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Judgment
30, 1965

IN THE PRIVY COUNCIL

No. 11 of 1965

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN :-

JANOS PATAKY

(Plaintiff) Respondent

- and -

UTAH CONSTRUCTION & ENGINEERING PTY. LTD. and BROWN AND ROOT SUDAMERICANA LIMITED

(Defendants) Appellants

CASE FOR THE RESPONDENT

1. This appeal is brought pursuant to final leave to appeal to Her Majesty in Council granted by the Supreme Court of New South Wales. Record p. 189

2. The action in which this Appeal is brought was heard on February 27, 28, March 2, 3, 5, 6, 23 and June 24, 1964 in the Supreme Court of New South Wales. The trial commenced before His Honour, Mr. Justice Asprey and a jury of four but on the second day the jury, by consent of the parties was discharged and the trial proceeded before His Honour alone. His Honour found a verdict for the Defendants on each of the two counts, the subject of the Plaintiff's claim. p. 68

3. The respondent claimed to recover damages from the Appellants upon each of two alternative causes of action: the first count was framed in negligence and alleged that the Appellants were in breach of their common law p. 3

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duty to the Respondent their employee to take reasonable care for his safety. The second count read as follows :-

p. 4

2. AND for a second count the Plaintiff sues the Defendant for that before and at the time of the grievances hereinafter alleged and at all material times the Defendant was carrying out certain excavation work to wit the making of a certain tunnel within the meaning of the Scaffolding & Lift's Act in an area in which the said Act had effect and the Defendant employed the Plaintiff to work at the said excavation work and tunnel and pursuant to the said Act and the Regulations duly made thereunder and in particular pursuant to the Regulation published in Government Gazette No. 86 of 25th May, 1950 of which the relevant part reads as follows:

> 98. Every drive and tunnel shall be securely protected and made safe for persons employed therein:

The Defendant was required to ensure that the said tunnel was securely protected and made safe for the Plaintiff yet the Defendant did not ensure that the said tunnel was securely protected and made safe for the Plaintiff and the Plaintiff was caught and struck by a certain rock WHEREBY the Plaintiff was seriously wounded and injured and suffered the damage in the first count hereof.

4. The Appellants pleaded "not guilty" and
p. 4 denied the inducements in the first count.
p. 5 The plea relating to the second count was as follows :-

p. 5

3. AND for a third plea the Defendant as to so much of the second count as alleges that the Defendant was carrying out certain excavation work to wit the making of a certain tunnel within the meaning of the Scaffolding & Lift's Act in an area in which the said Act had effect and the Defendants employed the Plaintiff to work at the said excavation work and tunnel and pursuant to the said Act and the Regulations duly made thereunder and in

particular pursuant to the Regulation published in Government Gazette No. 86 of 25th May, 1950 of which the relevant part reads as follows :- Record

> 98. Every drive and tunnel shall be securely protected and made safe for persons employed therein;

The Defendants were required to ensure that the said tunnel was securely protected and made safe for the Plaintiff deny the said allegations and each and every one of them. It should be noted that the Appellants did not demur to the second count or otherwise challenge its validity.

5. On the second day of the trial the Respondent sought to tender in evidence Regulation 98 of the Regulations made pursuant to the Scaffolding and Lifts Act 1912-1960. The relevant part of Regulation 98 reads as follows : p. 35

> "Every drive and tunnel shall be securely protected and made safe for persons employed therein". p. 150

6. The tender of Regulation 98 was objected to by the Appellants and rejected by His Honour on the ground that it was ultra vires the Act. p. 160

7. On 24th June, 1964 His Honour gave his reasons for judgment. His Honour found for the Defendants on the first count and, since the tender of Regulation 98 which was an essential part of the proof of the second count had been rejected, His Honour found the second count also had not been proved. p. 161

His Honour also rejected the tender of Regulation 95 (7) which reads as follows: p. 165

> "Safe means of access shall be provided to every place where persons are employed in excavation work".

His Honour stated that his reasons for rejecting the tender of this Regulation were the same p. 165

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as the reasons for his rejection of Regulation 98.
However His Honour did allow the tender of Regulation 114. This Regulation reads as follows :-

> 114. If two men responsible for counting the number of shots agree that the correct number of shots has been fired, then the person immediately in charge of the work, accompanied by the powderman, or where the powderman is immediately in charge of the work then the powderman, accompanied by his assistant, shall carefully examine the site and satisfy himself that it is in safe condition for work to be resumed. If the powderman is satisfied that work may be resumed with safety, he shall notify persons to that effect by calling in a loud voice "All Clear". No other person shall return to the site until the "All Clear" signal is given by the powderman. If gasless delayed action detonators are used, a period of at least 15 minutes shall elapse before any person returns to the site. Where shift work is in progress and firing has taken place at the end of a shift, the powderman of that shift shall inform the person in charge of the new shift of the number and the positions of the holes which have been fired.

p. 180

8. By Notice of Motion the Respondent appealed to the Full Court of the Supreme Court. The Full Court held that Regulation 98 was a valid regulation and intra vires the Scaffolding and Lifts Act 1912-1960. Accordingly, the Full Court held that His Honour was in error rejecting the tender of the relevant part of Regulation 98 and ordered a new trial of the action limited to the second count.

9. The Appellants now appeal against that

judgment of the Full Court. The two questions of importance to be decided in this Appeal are : Record p. 181

(1) Whether Regulation 98 is a valid regulation.

(2) If Regulation 98 is intra vires the Scaffolding and Lifts Act 1912-1960, does it give rise to a private right of action for damages to a person injured as a result of a breach of the regulation.

SUMMARY OF EVIDENCE IN RELATION TO SECOND COUNT

10. The Appellants were at all material times engaged in excavating a tunnel at a place called Island Bend in the Snowy Mountains area of Southern New South Wales. The Respondent was employed by the Appellants to work in the tunnel as an assistant surveyor. The tunnel which was being excavated into a mountain was being constructed to an ultimate dimension of 21' in diameter upon completion but, to permit subsequent concreting to bring it to this dimension, the tunnel was in fact being excavated at the time of the accident to a diameter of some 25' or 26'. p. 8 p. 10 p. 10

11. The following witnesses were called to give evidence :-

(A) <u>The Respondent</u>

The Respondent gave evidence as to the procedure of carrying out the excavation operations in the tunnel. The operations were carried out in a number of stages, namely :-

(i) the first stage is when the drillers drill holes in the tunnel face for the purpose of inserting the explosives p. 10

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p. 10 (ii) the second stage is when the explosives in the face of the tunnel are detonated

p. 11 (iii) after a waiting time of 15 minutes to allow for the clearing away of rubble the third stage commences when the electrician and the foreman or shift supervisor (who is also known as the "walker") goes to the tunnel face for the purpose of erecting lights

p. 12 (iv) the fourth stage occurs when the miners barr down the loose rocks from the tunnel roof and sides by means of steel bars varying in lengths up to 12' or 15'. The barrers-down first barr down the loose rocks on the roof of the tunnel and then on both sides of the tunnel. The purpose of the barring down is to make the freshly blasted area safe.

p. 13 (v) the fifth stage of the operations occurs when the chainman is sent to the face of the tunnel with a torch. This is visible to the surveyor who is positioned upon a platform hanging down from the tunnel roof some 600' to 800' back from the face.

p. 13 This platform is known as a roof station. The chainman moves the light until same is positioned in the centre of the surveyor's theodolyte upon the roof station. When the light is in the correct position the surveyor gives a signal to the chainman who makes certain marks upon the face.

p. 14 (vi) the sixth stage occurs when the surveyor himself goes to the face and commences to make certain markings to indicate where the next drilling stage is to go through

(vii) after the surveyor has made the markings the drillers recommence drilling for the purpose of inserting the charges for a new cycle to commence. Record p. 14

The Respondent gave evidence that on the day in question he left his position at the roof station after the chainman had positioned his light correctly at the face of the tunnel and proceeded to the face for the purpose of drawing lines thereon with a long pole and paint brush. He was doing this for six or seven minutes when he saw a large rock approximately three feet in diameter falling from the roof. This rock struck the Respondent causing him very serious injuries. p. 16 p. 17

The Respondent said that he worked for another contractor in the Snowy Mountains area (Kaiser) who used rock bolts (roof bolts) for the purpose of securing the roof and that a steel net was positioned right up to the face. The Respondent also said that he did not see the foreman or any other person in charge when he went to the face. p. 38 p. 41

(B) Charles Wooler Marshall, a mining expert, gave evidence that after the blast the person responsible for the face should make the face and the workings surrounding safe. The methods adopted were inspection, sounding and barring down of loose rock. Inspection comprises the examining of the sections of the roof with a strong light. Sounding comprises striking the rock surface with a metal bar and judging by the sound the degree of looseness. The function of the barrers down is to remove all loose, all loosened rock or material at any portion of the workings that are likely to cause injury and also in the process of removing that loose rock to sound the face systematically as they move from end to end or from side to side. p. 70 p. 70 p. 71 p. 71

Mr. Marshall said that there was an established safety practice in such excavation projects as being carried out by the Appellants p. 72

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that no one else except the person responsible should go into the face until the men had made the place safe by barring down or by such other method as was necessary. The responsible person in charge should remain at the site of the face all the time while men were working.

p. 73 Mr. Marshall said that in loose ground roof bolts are used to give the roof added strength. These bolts vary in length from 4' to 12' and have a bolt which has an expanding end of various types that will hold the roof in on a washer that adds extra strength to the lower plies or segments of the rock material.

Mr. Marshall said that if the ground was quite bad the general practice was to put up
p. 73 steel sets, lagging or use mesh between the rock bolts. He said the basic principle is that the roof must be made safe before the men work under it. Mr. Marshall stated that if all adequate safety precautions and methods are taken the occupation can generally be
p. 74 regarded except for catastrophic matters as a safe one.

Mr. Marshall stated that the more solid the rock the safer it is. Where the ground
p. 84 is loose the roof must be supported and the men underneath sheltered from pieces of rock falling down. Apart from the putting of a mesh over the section held back in place by
p. 84 roof bolts such methods as logging or timber arches are used. The man responsible for safety at the face would decide upon the
p. 84 degree of hardness of the ground and whether added safety precautions should be erected. For example the frequency of the use of rock bolts would depend on the country which varies so much in the Snowy Mountains area that it is almost impossible to standardise.

Mr. Marshall agreed in cross-examination that a man who has worked in tunnels in the Snowy Mountains area for some few years and who has worked through the different processes of mining to the rank of supervisor or walker

would be in that difficult type of country skilled in making decisions as to the use of rock bolts and safety devices. The use of rock bolts is a matter which can only be gauged by someone experienced in the work on the spot at the time.

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(C) Mario Vallee, a witness called by the Appellants stated he was the shift supervisor or walker at the time of the accident. Mr. Vallee stated that the rock which fell on the Plaintiff fell from the centre of the roof in the blasted area and that the barring-down was still in the course of operation at the time of the accident. When asked whether there appeared to him to be any cause for the fall of the rock observable to him Vallee replied :- "Not to me. Not to me. It should have been barred-down, that is all. We did not have time enough to be there". He indicated that the barrers down had not reached the point where the rock fell on the Plaintiff in the course of the operation of barring down.

p. 89

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p. 102

(D) Giusepe Maretti, a witness called by the Appellants stated that at the time of the accident he was barring-down some rocks from the roof in area about 10' from the face when he heard a noise and looked behind him and saw the rock lying on the Respondent who was approximately 6' or 7' from the face.

p. 131

p. 132

12. At the hearing the Appellants claimed Regulation 98 was inadmissible :

(a) Because it was beyond the regulation-making power conferred by Section 22 of the Scaffolding and Lifts Act 1912-1960.

p. 153

(b) Because the regulation was too vague uncertain and indefinite to be a valid exercise of the regulation-making power.

pp. 153 & 160

(c) Because the regulation only applies to a drive or tunnel and the blasted out place where the accident took

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place was not a drive or tunnel.

13. At the hearing the Respondent contended that the Regulation 98 was admissible :

(a) Because it was a valid regulation the making of which was authorised
p. 156 by either Section 22 (2) (g) (iv) or Section 22 (2) (g) (v) of the Scaffolding and Lifts Act 1912-1960.

(b) Because the place where the Respondent was injured was a drive or tunnel and the duty imposed by the Regulation applied in respect of that place.

14. The Trial Judge Asprey J. gave Judgment in favour of the Appellants in respect of the tender of Regulation 98 (81 N.S.W. W.N. 544) In his reasons for Judgment, the Trial Judge came to the following conclusions :-

(a) The wording of that part of Regulation 98 which was tendered was intended to create an absolute and imperative obligation whereunder the happening of the accident was sufficient evidence of its breach.

(b) That Section 22 (2) (g) (v) and Section 22 (2) (g) (vi) did not authorise the making of Regulation 98.

(c) That the power to make a Regulation relating to steps to be taken with a view to achieving a purpose is not validly exercised by stating that the purpose must be achieved without nominating the steps to be taken for its achievement.

15. The matters which are material to be decided in this Appeal were considered by the Full Court of New South Wales (Walsh Macfarlan
p. 186 and Taylor J J) in Scarlett v Utah Construction and Engineering Pty. Ltd. 82 W.N. (Part 2) 74. In that case the validity of Regulation 98 was considered, on demurrer and the Full Court

held Regulation 98 a valid regulation. The judgment of Asprey J. in the present case was considered by the Full Court but the Full Court refused to follow it. The Respondent relies on the decision and the reasoning of Scarlett's case (supra) which, if accepted by the Board, is conclusive in the determination of this Appeal. Record

16. The Respondent also relies on the following further submissions

17. The first question of importance in the determination of this Appeal is to ascertain the ambit and nature of the duty imposed by the relevant part of Regulation 98. It is submitted that an analysis of the relevant part of Regulation 98 shows that :

(1) it requires the removal of dangers which can be reasonably foreseen and no other dangers

(2) it does not describe the means by which such dangers are to be removed

(3) the dangers must be removed whether it is reasonably practicable to do so or not

(4) the failure to remove the danger will amount to a breach of the regulation even though the failure is only a temporary one.

18. The word "Safe" appears frequently in safety legislation both in New South Wales and in England. When legislation requires that some place or thing be "safe" or "made safe", the fact that some person is injured while at that place or using that thing is not conclusive proof that the place or thing was unsafe or that there has been a breach of the obligation imposed. A place is not "safe" when there exists a possibility of injury which can be reasonably foreseen : Curran v. William Neill & Son (St. Helen's) Ltd. (1961) 1 W.L.R. 1069 at p. 1074; Trott v. W.E. Smith (Erectors) Ltd. (1957) 1 W.L.R. 1154. "Safe" has the

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opposite meaning to "dangerous": The test of whether a place is "safe", it is submitted, is an inversion of the test whether machinery is "dangerous": Curran v. William Neill & Son (St. Helen's) Ltd. (supra): The modern test of whether a part of machinery is dangerous was used by Du Parcq J in Walker v Bletchley Flettons Ltd. (1937) 1 A 11 E.R. 170 at p. 175 in a passage which the House of Lords has approved: see John Summers & Sons Ltd. v. Frost (1955) A.C. 740 at pp. 765-6.

19. Although the phrase "securely protected" does not appear to be the subject of any judicial interpretation, the terms "secure" and "securely" are the subject of many decisions in the field of industrial and safety legislation. It is submitted that when a statute imposes an obligation to have some place or thing "securely protected", "securely fenced" or "secure" the proper approach is to ask, firstly, what is the danger contemplated by the statute in question. The place or thing is then "securely protected", "securely fenced" or "secure" when the possibility of injury from reasonably foreseeable dangers is removed: Brown v. National Coal Board (1962) A.C. 574 at pp. 595-96. Thus an obligation to securely fence dangerous parts of machinery imposes no obligation to fence against dangers which are not reasonably foreseeable: Burns v. Terry (1951) 1 K.B. 454: John Summers & Son. Ltd. v. Frost (1955) A.C. 740 at p. 769.

In this case the words "every drive and tunnel shall be securely protected" indicate that the danger contemplated is the danger of collapse or rock fall.

A drive or tunnel will be "securely protected" when the danger of collapse from events or causes which are reasonably foreseeable possibilities is removed. But there is no obligation to "securely protect" the tunnel against causes which are not reasonably foreseeable, such as earthquakes or other catastrophies: Marshall v. Gotham Co. Ltd. (1954) A.C. 360 at p. 374 Jackson v.

National Coal Board (1955) 1 A 11 E.R. 145: Brown v. National Coal Board (1962) A.C. 574 at p. 595:

20. In the present case Asprey J. held that there was a breach of the obligation imposed by Regulation 98 upon the happening of an injury to a person. It is submitted that this view is misleading if not erroneous and that there will be a breach of the obligation imposed only if the injury was caused by some event or thing the happening of which was reasonably foreseeable. The duty imposed by Regulation 98 is absolute in the sense that if reasonably foreseeable dangers are not removed there is a breach of the obligation, although the breach is only momentary: Galashiels Gas Co. Ltd. v. O'Connell (or Millar) (1949) A.C. 275 at pp. 283,287: Brown v. National Coal Board (1962) A.C. 574 at p. 596. It is also absolute in the sense that it must be observed whether or not it is reasonably practicable to do so: John Summers & Sons Ltd. v. Frost (1955) A.C. 740.

21. It is submitted that a regulation of the nature of Regulation 98 is a legitimate exercise of the regulation making power. The regulation is authorised both by Section 22 (2) (g) (v) and Section 22 (2) (g) (iv).

22. A "safeguard" is simply a protective stipulation or thing. Any notice which draws attention to a state of danger is rightly described as a "safeguard". A regulation requiring the erection of such notices would relate to a "safeguard" to be taken for the securing of safety. A regulation which requires the removal of dangers a fortiori relates to a "safeguard" to be taken for securing the safety and health of persons. The removal of foreseeable dangers is what Regulation 98 requires and such a requirement is rightly described as a "safeguard to be taken". The direction to remove foreseeable dangers is clearly done for the purposes of securing the safety and health of persons engaged in excavation work.

23. An employer reading Regulation 98 knows

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that his duty is to remove the dangers which may be a source of injury to the men employed in the tunnel. The fact that the employer is not told how to remove the dangers is beside the point and does not affect the validity of the regulation. As the evidence of Mr. Marshall shows there is in fact a good reason why the regulation-making authority has not laid down specific steps on practices. His evidence shows that the precautions or procedure to be adopted will depend upon the particular type of ground that is being tunnelled. The use of the correct device to ensure safety will vary from area to area. The choice of which method or device to use to make the tunnel safe must be left to the discretion of the men whose duty it is to make the tunnel safe. In determining whether or not a regulation is properly made, regard must be had to its practical operation and to its understanding among men experienced in the trade: Cann's Pty. Limited v. The Commonwealth 71 C.L.R. 210 at pp. 230.33 per Dixon J.

There was no evidence at the trial called by either party to show it was not practicable to securely protect or make the tunnel safe. Indeed the evidence of Mr. Marshall is that the person responsible for safety can make the tunnel safe by using such of the well recognised methods as the nature of the ground and practical experience dictates.

Once it is accepted that Regulation 98 requires the removal of reasonably foreseeable dangers and no other dangers, it is submitted that there can be no doubt that the Regulation is valid. For a requirement to remove danger clearly relates to a safeguard "to be taken for securing the safety and health of persons engaged in ... excavation work". The fact that the Regulation by its terms describes the end to be achieved and not what must be done is nothing to the point. For what is to be done is implicit in what is required to be achieved.

24. The second limb in paragraph (g) (v) "measures to be taken for securing the safety

and health of persons engaged in excavation work" is, at least as wide as and may be, wider than, the first limb of the paragraph. The word "measure" is one whose meaning is readily controlled by its context. In this context it should be read as meaning "means to be taken for securing the safety of persons". A Regulation which requires the removal of foreseeable dangers relates to a "means to be taken" for securing safety.

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25. In respect of these submissions the Respondent relies on the decision of the High Court of Australia in Australian Iron & Steel Ltd. v. Ryan (1956) 97 C.L.R. 89. In that case the validity of two sub-regulations were challenged as being beyond the regulation making power conferred by Section 22 (2) (g) (v). Regulation 73 (2) provided that a person engaged in building work should "provide and maintain safe means of access to every place at which any person has at any time to work". Regulation 73 (5) required such a person to "keep all stairways, corridors and passageways free from loose materials, supplies and obstructions of every kind". The High Court unanimously held that these sub-regulations were validly made under Section 22 (2) (g) (v) of the Act. Both Regulation 73 (2) and 73 (5) on analysis are of the same nature as the relevant part of Regulation 98.

AND DEBRIS, BUILDING MATERIALS

Regulation 73 (5) points to certain things which may be a source of danger and directs their removal, though it does not say how the stairways etc. are to be kept free. (See Galashiels Gas Co. Ltd. v. Miller (1949) A.C. 275 and John Summers & Son Ltd. v. Frost (1955) A.C. 740.) Accordingly, in the material respects the nature of Regulation 73 (5) is the same as the relevant part of Regulation 98.

26. Regulation 73 (2) requires the removal of dangers in the means of access which can be reasonably foreseen: Curran v. William Neill & Sons (1961) 1 W.L.R. 1069 at p. 1074: Trott v. W.E. Smith (Erectors) Ltd. (1957) 1 W.L.R. 1154: It does not specify how the means of access are to be made safe. A momentary failure to

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provide "safe means of access" would amount to a breach of this Regulation: Callaghan v. Fred Kidd & Sons Ltd. (1944) K.B. 560 at p. 564. In certain circumstances the provision of Regulation 74 can apply to Regulation 73 (2) so that in some cases the provisions of Regulation 73 (2) have only to be observed so far as practicable: Smith v. Rex Building Co. Pty. Ltd. 63 S.R. 32. But there will be many situations where the provisions of Regulation 74 do not apply and in those situations safe means of access must be provided and maintained whether or not it is practicable or reasonably practicable to do so. Accordingly, it is submitted that in many situations to which it applies the nature of the obligation imposed by Regulation 73 (2) is precisely the same as that imposed by the relevant part of Regulation 98.

27. It is submitted that in all material respects the regulations considered by the High Court of Australia in Australian Iron & Steel Ltd. v. Ryan 97 C.L.R. 89 are of the same nature and impose same obligations as does Regulation 98. They are regulations which impose duties intended to safeguard the safety of persons engaged in excavation works Australian Iron & Steel Ltd. v. Ryan 97 C.L.R. 89. Unless the Board holds that Ryan's case was wrongly decided on this aspect, it is submitted that this Appeal must be dismissed.

28. In the present case Asprey J thought that the enactment of Regulation 74 which exonerates compliance with Regulations 73 (1) (2) (3) where such compliance is impracticable was an indication why Regulation 98 was invalid. Semble he also sought to distinguish Australian Iron & Steel Ltd. v. Ryan (supra) on this ground. But it is submitted that there are many situations where Regulations 73 (1) and (2) impose duties and Regulation 74 has no operation. Moreover, the provisions of Regulation 74 do not qualify in any way the provisions of Regulation 73 (5) which was also considered by the High Court in Australian Iron & Steel Ltd. v. Ryan supra.

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29. Even if Asprey J is right in holding that the provisions of Section 22 (2) (g) (v) do not allow absolute obligations such as Regulation 98 to be made, it is submitted that the provisions of Regulation 5 may be used in appropriate cases to exempt employers from the operation of Regulation 98 where it is not practicable to comply with its provisions

10 30. Asprey J. in his judgment wrongly sought to rely upon the speech of Lord Radcliffe in Brown v. National Coal Board (1962 AC 574 at pp. 589 - 95.) Brown v. National Coal Board is distinguishable from the present case for the following reasons :-

(a) His Lordship was construing a section which defined in its own provisions the duties of a mine manager.

(b) Section 22 is not concerned directly
20 with the definition of duties but with the statement of topics or matters in respect of which power is granted to enact subordinate legislation.

(c) The exercise of power must always be seen to fall within the grant and the view of the courts on the meaning of words conferring a grant of power is not always governed by the same considerations as where the same or similar words are used to
30 define a duty.

(d) Regulations "relating to" the "manner of carrying out tunnelling" and "relating to" "safeguards and measures" is wider than a power which authorises a "prescribing" of regulations on the same subject matter.

(e) Asprey J. unduly restricted the meaning of the phrase "safeguards" and this lead to error in thinking that what Lord Radcliffe had said was applicable in this
40 case.

(f) The duty which had to be defined in Brown v. National Coal Board was one of

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several duties imposed on managers by the Act of 1954 and the duty to take such steps as may be necessary for keeping the working place secure was to be contrasted with duties to ensure something and duties to secure a particular result. It was "in the face of all these differences" that Lord Radcliffe thought it a duty to take steps to secure a particular result imposed to a different duty to requirement to secure a particular result.

31. It is submitted that the provisions of Section 22 (2) (g) (iv) also authorise the enactment of Regulation 98. In Australian Iron & Steel Ltd. v. Ryan 97 C.L.R. 89 the High Court held that the regulations in question in that case were authorised by Section 22 (2) (g) (iv) as well as Section 22 (2) (g) (v). It is submitted that case and its reasoning is directly applicable here. The regulation need only "relate" to the subject matters set out in the various paragraphs. A requirement that a tunnel which is being made should be made safe for persons employed in the tunnelling relates to the manner of carrying out tunnelling.

32. It is further submitted that the history and scope of the legislation indicates that duties of the nature of Regulation 98 are within the ambit of the regulation making power. In the original 1912 Act the Regulations were contained in the Second Schedule. Breach of these regulations in appropriate cases gave rise to a common law action for damages: O'Connor v. S.P. Bray Ltd. 56 C.L.R. 464. These Regulations remained in the Act until they were repealed by Act No. 38 of 1948, dealt mainly with scaffolding and cranes and lifts. But the Regulations did contain a number of absolute obligations of the type of Regulation 98. When the Regulations were repealed in 1948, the same Act inserted Section 22 which gave power to make regulations relating to safeguards and measures to be taken in connection with scaffolding and cranes and lifts, inter alia, as well as excavation work. If the judgment of Asprey J.

is right there is no power to make absolute obligations of the nature of Regulation 98 in respect of scaffolding. That is, that while up to 1948 the Legislature authorised the absolute obligations in the Regulations, it must be taken to have intended that under the new scheme Regulations could not contain absolute obligations. That would be a strange result, it is submitted, from an amending Act which greatly increased the Act's area of operation and the subject matters which it was to control and regulate.

33. By Section 22 (3) the Regulations may adopt wholly or partly the rules of the Standards Association of Australia or the British Standards Institution. The codes or rules of these organisations frequently impose what may be described as absolute duties. This indicates that when enacting S. 22 (2) (g) (iv) and (v) the Parliament did not intend in any way to prohibit the making of Regulations containing absolute obligations.

34. Absolute obligations have been a feature of N.S.W. Industrial legislation for many years: see e.g. Factories and Shops Act 1912 Section 33 (which provided that dangerous parts of machinery shall be securely fenced). By requiring that dangers be eliminated whether or not it is practicable to do so, the safety and health of workmen are secured. It may be assumed that when the regulation making power was inserted in the Act in 1948 the Legislature was well aware of this and contemplated that in many cases absolute obligations would have to be imposed if the safety and health of workmen were to be secured. Whether or not the Regulation achieves its purpose is peculiarly a matter for those administering the Act. The Courts will be slow to say that a regulation does not achieve its purpose: Stenhouse v. Coleman 69 C.L.R. 457.

35. The question whether a regulation made pursuant to Section 22 (2) (g) of the Scaffolding and Lift's Act 1912, as amended give rise to an action for damages at the

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suit of a person injured by breach of such a regulation was considered by the High Court of Australia in Australian Iron & Steel Ltd. v Ryan, 97 CLR. 89. The High Court unanimously held that such regulations, on breach, could give rise to a private action for damages. It is submitted that that decision is precisely in point and concludes the matter in the respondent's favour. As a result of Ryan's case (supra) many hundreds of actions have been brought in N.S.W. relying on breaches of the Scaffolding and Lift's Regulations as a cause of action. Apart from the formal raising of the point in Scarlett v. Utah Construction & Engineering Pty. Ltd. 82 W.N. (Part 2) 74, the decision in Ryan's case appears never to have been challenged in Australia, nor has there been any legislative intervention. It is submitted that these circumstances would be sufficient, per se, for the Board to refuse to reverse the decision in Australian Iron & Steel v. Ryan 97 C.L.R. 89.

36. Quite apart from these considerations, however, it is submitted that Ryan's case (supra) was correctly decided. The question whether a statutory enactment gives rise to a private right of action is often a difficult question. As Lord Simonds pointed out in his speech in Cutler v. Wandsworth Stadiums Ltd. (1949) A.C. 398 at p. 407. the only rule which in all the circumstances is valid is that the answer must depend on a consideration of the whole enactment and circumstances, including the pre-existing law, in which the enactment was passed.

37. Prior to 1950 the Regulations were contained in the Second Schedule of the Act. In O'Connor v. S.P. Bray Ltd. 56 C.L.R. 464, the High Court of Australia held that these regulations could in appropriate circumstances give rise to a private right of action. Whether any particular regulation gave rise to a private right of action was dependent upon the general principles by which the Courts determined whether a provision in a statute gave a private right of action.

38. By Act No. 38 of 1948 the general scheme

of the Act was changed. The Regulations contained in the Second Schedule were repealed: Section 6 (2) (b). Section 22 was inserted in the Act and this gave the Governor power to make regulations. In the absence of clear words to the contrary it is submitted that the Legislature intended that the Regulations made pursuant to Section 22 in appropriate cases would give rise to private rights of action.

39. In Australian Iron & Steel Ltd. v. Ryan 97 C.L.R. 89, it was argued that a power to make regulations does not enable the delegate to create causes of action, merely because the statute, itself, creates causes of action. The answer to this contention was given by Kitto J., 97 C.L.R. 89 at page 98.

> "The major premiss, however, is based upon the false assumption that the existence of a private right to the observance of specific requirements of a law depends upon there being discovered by a process of verbal interpretation a disclosure of a positive intention to create such a right."

The Respondent adopts these remarks of Kitto J.

40. There are a large number of cases in which actions for breach of statutory duty have been brought upon breaches of regulations made pursuant to Acts of Parliament. Many cases are to be found in the reports where actions have been brought for breaches of the Building Regulations, (1926) (S.R. & O 1926 No. 738:) see E.G. Potts (or Riddell) v. Reid (1943) A.C. 1; the Building (Safety, Health and Welfare) Regulations (1948) (S.I. 1948 No. 1145) e.g. Mortimer v. S.B. Allison Ltd. (1959) 1 All E.R. 567, H.L.; the Grinding of Metals (Miscellaneous Industries Regulations 1925), e.g. Bonnington Castings Ltd. v. Wardlaw (1956) A.C. 613; the Pedestrian Crossing Places (Traffic) Regulations 1941 (S.R. 7 1941 No. 397), e.g. London Passenger Transport Board

Record v. Upson (1949) A.C. 155.

The statement in Maylan v. Purcell (1949) S.R.1 at page 7 that no instance could be found in the books of a cause of action being created by a regulation not part of the Act was erroneous. It is only necessary to refer to the decision of the House of Lords in Potts (or Riddell) v. Reid (1943) A.C. 1 to ascertain this.

41. A statutory regulation made within the scope of the power authorising it, is to be regarded as part of the Act: Willingate v. Norris (1909) 1 K.B. 57 Ex-parte Nomartias (1944) 44 S.R. 187 Accordingly, it is submitted that the ordinary rules by which the Courts determine whether a statute gives rise to a private cause of action apply to a valid regulation.

42. On its face the provisions of Regulation 98 deal with safety questions and are designed for the benefit of employees. The obligations imposed by Regulation 98 fall on the employer: Regulation 6. Accordingly it is submitted that Regulation 98 gives a private cause of action:

O'CONNOR V.S.P. BRAY LTD. 56 C.L.R. 464

GRANT V. NATIONAL COAL BOARD (1956) A.C. 649.

AUSTRALIAN IRON & STEEL LTD. V. RYAN 97 C.L.R. 89

The Plaintiff belonged to the class of persons for whose benefit the regulation was passed and is entitled to bring an action for damages:

GROVES V. WIMBORNE (1898) 2 Q.B. 402

BUTLER (OR BLACK) V. LIFE COAL CO. (1912) A.C. 149

43. The Place where the Respondent was injured was clearly a place to which the Regulation applied and the Regulation should have been admitted in evidence.

44. Causes of action based on breaches of regulations made pursuant to the Scaffolding and Lifts Act have for many years been a feature of claims brought in New South Wales Courts. Dozens of cases are brought every year based upon breaches of various sub-regulations of Regulation 73 and upon Regulation 98. Many of the sub-regulations of Regulation 73 and of the other regulations made under the Act are similar in terms and extent to Regulation 98. The Courts have accepted the validity and applicability of these regulations. Many such actions have resulted in appeals and were considered by the Full Court and High Court. Regulation 98 came into operation concurrently with proposals for commencement of large scale tunnelling operations in the State of New South Wales where a vast network of tunnels has been constructed in connection with the Snowy Mountains Hydro-Electric and Irrigation Scheme.

The following are some of the recent decisions of the Full Court and High Court dealing with the various regulations :-

(i) SMITH V. REX BUILDING CO. PTY.LTD. (1963 N.S.W. SR. 32) Regulations 73 (1), 73 (2), 73 (3) and 74.

(ii) HIRST V. JESSOP (1963 N.S.W. SR. 15) Regulations 144 (1) (b), 144 (1) (c) 144 (2) (a) (ii)

(iii) STOROZUK V. COMMISSIONER FOR RAILWAYS (1963 N.S.W. SR. 581) Regulations 73 (1), 73 (3), 74, 84 (8), 84 (a), Leave to Appeal refused by High Court (37 ALJR 246)

(iv) SCARLETT V. UTAH CONSTRUCTION AND ENGINEERING PTY. LTD. (84 WN 74) Regulation 98. Leave to Appeal to Her Majesty in Council given by Full Court.

(v) EAST V. MALCO INDUSTRIES (79 N.S.W. WN 632) Regulations 73 (1) 158 (17), 158 (18)

Record

(vi) GENERAL CONSTRUCTIONS PTY. LTD. V. PETERSON (108 CLR 251) Regulation 73 (3)

(vii) McLAUGHLIN V. UTAH CONSTRUCTION AND ENGINEERING PTY. LTD. AND ANOR. Full Court of New South Wales (1965 unreported) Regulation 98 (demurrer dismissed)

(viii) BIRKETT V. A.F. LITTLE PTY. LTD. (1962 N.S.W. R 492) Regulations 73 (1), 73 (1), 73 (3) Appeal from Full Court dismissed by High Court (36 ALJ R 96)

(ix) ANGELUCCI V. AUSTRALIAN IRON & STEEL PTY. LTD. 1 (81 N.S.W. WN 162) Regulations 6, 63 & 67

(x) TRIMP V. S.A. BUTLER PTY. LTD. 81 N.S.W. WN 511 Regulations 73 (2), 73 (6), 73 (7), 127 (104)

(xi) CONIGLIO V. COMPRESSED YEAST CO. (N.S.W.) PTY. LTD. (82 N.S.W. WN 165) Regulations 73 (2) 80 (3)

(xii) AUSTRALIAN PAPER MANUFACTURERS LTD. V. CONYERS (1962 N.S.W. SR 682) Regulation 73 (2)

(xiii) DAVEY V. SKINNER 1961 N.S.W. SR 648 Regulations 73 (2), 80 (3), 80 (4) (a), 80 (6)

(xiv) SINCLAIR V. WILLIAM ARNOTT PTY. LTD. 80 N.S.W. WN 798 Regulation 73 (8)

(xv) CAVASSINI V. ELECTRIC POWER TRANSMISSION PTY. LTD. (79 N.S.W. WN 245) Regulation 73 (8)

45. The Respondent accordingly submits that the Appeal ought to be dismissed for the following among other reasons :-

REASONS

A. BECAUSE Regulation 98 was a valid regulation. Record

B. BECAUSE the Regulation applied to the place where the Respondent was injured

C. BECAUSE Regulation 98 gives a private right of action

D. BECAUSE the admission into evidence of Regulation 98 would have affected the result of the trial

10 E. BECAUSE the judgment of the Full Court of New South Wales in allowing the appeal against the judgment of Asprey J. was correct.

C. EVATT JNR.

M.H. McHUGH

No. 11 of 1965

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

JANOS PATAKY (Plaintiff) Respondent

- and -

UTAH CONSTRUCTION AND ENGINEERING PTY. LIMITED AND BROWN AND ROOT SUDAMERICANA LIMITED (Defendants) Appellants

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CASE FOR THE RESPONDENT

RODGERS HORSLEY & BURTON,
7/8, Norfolk Street,
Strand,
LONDON, W. C. 2.