the facts of the present case and I have come to the conclusion that the system of work employed by the defendant company at the time of the accident, for the labourers to cross from the one side of the moving conveyor to the other, i.e. the level crossings described in detail above, was not a safe system of work; the reason is that a gap existed between the two sides of the level crossings which was unfenced and exposed the labourers to the risk of an accident, such as the present one. It is clear that the labourers were passing over the moving conveyor on which boxes of fruit were being conveyed to the sealing machines. The system of work which existed at the time of the accident was eventually abandoned by the defendant company themselves, and the system used now by means of bridges is definitely the safe system of work that ought to have been used from the very beginning. I am therefore of the opinion that the defendant company was not providing a safe system of work for their employees at the time of the accident and they are liable under their common law duties.

Because of my above finding I do not consider it necessary to indulge into the breach of any statutory duty on the part of the defendants or not.

For the above reasons I hold that the system of work employed by the defendant company was defective and unsafe".

In dealing with the question of contributory negligence the learned trial Judge came to the conclusion that the plaintiff was not guilty of contributory negligence. His judgment on this issue reads as follows:

"The plaintiff acted as a reasonable workman under the circumstances and complied with the instructions given

to her by the defendants. She followed the unsafe system of work as I have found it, devised by the defendant company, and even if she believed that the level crossings were unsafe, she had no option or choice to do otherwise but pass over them; she had to obey the instructions of her superiors, and the level crossings were the only means of passing from one side of the conveyors to the other".

The present appeal is directed against both findings of the trial Judge that is his finding that there was negligence on the part of the appellants and his finding that there was no contributory negligence on the part of the respondent-plaintiff.

Counsel for appellants contended that the respondent had to prove that the appellants were in breach of their statutory duty or their common law duty of care or either of them which she failed to do. In the present case the trial Judge made no finding on the breach of any statutory duty and decided the case on the breach of the common law duty. In doing so he applied the absolute liability test which applies only in cases of breach of statutory duties but not under the common law. It is only under a statute, counsel submitted, that a duty is cast upon the employer to make the system of work absolutely safe, whereas under the common law he discharges his duty by providing a reasonably safe system of work and that in the present case the system of work provided was reasonably safe and no negligence has been proved against the appellant. He further contended that the inference drawn by the trial Court that the improved system provided by the appellant after the occurrence of the accident ought to have been used from the very beginning was wrong because the change of system is not a proof of the fact that the previous system was not reasonably safe and that the Court had to decide the case on the state of affairs as on the day of the accident. He concluded by submitting that on the totality of the evidence, there was no negligence on the appellants and that in any event the respondent was guilty of contributory negligence to a great extent.

We agree with counsel for the appellants that when the question as to whether a system of work is safe or not is in

issue, the particular system and all surrounding facts pertaining to the accident as prevailing at the time of the accident, have to be taken into consideration and that a subsequent improvement or abandonment of such system does not necessarily imply that the previous system was not safe.

In *Pipe* v. *Chambers Warf and Cold Stores Ltd.*, [1952] 1 Ll. L.R. 194 it was held that:

> "the subsequent provision of a lifting device did not necessarily imply that the system originally adopted was unsafe".

In *Davies* v. *Manchester Ship Canal Company* [1960] 2 Ll.L.R. 11 Sellers, L.J., in dealing with a similar issue, had this to say at p. 15:

> "After this accident, apparently, there was provided a slightly different slipper, 6 in. deep instead of the 3 in., and perhaps a little wider too. That factor was relied upon as establishing negligence against the defendants. It was said that this was a method of discharging which ought to have been recognized as one which had dangers and this new slipper would have served to overcome them. The learned Judge has not taken that view. He directed himself properly in law and came to the conclusion that there was nothing wrong with the original slipper which was provided which had been in existence and use for nearly 40 years, and also that there was nothing wrong with the system."

Also in *Gray* v. *The Admiralty* [1953] 1 Ll.L.R. p. 14 at p. 18 the judgment reads as follows:

> "Of course, witnesses who have been called for the plaintiff have said that since the time of this accident a stouter form of glass has been put in these panes in the hope that if an accident of this kind happened again the glass would be tough enough to resist any blow, and, therefore, this particular damage would not be done. I have considered that question as to whether that in itself should amount to a breach, or does amount to a breach, by the employers of their duty to make these premises reasonably safe, but I have come to the conclusion that it does not."

In the present case however the learned trial Judge reached his conclusion that the system of work employed by the appellants at the time of the accident was not a safe system of work and explained the reasons why such system was not safe. It was after he had concluded on this point that he remarked that the old system was abandoned and a new system employed which was definitely the safe system of work that ought to have been used from the very beginning. He did not reach his conclusion as to the unsafety of the system by relying on the abandonment of the system as a fact from which he could draw his inference but he found the breach of the duty from the condition of the system operating at the time of the accident.

As to the power of an appellate Court to deal with inferences of a trial Court we wish to refer to the opinion expressed by this Court in *Athanassiou* v. *The Attorney-General of the Republic* (1969) 1 C.L.R. 160 at p. 165, which we fully adopt.

> "Though we are an appellate tribunal, we not only have the power, but it is our duty, to substitute our own inferences for those drawn by the learned trial Judges, once we are satisfied that their inferences were wrong (see, too, in this respect, the views of Parker L.J., in the *Hicks* case (1), supra, at p. 50)."

In the recent cases of *Kakou* v. *Adriatica and another* (1980) 1 C.L.R. 357, *Parentis* v. *General Constructions* (1981) 1 C.L.R. 1, *Kyriacou* v. *Eliades Ltd.*, (1981) 1 C.L.R. 373, *Charalambous* v. *Metalco Ltd.*, (1982) 1 C.L.R. 636, this Court has dealt with the duty of an employer to provide a safe system of work and we need not repeat the principles enunciated therein. The Common Law has from early times imposed a duty on the master to take due care to provide a safe system of work though such duty does not extend to a duty to provide a system as safe as it can possibly be made, but a reasonably safe system and the precautions taken must be proportionate to the risk involved (see *Athanassiou v. The Attorney-General of the Republic* (supra) and the cases referred to therein; also, *Elia* v. *Progress Shipping and others* (1978) 1 C.L.R. 327).

Where a statutory duty is imposed upon the employer to

(1) Hicks v. British Transport Commission [1958] 2 All E.R. 39.

take certain steps for the protection of the employee and provide for the safety of the employee, compliance with the provisions of the law by the employer does not exonerate him from failure of his common law duty to maintain a reasonably safe system of work. In *Bux* v. *Slough Metals Ltd.* [1974] 1 All E.R. 262, Edmund Davies, L.J., in dealing with the proposition that compliance with an employer's statutory requirements per se absolve him from any liability to his employee, had this to say at pp. 267, 268:

> "No authority was cited to us for the proposition that compliance with an employer's statutory requirements per se absolves him from any liability to his employee at common law. On the contrary, there is a solid body of high authority to the contrary effect. For example, in *Franklin* v. *Gramophone Co. Ltd.*, this court held that compliance by the occupier of a factory with all statutory requirements will not necessarily absolve him from liability if he has not fulfilled his common law duty of care: and in *Matuszczyk* v. *National Coal Board* it was held that statutory regulations imposing on a shot-firer duties which were also incumbent on him at common law had neither impliedly nor expressly extinguished the latter. Reference should also be made to the observations of Lord Porter and Lord Reid in *National Coal Board* v. *England*. This is not to say that the scope of statutory regulations is wholly irrelevant to the question of whether there has been a breach of the common law duty; on the contrary, in many cases compliance with the relevant regulations may well be (as Lord Keith of Avonholm said in *Qualcast (Wolverhampton) Ltd.* v. *Haynes* of 'evidential value'.

I respectfully consider that the correct approach in this matter is that indicated to *Gill* v. *Donald Humberstone & Co. Ltd.* by Lord Reid, who, speaking of the Building (Safety, Health and Welfare) Regulations 1948, said:

> '... I find it necessary to make some general observations about the interpretation of regulations of this kind. They are addressed to practical people skilled in the particular trade or industry, and their primary purpose is to prevent accidents by prescribing appro-

priate precautions. Any failure to take prescribed precautions is a criminal offence. The right to compensation which arises when an accident is caused by a breach is a secondary matter. The regulations supplement, but in no way supersede, the ordinary common law obligations of an employer to care for the safety of his men, and they ought not to be expected to cover every possible kind of danger."

In the light of the above we have reached the conclusion that the learned trial Judge once he found that there was a breach of the duty of care cast upon the appellants by common law, the fact that he did not proceed to examine whether there was any breach of the statutory duties imposed upon the appellants by the Factories Law, Cap. 134, was not a wrong approach, as compliance with the statutory duty did not exonerate the appellants from any liability to the respondent at common law.

We now turn to the question as to whether the finding of the trial Court that the appellants did not provide a safe system of work for their employees at the time of the accident in breach of their common law duty to do so is correct. On the totality of the material before us we find ourselves in agreement with the findings of the learned trial Judge that the appellants failed in the discharge of their duty at common law to provide a safe system of work. We agree with the reasoning of the trial Court in reaching such finding in that "a gap existed between the two sides of the level crossing which was unfenced and exposed the labourers to the risk of an accident, such as the present one. It is clear that the labourers were passing over the moving conveyor on which boxes of fruit were being conveyed to the sealing machines." The above finding of the trial Court was warranted by the evidence before it and we have not been convinced that the inference drawn by the trial Court that the system of work was not safe was not reasonably open to it. The existence of danger due to the unfenced gap over the conveyor was reasonably foreseeable and that the failure of the appellant to take any precautions for eliminating danger amounts to negligence. In consequence, the appeal in this respect fails.

We are now coming to consider whether the trial Court

correctly found that there was no contributory negligence on the part of the respondent.

It is a well established practice both in England and in Cyprus that there would have to be a very strong case to justify any review of apportionment if an appellate Court accepted the same view of the law and facts as that taken by the trial Court (vide *Ekrem* v. *McLean* (1971) 1 C.L.R. 391 in which reference is made to the case of *Brown and Another* v. *Thompson* [1968] 2 All E.R. 708) or unless "some error in the Judge's approach is clearly discernible" (per Lord Reid in *Baker* v. *Willoughby* [1969] 3 All E.R. (H.L.) 1528 at p. 1530).

In *Brown and Another* v. *Thompson* (supra) Winn, L.J., had this to say at p. 710:

> "It is said by counsel for the appellant that, whereas it may be difficult and not in accordance with the practice of this court to change a complete acquittal by a judge of one party of any negligence at all into a finding against that party of some degree, however minor, of negligence, on the other hand, where there has been as here, a condemnation, albeit a mild condemnation, of the appellant, Mr. Thompson, as being partly responsible for this collision, counsel submits that the court is entirely unfettered and should feel itself free to substitute its own opinion for that of the trial judge on the question of the attribution of blame. If there is any widespread belief to that effect at the Bar, it should be entirely discarded. It can lead only to much wasteful use of an appellate court's time. It is quite contrary to the well established practice of this court. Perhaps at the risk of being tedious in giving this reminder, the locus classicus of course, in *British Fame* (*Owners*) v. *MacGregor* (*Owners*).(1) It was an Admiralty decision, which went to the House of Lords, and the speech to which I desire to direct attention, so that it may be borne in mind, is that of Lord Wright."

and at page 712:

> "Directing myself by those very authoritative pronouncements, and having taken note of other cases which are

(1) [1943] 1 All E.R. 33.

usefully noted in Bingham's Digest of Motor Claims Cases (5th Edn.), which entirely bears out the principle in various different sets of circumstances, I feel quite satisfied that I do not find any cause in the instant case for altering the apportionments made by the trial judge. I deliberately do not say that, had I been trying this case myself, my apportionment would have been twenty per cent. I am not concerned with that. I find no reason which moves my mind at all to consider that the trial judge's apportionment was wholly erroneous. Even if I had thought there was reasons to disagree with his apportionment, I would have thought it impossible, for the reasons indicated in the judgments to which I have referred, to interfere with the judge's apportionment."

In the same case Willmer, L.J., had this to say at p. 713:

"... the only thing that I desire to add for myself is an expression of my concurrence with the observations which have fallen from Winn, L.J., with regard to the reluctance of this court to interfere on a mere matter of apportionment where no error of principle is alleged and no misapprehension of the facts on the part of the trial judge is suggested."

In *Christakis Ioannou and Another* v. *Fivos Michaelides* (1966) 1 C.L.R. 235 in which the trial Court found that the appellant-defendant was wholly to blame, Triantafyllides, J. (as he then was) after concurring that the appeal should be dismissed, had this to say at pp. 238, 239:

"I would like to say only that I agree with the conclusion reached by Mr. Justice Josephides in this case, but my approach is slightly different. Though I do think that there is material on record on which the trial Court could possibly have found the respondent guilty of contributory negligence, sitting here on appeal I do not think that the view taken by the trial Court, to the effect that appellant was solely to blame, is so erroneous or unwarranted as to make it proper or necessary for this Court to interfere in the matter."

As to the principle of contributory negligence which under our Civil Wrongs Law (Cap. 148) s. 57 is the same as under the

provisions of the English Law Reform (Contributory Negligence) Act, 1945, Lord Atkin, in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1939] 3 All E.R. 722, although decided prior to the 1945 Act, when contributory negligence was a complete defence, had this to say at p. 731:

> "I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.
>
> But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine."

Caswell's case was referred to with approval in *Christodoulou* v. *Menicou and others* (1966) 1 C.L.R. 17 in which Josephides, J., had this to say at pp. 31 - 32:

> "The effect of the Caswell decision is that the standard of negligence is in all cases not an absolute standard but is dependant upon the attendant circumstances, and in the case of contributory negligence consisting of neglect of one's own personal safety the Court must have regard to the distractions of the plaintiff or deceased at the time of the accident and to the strain and fatigue of the work which may make a workman give less thought to his personal safety than persons with less trying surroundings and preoccupations. Thus, though there is only one standard of negligence that standard is subject to qualification in all cases. The Caswell case was considered and applied in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ltd.*, [1949] 1 All E.R. 620, where it was held that, in any event, to constitute contributory negligence it was not necessary to show that the conduct of the passenger amounted to the breach of any duty which he owed to the defendant, but it was sufficient to show a lack of reasonable care by the passenger for his own safety. This principle was subsequently applied in the Privy Council case of *Nance*

v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448.

In assessing degrees of liability the common sense approach had to be adopted. Evershed L.J., as he then was, in considering questions of apportionment of blame under the English Law Reform (Contributory Negligence) Act, 1945, in the Davies case (supra), at page 627 said: 'In arriving at the conclusion at which I do arrive, I conceive it to be my duty to look at the whole facts of the case as they emerged at the trial both of the action and of the third party proceedings, and then, using common-sense, to try fairly to apportion the blame between the various participants in the catastrophe for the damage which the deceased suffered'. See also page 629 in the same Report."

With the above principles in mind we are now coming to consider whether the finding of the trial Court that there was no contributory negligence on the part of the respondent is warranted by the evidence before him.

On the totality of the evidence and the material before the trial Court, we find ourselves unable to agree with the learned trial Judge that in the circumstances of the case the respondent is not to blame at all for her misfortune. There is no doubt that the only means available for passing from the one side of the conveyors to the other, was to climb the steps on the sides of the conveyors and when reaching the top step then she had to step over the conveyor, whilst such conveyor was operating to the steps on the other side. She was in the employment of the appellants for the last twenty years prior to the accident and she was well acquainted with the system of work operating in the store. It is correct that the degree of care that one may expect from a workman in a factory, may be different from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of a factory, but in the circumstances of the case, we feel that the plaintiff when passing over the unfenced gap, stepping from the top step on the one side to that on the other side, the distance being only 16 inches, should have exercised due care, knowing that an inadvertent step might cause her foot step and be caught by the moving conveyor. In having to assess the percentage of respondent's

negligence, we have reached the conclusion that in the circumstances of the case the respondent is guilty of contributory negligence to the extent of 20 per cent. In the result, the appeal succeeds in part and the award of the trial Court is reduced by 20 per cent.

As to costs, the order for costs before the trial Court remains undisturbed but as the appeal succeeds in part, we make no order for costs on appeal.

The judgment of the trial Court is varied accordingly.

Appeal partly allowed. No order as to costs.