JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49/85

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	ALCAN JAMAICA LIMITED & UNIVERSAL FENCING LIMITED	DEFENDANTS/ APPELLANTS
AND	EDWARD NICHOLSON	PLAINTIFF/ RESPONDENT

R.W. Goffe and Norman Davis for Alcan Jamaica Limited

K.D. Knight for Universal Fencing Limited

Dr. L.G. Barnett and Miss Hilary Phillips for Nicholson

30th June; 1st, 2nd & 3rd July & 24th October, 1986

CAREY, J.A.:

Alcan Jamaica Limited (the first appellants) contracted Universal Fencing (the second appellants) to whom the respondent was employed as a welder, to undertake some fencing at their Kirkvine Bauxite Installation in Manchester. On 1st May, 1980, the respondent as a member of a crew from the second appellants, was thus engaged. Just before resuming after the lunch break, he was minded to have a drink of water and on the way to the water cooler, thought that he might get some cigarettes as well. However, learning that the canteen was out of cigarettes, he betook himself into a location on the installation, called the 'percipitation area', where he

received a serious injury to his left eye when caustic soda fell in it. The vision in that eye had become seriously impaired as the eyelid has fused to the eye ball. In the result, he has been advised to give up his occupation as a welder. He never ever reached the water cooler. He claimed damages against both appellants, alleging negligence and/or breach of statutory duty.

Ellis, J., by an order dated 31st July, 1985 gave judgment against both appellants in the sum of $97,682.75 with costs. That judgment is now challenged in this Court by both appellants.

It is, I think, convenient to deal with the case against the respective appellants, separately, and in the reverse order of their appearance in the title to this suit. First, Universal Fencing Limited, the basis on which the learned judge imposed liability on these appellants, is set out at pages 45-46 of the record. At those pages of his judgment, he referred to dicta from two cases, viz., Caswell v. Powell Duffryn Associated Collieries Limited [1940] A.C. 152 at page 168 and Bonnington Castings Limited v. Wardlaw [1956] A.C. 613 at page 620 to show as the first case did, that there must be a casual connection between the accident and the breach of statutory duty and as the second case illustrated, what is, in effect, the same point, that the employee must prove on a balance of probabilities that the breach of duty caused or materially contributed to his injury. He then continued:

> "I accept the cited passages, albeit they are of only persuasive authority, as correct statements of the law. In this case, the plaintiff suffered his injury not during any welding

> "operation. He was not even injured in the vicinity of the area of his welding operations. He has not given any indication that he would have worn his glasses had he been provided with a pair.
> In all the circumstances, I cannot see any association of the breach of statutory duty with his injury. The plaintiff has not satisfied the statements cited in the cases above. He has shown no casual connection between his injury and the breach of statutory duty and his claim under that head fails."

So far, in my view, this approach of the learned judge cannot be faulted. But then he went further and stated:

> "But the plaintiff has, so to speak, another string to his bow in that he has also claimed in negligence. I am of the opinion that he can succeed on this ground.
>
> There is evidence in this case that Grant the leader of the team had a pair of goggles. He was the man in charge of the plaintiff - the first defendant's alter ego on the site but there is no evidence that Grant gave any order or any supervision as to the wearing of goggles.
>
> That situation takes the case within Nolan vs. Dental Manufacturing Company Limited [1958] 2 All E.R. 449. In that case, a workman failed in his claim under breach of statutory duty but succeeded because his employer had negligently failed to properly order and supervise his user of protective goggles. I would apply that decision to the instant case and find that the first defendant was negligent."

He thus relied on Nolan v. Dental Manufacturing Co. Ltd. [1958] 2 All E.R. 449, where the workman received his injury while engaged in sharpening a tool without wearing goggles. But that case is plainly distinguishable from the instant case where, the injury as the judge had earlier found, "was not during any welding operation".

The goggles which his employers were required to supply, were intended for use in the course of welding operations. It should be noted that he received his injury in the course of his search for cigarettes and he would hardly be expected to wear goggles at that time. It is surprising then that the learned judge, nevertheless, found that a failure to supervise the wearing of goggles, was a cause of his injury. With all respect to the judge, the basis for liability in the second appellants, is untenable. The importance of the Nolan case, lies in its recognition of the common law duty of an employer not only to provide safety appliances but to order and supervise their use. Paull, J., at page 454 made the following observation:-

> "..... but I hold that in this case there was a common law obligation on the part of the defendants not only to provide goggles, but to give strict orders that they were to be used and to supervise their workmen, at any rate to a reasonable extent, in order to insure that their orders were obeyed."

Dr. Barnett appreciated the insurmountable hurdle he faced in endeavouring to support the judge's rationalisation and argued that the second appellants had given no specific warning about caustic soda or alerted the workmen that agitation was in progress in the tanks, nor specifically prohibited entry into the precipitation area. In those circumstances, he maintained there was sufficient ground for urging that such warning as was given, was less than adequate to enable the respondent to be reasonably safe.

It is helpful at this stage to look at the pleadings to see what was alleged against these appellants

in this regard. The averment was as follows:

> "Particulars with respect to First Defendant (i.e. the second appellant)
>
> (1) .....
>
> (2) failed to give any or any sufficient instructions, warning or description of the said premises to the Plaintiff;
>
> (3) ....."

The respondent himself, in the course of his examination-in-chief, stated that no one told him anything about the premises. But he admitted under cross-examination that he knew that there were restricted areas on the site and that he should keep to his area of work. On behalf of the second appellants, evidence was given by a supervisor, Michael Somers, who said that he had given the respondent particular instructions about the premises, i.e., the dangers and the necessity for him to keep in his bounds, not to wander about.

The learned judge made no finding with respect to the adequacy or otherwise of any warning given by the second appellants to the respondent. Although we have combed the judgment, with the assistance of counsel, there was no mention whatsoever, as to the credit of the witnesses who spoke of this matter. But on the basis of the admission on the part of the respondent that he knew that he should keep to his area of work and not wander about, that he was aware (for he said as much) that caustic soda was on the compound, that he expected caustic soda to be contained "in a big tank stored up", that he entered an area 100 X 200 yards containing some 90 tanks

63 feet in height, which were not within the area of his work, although contiguous to it, it would be reasonable to say that in wandering where he did, he must have been aware he was disobeying the orders of his supervisor. I would hold, therefore, that he had adequate warning as to the character of the premises where he was working. The respondent is not without experience on such sites having worked on other bauxite installations and some common sense must be accorded to this technician.

In my view, having regard to all the circumstances, this particular head of negligence as to a failure to warn or give instructions on the part of the second appellants, has not been proved. The result is that these appellants must succeed, and the judgment entered against them reversed. I would order accordingly.

I come now to consider the case against Alcan Jamaica Limited and in that regard, set out the particulars of negligence alleged against them. They were as follows:

> "Particulars with respect to Second Defendant (i.e., the first Appellant)
>
> (1) Failing to warn the Plaintiff of the presence of the said caustic soda;
>
> (2) Failing to warn the Plaintiff of the tendency of the said caustic soda to fall out of the said tank;
>
> (3) Failed to fence or otherwise guard, the said tank.
>
> (4) By reason of the foregoing, failed to discharge the common duty of care in breach of the Occupier's Liability Act."

The learned judge rested liability in these appellants on the provisions of section 3(5) of the Occupiers Liability Act which recites as follows:

> "s 3(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

He put the matter thus at page 44:

> Dr. Barnett in his address referred to the fact that the building or area in which the plaintiff was injured was unfenced and had several entrances. It had no gate, door or barrier of exclusion. It was an area which contained several tanks with noxious substances in a state of agitation and flowing or boiling over and several men were seen working there at the material times.
>
> He accepted the fact that signs were posted on the premises. However, he contended that those signs were in positions convenient to physical adherence to the building and not dictated by possible effectiveness of warning.
>
> He asked the court to say that the facts to which he referred indicate that the second defendant did not reasonably provide for the safety of the plaintiff and that the plaintiff was not a trespasser.
>
> The Occupiers Liability Act Section 3 Subsection 4 and 5 state:
>
> '(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances;
>
> (5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.'
>
> In my opinion, the contention of

> "Dr. Barnett is sound. In so concluding I am not mindful of the existence of warning signs on the premises. But sub-section (5) as quoted, places a limitation on the effectiveness of warning signs by the occupier in absolving him from liability. In all the circumstances, I am not satisfied that the second defendant by the signs enabled the plaintiff to be reasonably safe. Why was no door or barrier placed around the area? Why were the signs not specifically referable to the tanks of caustic soda?
>
> In my judgment, the plaintiff was not a trespasser in the precipitating area. I hold that he reasonably thought he could go into that part of the premises, he having seen persons there who registered no alarm at his presence, and who directed him to take a particular route to the canteen."

It is, I think, tolerably clear from that extract from the judgment, that the learned judge focussed his attention on the adequacy of the signs erected or placed on the premises, and on the absence of physical barriers, i.e., fences, or doors in the area of the percipitation tanks of caustic soda. I am not altogether clear why the learned judge adopted this approach for the particulars of negligence as rehearsed earlier in this judgment, adverted to "failing to warn" which is, of course, general in scope and would comprehend warning signs as much as oral warnings. Moreover, evidence was led as to the latter. But regrettably the learned judge did not at all deal with that evidence either expressly or impliedly. That failure must destroy the conclusion at which he eventually arrived, seeing that he omitted as required by Section 3(5) to consider "all the circumstances." Plainly, the judge was obliged to take account not only of the evidence with respect to warning signs but also have regard to the

evidence of oral warnings or instructions as to safety measures on the installation given by the safety officer Mr. Patrick Anderson to the respondent and his fellow workmen from the second appellants.

An important issue which must now be considered, is the status of the respondent when he entered the precipitation area. Mr. Goffe for the appellants argued that he was a trespasser. Dr. Barnett contended that he was not, but even if he were, the first appellants, nevertheless, were negligent and owed him a duty of care. He invited us to consider the modern approach of the law with respect to an occupier of land to a trespasser. Seeing that the learned judge found the respondent "not to be a trespasser", but apparently a visitor, I must now give my comments on the validity of that conclusion.

The respondent was given a pass to enter the appellants' installation for the purpose of carrying out particular work in one particular area on the site. For the purposes of the Occupiers Liability Act, having been invited on the premises, he became a visitor to whom the appellants owed common duty of care, i.e.,

> "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

See Section 3(2) of the Act. Consistent with that duty, there was evidence that the appellants' safety officer ordered the respondent to change his boots and indeed, provided him with new boots, as one of the respondent's had a hole in the sole. The respondent said he was told

about caustic soda. When the injury was sustained, he had left his area of work, contrary to the instructions he said he had been given, and fully aware of the presence of caustic soda in tanks, and penetrated the precipitation area in his search for cigarettes. He had not been given any authority to go into that area. His presence there could never be said to be incidental to his job. No one expected him to be there. It was not a route to the canteen where, it is reasonable to expect, cigarettes would be sold for workmen normally employed on the site.

A possible test as to his status is, did the respondent act reasonably in following the path he did? Gould v. McAuliffe [1941] 1 All E.R. 515 is helpful. There the plaintiff went to a public-house to meet her husband and while waiting for him, was minded to seek the rest room. She did not enquire the location, but went out into a garden by the side of the public-house. At some time earlier, a rest room had been there, but it had since been removed. Not finding it, she went to the other side of the garden and passed through a gate which was open at the time. She was set upon by a dog belonging to the licensee of the premises when she had gone a few steps beyond the gate. Although the decision rested on other grounds, Singleton, J., did say this at page 518:

> "..... but I am satisfied myself that the plaintiff might reasonably think that the invitation extended to the yard, and that she was not in any way doing that which a reasonable person would not do in stepping through an open gate to go towards a door which she could see to look for the lavatory. If the question depended upon whether or not she might reasonably think the

> "invitation extended to that, I think that it would be comparatively easy, but, as I have said, I am not sure that that really is the test in this case."

The learned judge in the present case did set himself the same test and said:

> "I hold that he reasonably thought he could go into that part of the premises, he having seen persons there who registered no alarm at his presence, and who directed him to take a particular route to the canteen."

But the circumstances in the instant case are, in my view, altogether different. The respondent was well aware that he was restricted to his work area, that he was taking a risk in venturing where he did and further, the persons whom he said he saw working under the tanks formed no part of his work team. In Gould v. McAuliffe, the plaintiff was not taking any risk of which she was conscious although as it happened, the defendant's dog was in the yard. So in my view, the learned judge fell into error.

Since the question for the judge was whether the respondent was a trespasser or not, it may be, he took the view that those workmen were able to grant the respondent permission, by inviting him to enter the precipitation area for he stated in his judgment that "they directed the respondent to take a particular route to the canteen". If this were his approach, as it appears to be, it cannot be supported. Hillen & Pettigrew v. I.C.I. (Alkali) Ltd. [1936] A.C. 65 which was brought to our attention by Mr. Goffe, is, I think, apposite. There the appellants were members of a stevedores' gang employed

to load a steamship from the respondents' barge. The cargo in the hold of the barge consisted of bicarbonate of soda in bags and soda in kegs on top of the bags. The foreman required the bags to be loaded before the kegs. These were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ship's derricks. After this had been done the crew of the barge replaced the hatch covers on the after portion of the hatch, unsupported by the fore and aft beam. The engineer threw a sling on one of the hatch covers and the appellants placed seven kegs in the sling. When they were moving the eighth keg, the hatch covers gave way and the appellants fell into the hold and were injured. The men knew that it was dangerous and improper to load cargo off the hatch covers.

The opinion of Lord Atkin is valuable in two respects, firstly, as to the status of the stevedores, and secondly, whether the ship's crew could authorize the stevedores to use the hatch for the particular purpose. In respect to the latter point, the learned Law Lord said this at page 70:

> "It is said, however, that whatever may have been the scope of the general invitation of the owners to the stevedores' men, in this case the owners' servants, the crew, extended a special invitation to the plaintiffs to use the hatch for the particular purpose, and neglected to warn them of the danger which they knew and the plaintiffs did not. I am far from satisfied that any one so invited the plaintiffs; I think the engineer's part was confined to a friendly suggestion that they should all do something irregular together. But, whether there was an invitation by the crew or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners, and quite outside the ostensible scope of the authority of the crew. The

> "owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or drinking booth. They could not invite stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that, if he saw a trespasser unwittingly entering into danger upon the employer's property, he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable."

The situation in the instant case parallels the facts in the House of Lords' decision. The employees of Alcan in inviting the respondent to follow the route he did, were acting without the authority of Alcan and quite outside the ostensible scope of their authority. In the result, the respondent had no permission express or implied to go in search of cigarettes into the precipitation area. And I am reinforced in this view by the opinion of Lord Atkin when at pages 69-70 he expressed himself thus:

> "The plaintiffs' claim against the defendants is based upon the theory that they were invitees of the defendants for business purposes, and that the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe or at least to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the defendants or their servants. My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous

> "and constitute an improper use. As Scrutton L.J. has pointedly said: 'When you invite a person into your house to use the staircase you do not invite him to slide down the banisters.' (1) So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers."
>
> [Emphasis supplied]

Nowadays we no longer speak of invitees or licensees, as these terms have been abolished by the Occupiers Liability Act, but if we substitute "visitor" for "invitee", the principle is as valid then as it it now.

In one of the submissions addressed to us by Dr. Barnett as to the status of the respondent, he invited us to consider whether the invitation to the premises in respect of the workman was restricted either by specific instructions given to him or by warning signs indicating that the particular area in question was prohibited to him, or restricted to a class of persons of which he was not a member. I have already dealt with the respondent's appreciation of what he had been told, viz., to keep within his work area. But I must now say something about the signs which the judge found existed on the premises. There was no sign on the premises which specifically mentioned caustic soda. The smell of this chemical is so acrid that it is passing strange that the respondent stated that he smelt nothing malodorous while he was on the premises. Now the learned judge accepted the proposition of Dr. Barnett that the signs were in positions

convenient to physical adherence to the building and not dictated by possible effectiveness of the warning. That was a finding of fact. The Privy Council in Ellis v. Industrial Chemicals Co. Ltd. C.A. (Unreported) took us to task about interfering with findings of fact by a lower court and I for one, would not wish to transgress the prohibition. I, therefore, accept his finding but that does not conclude the matter, because all the circumstances must be taken into account. The signs which were erected in the installation are intended for employees of Alcan, who, in the normal course of things, according to the evidence, would receive instructions and safety talks. There was evidence that employees required to work in the vicinity of the precipitation area were required to wear special safety goggles. Some did and others did not. The respondent saw workmen under the tank, some of whom were wearing the safety goggles and some who did not. And as I understood Counsel, the signs in the area of the tank bore the legend "Danger - have you forgotten something ..." In the case of workers specially contracted to work on the premises, they too received safety instructions, although the respondent suggested he had not been the beneficiary of any such counsel or advice. But he did admit that he was told to keep within his bounds. And we must suppose as a welder, he was able to read.

In my opinion, the basis of liability ascribed by the learned judge to the appellants is with respect, invalid. The respondent when he entered the precipitation area, in disobedience of the order to keep to his work site, and fully alive as a reasonable man to the risk he

ran, must be regarded as a trespasser. In searching for cigarettes in the area he ventured, he cannot be considered as making an ordinary and reasonable use of the premises for the purpose for which he was invited. It was not the case that during the lunch break, while enroute to the canteen along the way provided to reach such a place, he sustained his injury. If that were the case, then different considerations would apply. I am satisfied for these reasons that the respondent could not be heard to say that, where he was, at the material time, was not out of bounds. I would hold that he was a trespasser at the time he was injured.

What then is the duty owed to a trespasser by an occupier of land? Since R. Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] All E.R. (Rep.) 1 the law has undergone some humanising change. The narrow formulation - "towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser" (per Lord Hailsham L.C. at page 4), has broadened into the rule that where an occupier knows that there were trespassers on his land or knew of circumstances that made it likely that trespassers would come onto his land, and also knew of physical facts in relation to the state of his land or some activity carried out on the land

which constitute a serious danger to persons on the land who were unaware of those facts, the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the dangers. See British Railways Board v. Herrington [1972] 1 All E.R. 749. As Lord Reid pointed out in Southern Portland Cement Ltd. v. Cooper [1974] 1 All E.R. 87 at page 93:

> "The essence of the Addie principle is that an occupier need neither give any consideration to a trespasser's safety nor do anything for his protection until he knows or as good as knows that the trespasser is already on his land."

Their Lordships in British Railways Board v. Herrington (supra) did not "overrule" the Addie case; they did not follow it. The experience of 40 years and the alteration in the moral climate, were considerations which made the principle therein articulated, out of joint with the times. There is now no longer an inflexible rule. Trespassers will no longer all be lumped together and treated alike - nor for that matter is the duty on all occupiers alike. All the circumstances of each case must be considered. On the part of the occupier, the duty is to act humanly and decently.

> "So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it." (per Lord Reid at page 758)

In the words of Lord Morris at page 767:

> "A duty to take such steps as common sense or common humanity would dictate."

If the occupier is possessed of great means and resources, then in guarding against the danger, regard will be had to that circumstance. Lord Wilberforce illustrated this by indicating at page 777 that :

> "What is reasonable for a railway company may be very unreasonable for a farmer, or (if this is relevant) a small contractor."

So too, the trespasser must be considered, seeing that he comes in all guises. The term trespasser is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child - all may be dubbed as trespassers.

I think all the speeches make it clear that a balance must be struck between a sensitivity for human suffering and a reluctance to place too heavy a burden on the occupier of land. So in considering what is reasonable in the circumstances, there are several other factors which must be considered, and support for this approach put forward by Dr. Barnett is to be found in Pannett v. P. McGuinness & Co. Ltd. [1972] 3 All E.R. 137 where Lord Denning at page 141 said this:

> "The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it. (2) You

> "must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3) You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4) You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are, the more precautions may have to be taken."

There is one other factor, which I think I should highlight and it is this; that the duty of an occupier to a trespasser despite its humanising patina, is not to be assimilated to the duty of an occupier vis-a-vis "a visitor" under the Occupiers Liability Act. A trespasser remains an illegitimate being within the law. Lord Pearson at page 779 made this abundantly clear when he stated:

> "It does not follow that the occupier never owes any duty to the trespasser. If the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor. Very broadly stated, it is a duty to treat the trespasser with ordinary humanity." [My emphasis]

And again at page 781:

> "Even when his presence is known or reasonably to be anticipated, so that he becomes a neighbour, the trespasser is rightly to be regarded as an under-privileged neighbour."

This fact is very relevant to the instant case where the respondent on entry into the premises, assumed the role of a "visitor" within the meaning of the Occupiers Liability Act but on entering the precipitation area became Lord Pearson's "under-privileged neighbour."

It remains therefore to consider the manner in which the respondent qua trespasser was dealt with by the occupier, the first appellants. Mr. Goffe took the position that the appellants had discharged the burden of proving that they had satisfied the test required by the Occupiers Liability Act and a fortiori, the test for a trespasser - in the event the Court took the view that the respondent qualified as such. As I understood the approach of Dr. Barnett, the Court should take account of the practicalities of the situation where different groups of workmen were engaged on locations close to each other, that it would be natural for there to be some intercourse between them, and the search for cigarettes is a normal course of conduct not in itself wrongful or dangerous, and there were no signs restricting entry. Applying the humanising factor indicated by the authorities, the appellants had fallen short of the standard required in common humanity.

There are two aspects which must be considered in this regard. First, there were undoubtedly signs in the vicinity of the precipitation area. The signs were clearly intended for the initiated. Part of the legend which one sign bore read - "Have you forgotten something". At the same time, it also read "Safety gear must be worn". The area was not one to which entry was intended to be prohibited but, one in which care should be exercised.

Employees of Alcan who were required to work in that area, were obliged to wear as part of their safety gear, "mono goggles". None were issued to the respondent because he was not required, having regard to his Firm's contractual obligations to enter that area. The learned judge expressed no view in this regard but this Court can, as a matter of inference, deal with that. For my part, I would consider it wholly unreasonable to expect Alcan to guard against some worker not being a part of its work force who ventured in an area where common sense would alert him to the danger of his action. The conduct to which attention must be paid, is not the search for cigarettes which is understandable, but entry into an area where it was risky to his knowledge to venture.

But, there is another aspect for which the learned judge did not care: he did not deal with it. The respondent was given instructions to keep within his bounds, he was given new boots and told of the danger of sores caused by caustic soda. He said he realized that caustic soda was kept in tanks. Despite all this, he went out of his bounds. The duty of Alcan who were aware of his presence was to give him instructions as to the inherent danger of the installation, the need to wear safety gear and to provide them if necessary. Common humanity demanded no less. From his own admissions he was adequately alerted to danger.

I do not think the appellants were under any obligation to erect special signs for trespassers. The signs which were in place were adequate to convey to employees and visitors, the need to exercise care. So the induction courses given, the safety monitors

provided, constant instructions and supervision, together amounted to such protection as to ensure that it would be reasonably safe to use the premises. In my judgment, the duty which was cast upon them vis-a-vis a visitor, a fortiori a trespasser, the appellants have discharged and I would absolve them of all blame. The judgment of Ellis, J., in my opinion, cannot stand and should be set aside.

In the result, I would allow the respective appeals and enter judgment in favour of each of the appellants with costs. They would each be entitled to the costs of this appeal.

WHITE, J.A.:

Ellis, J., after hearing evidence, upheld the claim of the plaintiff/respondent by giving judgment in his favour and awarded him the sum of $97,682.75 as damages for serious and deforming injury to his left eye, as a result of Caustic Soda falling into that eye. The plaintiff/respondent suffered this serious deforming injury while he was working on the Kirkvine Works premises of the second defendant/appellant (Alcan), where he was engaged on the 1st May, 1980, by virtue of his employment with the first defendant/appellant (Universal Fencing), to do welding work. This was under an agreement between Alcan and Universal Fencing. More specifically, he was engaged with other workmen in erecting a fence around a transformer which was apparently by the main road, which runs between the power plant and the precipitation building. The transformer was some distance away from the precipitation building and evaporating buildings where the unfortunate accident occurred. The evaporating buildings and the precipitation building consist of about 90 tanks in an area of about 100 X 200 yards. There is a retaining wall of concrete with steps about 3 feet in height. They contain caustic soda and Alumina which are in agitation, and the contents of the tanks sometimes flow over. According to Mr. Patrick Anderson, the safety officer at the Kirkvine Works, the height of each tank from the floor was such as not to allow one to walk under them. To use his words - "There was no unobstructed walk. One would have to keep bending under pipes."

There is no dispute that the plaintiff/respondent suffered the loss of his eye while in the precipitation area. The question is rather whether the learned trial judge was right in his decision that the defendants/appellants, though not liable for breach of statutory duty in failing to provide the plaintiff/respondent with goggles were, nevertheless, each equally liable for the serious injury to him by virtue of the terms of Section 3, subsections 4 and 5 of the Occupiers Liability Act.

As regards the alleged failure to provide the plaintiff/respondent with goggles, the trial judge expressed himself as follows:

> "In this case, the plaintiff suffered his injury not during any welding operation. He was not even injured in the vicinity of the area of his welding operations. He has not given any indication that he would have worn the glasses had he been provided with a pair.
>
> In all the circumstances, I cannot see any association of the breach of statutory duty with his injury. The plaintiff has not satisfied the statements cited in the cases above. [Caswell v. Powell Duffryn Associated Collieries Ltd. (1940) A.C. 152, 168 per Lord MacMillan; Bonnington Castings, Ltd. v. Wardlaw [1956] A.C. 613, 620] He has shown no causal connection between his injury and the breach of the Statutory duty and his claim under that head fails."

In expressing my agreement with that conclusion, I should point out that despite the foregoing, the learned trial judge had said - "Since the plaintiff is only required to make his case on a balance of probabilities, I hold that he has made out a case of not having any safety glasses issued to him." Dr. Barnett argued that the reasonable inference from the evidence is that if the plaintiff/respondent had been supplied with glasses he would have

worn them in the past and on this occasion had requested them'. Upon this ground he sought by a Respondent's notice to vary the judgment for the plaintiff/respondent. He was thus implicitly questioning the judge's comment that there was no evidence to show that if the plaintiff/respondent had been given the glasses he would have worn them. What is more important is accepting the judge's findings, that the plaintiff/respondent had not been provided with any goggles, the plaintiff/respondent still has to show that the breach of duty contributed to his injury. In support of this opinion, I would like to refer to the case of Cummings (or McWilliams) v. Sir William Arrol & Co., Ltd. and Another [1962] 1 All E.R. 623. That was a case of an alleged breach by failure of the employer to provide a safety belt for the use of a steel erector, who had a fatal fall from a tower crane under construction. The claim was that this failure to provide a safety belt was what resulted in the fatality. It was the practice of steel erectors not to wear safety belts for the job the deceased was doing. The judgments in the House of Lords were, in part, concerned with the argument whether it was open to the Court to infer that the deceased would not have worn a safety belt even if it were available. The decision was that on the evidence it was highly probable that he would not have worn a safety belt if one had been provided. While the death of the steel erector was the decisive factor to that conclusion, (there being in the circumstances no direct evidence from him) "the evidence showed, conclusively, that the deceased himself, on this and similar jobs, had, except on two special occasions (about which the evidence was doubted

by the Lord Ordinary) persistently abstained from wearing a safety belt and that other steel erectors had adopted similar attitude." "..... It was, however, urged that on this single occasion the deceased might have changed his mind and that the respondent did not and could not prove that he had not done so" per Viscount Simonds at page 629 A. 'There was proof that a safety belt was not available on day of the accident for his use if he had wanted to use it. A belt had been available until two or three days before the accident but then had been removed together with the hut in which it had been stored, to another site. It is a matter of conjecture whether the deceased knew that it had been removed', idem page 628 E.

It is against this background of fact that the comments of the Law Lords should be looked at for their relevance to the case before this Court.

The comments of Viscount Kilmuir, L.C., are at 626 B:

> "On the first point the appellant's case before this House was fourfold. It was submitted that to hold that the appellant had failed to prove that the provision of a safety belt would have prevented the accident (and still more that the respondents had proved that it would not) was wrong on grounds of authority, the type of evidence required as compared with that called, the effect of the evidence before the Lord Ordinary and a theory of causation.
>
> The first case to which reference was made was Roberts v. Dorman Long & Co., Ltd. . That was a case under reg. 97 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), of which the material words are:
>
> '.... and except for persons for whom there is adequate hand-hold and foot-hold ... there shall be available safety belts ... which will so far as practicable

'enable such persons who elect to use them to carry out the work without risk of serious injury.'

Lord Goddard, C.J., is reported as saying :

'... I think that, if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: "Well if I had done so, they would not have been worn'."

Birkett and Hodson, L.JJ., used language which, it was submitted to us, supported this view. In Drummond v. British Building Cleaners, Ltd. Parker, L.J., adopted Lord Goddard's words and reasoning . With respect I am unable to follow or accept this reasoning or its result. The necessity, in actions by employees against their employers on grounds of negligence, of establishing not only the breach of duty but also the causal connexion between the breach and the injury complained of is in my view part of the law of both England and Scotland. It was emphasised in this House in Bonnington Castings, Ltd. v. Wardlaw . I refer to, without quoting, what was said by Lord Reid , Lord Tucker and Lord Keith of Avonholm . Their words made perfectly clear that the principle applied whether the claim was based on the breach of a common law or statutory duty. This principle was in my respectful view correctly applied by Paull, J., in the first part of his judgment in Nolan v. Dental Mfg. Co., Ltd. . Counsel for the appellant was not able to suggest to us a principle of law which would not only place the onus of establishing that the breach of duty was not the cause of the accident on the employers but also, in Lord Guest's words, would preclude the employers from doing so.

It was urged on behalf of the appellant that to desiderate, in the case of a fatality, that the deceased would have used the safety device was to impose a burden on the pursuer which she could never discharge since without the deceased's evidence it must be impossible to prove what the deceased would have done in a particular hypothetical situation which did not arise in fact. The argument, therefore, took the form that Lord Guthrie

> "was right when he said that the onus was on the respondents and that the onus could only be discharged by direct evidence from the deceased as to what he was going to do. I cannot see any grounds for such a limitation on the type of evidence. What the deceased was going to do can be a matter of inference from appropriate facts. Further and with respect, I do not agree with Lord Guthrie that in this case or generally the onus is on the employers. I am not prepared to say that there can never be a case where the nature of the safety device and the obvious correlative duty of any reasonable employee to use it are such that in the absence of other evidence it should be inferred that he would have used it if it had been available: but that is not this case."

He further opined that -

> "Finally it was submitted that if the deceased's hypothetical refusal to wear a safety belt must be recognised as the effective cause of his not wearing one and hence of his death, the failure of the respondents to provide a safety belt should not be ignored as a causative factor. The answer in my view must be that there are four steps of causation: (i) a duty to supply a safety belt; (ii) a breach; (iii) that if there had been a safety belt the deceased would have used it; (iv) that if there had been a safety belt the deceased would not have been killed. If the irresistible inference is that the deceased would not have worn a safety belt had it been available, then the first two steps in the chain of causation cease to operate."

At page 628 Viscount Simonds expressed similar views:

> "My Lords, I do not doubt that it is a part of the law of Scotland as it is part of the law of England that a causal connexion must be established between a breach by an employer of his duty at common law or under a statute and the damage suffered by his employee: see e.g., Bonnington Castings, Ltd. v. Wardlaw . If a contrary principle is thought to be established in

> "Roberts v. Dorman Long & Co., Ltd. I cannot reconcile that case with Wardlaw . It may, however, be said that, where the employer is in breach of his duty, there is in that fact some prima facie evidence of a causal connexion between the breach and the subsequent damage. So far in this case I would go with the appellant. It is the next step that I cannot take. For it having been found as a fact by the Lord Ordinary and their Lordships of the First Division having unanimously concurred in that finding, that it would be totally unrealistic to hold that the failure to provide a belt was the cause of the accident, the learned counsel for the appellant was driven to the argument that the evidence on which that finding was based was inadmissible or at any rate of no weight. This argument I cannot accept."

Recognising the duty in the employer to provide safety appliance, Lord Reid specifically related to the quotation from the judgment of Lord Goddard, C.J., in Roberts v. Dorman Long, quoted in the excerpt from the judgment of Viscount Kilmuir, L.C., (supra) page 631 F-G:

> "In my view this is not correct. 'He cannot be heard to say' suggests to me personal bar or estoppel: indeed, I know of no other ground on which a defender can be prevented from proving a fact vital for his defence. If I prove that my breach of duty in no way caused or contributed to the accident I cannot be liable in damages. And if the accident would have happened in just the same way whether or not I fulfilled my duty, it is obvious that my failure to fulfil my duty cannot have caused or contributed to it. No reason has ever been suggested why a defender should be barred from proving that his fault, whether common law negligence or breach of statutory duty, had nothing to do with the accident."

These quoted passages illustrate the impact of the judgments of the House of Lords, that the plaintiff/

respondent's evidence must supply the facts from which the inference could inevitably or irresistibly be drawn that if he had been supplied with glasses he would have worn them. The goggles which should have been issued to the plaintiff/respondent would be relevant to his immediate work as a welder. He knew he ought to have had goggles, and in fact, on previous occasions when he worked on other Bauxite sites he had been issued a pair of goggles by Universal Fencing. Others employed with him on Alcan's site, the evidence disclosed, wore goggles. Despite this, the finding of fact by the learned trial judge that there was no evidence to indicate that the plaintiff/respondent would have worn the protective material, is a finding to which he could have arrived; nor was it necessary to draw the inference as suggested. Furthermore, the inference must be subject to the judge's explicit finding that he was not injured at the spot at which he was engaged to work on the power plant.

The point at which he was injured was some distance away from his work spot. It is clear that he strayed from that spot. He described his movements after lunch and before resumption of work on the fateful day. He started out to go to the water cooler for a drink of water. He did not in fact reach the water cooler which was in front of the changing room about four chains from where he was working. Yielding to a craving for cigarettes/changed his course, on the reasoning that "since I was going for water I might as well pick up a cigarette same time." This diversion lead him under the tanks, after he was advised by some men working underneath a tank to go under the tanks and go upstairs, where the man selling the cigarettes had gone.

It was while he was coming back from his abortive search that he suffered the injury to his left eye. As he emerged from under the tanks he said he looked up to see, (just as he had done on the occasion when at first he was going in search of the cigarettes), if any danger was overhead. He "looked good to see if there was any danger sign because I thought maybe it dangerous. I saw no sign that is why I went." Undeniably, it was well-known to him that he should keep to his area of work. This admission is supported by the evidence of Michael Somers, supervisor of Universal Fencing, that the fencing work did not involve going into the precipitation building. Universal Fencing had no control over that part of the premises. And in fact he would not have expected any of his workmen to be in the precipitation building.

As for the character of the plaintiff/respondent, I do not accept that he was not a trespasser. True it is that he was on those premises by reason of the contract between Alcan and Universal Fencing, but at the material time, indubitably, he had lost the character of a visitor by ignoring all the warnings displayed by signs reading e.g., 'Danger', plus the safety lecture which was given to all the workmen on the site by Mr. Patrick Anderson.

My brothers Carey and Campbell, JJ.A., have examined in depth the duty owed by an occupier of premises to a trespasser, with special reference to the terms of the Occupiers Liability Act s 3(4)(5). I do not propose to go into that aspect of the case, because I agree with their exposition of the law. Nevertheless, I underscore what they have said by dealing with the evidence by the plaintiff/respondent that he was encouraged to go for the cigarettes by walking under the tanks when he was

advised by some workmen, who he saw were employed in the area of the tanks, how to get to the man with the cigarettes. I do not accept that this advice was of sufficient authority to make Alcan liable in the present circumstances.

Lord Atkin's remarks in his judgment in Hillen & Pettigrew v. I.C.I. (Alkali), Ltd. [1936] A.C. 65 at pages 69-70 give point to my observation. I quote:

> "The plaintiffs' claim against the defendants is based upon the theory that they were invitees of the defendants for business purposes, and the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe or at least to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the defendants or their servants. My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: 'When you invite a person into your house to use the staircase you doo not invite him to slide down the banisters.' [The Calgarth (1926) P. 93,110] So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers. The defendants had no reason to contemplate such a use; they had no duty to take any care that the hatch when covered was safe for such a use; they had no duty to warn any one that it was not fit for such use. I know of no duty to a trespasser owed by the occupier of land other than, when the trespasser is known to be present, to abstain from doing an act which if done

> "carelessly must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him. The owners of the barge therefore were not guilty of any breach of duty to the plaintiffs.
>
> It is said, however, that whatever may have been the scope of the general invitation of the owners to the stevedores' men, in this case the owners' servants, the crew, extended a special invitation to the plaintiffs to use the hatch for the particular purpose, and neglected to warn them of the danger which they knew and the plaintiffs did not. I am far from satisfied that any one so invited the plaintiffs; I think the engineer's part was confined to a friendly suggestion that they should all do something irregular together. But, whether there was an invitation by the crew or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners, and quite outside the ostensible scope of the authority of the crew. The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or drinking booth. They could not invite stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that, if he saw a trespasser unwittingly entering into danger upon the employer's property, he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable."

I quote also from the judgment of Lawton. L.J., in

Westwood & Another v. Post Office [1973] 1 All E.R. 283

at page 289:

> "The line between trespass and conduct outside the scope of employment may not always be easy to see; but on the evidence in this case, it is in my judgment, clearly discernible. The concept of a man becoming a trespasser though going to parts of his place of work where he had no business to be is one which the law

> "recognises: see Hillen & Pettigrew v. I.C.I. (Alkali) Ltd. in which members of the stevedores gang, who stood on hatch covers for the purpose of unloading when they knew they should not have done so, were adjudged to be trespassers."

Those words can be applied mutatis mutandis to the facts of this case. They show that a man can be a trespasser even if, when invited into premises, he goes to a section of those premises where he knows he is not to go. In the event of an injury in that part of the premises to which entry is forbidden, he must expect that the Court will not exact from the occupier a higher duty than to see that the occupier does nothing deliberately to harm the trespasser given the knowledge of the presence of the trespasser. It is not an aspect of this case that that was done. Indeed, the evidence is replete with the steps which were taken by the second defendant/appellants to see that the plaintiff/respondent was aware of the dangers attendant on his being on their premises.

Absent from the findings of Ellis, J., is any discussion of the awareness of the dangers by the plaintiff/respondent, in so far as the evidence of Mr. Patrick Anderson was unchallenged. The trial judge did not make any finding as to whether the safety talk deponed to by Mr. Anderson was given. It is not unlikely that if he had considered the relevance and importance of the safety talk he would, inevitably, have gone on to hold that the plaintiff/respondent not only recognised and realised the dangers and the risks he was faced with while on the Alcan premises, but also that he ignored the obvious warning signs, and did not observe that care which he should have observed for his own safety. The concern for the safety of

persons on that site, is underlined by the evidence that Mr. Anderson had issued a new and wholesome pair of boots to the plaintiff/respondent in replacement of the pair which he had been wearing up to then. This old pair had a hole in the sole, and constituted a hazard to the plaintiff/respondent, from the caustic soda spilling onto the roadway where workmen were legitimately able to walk. The plaintiff/respondent was less than frank when he purported to deny any knowledge that caustic soda was in the area, and to deny that any danger signs were displayed in the specific precipitation area.

I do not, therefore, accept as valid the holding of the learned trial judge that the second defendant/appellant had not taken any sufficient steps to discharge its duty to the plaintiff/respondent. I agree with the comment that in so holding he erred in focussing his attention entirely on the presence or absence of signs and physical barriers, instead of considering as well the abundant evidence concerning the safety talk given to the plaintiff/respondent by employee of the second defendant/appellant.

The end result is, that I agree that neither of the defendants/appellants is liable for breach of any statutory duty, nor is the second defendant/appellant liable to the plaintiff/respondent under the terms of the Occupiers Liability Act, and I would therefore allow the appeals of both appellants.

CAMPBELL J.A.

The plaintiff/respondent (hereafter called the respondent) suffered serious injury to his left eye on May 1, 1980. The injury was suffered while he was on the Kirkvine premises of the 2nd Defendant/Appellant (hereafter called "Alcan.") He had been despatched to these premises by his employer the 1st Defendant/Appellant (hereafter called "Universal Fencing") to do some welding work contracted to be done for Alcan by Universal Fencing. The respondent had been employed by Universal Fencing as a welder since February 1976 and on his own admission was aware of the need for safety equipment including helmet, safety glasses, boots and long gloves when performing his work. The site to which he was assigned to work on Alcan's premises was not the site where he was injured. Also he was not injured while he was actually working. Nor was he injured while making use of the canteen, water cooler or other welfare amenities provided on the premises nor was he injured on the roadway available for use by him in getting to and from these amenities to his work site. He was injured in an area in which there were many cylindrical tanks resting on concrete slabs which were raised from the ground. This area was about 10 - 15 feet from the roadway leading to the canteen and water cooler. He had detoured to this area in search of cigarettes. He was walking in a bent posture under the concrete slabs supporting the tanks when on looking up caustic soda dropped in his left eye causing the injury resulting in blindness in that eye.

On the respondent's admission in evidence, these further facts were elicited from him namely that he knew there where restricted areas on the premises and that he should keep to his area of work. He knew that a bauxite plant was a "serious place" and was covered by rules and regulations. That

the plant comprised huge machinery some of which might be dangerous. He knew that persons cannot walk anywhere on the premises as they like. Though there were no signs marked "caustic soda", he admitted seeing signs marked "danger". He expected caustic soda to be on the premises and that it would be stored away in a tank even though he said a "big" tank. Apart from the tanks under which he was walking he saw no other tanks on the premises which could have held caustic soda.

The learned trial judge summarised the case for Universal Fencing and Alcan as hereunder:

> 'The first defendant's case (Universal Fencing) was that the plaintiff was issued with safety goggles but neglected to wear them and was thus author of his own injury or contributed thereto."
>
> "The second defendant (Alcan) contended that any duty it owed to the plaintiff was fully discharged by the erection of adequate warning signs on its premises. In addition, its safety officer instructed the plaintiff and others to be careful against dangers on the premises. In any case, the plaintiff was a trespasser at the particular site where he received his injury. This defendant also contended that the plaintiff contributed to his injury."

He thereafter posed the undermentioned questions which he correctly apprehended were necessary for him to answer. These were:

> "1. Was the plaintiff injured to his left eye?
>
> 2. Was the plaintiff issued with safety goggles by the first defendant (Universal Fencing) at the relevant period?
>
> 3. Was the plaintiff a trespasser where he was injured?
>
> 4. Did the second defendant (Alcan) adequately warn or protect the plaintiff against dangers on the premises?"

The learned judge found for the plaintiff on all four issues namely that he was injured in his left eye; that he was not issued with safety goggles by Universal Fencing, was not a trespasser on Alcan's premises at the time he was injured and that Alcan had not adequately warned and or protected the plaintiff against dangers on the premises. Judgment was accordingly given in favour of the respondent against Universal Fencing and Alcan in equal proportion and the respondent was adjudged not guilty of contributory negligence. Against this judgment Alcan and Universal Fencing have each appealed and the respondent has filed a respondent's notice.

Alcan's grounds of appeal may be summarised thus:

1. The learned trial judge should have held that the respondent was a trespasser at the material time. On this basis Alcan had discharged its duty of care to the respondent as a trespasser which duty was that of refraining from doing him wilful harm or exposing him to injury from concealed dangers.

2. Alternatively even if the learned judge is correct in his finding that the respondent was not a trespasser and was in fact a visitor, Alcan had discharged its common duty of care under the Occupier's Liability Act. The failure of the learned judge so to conclude was due to his failure to consider and evaluate the entire evidence including the evidence of safety talks given to the respondent.

3. Alternatively even if the learned judge is correct that Alcan was in breach of its statutory duty under the Occupier's Liability Act, he nonetheless erred in failing to find that the respondent was negligent and that his own negligence materially contributed to his injury. He thus erred in his treatment of contributory negligence.

Universal Fencing's grounds of appeal coincide with Alcan's on the issue of trespasser vel non and on contributory negligence. The other grounds of appeal are peculiar to Universal Fencing. They relate to the learned judge's conclusion

that this appellant was negligent in not properly ordering and supervising the wearing of protective goggles and to the inconsistency of this conclusion with his earlier finding that there was no casual connection between the failure of Universal Fencing to provide goggles and the respondent's injury.

The status of the respondent as a visitor as found by the learned judge is thus central to both appeals.

The learned judge's reasoning and conclusion that the respondent was not a trespasser is stated thus:

> "In my judgment, the plaintiff was not a trespasser in the precipitating area, I hold that he reasonably thought he could go into that part of the premises, he having seen persons there who registered no alarm at his presence, and who directed him to take a particular route to the canteen."

The evidence of the respondent which the learned judge accepted and on which he relied for his finding is in these words:

> 'I was going to where the water cooler is. It is in front of the changing room about 4 chains from where I was working. I went down the road an asphalt area on which vehicles drive. I did not reach the water cooler. Some men were underneath a tank working. Cigarettes were scarce - none in the canteen and since I was going for water I might as well pick up a cigarette same time. I asked the men that I saw if any of them had cigarettes selling - he said a man there sell cigarettes but him gone upstairs. I was told to go under the tanks and go upstairs I would see the man."

Under cross-examination on behalf of Universal Fencing, the respondent said he had walked by the tanks several times. He had never before entered under any of them. He knew that there were restricted areas on the premises and he also knew that he should keep to his area of work. He was not working in the area in which he went to buy the cigarettes.

Mr. Goffe for Alcan complained that the basis on which the learned judge found that the respondent was not a trespasser is not well founded in law since it appears to be based on the response of persons present in the area in which the respondent had entered and or on the invitation of those persons to the respondent to enter. He submitted that if on the other evidence in the case there was in fact a trespass, as indeed there was, the response of persons who themselves could well be trespassers also, could not negate the trespass. He relied on Hillen and Pettigrew v. I.C.I. (Alkali) Ltd (1936) A.C. 65 in support of his submission and also to buttress the further submission that even if the persons whose response and or invitation is relied on were in fact employees of Alcan, such employees could not transform a trespass into a licence or invitation. He further relied on this case as laying down the criterion for determining whether a person in the circumstance of the respondent is to be regarded as a trespasser. The headnote in that case reads as follows:

> "The appellants (Hillen and Pettigrew) were members of a stevedores' gang employed to load a steamship from the respondents barge 'Hibernia.' The cargo in the hold of the barge consisted of bicarbonate of soda in bags and soda in kegs on top of the bags. The foreman required the bags to be loaded before the kegs. The kegs were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ships derricks. After this had been done, the crew of the barge replaced the hatch covers on the after portion of the hatch unsupported by the fore and aft beams. The engineer threw a sling on one of the hatch covers and the appellants placed seven kegs in the sling, when they were moving the eight keg, the hatch covers gave way and the appellants fell into the hold and were injured. The men knew that it was dangerous and improper to load cargo off the hatch covers."

It was unanimously held by the House of Lords that the appellants had no cause of action against the respondents because:

(1) the crew of the Hibernia had no authority to invite the appellants to use the hatch covers for the purpose for which, or in the way in which, they were used;

(2) consequently the appellants in so using the hatch covers were trespassers, and not invitees of the respondents;

(3) that even if they were invitees, they were guilty of contributory negligence.

Lord Atkin in delivering the opinion of the House of Lords on behalf of himself, Lord Thankerton and Lord Wright on the question whether the appellants were trespasser said at p. 69:

> 'The plaintiffs' claim against the defendants is based on the theory that they were invitees of the defendants for business purposes, and that the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe or at least to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the defendants or their servants. My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows to be wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: when you invite a person into your house to use the staircase you do not invite him to slide down the bannisters. So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser and his rights must be determined accordingly."
>
> (emphasis mine)

At page 70 he continued:

> "It is said, however, that whatever may have been the scope of the general invitation of the owners to the Stevedores' men, in this case, the owners' servants, the crew extended a special invitation to the plaintiffs to use the hatch for the particular purpose, and neglected to warn them of the danger which they knew and the plaintiffs did not ..... But whether there was an invitation by the crew or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners and quite outside the ostensible scope of the authority of the crew. The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or drinking booth. They could not invite Stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that if he saw a trespasser unwittingly entering into danger upon the employer's property, he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty, an employer is not vicariously liable."

I apprehend the submission of Mr. Goffe to be that the respondent on the evidence, in making the detour from the drive way and walking under the concrete slabs on which the cylindrical tanks were seated in spite of seeing the exhibited danger sign, had set foot on Alcan's premises which was outside the invitation to him as a visitor and was thus a trespasser.

Dr. Barnett on the other hand submitted that the respondent was not a trespasser. He predicated his submission on what he said the evidence disclosed, namely that firstly the pass given to the respondent was not restricted to a particular area and secondly the advice given, presumably the safety talk, was in general terms merely that the entire premises should be considered as containing dangers for which he should look out and against which he should guard himself. Against this background, Dr. Barnett submitted that the respondent could reasonably have considered that in the absence of any specific

prohibition or restriction orally communicated to him or communicated by signs that a particular area was out of bounds, he was free to make reasonable use of the premises as being covered in the scope of his invitation. As it was not an unreasonable, unusual or dangerous use of the precipitation area to search therein for cigarettes, the respondent by proceeding thereto did not become a trespasser. Dr. Barnett relied on Gould v. McAuliffe 1941 1 K.B. 515 and Westwood & Anor. v. The Post Office (1973) 1 All E.R. 283 in support of his submission. Dr. Barnett's submission suffers from the weakness that even if in fact the pass did on the face of it appear unlimited, and the safety talk which was given was in general terms, the respondent had no doubt in his mind that there were restricted areas and that he should keep to his area of work. As earlier stated he admitted that he knew that bauxite plants are covered by rules and regulations. That they comprised huge machinery some of which could be dangerous. He knew that persons were not free to walk anywhere on bauxite premises as they liked. He expected caustic soda to be on the premises stored away in tank albeit he said in a big tank. He did not see any big tank but he saw many cylindrical tanks clustered together in a particular area and he did not see tanks elsewhere on the premises. Despite the absence of a sign marked "caustic soda" he saw the sign "danger". He could have had no illusion that these tanks must contain the caustic soda which he expected to be on the premises. He was told by Somers his supervisor to keep within the bounds of his operation. It seems to me that the respondent realising that it would have been out of bounds for him to detour from the roadway, sought to legitimize his conduct by giving evidence of seeing persons working in the area on whose invitation he entered the precipitation area. It was on this basis that the learned judge found that the respondent was not a trespasser. But

Hillen & Pettigrew v. I.C.I. (Alkali) Ltd (supra) establishes that such a basis for finding that the respondent was not a trespasser, namely, on the ground of a special invitation to him given by persons in the area, is not properly founded in law. In this connection, the learned judge's finding that persons in the precipitation area extended an invitation to the respondent by directing him "to take a particular route to the canteen" (emphasis mine) is not strictly in accord with the evidence. The respondent was not intending to go to the canteen, because from his evidence there were no cigarettes there. The evidence of the respondent was to the effect that he was directed to "go under the tanks and go upstairs" where the cigarette seller would be found. However, even if the persons had directed the respondent to take a short cut to the canteen, his use of this unauthorised route away from the approved roadway would amount to a trespass in that he would be setting foot outside the area of his invitation. The area of his invitation in my view comprised the area of his workplace, the welfare facilities provided which catered for his working area, and the authorised access roads to and from these facilities to his working area. I am further of the view that it can never constitute a reasonable use of the precipitation area for even an employee not employed therein to proceed thereto in search of cigarettes, merely because there are no cigarettes in the canteen in which ordinarily cigarettes are sold. To hold otherwise would be to extend an invitation to persons to roam about at large on the premises known to contain dangers in search of cigarettes on any occasion when for some reason no cigarettes are in the canteen. Gould v. McAuliffe (supra) is in my view clearly distinguishable from the facts in this case. In that case the alleged trespasser was proceeding in the direction where from previous knowledge, albeit not recent, she knew a

lavatory for use by customers of the public house was situated. The lavatory had been relocated without her knowledge. In the circumstances and on its own particular facts the decision that the injured party was not a trespasser can be supported even though as the editorial note proclaims, with which I agree, it was clearly a borderline case. Westwood & Anor v. The Post Office (supra) dealt with the adequacy of Notice. The Court of Appeal held that the learned trial judge was wrong in not finding that plaintiff was a trespasser when he entered a "lift motor room" because he was not employed therein and there was notice visible to him in these words "Only the authorised attendant is permitted to enter" which was clear indication to the plaintiff that he, not being an authorised attendant, the "lift motor room" was out of bounds to him. That case is not helpful, because in this case, the respondent's own knowledge that he must confine himself to the area in which he was working condemns him even in the absence of danger signs or safety talks.

In my opinion the complaint of Universal Fencing and Alcan that the learned judge erred in finding that the respondent was not a trespasser is justified. The bases on which his finding rests are not recognized in law as valid. On the other evidence on record, including the learned judge's own finding that the respondent "was not even injured in the vicinity of the area of his welding operation "the only conclusion to which he could have come-but for relying on the invalid bases earlier mentioned, would be that the respondent was a trespasser.

Mr. Goffe's next submission is that had the learned judge correctly found that the respondent was a trespasser, he would, applying the correct principle of law on the duty of an occupier to a trespasser, necessarily and inevitably have found that Alcan had fully discharged its duty to him. He goes further and submits that, even on the basis that the respondent

was a visitor, Alcan had discharged the duty of care owed and accordingly would not be liable for the injury suffered by the respondent. The duty to a trespasser says Mr. Goffe is not to cause him any wilful harm intentionally or recklessly, or not to cause him harm by setting a trap for him. Alcan on the evidence is not shown to have done anything causing injury to the respondent. In so stating the duty, Mr. Goffe, though not citing the case, was no doubt relying on the principle as stated in R. Addie & Sons (Collieries) Ltd v. Dumbreck (1929) A.C. 358. In that case Lord Hailsham L.C. stated the principle thus at p. 365:

> "Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed dangers. The trespasser comes on the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at the least some act done with reckless disregard of the presence of the trespasser."

Dr. Barnett submitted that the duty owed by an occupier to a trespasser is no longer that laid down in R. Addie & Sons (Collieries) Ltd (supra) which was applied by the Privy Council as late as 1964 in Commissioner for Railways v. Quinlan (1964) 2 W.L.R. 817. The new principle is formulated by the House of Lords in British Railways Board v. Herrington (1972) 1 All E.R. 749. This reformulated principle was adopted by the Privy Council in Southern Portland Cement Ltd v. Cooper (1974) 1 All E.R. 87. By the standard of the reformualted principle Alcan says Dr. Barnett, had failed to discharge its duty to the respondent even on the basis that he was a trespasser and a fortiori on the basis that he was a lawful visitor.

In British Railways Board v. Herrington (supra) Lord Reid formulated the new principle in these words at p. 758:

> 'The duty laid down in Addie's case was a humanitarian duty. ..... An occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a humane manner - that is not asking too much of him but I do not see why he should be required to do more. So it appears to me that an occupier's duty to trespassers must vary according to his knowledge, ability and resources ..... So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it."

Lord Morris of Borth-Y-Gest at page 762 posed the question:

> 'Although, generally speaking, an occupier is not obliged to fence his land and although, generally speaking, there is no obligation to prevent somebody from becoming a trespasser, are there some circumstances in which a duty arises to take some action to lessen the risk of peril both in the case of potential or prospective trespasser and in the case of some one who has become a trespasser?" (emphasis mine)

Having considered and quoted from decided cases antedating Addie v. Dumbreck (supra) which cases were considered in the latter he answered the question posed in these words at p. 765:

> "If the passages to which I have referred show that even in days when property rights were jealously safe-guarded it was firmly recognized that the dictates of humanity must guide conduct even towards trespassers such recognition must surely be no less firm today. ..... The nature and extent of any duty owed will call for separate consideration. But there must be some circumstances in which, by reason of them, a duty is owed by an occupier of land to potential trespassers as well as to actual trespassers of whom he is positively aware."

At page 767 he continued:

> 'In my view while it cannot be said that the appellants owed a common duty of care to the young boy in the present case they did owe to him at least the duty of acting with common humanity towards him. ..... The duty that lay on the appellants was a limited one. There was no duty to ensure that no trespasser could enter on the land And certainly an occupier owes no duty to make his land fit for trespassers to trespass in. Nor need he make surveys of his land in order to decide whether dangers exist of which he is unaware. The general law remains that one who trespasses does so at his peril. But in the present case there were a number of special circumstances: (a) the place where the fence was faulty was near to a public path and public ground (b) a child might easily pass through the fence, (c) if a child does pass through and go on to the track he would be in grave danger of death or serious bodily harm (d) a child might not realise the risk involved in touching the live rail or being in a place where a train might pass at speed. Because of these circumstances (all of them well known and obvious) there was, in my view, a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate, they would be steps calculated to exclude or to warn or otherwise within reasonable and practicable limits, to reduce or avert danger."

Lord Diplock expressed his opinion thus at p. 794:

> "My Lords, I conclude therefore that there is no duty owed by an occupier to any trespasser unless he actually knows of the physical facts in relation to the state of his land or some activity carried out on it, which constitutes a serious danger to persons on the land who are unaware of those facts. He is under no duty to any trespasser to make inspections or enquiries to ascertain whether there is any such danger. Where he does know of physical facts which a reasonable man would appreciate involved danger or serious injury to the trespasser his duty is to take reasonable steps to enable the trespasser to avoid the danger. What constitute reasonable steps will depend on the kind of trespasser to whom the duty is owed. If the duty is owed to small children too young to understand a warning notice the duty may require the provision of an obstacle to their approach to the danger sufficiently difficult to surmount as to make it clear to the youngest unaccompanied child likely to approach the danger, that beyond the obstacle is forbidden territory."

In Southern Portland Cement Ltd. v. Cooper (supra) the Privy Council accepted the new formulation of the law on the duty of an occupier of land to a trespasser.

At page 97 Lord Reid in delivering the judgment of the Board said:

> "In their Lordships' judgment the Addie formulation of the occupier's duty is so narrow that it will not cover many cases where humane consideration would clearly impel an occupier to do something to avoid or lessen danger to trespassers. It is not enough to say that he must not act recklessly or maliciously. His duty must be formulated in broader terms."

With regard to the extent of the duty, the expense involved in discharging the duty, and when the duty arises he said:

> "With regard to dangers which have arisen on his land without his knowledge he can have no obligation to make enquiries or inspection. With regard to dangers of which he has knowledge but which he did not create he cannot be required to incur what for him would be large expense. If the occupier creates the danger when he knows that there is a chance that trespassers will come that way and will not see or realise the danger he may have to do more. ..... The occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there."

I respectfully agree with the opinions expressed that the duty of care owed by an occupier to a trespasser established in Addie v. Dumbreck (supra) based on the categorisation of persons who enter an occupier's land into invitees, licensees and trespassers is too narrow. A principle based on humane considerations having regard to the occupier's knowledge of the seriousness of the danger which exists on his premises, his knowledge of the likelihood of persons especially young children trespassing, his skill and financial resources in safeguarding such

trespassers from injury is a more flexible and acceptable principle and for my part ought to be adopted. But even on the basis of the reformulated principle it must be remembered that no duty is imposed on an occupier in relation to a trespasser unless the circumstances established by the evidence disclose that the occupier in the words of Lord Reid in Southern Portland Cement Ltd. v. Cooper (supra) "knows that there is a chance that trespassers will come that way and will not see or realise the danger". (emphasis mine)

The evidence in this case does not establish that Alcan knew of persons trespassing in the precipitation area nor is there evidence of facts from which such knowledge could be inferred.

An even more formidable obstacle precluding the respondent from taking the benefit of the reformulated principle is that considering the evidence as a whole the irresistible inference to be drawn therefrom is that the precipitation area with the cluster of cylindrical tanks mounted on concrete slabs was clearly visible to him. There was a warning sign marked "danger". He had worked on other bauxite premises and knew that caustic soda is stored on such premises. On his own admission he said "I thought place might be dangerous but men were working under there." Though he said he did not smell caustic soda his own witness said that from one enters the plant one smells something strong. Respondent went on to say he would be looking for caustic soda in a tank. He saw no other tanks around, that could have held caustic soda. On this evidence the respondent would undoubtedly have realised the danger associated with entering the precipitation area. There is the further evidence from which an irresistible inference of knowledge by the respondent of the danger of entering the area of the tanks can be inferred. This is the evidence given on behalf of Alcan which was not rejected by the learned judge. It is to the following effect:

> "Nicholson boots had a hole. I told him the tanks can overflow on the roadway. Caustic sores, and take up to six months to heal. The safety monitor only complained about Nicholson's boots."

On this evidence the learned judge would, in my opinion, inevitably have concluded that the duty owed by Alcan to the respondent qua trespasser had been discharged. The respondent being himself aware of the danger would not even need any warning. Thus, even without warnings and despite the broader reformualtion of the duty to a trespasser, Alcan would not be liable for breach of duty because as I have earlier stated the respondent was fully aware of and did realise the danger inherent in entering the precipitation area.

Mr. Goffe has submitted that even if the respondent had been a visitor Alcan would on the evidence have discharged its duty of care to him. He complained of the failure of the learned judge to have regard to the evidence of safety talks as constituting "warning" in addition to the "warning signs" which the learned judge considered.

I think Mr. Goffe's complaint is justified. The learned judge having considered the respective submission of the rival parties delivered himself thus:

> "Dr. Barnett in his address referred to the fact that the building or area in which the plaintiff was injured was unfenced and had several entrances. It had no gate, door or barrier of exclusion. It was an area which contained several tanks with noxious substances in a stage of agitation and flowing or boiling over and several men were seen working there at the material time. He accepted the fact that signs were posted on the premises. However he contended that those signs were in positions convenient to physical adherence to the building and not dictated by possible effectiveness of warning. He asked the Court to say that the facts to which he referred indicate that the second defendant (Alcan) did not reasonably provide for the safety of the plaintiff and the plaintiff was not a trespasser.

"The Occupiers Liability Act Section 3 Subsection 4 & 5 state:

> '(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances;
>
> (5) where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

> "In my opinion, the contention of Dr. Barnett is sound. In so concluding I am not unmindful of the existence of warning signs on the premises. But subsection (5) as quoted, places a limitation on the effectiveness of warning signs by the occupier in absolving him from liability. In all the circumstances, I am not satisfied that the second defendant (Alcan) by the signs enabled the plaintiff to be reasonably safe why was no door or barrier placed around this area? Why were the signs not specifically referable to the tanks of caustic soda?"

It is clear that the learned judge in determining the effectiveness and sufficiency of the warning referred to in subsection 5 above, construed it as referring to warning signs and concluded that the warning signs in all the circumstances were insufficient to safeguard the respondent from injury. However, there was, in addition, evidence given on behalf of Alcan, on which there was no cross-examination, that persons coming to work on the premises are given safety induction talks. The evidence of Patrick Anderson is to the following effect:

> "In relation to people coming on to the site to work one must get safety induction and then the pass to enter the plant. Safety induction would refer to Mining Regulations work in areas with which acquainted, working in obedience to supervisors and dangers on the site possible overflow of tanks and broken gaskets and wearing of safety gears. ..... Plaintiff was injured on 1st May, 1980. I took him to the Dr. on that day (Thursday) I had spoken to him in a group of men on Monday before. He came to work on fencing with Universal Fencing Limited. This was at the gate. Universal Fencing Limited was fencing a transformer. The talk I gave to Nicholson was along the lines I mentioned I signed for the passes. I next saw Nicholson on the day before, he was taken to me by a safety monitor for I threatened him that the contractors came and worked without safety gears. I waded into him. Nicholson boots had a hole. I told him the tanks can overflow on the roadway. Caustic sores, and take up to six months to heal ..... I gave a safety talk on Monday to Nicholson ..... on the Wednesday I spoke to him in strong terms about safety."

There was no evidence adduced against Alcan nor even a suggestion made to it, that it had breached the mining regulations applicable to it, or that it had failed to fence or other wise guard the tanks or that it was feasible and practicable to place barrier around the area as opined by the learned judge. What the evidence disclosed is that the precipitation building with about 90 tanks is in an area of about 100 x 200 yards. There is a retaining wall about 3 ft. in height with steps which have to be climbed to reach the flooring of the tanks if one is proceeding thereto from the roadway. There is no unobstructed walkway under the flooring of the tank as one would have to keep bending due to pipes. It is reasonable to surmise that the retaining wall was a substitute for fencing and that in the circumstances, whether Alcan had discharged its duty to the respondent qua visitor, depended substantially on the sufficiency of the warning. It must be borne in mind that the respondent was not a child of immature age who may not fully realise the significance of oral and sign warnings. He was a welder of mature age who was fully conversant with the danger existing on bauxite premises on which he had

previously worked albeit not on the Kirkvine premises. The warning signs which admittedly existed, together with the safety talks which specifically referred to the possibility of the tanks overflowing resulting in caustic sores if proper boots were not worn would in my view be sufficient to discharge the common duty of care which Alcan would have owed to the respondent even on the basis as found by the learned judge that the respondent was a visitor. In my view this conclusion would have been inevitable had the learned judge adverted to the warnings constituted by the safety talks, instead of confining himself to "warning signs."

My conclusion on grounds 1 and 2 of Alcan's summarised grounds of appeal, disposes of the appeal in favour of both Alcan and Universal Fencing, and makes it unnecessary for me to consider the question of contributory negligence. But in view of the submission made, I will express my opinion thereon.

In relation to Universal Fencing, the learned judge has found as a fact that the respondent had not suffered his injury during welding operation nor even in the vicinity of the area of his welding operations. On this finding of fact the conclusion would inevitably appears to be that Universal Fencing was not liable at all, since there was no causal connection between the injury suffered by the respondent and any breach of common law duty and or negligence, even if such there was, of Universal Fencing qua employer, towards the respondent, qua employee. Thus whether or not the respondent had been given goggles or other protective device to wear, or had been ordered or properly supervised to ensure that he wore his goggles are academic and irrelevant, because on the learned judge's own finding, the respondent was not injured while engaged in and about his employers business. To the contrary if the finding was that the injury was suffered while the respondent was engaged in

welding operations, then notwithstanding the further finding of the learned judge that the respondent had given no indication that he would have worn his goggles had he been provided with a pair, Universal Fencing would be fully liable and no question of contributory negligence would arise because as was said in Nolan v. Dental Manufacturing Company Limited (1958) 2 All E.R. 449 on which the learned judge relied, the respondent could not have contributed to his injury by not wearing his goggles when no such goggles had been provided for him. The learned judge in relying on the above case in finding negligence in Universal Fencing failed to distinguish the facts found by him in this present case from the facts in the cited case which showed that injury was suffered while the plaintiff was at his work.

In relation to Alcan, the evidence, contrary to the finding of the learned judge, disclosed a case in which, had Alcan been found to be in breach of its common duty of care to the respondent, qua a visitor, the latter would in my view be guilty of contributory negligence since on the learned judge's own finding the respondent had taken a risk when he went into the precipitation area. I would have assessed the respondent's contributory negligence at fifty per cent.

For the reasons given herein I would allow the appeal of both appellants and substitute for the judgment in favour of the respondent, judgment dismissing his claim against each of the appellants with costs here and below in their favour, the same to be taxed if not agreed.