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Viscount
Simonds
Lord Reid
Lord

Tucker

Lord
Keith of
Avonholm

Lord

Somervell
of Harrow

HOUSE OF LORDS

BONNINGTON CASTINGS LIMITED

v.

WARDLAW

Viscount Simonds

1st March, 1956

my lords,

I have had the advantage of reading the Opinion which my noble and learned friend, Lord Reid, is about to deliver and I agree with it in all respects. I shall therefore do no more than move that this appeal be dismissed with costs.

Lord Reid

My lords,

The Respondent was employed by the Appellants for eight years in the dressing shop of their foundry in Leith, and while employed there he contracted the disease of pneumoconiosis by inhaling air which contained minute particles of silica. He ceased work on 12th May, 1950. The Lord Ordinary (Lord Wheatley) held the Appellants liable for this and awarded £2,000 damages. The First Division by a majority (Lord Carmont and Lord Russell, the Lord President dissenting) adhered to the Interlocutor of the Lord Ordinary.

The Appellants produce steel castings. These are made by pouring molten metal into moulds which consist of sand with a very high silica content. When the casting has cooled it is freed from sand so far as possible and then annealed. The annealed casting has a certain amount of the sand adhering to it or burnt into it and the surface of the casting is somewhat irregular. It is then necessary to remove these irregularities and smooth the surface of the casting, and in the course of doing this any adhering sand is also removed. This is done in the dressing shop by three types of machine. In two of these machines, floor grinders and swing grinders, the means employed are grinding wheels made of carborundum, and in the third a hammer or chisel is driven by compressed air so that it delivers some 1,800 blows per minute. There are several of each type of machine in the dressing shop and all of them produce dust, part of which is silica from the sand which they remove. The particles of this sand are originally sufficiently large not to be dangerous, because it is only exceedingly small particles of silica which can produce the disease—particles which are quite invisible except through a powerful microscope. But either in the annealing process or by the working of these machines or at both stages (the evidence on this is inconclusive) a number of the original particles are broken up and the dust produced by all of these machines contains a certain proportion of the dangerous minute particles of silica.

Most of the dust from the grinders can be sucked into ducts or pipes, but during the time when the Respondent contracted his disease there was no known means of preventing the dust from the pneumatic hammers from escaping into the air, and it is now admitted that no form of mask or respirator had then been invented which was effective to protect those exposed to the dust.

Throughout his eight years in the Appellants' service the Respondent operated one of these pneumatic hammers and he admits that he cannot complain in so far as his disease was caused by the dust from his own or any of the other pneumatic hammers. As there was no known means of collecting or neutralizing this dust, and as it is not alleged that these machines ought not to have been used there was no breach of duty on the part of the Appellants in allowing this dust to escape into the air. The Respondent makes

no complaint with regard to the floor grinders because the dust-extracting plant for them was apparently effective so far as that was possible, and it seems that any noxious dust which escaped from these grinders was of negligible amount. But the Respondent alleged, and it is admitted, that a

considerable quantity of dust escaped into the air of the workshop from the swing grinders, because the dust-extraction plant for these grinders was not kept free from obstruction as it should have been. It frequently became choked and ineffective.

Regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, provides " No racing dry grinding or glazing ordinarily causing " the evolution of dust into the air of the room in such a manner as to be " inhaled by any person employed shall be performed without the use of " adequate appliances for the interception of the dust as near as possible to " the point of origin thereof and for its removal and disposal so that it shall " not enter any occupied room. . . ."

It is admitted for the Appellants that they were in breach of this Regulation in that for considerable periods dust from the swing grinders escaped into the shop where the Respondent was working owing to the appliances for its interception and removal being choked and therefore inadequate. The question is whether this breach of the Regulation caused the Respondent's disease. If his disease resulted from his having inhaled part of the noxious dust from the swing grinders which should have been intercepted and removed then the Appellants are liable to him in damages: but if it did not result from that then they are not liable.

The Lord Ordinary and the majority of the First Division have dealt with this case on the footing that there was an onus on the defenders, the Appellants, to prove that the dust from the swing grinders did not cause the pursuer's disease. This view was based on a passage in the judgment of the Court of Appeal in *Vyner v. Waldenberg Brothers Limited* [1946] K.B. 50: " If there is a definite breach of a safety provision imposed on the " occupier of a factory, and a workman is injured in a way which could " result from the breach, the onus of proof shifts on to the employer to show " that the breach was not the cause. We think that that principle lies at the " very basis of statutory rules of absolute duty " (per Scott, L.J., at p. 55). Vyner was working a circular saw when part of his thumb was cut off. The saw failed in several respects to comply with the Woodworking Machinery Regulations, and in particular the guard was not properly adjusted. The accident happened before the passing of the Law Reform (Contributory Negligence) Act, 1945, and the main defence was contributory negligence. The arguments of Counsel are not reported, but it does not appear to have been suggested that the accident might have happened even if the guard had been properly adjusted. There was, however, a question whether the duty to see that the Regulations were complied with had been delegated to Vyner. Of course, the onus was on the Defendants to prove delegation (if that was an answer) and to prove contributory negligence, and it may be that that is what the Court of Appeal had in mind. But the passage which I have cited appears to go beyond that and, in so far as it does so, I am of opinion that it is erroneous.

It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred from the enactment of a duty that Parliament intended

that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury.

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The only authority cited by the Court of Appeal in *Vyner's* case for their statement of the law is a passage from the judgment of Lord Goddard in the Court of Appeal in *Lee* v. *Nursery Furnishings, Ltd.* [1945] 1 All E.R. 387. " In the first place I think one may say this, that where you find there has " been a breach of one of these safety regulations and where you find that " the accident complained of is the very class of accident that the regulations " are designed to prevent, a court should certainly not be astute to find that " the breach of the regulation was not connected with the accident, was not " the cause of the accident". I agree: a Court should not be astute to find against either party, but should apply the ordinary standards. I cannot see in what Lord Goddard said any suggestion that the ordinary onus of proof is to be shifted. I would only add that in at least two subsequent cases *(Mist* v. *Toleman & Sons* [1946] 1 All E.R. 139, and *Watts* v. *Enfield Rolling Mills (Aluminium) Ltd.* [1952] 1 All E.R. 1013) the Court of Appeal, being powerless to overrule a previous decision of that Court, were driven to find distinctions which do not appear to me to be satisfactory and which I doubt whether they would have adopted if they had been convinced of the validity of the general rule.

The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is which was the most probable source of the Respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders. It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle but yet too small to be material.

As the Lord Ordinary did not deal with the case from this point of view, I must deal with the evidence afresh in light of such of his findings of fact as are relevant in this connection. He said: " *Prima facie* it would appear " that the main source of injurious silica dust which the pursuer inhaled came " from the dressing processes in which he was engaged at the dressers' bench " over the years ". With that I agree. Then he said: " but to succeed in this " argument the defenders have to establish that on the balance of probabilities " it was the *only* source." I have already stated my reasons for not agreeing with that. Then he considered certain evidence and said: " In the face of that

" evidence I cannot hold that the silica dust from the dressing process was " the sole source of infection, having regard to the proximity of the pursuer's " place of work to the swing grinders, unless it is established that the system " of ventilation in the shop was sufficient to carry away the noxious particles " of silica dust and prevent them from being inhaled by the pursuer." He held that the ventilation was defective and insufficient to do this. I do not think that the ventilation was insufficient to comply with the Regulations but I agree that it did not carry away dust so quickly as to prevent it from floating in the general atmosphere of the shop for some time; probably no system of ventilation would have prevented that.

I think that the position can be shortly stated in this way. It may be that, of the noxious dust in the general atmosphere of the shop, more came from the pneumatic hammers than from the swing grinders, but I think it is sufficiently proved that the dust from the grinders made a substantial contribution. The Respondent, however, did not only inhale the general atmosphere of the shop: when he was working his hammer his face was directly over it and it must often have happened that dust from his hammer substantially increased the concentration of noxious dust in the air which he inhaled. It is therefore probable that much the greater proportion of the

noxious dust which he inhaled over the whole period came from the hammers But on the other hand some certainly came from the swing grinders, and I cannot avoid the conclusion that the proportion which came from the swing grinders was not negligible. He was inhaling the general atmosphere all the time, and there is no evidence to show that his hammer gave off noxious dust so frequently or that the concentration of noxious dust above it when it was producing dust was so much greater than the concentration in the general atmosphere, that that special concentration of dust could be said to be substantially the sole cause of his disease.

The Lord President was of opinion that there was " no evidence of any " material contribution of noxious dust from the swing grinders", and I must examine his reason for taking that view. He said: " But when the " evidence of noxious dust from the swing grinders is analysed it is not " impressive. Much of the evidence in regard to these machines is related to " dust generally, and this body of evidence has misled the Lord Ordinary " into phrases such as ' a fairly constant stream of silica dust in the " ' atmosphere over a very extended period '. There is no such evidence in " regard to silica dust. The evidence of fellow-workmen of the pursuer " relates to visible dust and is not helpful on the vital issue ". In this I think that he was mistaken.

It is, of course, true that the only direct evidence related to harmless dust because it alone was visible. But if the larger visible particles hung in the atmosphere for some time, then smaller, lighter and invisible particles emitted by the swing grinders must have hung there even longer. No doubt the amount of noxious dust was very much less than the amount of visible dust. But there is nothing to indicate that the castings dressed with the swing grinders had substantially less sand adhering to them than had the castings dressed with the pneumatic hammers or that substantially less noxious dust was produced by the grinders than by the hammers. No doubt the total amount from both sources in the atmosphere was small at any one time but

the combined effect over a period of eight years was to cause the Respondent's disease. The importance of the evidence of the fellow-workmen is that it shows that the visible dust and therefore also the invisible dust from the swing grinders was not immediately dispersed, and therefore that the Respondent was bound to inhale some of the invisible noxious dust from the swing grinders. On this matter Lord Carmont said: " Even if the majority " of the pursuer's inhalations took place near the source where the silica " dust was produced, i.e. at his hammer, a minority of inhalations from the " general atmosphere of the shop needlessly contaminated owing to the break- " down of the extracting hood, duct and fan at the swing grinders may well " have contributed a quota of silica dust to the pursuer's lungs and so helped " to produce the disease ". On his view of the onus of proof Lord Carmont did not require to go farther than that. In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the Appellants, and I am therefore of opinion that this appeal should be dismissed.

Lord Tucker

MY LORDS,

It is, I think, clear from the Opinion of the Lord Ordinary that he accepted in substance the evidence of the pursuer's witnesses with regard to the extent of the defective condition of the dust extraction appliances in the swing grinders and that this defective condition had existed over a substantial period of time, if not throughout the whole length of the pursuer's employment. On this basis it follows that the quantity of silica dust discharged into the atmosphere of the shop from this source cannot be disregarded as negligible on the *de minimis* principle.

In my opinion, the inference to be drawn from these facts is that the silica dust discharged from the swing grinders contributed to the harmful condition of the atmosphere, which admittedly resulted in the pursuer contracting pneumoconiosis, and was therefore a contributory cause of the disease.

This was the decision reached by the majority of the Judges in the First Division, but in so doing both Lord Carmont and Lord Russell were to some extent influenced by certain decisions of the Court of Appeal in England with regard to the existence of an onus on defenders in cases of alleged breach of statutory duty. The cases actually referred to were *Mist* v. *Toleman & Sons* [1946] 1 A.E.R. 139, and *Watts* v. *Enfield Rolling Mills (Aluminium) lul.* [I952] I A.E.R. 1013, but the origin of this supposed onus is to be found in the judgment of the Court of Appeal delivered by Lord Justice Scott in *Vyner* v. *Waldenberg Brothers, Ltd.* [1946] K.B. 50 where he said:-

> " If there is a definite breach of a safety provision imposed on the " occupier of a factory, and a workman is injured in a way which " could result from the breach, the onus of proof shifts on to the employer

" to show that the breach was not the cause. We think that that prin-
" ciple lies at the very basis of statutory rules of absolute duty."

The judgment then went on to cite a passage from the judgment of Lord Goddard in *Lee* v. *Nursery Furnishings Ltd.* [1945] 1 A.E.R. 387, in the course of which he used these words: —

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

In the subsequent cases of Mist and *Watts* attempts were made to explain and to some extent to modify the actual language of Lord Justice Scott in *Vyner's* case, but the existence of some onus was recognised.

My Lords, I think it is desirable that your Lordships should take this opportunity to state in plain terms that no such onus exists unless the statute or statutory regulation expressly or impliedly so provides, as in several instances it does. No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both the plaintiff or pursuer must prove *(a)* breach of duty and *(b)* that such breach caused the injury complained of. (See *June Wakelin* v. *The London and South Western Railway Company* (1886) 12 A.C. 41, and *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (1940] A.C. 152). In each case it will depend upon the particular facts proved and the proper inferences to be drawn therefrom whether the pursuer has sufficiently discharged the onus that lies upon him. In the present case I think he has, and on this ground, and without expressing any view on the subject of the alleged defective ventilation, I would dismiss the appeal.

Lord Keith of Avonholm

my lords.

This appeal falls, in my opinion, to be decided upon a few material facts established by the evidence in the case. The onus is on the pursuer to prove his case, and I see no reason to depart from this elementary principle by invoking certain rules of onus said to be based on a correspondence between the injury suffered and the evil guarded against by some statutory regulation. I think most, if not all. of the cases which professed to lay down or to recognise some such rule could have been decided as they were on simple rules of evidence, and I agree that the case of *Vyner* in so far as it professed to enunciate a principle of law inverting the onus of proof cannot be supported. The correct principles governing the matter were laid down by this House in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152. and by the Master of the Rolls in *Stimpson* v. *Standard Telephones and Cables Ltd.* [1940] 1 K.B. 342.

I refer to the facts as set out by my noble and learned friend, Lord Reid What to my mind determines this case is, (I) that the pursuer is suffering from pneumoconiosis, which is a disease caused by the inhalation of minute particles of silica into the lungs; (2) that it is admitted that the disease was contracted by the pursuer in the course of his employment with the defenders; (3) that

he was employed by the defenders as a steel dresser in the defenders' dressing shop for a period of over eight years before the disease manifested itself; that in the dressing shop the pursuer was exposed throughout this period to the action on his lungs of silica dust which pervaded the dressing shop; that part of this silica dust was released into the atmosphere of the dressing shop from the operations conducted at the swing grinders; (6) that a substantial part, if not much the greater part, of the silica dust from the swing grinders was released as the result of repeated negligence of the defenders in failing to keep clear of obstruction the flues or ducts designed to carry away the noxious dust from the swing grinders ; (7) that this negligence recurred at very short intervals throughout the whole of the time during which the pursuer was employed by the defenders; (8) that silica dust, when inhaled, is gradual and insidious in its effects and requires to operate on the lungs for a considerable period of time before producing pneumoconiosis.

On these facts I think the pursuer has proved enough to associate his illness with the fault of the defenders, or at least to establish a *prima facie* presumption to that effect. The case for the defenders depends on the fact that the pursuer, as a steel dresser, engaged over the whole period of eight years in operating a pneumatic hammer on steel castings, was exposed much more immediately and in a much greater measure to silica dust released from these castings. I am prepared to agree, as did all the judges in the Court below, that the main source of silica dust inhaled by the pursuer came from this operation, a cause for which it is agreed the defenders were in no way to blame. It was accordingly maintained for the defenders that the pursuer must show that the dust released by their negligence from the swing grinders had contributed materially to the dangerous dust inhaled by the pursuer. As there was no evidence to show the proportions of the dust emanating from the various sources in the dressing shop inhaled by the pursuer his case, it was said, must fail. The pursuer has, however, in my opinion, proved enough to support the inference that the fault of the defenders has materially contributed to his illness. During the whole period of his employment he has been exposed to a polluted atmosphere for which the defenders are in part to blame. The disease is a disease of gradual incidence. Small though the contribution of pollution may be for which the defenders are to blame, it was continuous over a long period. *In cumulo* it must have been substantial, though it might remain small in proportion. It was the atmosphere inhaled by the pursuer that caused his illness and it is impossible, in my opinion, to resolve the components of that atmosphere into particles caused by the fault of the defenders and particles not caused by the fault of the defenders, as if they were separate and independent factors in his illness. *Prima facie* the particles inhaled are acting cumulatively, and I think the natural inference is that had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all. The inference, of course, would have been different if it could be shown that the pursuer could not have inhaled any particles given off from the swing grinding operations, or that the particles negligently released from the swing grinding operations were released at intervals so infrequent, or in quantities so insignificant even if taken cumulatively, as to make it unreasonable to regard them as a material contributing cause of the pursuer's disease. But that, in my opinion, the defenders are unable to show. On the whole evidence I consider that the pursuer has discharged the onus that is upon him of showing that the defenders' fault was a material contributing cause of his illness. I would accordingly dismiss the appeal.

Lord Somervell of Harrow

my lords,

I agree.

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