22nd June, 1988.

IN THE ROYAL COURT OF JERSEY

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat Mrs. B. Myles
Jurat G.H. Hamon

Between	Martin George Hacon	Plaintiff
And	Philip Francis Godel	First Defendant
And	Brocken and Fitzpatrick Limited	Second Defendant

Advocate Miss C.J. Dorey for Plaintiff
Advocate P. de C. Mourant for 1st Defendant
Advocate G.R. Boxall for 2nd Defendant

The plaintiff was employed as a painter and decorator by the first defendant, who, as a sub-contractor, was engaged in the re-painting of a feed hopper to the precast workshop at Ronez Quarry, in the Parish of St. John.

The second defendant had erected scaffolding around the feed hopper to enable the repainting to be carried out.

On Thursday the 1st August, 1985, the plaintiff was on the scaffolding, painting the feed hopper.

At approximately 4 o'clock p.m. that day, the plaintiff fell through a perspex roof light of the corrugated asbestos roof of the precast workshop; he fell some nineteen feet onto the concrete floor below; probably, he hit parts of machinery in the workshop during his fall; he suffered multiple injuries.

The plaintiff alleges that on the day in question he was engaged in painting the East elevation of the feed hopper - in his Order of Justice he says "on the North East corner thereof", whereas in evidence he said that it was about the middle of the East elevation. As he worked he noticed a foreign

substance, possibly bitumen, on the side of the hopper and he went to remove it, using a small paint scraper. Whilst he was doing this, the plaintiff inadvertently dropped the scraper which fell, rolled, bounced or slid to the end of the scaffold platform.

The scaffold was defective in that the boards of the four board wide platform projected over the end supports by 3'2", and no toe boards existed at the North-East corner.

The plaintiff alleges that he bent down to pick up the scraper from the end of the scaffold platform but as he straightened up his head struck the guard rail directly above the end supports, causing him to lose his balance. In an effort to prevent himself falling some twenty feet to the ground the plaintiff pushed himself towards the roof of the adjacent precast workshop building, which was only some 3'4" below. The roof of the precast workshop building consisted of corrugated asbestos sheets with a line of perspex roof lights along the full length of the roof. The plaintiff must have jumped and either landed or fell onto the perspex light which shattered under his weight causing him to fall to the floor below.

The plaintiff's action is brought on more than one ground. Firstly, he alleges a breach of statutory duty on the part of both or either defendants in that there was a failure to ensure that the scaffold boards at the North East corner did not overlap their end supports by more than four times the thickness of the boards, contrary to Regulation 72 of the Construction (Safety Provisions) (Jersey) Regulations, 1970, made in pursuance of the Safeguarding of Workers (Jersey) Law, 1956, and a failure to ensure that toe boards were provided on the North-East corner, contrary to Regulation 75 of the same Regulations.

Secondly, the plaintiff alleges that the accident was caused by the negligence of the first defendant in causing, permitting or allowing the scaffold boards to overlap the supports to a dangerous extent; failing to ensure that

there were any or any sufficient toe-boards; failing to heed or observe the dangerous condition of the scaffolding; failing to take any or any adequate precautions for the safety of the plaintiff while he was employed upon the work; and failing to provide and/or maintain a safe method and/or place and/or system of work.

And thirdly, the plaintiff alleges that the accident was caused by the negligence of the second defendant, its agents or servants, in causing, permitting or allowing the scaffold boards to overlap the supports to a dangerous extent; failing to ensure that there were any or any sufficient toe-boards; failing generally to exercise any or any adequate skill or care in the erection of the scaffold; failing to heed or observe the dangerous condition of the scaffold; and failing to take any or any adequate precautions for the safety of the plaintiff whilst he was on the scaffold.

The alleged factual content of the Order of Justice was based on a Social Security Department report prepared by Accident Prevention Officer Mr. Stuart Reginald Copp and dated the 11th August, 1986. 'It is with regret that we feel compelled to criticise the quality of the accident investigation in this case and of the report. The report, in effect, recites the plaintiff's version of how the accident happened, taken from him one year later. It does not report anything said by the first defendant, or by Mr. Steven John Pallot, another employee of the first defendant, who was working with the plaintiff very shortly before the accident occurred, or by Mr. Power, an employee of Ronez Limited, who was working within the precast workshop at the time; the report merely records the fact that they were interviewed. The second paragraph states, as a fact, that "Work was in progress repainting the feed hopper to the precast workshop which was being carried out by employees of Mr. P. Godel. At the time of the accident Mr. Hacon was painting the East elevation of the hopper and a Mr. S. Pallot was working on the opposite side". That, as we have said, is reported as a fact and not as an allegation on the part of the plaintiff. And yet, the most cursory investigation must have concluded otherwise, i.e.

that no painting had been carried out on either the East or the North elevations of the feed hopper. The penultimate paragraph of the report reads: "There were no witnesses to the incident". Whilst in a sense true, in that there were no eye-witnesses as to how the accident occurred, it is equally true that Mr. Power witnessed the plaintiff's fall within the precast workshop and we found his evidence most helpful. It appears that no written statements were taken from the first defendant, Mr. Pallot or Mr. Power and that no notes were made of the conversations with them. The report did not seek to test the plaintiff's version of the accident and reached no conclusions, the final paragraph merely stating: "I have no first hand knowledge as to how this accident occurred".

We feel compelled also to criticise two of the relevant regulations in the Construction (Safety Provisions) (Jersey) Regulations, 1970, (R & O 5381) as amended.

Regulation 55, as amended by the Construction (Safety Provisions) (Amendment No.2) (Jersey) Regulations, 1979 (R & O 6661) provides as follows:-

"(1) Every scaffold from which a person is liable to fall a distance of ten feet or more shall be thoroughly examined by a competent person before it is taken into use or after it has been substantially altered or extended.

(2) Every scaffold from which a person is liable to fall a distance of ten feet or more shall be inspected by a competent person at least once in every period of seven days.

(3) Whenever a scaffold has been exposed to weather conditions likely to have reduced its strength or stability or to have displaced any part of it or any structure or appliance used as a support for it, it shall not be used unless, since such exposure, it has been inspected by a competent person.

(4) A report, in the form and containing such particulars as may be specified by the Committee, of the results of every examination or inspection required by paragraph (1), (2) or (3) of this Regulation, shall be made by the person carrying out the examination or inspection as aforesaid and shall be signed by him.

(5) A copy of the report of an examination carried out in accordance with the requirements of paragraph (1) of this Regulation shall be delivered to the contractor or employer (or an agent appointed by him) for whom the scaffold was first erected as soon as practicable after the examination.

(6) Every report required by this Regulation shall be kept on the site of the operations or works or at an office of the contractor or employer.

(7) Every report required by this Regulation shall be kept by the contractor or employer for a period of at least twelve months after the scaffold has been dismantled.

(8) Every report required by this Regulation shall at all reasonable times be open to inspection by an inspector or any person required to work from the scaffold".

Regulation 70, as amended by the same Amendment, provides for scaffolds used by workmen of different employers. Paragraph (1) provides as follows:-

"(1) Where a scaffold or part of a scaffold is to be used by or on behalf of a contractor or employer other than the contractor or employer for whose workmen it was first erected, the first mentioned contractor or employer shall....either personally or (where he does not have sufficient knowledge of the scaffold) by a competent agent appointed in writing on his behalf, inspect the scaffold -

(i) before it is taken into use; and

(ii) at least once in every period of seven days during which he continually uses it."

There follow similar provisions of reporting, retention of reports and inspection of reports.

Article 9A of the Safeguarding of Workers (Jersey) Law, 1956 (Recueil des Lois, Tome VIII, p.461) whereunder the Regulations are made, provides that:-

"Where any entry is required by this Law, or by any regulations or order made thereunder, to be made on any certificate, record, report or other document with respect to the observance of any provision of this Law, those regulations or that order, the fact that such an entry has not been made shall be admissible as evidence that that provision has not been observed".

In practice, the Social Security Department has required the examination under Regulation 55(1) to be carried out by the scaffold erector or a competent person on his behalf. Form F.1.4, specified by the Social Security Committee under Regulation 55(4) is so designed and refers to a scaffold or section of scaffold "handed over". However, Regulation 55(1) does not refer to a scaffold "handed over" but to a scaffold "taken into use".

It was common ground between the parties that the scaffold in the instant case was erected by the second defendant in pursuance of a contract between the second defendant and Ronez Limited. Ronez Limited contracted with Messrs. J.P. Bailhache & Son for the painting of the feed hopper on a labour only contract, with Ronez Limited supplying all materials. However, the firm of J.P. Bailhache & Son was closed for the annual holiday during the last week in July and the first week in August, 1985, and neither Mr. John Norman Bailhache, the sole principal in the firm of J.P. Bailhache & Son, nor any

member of his staff visited the site at Ronez Quarry during that time. Instead, Mr. Bailhache sub-contracted the work out to the first defendant. No Form F.1.4 report was delivered by the second defendant to Ronez Limited. No inspection was carried out by Ronez Limited. The liability of the first defendant was not under Regulation 55 but under Regulation 70; he carried out an examination but failed to make a report as required by Regulation 70(2) on Form F.1.5 specified by the Social Security Committee.

Miss Dorey seeks, with the assistance of Article 9A, to use the failure of the second defendant to make a report of inspection under Regulation 55(1) on Form F.1.4 specified under Regulation 55(4), as evidence that the provisions of Regulations 72 and 75 had not been observed by the second defendant and that, therefore, the second defendant was in breach of its statutory duty to the plaintiff.

Mr. Boxall, on the other hand, submits that Regulation 55(1) does not impose any obligation on the second defendant as the scaffold erector and that any obligation imposed thereby is imposed on the contractor by whom the scaffold is taken into use.

Further confusion is created by the imposition of obligations under the Regulations on "every contractor and every employer of workmen who is undertaking any of the operations or works to which the Regulations apply." The terms "every contractor and every employer of workmen" and "the contractor or employer" recur throughout the regulations. The word "contractor" is not defined. Does it mean merely one who contracts so that Ronez Limited, having contracted with the second defendant for the erection of the scaffold, rendered itself liable as contractor under the Regulations even if it carried out no work and employed no workmen requiring the use of the scaffold? - clearly Ronez Limited did not inspect the scaffold and, through its representatives who gave evidence, did not know or believe that it had any responsibility for the scaffold - or does it mean one who undertakes work by contract, e.g. a building or engineering contractor?

To add to the confusion we find, in Regulation 28, the term "individual contractor", defined, for the purposes of that regulation, as a contractor who personally performs demolition operations without employing any workmen thereon. We have examined the principal Law under which the Regulations are made; this too only adds to the confusion; the principal Law does not refer to contractors of any kind. It refers to the "responsible person", who, in relation to premises is generally the occupier of the premises; in relation to machinery or plant used on or about premises, is generally the owner of the machinery or plant; and in relation to any process or description of manual work is the employer of workers engaged therein or, in the case of a worker engaged therein on his own account, that worker.

The solution is to be found in the equivalent English legislation, upon which, no doubt, the Jersey Regulations were modelled, and in two commas in Regulation 3 of the Construction (Working Places) Regulations 1966 (S.I. 1966 No.94) which are omitted from Regulation 3(1) of the Jersey Regulations. Regulation 3(1) of the English Regulations reads:-

"It shall be the duty of every contractor, and every employer of workmen, who is undertaking any of the operations or works to which these Regulations apply - (a) to comply....".

Hence, a contractor is liable not if he merely contracts (in this case for the erection by the scaffold erectors) but only if he is undertaking any of the operations or works to which the Regulations apply, i.e. building operations or works of engineering construction (see Regulation 2).

We have to consider the position of the first defendant, the second defendant, and Ronez Limited.

The position is clearly stated in Monkman on Employer's Liability, 10th Edition, at page 428:-

"Reg. 3 allocates responsibility among various persons (being 'contractors or employers of workmen') for complying with the regulations....

"In particular the first two cases - employers under 3(1)(a), contractors under 3(1)(b) - must be kept clearly apart. Under head (a), 'employers' are responsible for one block of regulations to their own employees only; under head (b) 'contractors' are responsible to all persons employed on the site for another block of regulations but only so far as their own operations are concerned....

"Employers. They are responsible under reg. 3(1)(a) to their own men - provided that the men are present in the course of their employment or with the employer's permission....

"Contractors undertaking operations. Under reg. 3(1)(b), contractors who undertake the actual performance of any work, act or operation are responsible to all persons for breach of certain regulations connected with the safety of their operations; but they are not responsible for breaches by sub-contractors except where they themselves are actually controlling operations, as where several 'labour only' gangs are supervised (Donaghey v. Boulton and Paul Ltd. (1968) A.C.1, (1967) 2 All E.R. 1014). An owner of property who, instead of engaging a main contractor, employs various specialists, does not thereby become a 'contractor undertaking operations' (Kealey v. Heard (1983) 1 All E.R. 973 (1983) 1 W.L.R. 573)....

"Erectors of scaffolding. This includes, in addition to ordinary builders and contractors who erect their own scaffolding, contractors who specialise in the erection of scaffolding and nothing else. (Sexton v. Scaffolding (Great Britain) Ltd.) It is a separate and additional duty and does not exonerate scaffolding erectors from their duties under the other heads, ..."

In our judgment, Regulation 3(1)(a) applies only to the first defendant. Thus, only the first defendant was under a duty to comply with the requirements of Regulation 55. That interpretation is, of course, consistent with the words "taken into use" in Regulation 55(1), although it is inconsistent with the provisions of Regulation 55(5). But the Social Security Committee cannot alter the words "taken into use" into the words "handed over", merely by specifying the latter in the form of the report specified under Regulation 55(4).

Further, in our judgment, Regulation 3(1)(b) has no application in the present case. The second defendant was not, at the time of the accident suffered by the plaintiff, a contractor who was undertaking any of the operations or works to which the Regulations applied. The second defendant had carried out a building operation, i.e. the erection of the scaffold, but that operation was complete. It may well be that Ronez Limited was a contractor who was undertaking a building operation in that it was employing a 'labour only' sub-contractor and, apparently, was carrying out some work of its own, e.g. welding; but we are not called upon to decide that question, which would require further evidence. And, in any event, Regulation 3(1)(b) imposes no duty to comply with Regulation 55.

Certainly, the second defendant was under a duty to comply with Regulation 3(1)(c) - and thus to comply with such of the requirements of the Regulations as relate to the erection or alteration of scaffolds. These include Regulations 72 - boards and planks in working platforms, gangways and runs - and 75 - guard-rails and toe-boards at working platforms and places. Mr. Boxall argues that Regulation 55 - inspection and examination of scaffolding - does not relate to "erection or alteration" and, therefore, that the second defendant is under no duty to comply with Regulation 55.

A breach of the Regulations is a quasi-criminal offence which renders the offender liable to a penalty. Statutes creating penalties must be construed strictly, so that the benefit of any doubt must be given to the alleged

wrongdoer. Nevertheless, the rule as to strict construction, invoked by Mr. Boxall, has no great force in this particular context. According to Denning L.J. in McCarthy v. Coldair Ltd (1951) 2 T.L.R. 1226:-

"So far as the Factories Act is concerned, the rule is only to be applied when other rules fail. It is a rule of last resort".

In Harrison v. National Coal Board (1951) 1 All E.R. 1102, at p.1107, Lord Porter said:-

"It was suggested....that the Coal Mines Act 1911, is a measure imposing criminal liability, and, therefore, should be interpreted as throwing no greater burden on the employer than its words compel. It has, however, to be remembered that this Act is also a remedial measure passed for the protection of the workmen and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits".

The rule is "an illegitimate method of interpretation of a statute, whose dominant purpose is to protect the workman, to introduce by implication words of which the effect must be to reduce that protection"; per Viscount Simmonds in John Summers & Sons Ltd. v. Frost (1955) 1 All E.R. 870 at p.872.

Nevertheless, there are cases where the maxim as to strict construction of penal statutes has some force. One of these is where there may be an ambiguity: but said Denning L.J. in McCarthy's case (supra) "this...does not mean every ambiguity which the ingenuity of counsel may suggest, but only an ambiguity which the settled rules of construction fail to solve".

We accept and adopt these principles. There is, it could be said, an ambiguity between Regulation 55(1) and Regulation 55(5) in that a contractor or employer may be required, if he, as a competent person, examines the scaffold himself before taking it into use, to deliver the report of the examination to himself.

In this instance, no assistance can be obtained from the English regulations, because Jersey is further advanced in its legislative provisions. We understand that Regulation 55 is based upon recommendations of a Sub-Committee of the Joint Advisory Committee on Safety and Health in the Construction Industries, which reported in 1973. The Sub-Committee recommended that Regulation 22 of the Construction (Working Places) Regulations 1966 should be changed to require an initial 'thorough examination' of a scaffold by a properly trained and suitably qualified competent person, before it is taken into use after erection or substantial alteration and every seven days thereafter. In the event, Regulation 22 was not amended. Quite separately, the Sub-Committee reported that the National Association of Scaffolding Contractors had devised a Handing-Over Certificate which gave useful and important information e.g. about loading conditions, to the user of the scaffold: "The certificate was not thought to have any legal significance in terms of statute or common law. Its legal significance was limited to the contractual obligations entered into by the scaffolding contractor and his customer". It appears that when Regulation 55 was amended confusion must have arisen between the recommended amendment to Regulation 22, where the statutory inspection was to remain the responsibility of the employers of labour using the scaffold structure and the Handing-Over Certificate, the legal significance of which was limited to contractual obligations, and an unsuccessful attempt was made to merge the two.

The first and most elementary rule of construction is that words in a statute must be given their ordinary and natural meaning. The act of "taking" infers a receiving or getting hold of. It is not the person who hands over an article but the one who receives it from him who "takes" it. In our judgment, therefore, the words "before it is taken into use" in Regulation 55(1) impose a duty upon the employer of workmen about to use the scaffold and not upon the scaffolding contractor.

Accordingly, we find that no duty is imposed on the second defendant, as the scaffold erector, to comply with Regulation 55(1). It follows that Article 9A of the principal Law cannot be called in aid by the Plaintiff as evidence

that the provisions of the Regulations relating to the erection of scaffolds had not been complied with by the second Defendant.

We next turn our attention to Regulation 72(2) which provides that:-

"(2) No board or plank which forms part of a working platform, gangway or run shall project beyond its end support to a distance exceeding four times the thickness of the board or plank unless it is effectively secured to prevent tipping, or to a distance which having regard to the thickness and strength of the plank, renders the projecting part of the plank unsafe support for any weight liable to be on it."

It is common ground that the boards of the four board wide platform on the East side at the North-East corner projected over the end supports by 3'2" and thus to a distance exceeding four times the thickness of the boards.

The plaintiff alleges that this constitutes an infraction of Regulation 72. Miss Dorey argues that the words of the regulation are simple and unambiguous, that the boards did form part of a working platform, that the regulation does not contain any reference to part of a board and that one cannot subdivide a board into a good and a bad part; it is the purpose of the legislation to protect workers from dangerous situations and from themselves; giving the words used their ordinary meaning the regulation covers any part of a board that forms part of a working platform.

The defendants deny any infraction of Regulation 72(2). Mr. Boxall fundamentally disagrees with Miss Dorey. He attaches importance to the words "liable to be on it" and argues that as a matter of commonsense there is no weight liable to be on that part of a platform which is outside the guard rail and that the regulation envisages something regular, i.e. regular use of the working platform for men and materials. Mr. Boxall submits that in order to satisfy Miss Dorey's interpretation one has to read into the Regulation such words as "No part of a board or plank, any other part or the remainder of which forms part of a working platform, gangway or run, shall project...."

Working platform is not defined, except to include a working stage. Regulation 72 is in identical terms to Regulation 25 of the Construction (Working Places) Regulations, 1966. However, Counsel did not direct us to any authority on the interpretation of "working platform" and we have found none directly in point. In the absence of any definition we think that the question must be decided as a matter of common sense. Mr. Boxall seeks to impose an artificial boundary on the working platform, i.e. the line of the guard rail and of the toe-board that should be beneath it. That too requires some rewording of Regulation 72(2) to read "That part of any board or plank which forms part of a working platform, gangway or run shall not project".

A platform, in this context, is a raised level surface formed with planks, boards or the like. A working platform is a platform on or from which one may work, a platform for the performance of work.

We think that some assistance can be obtained from Regulation 72(5) which provides that where work has to be done at the end of a wall or working face the working platform at such wall or face shall, wherever practicable, extend at least twenty-four inches beyond the end of the wall or face. The fact that it may do so does not exonerate a contractor or employer of workmen from compliance with Regulation 72(2); if, in extending at least twenty-four inches beyond the end of the wall or face the boards or planks forming the working platform project beyond their end support to a distance exceeding four times their thickness, they must be effectively secured to prevent tipping.

In our view the expression "working platform" is analogous to a "working place"; it must include any part of a platform from which persons are working or may work; it cannot cease to be a working platform at an artificial boundary created by the line of the guard rail and of the toe-board; Regulation 75(4) provides that guard-rails and toe-boards may be removed or remain unerected for the time and to the extent necessary for the access of persons or the movement of materials or other purposes of the work;

this would have the effect of creating a "moving" boundary for the working platform, depending on whether or not guardrails and toe-boards had or had not been erected or removed. But the purpose of the legislation is, inter alia, to protect workers from dangerous situations; whereas to allow boards or planks to project to a distance which could result in tipping when, temporarily or otherwise, there are no guardrails or toeboards, would be to allow a dangerous situation.

We have come to the conclusion that the whole of the platform constitutes the "working platform". And that no board or plank which forms part of that platform as a whole should project beyond its end support to a distance exceeding four times the thickness of the board or plank, unless it is effectively secured to prevent tipping. We do so notwithstanding the evidence of Mr. Copp to the effect that he did not think the overlapping boards formed part of the working platform because they were outside the guardrail; he said that it was not particularly good practice but, in his opinion, there was no breach of Regulation 72(2), although acknowledging that there was no judicial decision upon which to depend, and that the matter had not been referred to H.M. Attorney General for consideration. The fact that scaffold boards or planks are of standard length and that in order to prevent an overlap (at the end of the platform) outside the guardrail and toe-board one would be obliged to create an overlap along the length of the working platform is no answer; indeed that situation is foreseen by the Regulations; Regulation 72(3) requires that suitable measures shall be taken by the provision of adequate bevelled pieces or otherwise to reduce to a minimum the risk of tripping and to facilitate the movement of barrows where boards or planks which form part of a working platform overlap each other. This provision appears to support our interpretation.

Accordingly, in our judgment, there was, in this case, a breach of Regulation 72(2) in that the boards or planks which formed part of the working platform at the North-East corner did project beyond their end support to a distance exceeding four times their thickness.

It may be that, resulting from our decisions with regard to Regulations 55 and 72, the Social Security Committee will wish to promote legislation to remove the ambiguities that clearly exist. We certainly recommend that the legislation be the subject of careful re-examination.

We now have to go on to consider whether there was a breach of statutory duty by either or both defendants, having regard to the findings we have already made.

It is, as we have said, common ground that the boards of the four board wide platform on the East side at the North-East corner projected over the end supports by 3'2" and thus to a distance exceeding four times the thickness of the boards. We have now found that those facts constitute an infraction of Regulation 72(2). It is also common ground that, at the time of the accident, there was no toe-board across the North end of the platform on the East side at the North-East corner and no toe-board for perhaps the final four feet in length of the East side of the platform at the same North East corner; thus there was an infraction of Regulation 75(1).

The first defendant has a statutory duty to his workmen under Regulation 3(1)(a) in relation to both Regulations 72 and 75. However, there is a proviso to Regulation 3(1)(a) which is in the following terms:-

"Provided that the requirements of the said Regulations shall be deemed not to affect any workman if and so long as his presence in any place is not in the course of performing any work on behalf of his employer and is not expressly or impliedly authorised or permitted by his employer".

Miss Dorey urged upon us that the proviso has no application to the present case, that the Court should not be hasty to deprive a workman of the protection granted to him by the legislation, and that the plaintiff was impliedly authorised and permitted by his employer, the first defendant, to be on any part of the scaffold surrounding the feed hopper.

Miss Dorey further urged that "place" in "his presence at any place" means the whole of the scaffolding erected at Ronez Quarry by the second defendant, that it is not logical to divide up the scaffolding into parts and that the plaintiff was protected by the legislation during ingress, egress, tea-breaks, visits to the toilet etc., in other words that the plaintiff's presence on the scaffold, whatever detour he might have made, was in the course of his employment.

To our surprise, Mr. Mourant expressed some sympathy for Miss Dorey's argument. Deliberately, he had chosen not to invoke the proviso; whilst one could argue that there was no authority for the plaintiff to go anywhere other than the area where he was working, there was no express prohibition. However, Mr. Mourant now recognized the importance of the words "in the course of performing any work" in the proviso to Regulation 3(1)(a). But he believed that the decision in Moir-Young v Dorman Long Bridge and Engingeering Limited (1969) 7 KIR 86 was important. The decision can be summarised thus: "So long as a man is genuinely going to a place in the course of his work, although to get into the wrong place in a way which the employer did not foresee, the proviso does not take him outside the protection of the regulations".

Although Regulations 3(1)(a) does not affect the second defendant, because, in the pleadings, the first defendant seeks an indemnity from the second defendant, should he be found liable, i.e. he would seek a contribution from the second defendant, Mr. Boxall very properly addressed himself to the question of the proviso. He argued that the burden of proof with regard to the proviso is important; the regulation does not apply if the plaintiff was not in the course of performing any work and the burden is upon the plaintiff to show that his presence at the North East corner was in the course of performing work on behalf of the first defendant, or that his presence there was either expressly or impliedly permitted by the first defendant.

In Moir - Young - v - Dorman Long (supra) the plaintiff was employed by the defendants as a ganger. In the course of his employment he was instructed to take his men to do some cleaning up in a scale pit in the defendants' steel mill. He attempted to reach the scale pit by one of two staircases but the staircase was unlighted and he went to ask the general foreman for lights. The foreman told him that he had gone the wrong way to the scale pit and that he would show him the right way. While they were on their way back the foreman was intercepted by somebody who wanted to speak to him, and the plaintiff went on alone. He went down one of the staircases and a passageway and reached a door, beyond which was darkness. On striking a light, he saw that the door did not lead to the scale pit, and was turning to go back when his foot slipped and he fell some 25 feet, sustaining injuries. He brought an action against the defendants, alleging breach of statutory duty under, inter alia, Regulations 27(2) and 28(1). The judge found that although the defendants were in breach of those regulations they owed no duty thereunder to the plaintiff since regulation 4(1) required that the employer as a reasonable employer should reasonably foresee that a particular workman might go to a particular part of the premises at the time when he did go there, and the presence of the plaintiff in the place where the accident had occurred was not reasonably forseable by the defendants; further that the plaintiff's presence in that place was not in the course of performing any work on behalf of the defendants and he was not expressly or impliedly authorised or permitted by them to be there. The Court of Appeal held (1) that there was nothing in the wording of regulation 4(1) to limit the general duty of contractors and employers of workmen by the test of foreseability and that, therefore, the relevant regulations did "affect" the plaintiff and the defendants were under a duty to comply with them and (2) that, on the facts, the presence of the plaintiff in the place where he sustained the accident was impliedly authorised or permitted by the defendants.

Dankwerts L. J., at page 89, said this:- "It seems to me that in the present case the first part of that proviso is satisfied by the fact that the plaintiff was in that part of the factory site in the course of performing his work. His work as a ganger involved detailing men to do a job and then leading them to the site where they would carry it out - and at the time of his accident he was engaged in that work".

But can we say the same in the present case? Are we really able to say that the plaintiff was at the North-East corner of the building in the course of performing his work?

On the facts of the present case, we think not. We have substantially to disregard the evidence of the plaintiff because he does not know on which part of the scaffold he was working. Mr. Pallot told us that there was absolutely no reason for them to go to work on the North or the East sides of the feed hopper, no painting at all had been done there, the first defendant had not yet cleaned the old paint off; he and the plaintiff were working together on the South side; they had no business to go on the North or East sides; he could think of no reason why the plaintiff would want to go there. The first defendant confirmed Mr. Pallot's evidence; he could not think of any reason for access to the North side unless it was to look at the view; later he said that he could not suggest any reason for the plaintiff going onto either the North or the East sides of the scaffold on the day of the accident.

In our judgment, the present case is to be distinguished on its facts from Moir - Young - v - Dorman Long. In the latter case, the plaintiff was attempting to lead his men to the scale pit, however misguided the way that he chose. Thus, his presence in the place where he suffered his accident was in the course of performing his work. But in the present case, the plaintiff had no business at all to be at or near the North-East corner of the scaffold or, indeed anywhere on the North or East sides; thus his presence there could not be in the course of performing his work.

With regard to the second part of the proviso, Dankwerts, L.J. in Moir - Young - v - Dorman Long said this:- "The applicability of the second part of the proviso i.e. whether his presence was or was not "expressly or impliedly authorised or permitted by his employer", is rather more doubtful. His presence where he was was not "expressly" authorised, it is quite plain; the foreman had told him that he had chosen the wrong way and that he would show him the right way.

There was, however, no warning notice there; there was no express prohibition, and I think it is possible to draw from the words used in this proviso that he was, perhaps, by implication "permitted", at any rate, to use this particular method of getting to the scale pit although, in fact, the right hand staircase which he took was not the correct one for him to use to reach it".

Mr. Godel told us that he did not specifically forbid his employees to go on to any part of the scaffolding; nor did he rope-off any part of the scaffold to prevent access; they had physical access to all parts of the scaffolding if they chose to go there and on the job as a whole they would later be using the North and East sides.

Miss Dorey urged upon us that the plaintiff's presence on the scaffold was most definitely authorised - with which we agree - and that because the first defendant had not roped off or forbidden access to any section, the proviso cannot apply in the present case.

But the instructions of the first defendant were clear; the plaintiff and Mr. Pallot were to finish the painting on the South side of the hopper and then they could go home. There was no purpose, connected with performing his work, for which the plaintiff needed to go to the North-East corner.

The burden of proof is on the plaintiff; in our judgment he has failed to show that, on the balance of probabilities, he was expressly or impliedly authorised or permitted by the first defendant to be on the North-East corner of the scaffold on the day of the accident.

But, if we are wrong as to the proviso to regulation 3(1) and the first defendant was in breach of his statutory duty, the plaintiff still has to satisfy us that the breach of duty resulted in, or contributed to, the harm or damage sustained by the plaintiff and we shall return to consider that matter in conjunction with the alleged breach of the common law duty of care, because the issue of causation is there the decisive factor.

We turn now to the alleged breach of statutory duty on the part of the second defendant. We have already found that the second defendant was under a duty to comply with Regulation 3(1)(c) in relation to the erection of the scaffold and we have already found a breach of Regulation 72(2). But with regard to Regulation 75(1) the second defendant puts forward a defence on the facts i.e. that at the time the platform was handed over, there were toe-boards at the North-East corner of the scaffold on both the North and East sides.

For this, the second defendant relies on the evidence of Mr. William Baines who is a director in and part-owner of the second defendant and who has some twenty years' experience in scaffolding work and was responsible for the contract carried out at Ronez. Mr. Baines was definite in his evidence that the scaffold was completely boarded-out by the second defendant, including the toe-boards at the North-East corner; he personally checked that everything was in order before he left the site and the toe-boards were in position. Since the toe-boards were missing on the day of the accident he could only conclude that they had been removed. It was possible that the boards could have been used inside the hopper because, when the scaffold was removed a scaffold board was found on and across the steel plates on the inside of the hopper. He believed some welding had been carried out there. However, Mr. Baines was confused as to the date of his completion of the scaffold and inspection. At first he stated that it was on Monday, 29th July, but later said that it could have been on the Monday, Tuesday or Wednesday, the latter being the day preceding the date of the accident.

The first defendant had examined the scaffold in order to satisfy himself that there were no "traps"; he checked that the boards were on the cross-members and he checked the guardrails. As far as he was concerned the scaffold was safe; he did not move any boards; if he had found anything wrong he would have called the second defendant back to the site; but he did not check specifically for toe-boards; he must have missed the toe-board on the North end at the North-East corner because it was not there; he did not notice the absence of the toe-board at the time of his examination which was early on

the morning of Thursday the 1st August - the day of the accident. On the day before, or possibly on the Tuesday, the second defendant had completed the scaffold because there were some boards missing and he had re-called the second defendant to complete it. However, the first defendant remained convinced that there was a toe-board on the East side at the North-East corner, although counsel for both defendants agreed that the photographs proved that there were no boards on the North or immediate East of the North-East corner, a fact also proved by both Mr. Copp and Mr. Colin Bertram Myers, the accident investigation officer who assisted him.

Mr. Snowden Albert Le Marquand, works manager for Ronez Limited, told us that Ronez were closed for annual holidays at the relevant time and that only a skeleton staff was working there on specific tasks well away from the hopper; he was there throughout and not much could happen that he would miss; it was very unlikely that anybody could have interfered with the scaffold without his knowledge; or that anybody needing a board would climb up to get it; no staff had been detailed to work on the hopper and no member of Ronez staff would have any reason to go there.

Whilst we fully accept Mr. Le Marquand's evidence, there is in our judgment, no reason to reject the evidence of Mr. Baines. The unlikely does happen on occasion. We find, therefore, that the plaintiff has failed, on the balance of probabilities, to discharge the burden of proving that the second defendant was in breach of its statutory duty with regard to Regulation 75(1).

We come now to the main question, that of causation. It is not in dispute that the second defendant owed a duty of care to the plaintiff, because that duty was owed to all persons who the second defendant would or should foresee would use the scaffold. That duty covers the construction of the scaffold in a safe manner. To erect a scaffold the boards or planks of which project beyond their end supports to such an extent that there is danger of tipping is a bad or unsafe practice. There will be a temptation to lean or step outside by 'ducking' under the guardrail, particularly if there is no toe-board,

for whatever reason, to reduce the gap between the platform and the guardrail. And we have already found a breach of statutory duty in relation to the projecting boards or planks. Nor is it in dispute that the first defendant owed a duty of care as employer to his employee, extending, in particular, to the safety of the place of work. It is a duty to take reasonable care for his servant's safety in all the circumstances of the case. And, if we are wrong with regard to the proviso to Regulation 3(1), the same test would apply to the breach of statutory duty.

As was said, per curiam, in Ginty -v- Belmont Building Supplies, Limited and another (1959) 1 All ER 414 at p.423, albeit about delegation of statutory authority: "...the important and fundamental question in a case like this is...simply the usual question: Whose fault was it?".

Thus, we must examine the facts. As we have already said, we have substantially to disregard the evidence of the plaintiff because he does not know on which part of the scaffold he was working. Mr. Pallot's evidence is clear and credible. He and the plaintiff were working on the South side of the feed hopper, both priming the bare metal of the hopper. The plaintiff was working with him, within two feet, and then he became aware that the plaintiff was no longer there; he could have been gone to fetch more paint or to the toilet. Mr. Pallot thought nothing of it. The plaintiff had absolutely no reason to go on either the North or the East side of the hopper. No painting at all had been done there. The plaintiff could not have done so even if he had wanted to, because the sides had to be prepared - they had to be cleaned off. The plaintiff and Mr. Pallot had been sitting virtually side by side and the plaintiff had finished his panel first; whoever finished first would go on automatically to the third panel; but the plaintiff did not do so; instead, he disappeared.

The plaintiff could not walk to the North-East corner from the South side via the East side because there was a structure there. Thus, he had to go along the remainder of the South side, along the whole of the West side and

along the North side, to the North-East corner. The plaintiff's paint kettle and brush were found about half way along the West side; they were not Mr. Pallot's because he put his away after the accident. It follows that the evidence of the plaintiff is wholly unreliable, not, we hasten to add, because he is lying, but because he cannot remember and has come to believe a version suggested to him either by auto-suggestion or by others or by a mixture of both. If the plaintiff's version were tenable he would have been painting on the West side, where his kettle and brush were found, and where he could have seen a 'foreign object', in which event the accident would have occurred at the North-West and not the North-East corner; alternatively, he would have been on the North side - on "the opposite side from Steve Pallot", as he put it, where no painting whatever had been, or could be, done.

Dr. Philip Kennedy, an eminent neurologist, gave expert evidence on the probable effects of the injuries suffered by the plaintiff and on the comparisons and contrasts to be drawn between post-amnesia and retrograde amnesia. The plaintiff had been unconscious for a quite considerable time. It is unnecessary for us to describe in detail the wealth of medical evidence put before us. Dr. Kennedy's evidence was to the effect that, on the balance of probabilities, the plaintiff was not in a position to remember the events before the accident; and his claimed clarity or recollection of events immediately before the accident was a complete puzzle. He would have suffered both post and retrograde amnesia.

We consider the evidence of Mr. Power to be of some importance. He was working in the precast workshop. He heard the noise of perspex breaking; he looked up; he saw the plaintiff's two feet come in first; he could not say how the plaintiff got there, but it was obvious that he must have been walking on the roof. The plaintiff caught his head on the side of the press as he came down, he fell straight down, his hands out as if trying to catch the sides of the perspex as he fell; he must have landed feet first. Mr. Power would not have heard the plaintiff walking on the roof because of the noise of the press at which he was working; and the plaintiff must have been standing on the roof because otherwise - had he jumped - he would have come through faster.

Dr. Kennedy supported Mr. Power - the injury to the spine had helped him to assume that there had been vertical force - to which the spine had been subject - this was a fall onto the heels or the head, but if it had been a fall onto the head there would have been a fatality. Dr. Kennedy interpreted the fall as a vertical one onto the heels.

The plaintiff claims that, realizing he was losing his balance after stepping out onto the projecting platform boards or planks, and striking the back of his neck onto the guardrail, he jumped onto the roof of the precast workshop.

A paint scraper, identified as his by the plaintiff, was found on the floor of the precast workshop; according to the plaintiff, this was a paint scraper that he had recovered from the end of the scaffold platform, the recovery of which had caused him to strike the back of his neck on the guardrail, start to lose his balance, and jump. Dr. Kennedy was surprised to hear that the scraper was where it was found - if one leaps, both arms and hands open; he would have expected the scraper to end up on the roof. The plaintiff had given a graphical description of the fright that he suffered; he claimed to have jumped a distance of some eight feet, in order to save his life, and the doctor, on that basis and with the great care shown by members of the medical profession "expressed surprise" that the scraper got as far as it did. Moreover, the hole in the roof was not consistent with a spreadeagled fall; it was consistent with a vertical fall. However, Mr. Copp did not accept that the hole in the roof was necessarily consistent with a vertical fall and said that, in his opinion, the plaintiff did not necessarily fall head or feet first.

Mr. Stephen John Crane, a barrister, had attempted a possible reconstruction of the accident to the plaintiff by carrying out a series of ten jumps at the Victoria College gymnasium. These were made from a vaulting box 3'4" in height, i.e. the same as the difference in height between the working platform from which the plaintiff allegedly jumped and the roof of the precast workshop through which he undoubtedly fell. He was trying to show

that a person in the plaintiff's alleged situation could jump at least eight feet. Mr. Mourant dismissed this evidence as "amusing and irrelevant", because it was not a true reconstruction. Mr. Boxall did not so lightly dismiss Mr. Crane's evidence and we do not do so either. Of the ten leaps made only one, the third, managed to get the jumper's feet a distance in excess of 8'4", i.e. the distance between the edge of the building and the hole. Perhaps more significant is the fact that, on every occasion, Mr. Crane's hands achieved a greater distance than did his feet - he explained that his weight came forward and he had to come down on his hands - he tried to prevent this but found it impossible. The difficulty of reconciling that situation with the evidence of Mr. Power and of Doctor Kennedy and of the size and shape of the hole is self-evident. If the scraper found on the floor of the precast workshop and shown to the plaintiff by Mr. Copp about one year later was indeed the plaintiff's - Mr. Power told us that there were scrapers sometimes lying around anyway - then its presence there appears inconsistent with that of a jump but, of course, it is possible that the scraper was not held by the plaintiff but fell out of his pocket.

The inference that the plaintiff was walking on the roof of the precast workshop is a strong one. Could it have been that he was doing so in order to look at the view? Mr. Myers said that it was most peculiar that this accident happened at all; he had checked to see whether the view from the scaffold was in any way hindered; in fact, one had a better view out to sea from the scaffold than one had from the roof; but this would not necessarily apply if one wanted to see something specific inland. He recalled leaning on the guardrail and looking at the roof for signs that it had been walked on; the case was not clear at all and he found it perplexing; he recalled looking specifically for marks and seeing nothing at all to give the impression that someone had walked on the roof. When it was suggested to him that the photographs indicated that some areas were without dust, he said that it was very difficult to make assumptions from photographs which could be very deceiving and although the photographs seemed to indicate that some of the ridges were clear of dust he could only reiterate that no signs were visible to him.

We make the following findings of fact:-

The plaintiff was not painting the East elevation of the feed hopper, working on the North-East corner thereof, as alleged in paragraph 4 of his Order of Justice; the plaintiff was painting the South elevation of the feed hopper; the plaintiff had no reason connected with his work to go onto the North or East sides of the scaffold; if, as is alleged, the plaintiff noticed a foreign substance on the side of the hopper, which is not established, it could only be either on the South or on the West side; if the plaintiff inadvertently dropped his paint scraper, which is not established, it could only be on the South or on the West side, probably on the latter where his paint 'kettle' and brush were found; it was impossible, therefore, for the paint scraper to fall or bounce along to the North-East corner of the scaffold; there is no evidence to support the allegations in paragraphs 6 and 7 of the Order of Justice as to the manner in which the accident to the plaintiff came about; on the balance of probabilities the plaintiff walked from the South side of the feed hopper where he was working, to the West side where he left his paint 'kettle' and brush, thence along the North side to the North-East corner, and thence onto the roof of the adjacent precast workshop whilst "on a frolic of his own"; the plaintiff did not jump onto the roof; the plaintiff fell through the roof vertically and feet first; and the accident was the plaintiff's own fault.

In Moir-Young -v- Dorman Long (cited supra) the Court of Appeal, whilst finding that the judge at first instance had been wrong as to the regulations in that the regulations did affect the plaintiff, the defendants were under a duty to comply with them and the presence of the plaintiff in the place where he sustained the accident was impliedly authorised or permitted by the defendants, nevertheless upheld the finding of the judge on the issue of liability. At page 90, Dankwerts L.J. said this:- "There remains the question of common law negligence. Who was responsible, really, for this accident? This, I should have thought, must be decided on the principles laid down in Ginty -v- Belmont Building Supplies Ltd (1959) 1 All ER 414, a well-known case where the answer was that the plaintiff and nobody else was responsible for the accident which

occurred to him and that, therefore, in that case - and in many other cases - the employers were freed from the liability which was prima facie theirs by reason of a breach of the regulations. Of couse, one has to apply the facts of a particular case, but, on the whole, I think that the judge reached the right conclusion, namely, that the accident was really the plaintiff's own fault and not the employers' and, therefore, that he was disentitled from putting the blame for what he did on the employers".

The case of Ginty -v- Belmont Building Supplies Ltd., just referred to, was essentially a case of contributory negligence where, co-incidentally the plaintiff had also fallen through a roof and was seriously injured. The plaintiff had been working on an asbestos roof without using boards. The court found that boards had been 'provided' but not used. There was an obligation on the employer not merely to provide the boards but also, vicariously, to use the boards, and there was also an obligation on the plaintiff to use the boards; though the plaintiff, and through him, his employer, were both in breach of duty under the regulations, since the boards were not used, yet the plaintiff was not entitled to recover damages because the fault was the plaintiff's. At page 423, Pearson, J. said: "In my view, the important and fundamental question in a case like this is....simply the usual question: Whose fault was it?.... If the answer to that question is that in substance and reality the accident was solely due to the fault of the plaintiff, so that he was the sole author of his own wrong, he is disentitled to recover."

We find ourselves in the same situation in the instant case so that it matters not whether or not we are correct with regard to the proviso to Regulation 3(1)(a). We find that, in substance and in reality the accident was due solely to the fault of the plaintiff.

In the case of the second defendant and, if we were wrong as to the proviso, in the case of the first defendant also, if we believed that the statutory infractions or breach of statutory duty on the part of both or either of the defendants had contributed in some measure towards the accident, then,

subject to the question of contributory negligence, we would have to find in favour of the plaintiff and proceed to apportion blame. This was the case in Uddin -v- Associated Portland Cement Manufacturers Limited (1965) 2 All ER 213, an action brought under section 14(1) of the Factories Act, 1937, where there was no proviso to limit the liability of the employer and where the duty was to "every person employed or working on the premises". The Court found that the plaintiff's behaviour, in leaning over the shaft of an unfenced machine, in an area where he had no authority to go, in order to catch a pigeon which was sitting behind it was an act of extreme folly - it was "an unauthorised act, in an unauthorised place, for his own purposes". Nevertheless, because the machine was unfenced, which contributed to the accident, there was liability and the plaintiff recovered twenty per cent of the damages found. There was a similar situation in Allen -v- Aeroplane and Motor Aluminium Castings Ltd (1965) 3 All ER 377 where the Court of Appeal held that as the facts showed that there had been a breach of statutory duty, because of which the accident happened, or without which it would not have occurred, and that the employee was injured by the accident while employed, there must be judgment for him notwithstanding that he had not given an acceptable version of how the accident occurred. Uddin -v- Associated Portland Cement Manufacturers Limited was approved by the House of Lords in Westwood and another -v- The Post Office (1973) 3 All ER 184 in a case involving a breach of statutory duty under the Offices, Shops and Railways Premises Act 1963. In that case their Lordships found that the sole act giving rise to the accident was the Post Office's breach of statutory duty and any fault on the part of the employee was one of disobedience, not negligence.

But, with regret, we find ourselves unable to make any similar finding here. In our opinion, on the balance of probabilities, the plaintiff must have climbed down, or let himself down, onto the roof of the precast workshop and walked upon it. It was a negligent act - it was an unauthorised act, in an unauthorised place, for his own purposes. He could not but foresee the danger of going onto an asbestos and perspex roof. We are quite unable to find that the projecting boards or planks or the absence of toe-boards were breaches of

statutory duty without which the accident would not have occurred. The accident occurred because the plaintiff was on a roof that could not support his weight and was the plaintiff's own fault.

We find ourselves in the same situation as did the Court in Docherty -v- The Jersey Gas Company Limited (2nd December, 1985 - unreported), a case involving a plaintiff who had fallen from a tressel table made up of two tressels put together in the workshops of the defendant company and across which were laid two ordinary standard scaffolding planks from which the plaintiff was painting a butane storage vessel and its supporting frame or cradle. There the Court concluded its judgment with the following words, which are so apt in the present case:-

"...this is an unhappy case, it is unfortunate that this accident did happen, and we indeed sympathise with the plaintiff, but he has not succeeded in establishing in law a claim which is sustainable".

We appreciate that Miss Dorey, who represents the plaintiff on legal aid, must have felt under an irresistable compulsion to bring the present action in an attempt to recover compensation for the plaintiff who is now unemployable. Therefore, we applaud the fact that neither defendant seeks an order for costs.

Accordingly, the Order of Justice is dismissed and we make no order as to costs.

Authorities referred to in the judgement:-

Monkman on Employer's Liability, 10th Edition at p.428 et seq.

McCarthy -v- Coldair Ltd. (1951) 2 T.L.R. 1226

Harrison -v- National Coal Board (1951) 1 All E.R. 1102 at p.1107

John Summers and Sons Ltd. -v- Frost (1955) 1 All E.R. 870 at p.872

Moir-Young -v- Dorman Long Bridge and Engineering Limited (1969) 7KIR 86

Ginty -v- Belmont Building Supplies Ltd. et al (1959) 1 All E.R.414 at p.423

Uddin -v- Associated Portland Cement Manufacturers Ltd. (1965) 2 All E.R. 213

Allen -v- Aeroplane and Motor Aluminium Castings Ltd. (1965) 3 All E.R. 377

Westwood et al -v- The Post Office (1973) 3 All E.R. 184

Docherty -v- The Jersey Gas Company Ltd. JJ 2nd December, 1985, as yet unreported

Other authorities referred to:-

Monkman on Employer's Liability, 10th Edition at pp. 79 & 207

Rules of the Supreme Court - 1988 Edition - para. 18/8/20

Keely -v- Hurt (1983) 1 All E.R. 973