

~~P.C.~~
~~CDI.G.6~~

Judgment
30 1965

IN THE PRIVY COUNCIL

No. 11 of 1965

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

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

Appellants (Defendants)

-- and --

JANOS PATAKY

Respondent (Plaintiff)

RECORD OF ~~PROCEEDINGS~~

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London, W.C.2.
Solicitors for the Appellants.

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Solicitors for the Respondent

P.C.
~~CDH 6.6~~

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 FEB 1966
25 RUSSELL SQUARE
LONDON, W.C.1

30969

ON APPEAL

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B E T W E E N :

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

Appellants (Defendants)

- and -

JANOS PATAKY

Respondent (Plaintiff)

TRANSCRIPT RECORD OF PROCEEDINGS

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1.

IN THE PRIVY COUNCIL

No. 11 of 1965

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

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

- and -

10 JANOS PATAKY Respondent (Plaintiff)

RECORD OF PROCEEDINGS

NO.1

WRIT OF SUMMONS

IN THE SUPREME COURT COURT OF NEW

NEW SOUTH WALES

No.10247 of 1962

BETWEEN: JANOS PATAKY 23 Augustus Street,
Enmore Plaintiff

- and -

20 UTAH CONSTRUCTION AND ENGINEERING
PTY. LIMITED and BROWN AND ROOT
SUDAMERICANA LIMITED - both Defendants
are companies duly incorporated under
the Companies Act of New South Wales
liable to be sued by their corporate
names and styles having their registered
offices c/o Messrs.Price & Waterhouse
& Co., 31 Macquarie Place, Sydney.
Defendants

30 ELIZABETH THE SECOND, By the Grace of God, of the
United Kingdom, Australia and her other realms
and Territories Queen, Head of the Commonwealth,
Defender of the Faith.

In the Supreme
Court of New
South Wales

No. 1

Writ of Summons
11th October
~~1955~~ 1962

In the Supreme
Court of New
South Wales

To UTAH CONSTRUCTION AND ENGINEERING PTY.LIMITED
c/- Messrs. Price & Waterhouse & Co.,
9th Floor, 31 Macquarie Place, Sydney. &
BROWN & ROOT SUDAMERICANA LIMITED
c/- Messrs. Price & Waterhouse & Co.,
9th Floor, 31 Macquarie Place, Sydney

No. 1

Writ of Summons
11th October
~~1955~~ 1962
continued

WHEREAS the above named Plaintiff has commenced
an action against you in this Court:

WE command you that if you desire to contest
his claim you do, within ten days after service
of this writ upon you, file in the office of the
Court a notice of appearance in the form
prescribed by the rules of the Court and serve a
copy thereof on the plaintiff or his solicitor.

10

AND take notice that such notice of appear-
ance may be filed on your behalf by a solicitor
of this Court or by yourself in person, in which
latter case the address given therein for
service of documents upon you must be within two
miles of the General Post Office, Sydney.

20

AND take notice that if you fail to file
such notice of appearance within the time limited
for your appearance the plaintiff may proceed
with the action as provided by the Common Law
Procedure Act, 1899, and the rules made thereunder.

WITNESS - The Right Honourable Herbert, Vere
Evatt Chief Justice of our said Court at Sydney
this 11th day of October 1962

For the Prothonotary

G. CASEY

Clerk of the Supreme Court

30

This writ was issued by John Lawrence Aston of
11c Castlereagh Street, Sydney.
The address for service of documents is
11c Castlereagh Street, SYDNEY

The Plaintiff claims Fifty Thousand Pounds
(£50,000.0.0.) and sixteen pounds (£16.0.0.) for
his cost together with the fees properly paid for
service of this writ upon you and if those sums
be paid to him or his solicitor within the time
above limited for your appearance further
proceedings in this action will be stayed.

40

J.L.ASTON
Plaintiff's Solicitor

NO. 2

ISSUES FOR TRIAL

In the Supreme
Court of New
South Wales

No. 2

B E T W E E N : JANOS PATAKY Plaintiff

- and -

UTAH CONSTRUCTION AND
ENGINEERING PTY. LIMITED
Defendant

- and -

BROWN AND ROOT SUDAMERICANA
LIMITED Defendant

Issues for
Trial
4th January
1963

10 Writ: Issued 11th day of October, 1962.

Appearance: Entered the 25th day of October, 1962

Declaration: Dated the day of November, 1962

SYDNEY) JANOS PATAKY by JOHN LAWRENCE ASTON his
TO WIT) Attorney sues UTAH CONSTRUCTION &
 ENGINEERING PTY. LIMITED and BROWN AND
 ROOT SUDAMERICANA LIMITED (JOINT VENTURE)

20 for that before and at the time of the grievances
hereinafter alleged and at all material times
the Defendant employed the Plaintiff to work at
certain operations in a certain tunnel and there
was within the said tunnel certain rocks which
said employment work operations tunnel and rocks
were under the care control management maintenance
inspection and supervision of the Defendant its
servants and agents whereupon the Defendant by
itself its servants and agents was so negligent
in and about the care control management
maintenance inspection and supervision of the said
employment work operations tunnel and rocks and
30 in and about the system of work in which the
Plaintiff was employed and in and about failing
to use proper and safe plant gear and equipment
that whilst so employed as aforesaid the Plaintiff
was caught and struck by a certain rock WHEREBY
the Plaintiff was seriously wounded and injured
and suffered great pain of body and mind and was
permanently incapacitated and unable to attend to
his occupation and lost the monies he would
otherwise have received and incurred expense for

In the Supreme
Court of New
South Wales

No. 2

Issues for Trial
4th January
1963
continued

nursing and medicine and medical and surgical attendance and was otherwise greatly damnified.

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:

10

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

20

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.

Particulars Under Order X Rule 7 Dated the
day of November, 1962.

30

Medical £7. 7. 0.

Pleas: Dated the 20th day of December, 1962

UTAH CONSTRUCTION)
& ENGINEERING PTY.)
LIMITED & ANOR.)
- ats.-)
PATAKY)
UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED AND BROWN AND ROOT
SUDAMERICANA LIMITED (JOINT
VENTURE) by their attorney
RUSSELL O'HARA SILVA as to the
first and second counts of the
Plaintiff's declaration say that
they are not guilty.

40

5.

10 2. AND for a second plea the defendant as to so much of the first count as alleges that the defendant employed the plaintiff to work at certain operations in a certain tunnel and there was within the said tunnel certain rocks which were under the care control management maintenance inspection and supervision of the defendant its servants and agents deny the said allegations and each and every one of them.

In the Supreme
Court of New
South Wales

No. 2

Issues for
Trial
4th January
1963
continued

20 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
30 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;

40 The defendant 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.

Replication: Dated the day of January 1963.

In the Supreme Court of New South Wales

No. 2

Issues for Trial
4th January 1963
continued

PATAKY)
-v-) The Plaintiff by John Lawrence
UTAH CONSTRUCTION) Aston joins issue upon the
& ENGINEERING PTY.) Defendants pleas herein.
LIMITED & ANOR.)

Dated this day of January, 1963.

J.L. Aston
Solicitor for the Plaintiff,
11c Castlereagh Street, SYDNEY

No. 3

Opening of Proceedings
27th February 1964

NO. 3

10

PATAKY -v- UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED & ANOR.

MR. EVATT Q.C., and MR. EVATT Jnr. appeared
for the Plaintiff.

MR. D. WARD appeared for the Defendants.

Plaintiff's Evidence

No. 4

Janos Pataky Examination
27th February 1964

PLAINTIFF'S EVIDENCE

NO. 4

Janos Pataky Sworn, examined, deposed

MR. EVATT Jnr.: Q. Your name is Janos Pataky?

A. Yes.

Q. So we would call you John here, I suppose.
You are the plaintiff in this action and you are
32 years of age? A. Yes.

20

Q. I am going to ask you to speak up a little
bit because we do have to hear you over here.
You were born on the 16th February, 1932, if
I might lead? A. Yes.

Q. And you were born at Szolnok which is a town
east of Budapest? A. Yes.

Q. You went to high school there? A. Yes.

Q. I think you left high school at the age of
18, is that right? A. Yes.

30

Q. With the certificate? A. Leaving.

Q. Our equivalent of the Leaving. Did you get that there? A. Yes.

Q. You got the Leaving Certificate? A. Yes.

Q. Did that enable you to get to the University? Was it what we would call a matriculation? A. Yes, it is the same standard as matriculation in Australia.

10 Q. Nevertheless you did not go to the university. I think on leaving school you joined the Hungarian Air Force? A. Yes.

Q. Were you there for five years? A. Yes.

Q. I told the jury you are a Flight Lieutenant. What actually was your rank? A. Yes, Flight Lieutenant.

Q. Did you actually fly aeroplanes? A. Yes.

Q. I think in 1957 for, what shall we say, political reasons you left Hungary and came to Australia? A. Yes, I did.

20 Q. With the intention of remaining here permanently? A. Yes.

Q. And you are now a naturalised Australian citizen, is that right? A. Yes, I am Naturalised.

Q. I think you had various jobs in Australia. You did labouring work? A. Yes.

Q. And you worked with the butchers, is that right? A. Yes.

Q. And various jobs like that, and then you went down the Snowy Mountains Hydro-electric Authority, is that correct? A. Yes.

30 Q. For something like $2\frac{1}{2}$ years approximately? A. Yes.

Q. That is the Commonwealth organisation down at the Snowy Scheme? A. Yes.

Q. It says here in my brief that your classification there was a chainman? A. Yes.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964
continued

Q. What is a chainman? A. A chainman helps the surveyors with their work. He has to carry the staff and he helps to set up the instrument for the surveyor and assists the surveyor on the field or in the tunnel or shaft job.

Q. You would do mainly tunnel work with the Hydro-Electric Authority or outside work? A. No, I was working all the time in tunnels and shafts.

Q. I think you then did about a year with Kaiser-Perini-Morrison-Raymond? A. Yes.

10

Q. They had a contract for one of the tunnels and they were doing one of the tunnels down there? A. Yes. T.2.

Q. I think your classification with them was as an assistant surveyor? A. Yes.

Q. Did you have to study to become an assistant surveyor? A. Yes, I did before.

Q. I think by the time you left the Snowy Mountains Authority you had risen to be an assistant surveyor? A. Yes.

20

Q. What study did you have to do to get that qualification? A. At S.M.A. they had short courses for the surveying section and registered surveyors and qualified engineers taught us. When I started at work I was chainman 3 and then I became chainman 2 and then first class chainman and the next is instrument man who can use the instruments and make some calculations, and the next one is assistant surveyor who works by himself. So I learned surveying actually at the S.M.A.

30

HIS HONOR: Q. Do you have to pass examinations? A. Yes, at the S.M.A.

MR. EVATT Jnr.: Q. Did you like that sort of work, surveying work? A. Yes.

Q. I think it is well known that the Kaiser job cut out - the contract ended, is that right? A. Yes.

Q. And you took a job driving a taxi cab? A. Yes.

Q. That was in Sydney? A. In Sydney.

Q. Approximately what were your average earnings as a taxi cab driver? A. £35 a week.

Q. About £35 a week. You would be driving for long hours or long periods for six days a week or something like that? A. Yes, I did.

Q. Did you like taxi cab driving? A. No, I did not like it.

10 Q. You know Mr. Don Fuller, do you? A. Yes. I did not know him before. I met him when I started to work.

Q. He is the personnel officer at Utah, isn't he? A. No, he is the engineer.

Q. Did you receive this telegram on the 7th June? A. Yes, I did.

Q. That is while you were in Sydney? A. Yes.

(Telegram tendered and marked Exhibit "A".)

20 Q. They offered you a job there as an assistant surveyor at £35 a week with shift allowance, is that right? A. Yes, they did.

Q. We know you started work with them on the 11th June 1962? A. Yes.

Q. So you must have gone down there almost immediately on receipt of the telegram? A. Yes, I did.

Q. I think the 11th June was a Monday and this accident occurred on the 7th July, 1962? A. Yes.

30 Q. Was the job you did with Utah in the five weeks you were with them, or four weeks I think, the same as the sort of work you did for Kaiser's and for the Snowy Mountains Authority? A. Exactly the same.

Q. I will lead on this, Your Honor, unless I am interrupted; there may not be any dispute. You heard me open to the jury about the procedure of carrying out these operations in the tunnel?
A. Yes.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964

continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964
continued

Q. The first stage in the tunnel is that the drillers on the jumbo drill the holes? A. Yes.

Q. For the explosives, is that correct? A. Yes.

HIS HONOR: Q. In the tunnel face? A. In the tunnel face, yes.

MR. EVATT: Q. Incidentally, at the time of your accident yours was the tunnel at Island Bend, was it not? A. Island Bend.

Q. How far in the mountain were you at the time of this accident? I mean only approximately?
A. I cannot quite remember. Between eight or 900 yards.

10

Q. The explosives in the face of the tunnel are detonated, is that correct? A. When?

Q. After everyone has gone away and the charges have been set the explosives are detonated?
A. Yes.

Q. Again I do not think there is any dispute about this - a considerable amount of rock and rubble then remains after the explosion? A. Yes

20

Q. And that has to be cleared away? A. Yes.

Q. Incidentally, the correct dimensions of this tunnel were 21 feet in diameter? A. Yes.

Q. Which would mean, I think, that the tunnel would have to be bigger than that to allow for the concreting and so on? A. Yes. It is for the overbreaks. They could not drill 21 feet exactly and usually it has overbreaks and it is 25 or 26 feet.

Q. After the explosion is there any waiting time before anyone comes back near the face? (Objected to as a general question.)

30

HIS HONOR: I have taken the evidence to be evidence of the procedure as observed by the plaintiff during this period of work from the 11th June, 1962 to the 7th July, 1962, and if it is not that there would have to be some correction.

MR. EVATT: I would like to make it a little wider, Your Honor.

Q. Was the procedure with Utah so far as tunnelling was concerned the same as with the Snowy Mountains Authority and Kaiser's? (Objected to; rejected.)

(Luncheon adjournment)

HIS HONOR: You were asking the plaintiff about the procedure in the tunnel.

10 MR. EVATT: At Utah, Your Honor.

HIS HONOR: Yes.

MR. EVATT: Q. After the explosion is there any fixed period before anyone returns near the vicinity of the face? A. Yes, there is.

Q. What is that? A. Usually the electrician goes off with a foreman or a walker to the face and puts up the lights.

20 Q. I wanted the period of time first of all between the explosion and anyone going near the face? A. 15 minutes regulation time (Objected to; rejected.)

Q. The usual time is what? A. 15 minutes. *regulation time*
(Directed to be struck out.)

Q. After the 15 minutes who are the first persons to go into the area. A. The walker and the electrician.

Q. I think the walker is the shift supervisor?
A. Yes, he is above the foreman.

30 Q. He is the shift supervisor above the foreman and in charge of the particular shift? A. Yes, in charge of the crew.

Q. He also is a staff man, is that right? A. Yes.

Q. What does the walker do when he goes in?
A. When the electrician sets up the lights the walker makes an inspection of the freshly blasted

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964
continued

face and he gives orders to the miners to bar-down and make that freshly blasted area safe.

Q. To make sure that the blasted area is safe, is that correct? A. He makes an inspection and gives an order to the miners to bar-it down and make that area safe.

Q. The barrers-down are what? What do they do? A. First of all they are barring-down the loose rocks.

Q. What do they use? A. A bar.

10

Q. Long bars? A. Very long steel bars.

Q. Different lengths? A. One is six feet and another 12 or 15 feet long.

Q. I have heard of 20 ft. ones. Have you struck those?

HIS HONOR: We want to know what was being used in this period.

MR. EVATT: Q. In this particular period they would use these bars, you say, and what would they do with them? A. When?

20

Q. When they, the barrers-in, go in, what do they do with them? A. They bar down the loose rocks on the roof of the tunnel, first of all, and then they are barring-down on both sides of the tunnel.

Q. What is the purpose of all this barring-down? A. To make the freshly blasted area safe.

Q. What about rocks on the roof of the tunnel which are loose or likely to fall? What do they do about those? A. They usually bar-down the rocks when they can see by eye that they are loose. Then usually they check it by hitting the roof with a steel bar and they can judge if the rock is loose or not by the sound of the rock. If it sounds like an empty drum, if it makes that kind of sound, it means you cannot see by eye that something is cracked.

30

Q. Whilst you were there working in the tunnel was there a usual period of time in which the barrers-down would complete their work from start to finish? A. It takes from half an hour to three-quarters of an hour.

Q. Who goes in after the barrers-down have made it safe? A. To do the surveying work at the face an assistant to the surveyor, the man who helps the surveyor, the chainman, goes up there.

10 Q. The assistant surveyor goes up there —

MR. WARD: Not the assistant surveyor, but the chainman.

MR. EVATT: Q. You had an assistant, did you?
A. I had an assistant. Actually he was a miner, but this time he was acting as a chainman and he was helping me.

20 Q. He would go to the face, would he? A. Yes. He goes up to the face about three-quarters or one hour's time after the blast when he sees they have finished barring-down. He gave a sign with a torch to me because at this time I am in the roof station -- there is a platform that is hanging down from the roof six to 800 ft. behind the face, and he gave me a sign with a torch that he was going up to the face.

Q. This is the usual procedure, with Utah, is it?
A. Yes.

30 Q. You are in a sort of office on a platform as you say, some 600 feet from the face? A. Yes. It is a platform hanging down from the roof.

Q. And the signal he gives you - I think he waves his torch in a circular --- A. When he sees they are finished barring it means he can go up to the face and he can hold his torch on the face - (answer objected to, rejected; question withdrawn).

Q. Is this correct, you get a signal from the chainman and he goes up to the face? Is that correct? A. Yes.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 4

Janos Pataky
Examination
27th February
1964

continued

In the Supreme Court of New South Wales

Plaintiff's Evidence

No. 4

Janos Pataky Examination 27th February 1964 continued

Q. As far as I can understand he calculates the centre of the face. Tell me what he does there?

A. He goes up with a torch to the face. I have a theodolite set up on the roof station and I am going to shoot the centre. Now, it is a very small place and you can see through the theodolite - you can see that far to the face. This man has the torch facing towards the roof station on the face and I can see him through the theodolite and then when the light is in the crossbars I give him "that's O.K." and he makes a mark on the face, and he does that three or four times and he makes three or four marks.

10

Q. You go down to the face to make your own calculations or marks, do you? A. Not yet. In from about half an hour to three quarters of an hour time the surveyor goes up to the face.

Q. After? A. After, I make a mark. When the chainman makes a mark on the face it is half an hour or three-quarters of an hour's time that the surveyor goes up to the face.

20

HIS HONOR: Q. Why does the surveyor wait for half an hour to three quarters of an hour?

A. Because they are still mucking and the muck pile is too high.

MR. EVATT: Q. After about half an hour you go to the face or the assistant surveyor goes to the face and you start your calculations and markings where the next drilling is to go through, is that right? A. Yes. You go up to the face. It has finished barring, and then you go off with the assistant or what we call the chainman up to the face and make the necessary measurements and draw the centre line on the face.

30

Q. You said before lunch that after the blast there are a lot of rocks and rubble on the ground, on the floor of the tunnel, after the blast?

A. Yes.

Q. And in addition I suppose there are those rocks that fall from the tunnel that the barrers-down knock down? A. Yes, they go to the muck pile.

40

Q. They call that pile of rock the muck pile?
A. Yes.

In the Supreme
Court of New
South Wales

Q. For example, at the time of your accident
how high was that muck pile approximately - three
feet, four feet, or five feet? A. Five or six
feet.

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Q. Do these piles of muck and rock usually
vary in height up to what? A. It all depends
how they shoot the tunnel and the height.

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10 Q. After the barrers-down go in they have this
machine called a mucking machine, is that
correct? A. Yes.

Q. Is the mucking machine a machine that runs on
rails? There are railway lines in the tunnel?
A. Yes.

Q. And it scoops up the boulders and the rock
and the gravel? A. Yes.

Q. To be put into the trucks to be taken out
and dumped? A. Yes.

20 Q. Would you have a look at the bottom photo-
graph there? Is that a mucking machine? A. Yes.

(Photograph of machine tendered, objected
to as irrelevant; tender deferred.)

Q. The mucking machine - I think I can lead on
this - is very noisy and vibrates while it is
in use? A. Yes.

30 Q. What is the lighting like in the tunnel at
the face? A. They use floodlights on the side
of the tunnel.

Q. They are eight-hour shifts, are they?
A. Eight-hour shifts.

Q. Three shifts a day? A. Three shifts.

Q. And six days a week? A. Six days a week.

Q. How many times a shift on the average would
this whole operation from blast to blast occur?

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Would there be one blast a shift or two blasts a shift or three blasts a shift? A. About three.

Q. About three blasts a shift? A. A good shift, yes.

Q. What we might call the cycle? A. Yes.

Q. Was the pattern of the cycle that you described at Utah the same as the cycles of work with Kaiser and with the Snowy Mountains Authority? A. It was the same.

Q. I will take you to the time of the accident now. We will start with the blast. There was a blast, is that correct? A. Yes.

10

Q. You, I take it, were in the roof section that you talked about at the time of the blast? A. No. Everybody goes back 2,200 ft. from the face for the blast.

Q. What did you do after the blast? A. After the blast I went to the roof station.

Q. And did you wait there for the signal from your assistant? A. Yes, I was at the roof station waiting for the signal.

20

Q. How long after the blast on this occasion was it that you received the signal approximately? A. Three-quarters of an hour.

Q. You used the theodolite, did you? A. Yes.

Q. In the way you have just described to the jury that you usually used it? A. Yes.

Q. How long after you got the signal did you go to the face approximately? A. Three-quarters of an hour. From half an hour to three quarters of an hour.

30

Q. So you went to the face about $1\frac{1}{2}$ hours after the blast? A. About an hour and three-quarters.

Q. I am sorry, I did not hear that. A. An hour and a half or an hour and three quarters.

Q. When you got to the face had the barrers-down finished? A. Yes.

HIS HONOR: Q. They had finished? A. They had finished barring, yes.

MR. EVATT: Q. Had the bars been put away? A. Yes.

Q. What was the lighting like at the face? A. It could be better.

10 Q. It could be better. Could you use another adjective? (Objected to on the ground that nothing in the particulars relates to lighting; rejected.)

Q. Incidentally, when you got there was the mucking machine going? A. Yes.

Q. Did you go to the face to carry out your jobs or work? A. I went up to the face with the chainman and saw the barrers were finished barring-down and I went up to the face to do my job, to do my work.

20 Q. How long were you doing it before the accident, approximately? A. I was doing it six or seven minutes. I was doing the fine movements actually. I was drawing the line down on the face with a long pole and a paintbrush and I was drawing the line down and I saw a rock falling on me.

Q. You saw a rock falling on you? A. Yes.

Q. What was the size of the rock approximately? A. About like this.

30 HIS HONOR: He has indicated about three feet in diameter.

WITNESS: I don't know. It could be bigger. I got a glance of it as I was drawing the line.

MR. EVATT: Q. The rock fell from the roof, did it? A. Yes, as I was drawing the line here.

HIS HONOR: Q. From where did it fall? A. From the roof.

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Q. Immediately above your head? A. Yes, as I was looking up it was coming on me.

MR. EVATT: Q. I think it hit you a glancing blow and that is about all you remember, is that right? (Not answered.)

HIS HONOR: Q. Where did it hit you? A. It hit me on the helmet here.

MR. EVATT: Q. On the helmet? A. Yes, with a blow and it pushed me back and pinned me on the ground.

10

(Pamphlet tendered, objected to, rejected.)

Q. When you went to the face to do your work was the foreman there or any person in charge?

A. No. (Question objected to, rejected.)

Q. When you went to the face did you see the foreman or any other person in charge? A. No.

Q. I think your next conscious recollection was at the hospital? A. Yes.

Q. That is at the Cooma Hospital? A. In the Cooma District Hospital.

20

Q. Where were you? Were you in bed in plaster?

A. I was in bed, yes in plaster with straps over me, and I cannot recollect things.

HIS HONOR: Q. What time did this accident take place, do you know? A. It was in the morning.

MR. EVATT: Q. Was it daylight or night time when you woke up in the morning, or can't you remember? A. I would not know, because all the curtains were around the window and I was by myself in the room.

30

Q. Were you in any pain at all? A. Yes.

Q. Whereabouts? A. All over my body.

Q. Did you notice any injury to your head? A. Yes.

Q. What was that? A. There was a wound, a sort of wound on my head.

Q. Do you mean a cut? A. A cut, yes.

Q. How long? A. About from here to there.

MR. EVATT: That would be about three inches or thereabouts.

HIS HONOR: He indicated the front part of the top of his head.

10 MR. EVATT: Q. And the scar is still there now, is that right? A. Yes, you can feel it.

Q. They put your legs in plaster, I take it?
A. Yes, it was in plaster and I don't remember - in a pulley; there were pins across the leg and the bone and weights that went up.

Q. Were your legs sticking up in the air?
A. Yes, like that.

Q. At about 45 degrees angle? A. Yes.

Q. With weights and pulleys attached to them?
A. Yes.

20 Q. Incidentally, were your shoulders tied to the other end of the bed? A. No.

Q. Then these weights were on your legs and the idea of that was to keep them straight? A. Yes. The bed was at an angle like that.

Q. The bed was at an angle? A. Yes.

Q. We know that you got out of the hospital on the 14th January. How long were you in that position on the bed, just approximately? Weeks or months or what? A. About five months.

30 Q. During the five months did you just have to lie still? A. Yes. I could not move because the pins were in the bone and if I tried to move it was twisting and I could not move at all.

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Q. They were pins through your bones to join them. I think you had the use of your arms?
A. I think for the first six weeks they fed me; my arm was not broken but I could not lift it up; I had no strength. They fed me for four or five weeks, I think.

Q. What treatment did they give the head?
A. They just washed the cut, the nurse or sister; that is what I had.

Q. The moment you got out of hospital on the 14th January - you had been taken out of this traction by then? A. Yes.

10

Q. Were you still in the plaster? A. No.

Q. What was your condition like when you got out of the Cooma Hospital in January?
A. I was on crutches.

Q. Crutches? A. Yes. It was hard to move, I was all stiff.

Q. Were both legs in plaster? A. No, they were not in plaster.

20

Q. They were not in plaster, but you were on crutches? A. Yes.

Q. Were you given these special boots? A. I got those calipers in December.

Q. I am talking about when you got out of the Cooma Hospital in January 1963. Did you have calipers then? A. Yes.

HIS HONOR: Q. Did you have a caliper on each leg? A. Yes.

MR. EVATT: Q. When did you go to the Hunters Hill hospital, the same day? You went straight by ambulance, was it? A. Yes.

30

Q. You were in the Hunters Hill hospital from the 14th January 1963 until the 22nd July 1963. However, it does seem to me that you were allowed out of that Hunters Hill hospital for periods of days or something like that, is that

right? A. On Sundays.

Q. They let you out on Sundays? A. Yes.

Q. And I think on a couple of other occasions because I know that you saw Dr. Furber on one occasion? A. Yes, and I go back on Monday.

Q. What did they do for you at the Hunters Hill hospital? A. I was having physiotherapy.

Q. I think Miss Bull used to go to the hospital daily, didn't she? A. Yes, she did.

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10 Q. What did she do to you? I mean what do they do? Do they massage you or use electric rays? A. No, I was doing exercises and she was moving my foot and she was moving the toes and trying to bend the knees and that sort of thing.

Q. You had an operation at the Hunters Hill hospital for that muscle at the back of your ankle? A. Yes.

Q. The tendon. How long were you in plaster after that operation? A. Four weeks.

20 Q. When they let you out of the Hunters Hill hospital what was your condition? Were you on crutches? A. Yes.

Q. Again with the calipers that you are wearing now? A. Yes.

Q. And in plaster or no plaster? A. No plaster.

Q. What did they give you for the pain when you first got to Cooma hospital? Did they give you injections or tablets? A. I can't remember.

30 Q. By the time you got out of Cooma hospital were you suffering any pain; that is, when you got out of Cooma hospital? A. Yes.

Q. Whereabouts? A. All the ankles, all the joints.

Q. The ankles? A. Yes, both ankles, both feet. They were swollen.

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Q. How about the knees? A. And aching knees.

Q. How about your head? A. I had frequent headaches.

Q. When did you first notice these headaches?
(Not answered.)

MR. EVATT: Q. I asked you when you first noticed the headaches after the accident?

A. I was having headaches in Cooma.

Q. In the Cooma Hospital? A. Yes. They became worse when I came down to Sydney. 10

Q. Yes, they became worse when you came down to Sydney, but you first noticed them in the hospital? A. Yes.

Q. Did you get them every day or once a week?
A. Not every day.

Q. How often would you get them in the early periods at Cooma Hospital? A. One day, two days - a few days.

Q. How long would they last when you first got them? A. A few days. 20

Q. Did they give you anything for the headaches - injections? A. I used to have tablets.

Q. Did they give you anything for the pain at Cooma Hospital? A. Yes, injections. I do not know how many every day.

Q. Did they do any good? A. That was not for the headache; it was for the pain of the injury.

Q. Did you get any relief from the things they gave you? A. The injections, Yes; but not tablets. 30

Q. What relief did you get from the injections?
A. Some kind of dizziness; I did not feel a sharp pain in my bones.

Q. Can you tell us when it was that you decided

to study for the Matriculation? A. That was in Hunter's Hill Hospital.

Q. Just after you got there? A. Yes.

Q. Why did you want to do it? A. I just did not want to lay in the bed doing nothing.

Q. Did you get the books and enrol for various courses? A. Yes. First of all, the main thing I was going to study was English. I would like to pass the English, and Ancient History.

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10 Q. Any other subjects did you study? A. I studied Maths. I and Maths. II; but mainly I was studying English and Ancient History, which is the hardest, I think.

Q. How long did you manage to keep the studies up? A. I studied nearly three months, I think.

Q. Did you have any trouble or difficulty?

20 A. Yes, I had trouble when I kept studying and thinking over things. I was having headaches and I had to just leave it, and I tried it again and was forgetting what I was studying one day -- not completely, but I had a bad memory.

Q. How was your memory before the accident?

A. It was good.

Q. Were you subject to headaches before the accident? A. No I did not have them.

Q. Did you have any trouble in getting through your Matriculation in High School in Hungary?

A. No.

30 Q. Or in studying for your Assistant Surveyor's Certificate? A. No.

Q. Why did you give up the studies in the end, after five months? A. First of all I was concentrating on things and thinking deeply. I was having headaches. Secondly, I could not quite remember the things I was studying.

Q. Have you a headache now? A. Yes.

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Q. When you got out of the Hunter's Hill Hospital where did you go to live? A. I was transferred from Hunter's Hill down to Cooma, to the Rehabilitation Centre.

Q. You went almost straight away to the Rehabilitation Centre? A. Yes.

Q. How long were you at the Rehabilitation Centre; for approximately a month - two or three? A. I think about four months.

Q. What were the sort of things you had to do in the Rehabilitation Centre? A. Pushing things around and doing gymnastics - pulling weights. 10

Q. Did you like it there? A. And using a bicycle.

Q. Did you like it there at the Rehabilitation Centre? A. Yes, it was all right.

Q. You liked it? A. Yes.

Q. Why was that? A. Because I was doing exercises and I thought I would be getting better. 20

Q. When you went to the Rehabilitation Centre you were walking with crutches and calipers? A. Yes.

Q. Did you manage to walk without crutches at the Rehabilitation Centre.? A. I actually did not manage. I took a few steps and they were pushing me - the man who made the physiotherapy - he used to come around and lift me up and hold me by the shoulder and say "Come on, you can walk" and things like that. I made a few steps, but I had so much pain in the legs. If I was doing it in the morning I could not move all day; I had to sit down - lie down. 30

Q. Did they give you any exercises to do at the Rehabilitation Centre? A. What kind of exercises?

Q. Moving your foot and turning your legs and things like that? A. Yes, they did.

Q. Did you do your best at the Rehabilitation Centre? A. Yes, I did.

Q. When did you leave? I think you said at the end of four months. Why did you leave? A. At the end of the four months the personnel manager from Utah came in and he said to me "From the following Saturday you have to leave the Rehabilitation Centre."

10 Q. Did he give you any reason? A. He did not tell me why.

Q. Was that Mr. Burns, the personnel manager? A. Yes.

Q. A few days later did you receive this letter I show you, from the defendant company, and the document attached to it as well (shown)? A. Yes.

20 (Letter dated 20th November 1963 from defendant company to plaintiff, together with cheque dated 20th November, 1963 payable by the defendant to the plaintiff, tendered and marked Exhibit "B".)

Q. I think you came to Sydney then? A. Yes.

Q. And you found accommodation with some friends? A. Yes.

Q. And you looked after their child? A. Yes.

Q. While the lady of the house was working? A. Yes, she was working too.

30 Q. Have you been looking around for something to do since you have been in Sydney, something to occupy your time? A. Yes. Six weeks ago I went around to several places.

Q. Has someone promised you a small job? A. Yes, from one place; they promised a small job for two days.

Q. Two days a week? A. Two days a week - two half days a week.

Q. What do you have to do? A. Packing shoes in a small shoe factory at Erskineville.

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Q. Where is the factory situated? A. Erskineville

Q. And you live at Enmore? A. Yes.

Q. How are you going to get over there; have any arrangements been made to take you over?

A. A friend of mine where I am living is driving me over there; actually he is Hungarian; he can take me.

Q. Will you be able to sit down and pack the shoes? A. Yes.

Q. And wrap them up? A. Yes.

10

Q. How much are you going to get for this work?
A. £4 for two half days.

HIS HONOR: Q. Is it a permanent job, or temporary? A. No, for a few months.

MR. EVATT: Q. And you will start next week?
A. In March.

Q. Is that the only employment you have been able to find since the accident? A. Yes.

Q. Are you still doing these exercises, moving your feet, or whatever it was you were doing while at the Rehabilitation Centre? A. Every morning - every day, and in the evening too.

20

Q. Have you tried to walk on two walking sticks?
A. Yes, I have tried.

Q. How did you manage on the walking sticks?
A. I am not safe on them

Q. Why is that? A. If I put the whole weight on my legs, on my ankles, they are aching and paining and I cannot hold myself up on the sticks because I start wobbling in my hands. I have no strength in my forearm.

30

Q. And your balance is affected? A. Yes and I am not safe on them.

Q. Start with the beginning of the day; you can sleep in an ordinary bed - take a typical day.
A. Yes, if I can sleep.

- Q. Do you have any trouble sleeping? A. Yes.
- Q. What is the difficulty? A. Nervous. Sometimes I cannot sleep.
- Q. Does the pain worry you at all? A. Yes.
- Q. Whereabouts? A. In the ankles; and like now, it is paining and annoying me.
- Q. What about getting up and getting dressed in the morning; are you able to get dressed yourself? A. Yes, I am.

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- 10 Q. Can you put on these special shoes yourself?
A. Yes, I put the shoes on myself, but I cannot go anywhere without those shoes.
- Q. What do the shoes do for you; what relief do you get? A. The springs on the calipers are keeping my feet up; my feet are trying to go back. They keep my feet up, otherwise both my feet fall down like that (demonstrating), and they give support to the ankles, because in bare feet I cannot stand up. When I put my leg down all the joints are jumping up.
- 20 Q. Have you any control over your feet at all without those special shoes? A. No.
- Q. The doctor gave you the ones you are wearing now, in December last? A. It has been changed once.
- Q. When did you get the ones you have on now?
A. Dr. McMurray ordered them, but I cannot remember when.
- 30 Q. Are you able to make your bed? A. No, I do not make my bed.
- Q. What about having a shower or a bath? A. I cannot have a shower because I cannot stand up. I have a bath. I put a chair next to the bath tub and sit down on the chair and I get undressed, and I have to slide into the bath. I cannot have a shower.
- Q. How do you manage going up and down steps?

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A. It is pretty hard.

Q. Have you tried walking around the block on the crutches, or walking up the street on the crutches for exercise? A. Yes, I try.

Q. How do you manage? A. For the first fifty yards or so it is not so bad; afterwards it is very slow and it is getting painful because I cannot hold myself on the hands.

Q. After you left Cooma Hospital how did these headaches develop; did they get better, remain the same or did that get worse? A. I think they got worse. 10

Q. How often do you get them over the last few months? A. Three or four days - two or three days and it goes away for a few days. I get them periodically.

Q. For how long do they last? A. Three or four days.

Q. Do you get any relief from tablets or headache powders? A. I had tablets, but it does not help. 20

Q. How is your memory these days? A. Not so good.

Q. Could you give us some examples of this? What do you notice about your memory?

A. Reading something or watching something - forgetting things like that; or talking to someone.

Q. That is, inability to learn things? You read something and you will forget it; is that right? A. Yes. 30

Q. What about your memory for things generally, going back before the accident; do you get difficulty in remembering birthdays and things of that nature? Do you understand me. A. Yes, I noticed I was going to ask someone to write home after the accident, four or five months after the accident, and I could not remember my family's address. I had to send someone to Island End to get the address from the books. 40

Q. What about your ability to concentrate; for example reading the papers or reading a book?

A. I get nervous.

Q. In what way? A. Usually I have headaches and I cannot concentrate because I could not get it into my head.

Q. Have you tried to drive a car since the accident. A. Yes.

10 Q. How did you manage? A. I could not drive. I had a car of a friend of mine. Last December I tried to drive and I got no - I sat in the car and I cannot use the brake; I cannot put pressure on.

Q. Tell the jury about the pain you still feel at the present time in your legs and foot? A. At the present time both of my ankles are swelling - a sharp pain around them. I have a numb feeling in both legs; some sort of pressure I feel, and there is a numb feeling around the knees.

20 Q. What about any changes in the weather? A. It is worse in cool weather, or in rain. Both of the ankles are getting stiff, getting really stiff, and cold feelings in them. If I touch my foot it is very cold. All the joints are aching; or in very hot weather it swells up.

Q. You have scars on your body? A. Yes.

Q. Where are they - mainly on your legs and your thigh? A. Yes, on my thigh and on my legs.

30 Q. What about the soles of your feet, the underneath part? A. Under the right foot I cannot bear the smallest touch, because of a feeling like a needle goes in at the bottom of the right foot.

Q. In this accident you cracked or hurt your teeth? A. Yes, all inside here. I asked them to do something, but they did not do anything about them.

Q. And you have bands or fillings on your teeth now? A. No, I have cracks at the bottom, inside.

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Q. I am assuming you are using your calipers and your sticks; how long can you stand up for? Do you make your own meals in the kitchen, or do anything of that nature? A. No, I do not stand up.

Q. I mean with the aid of the crutches? A. If I am standing with the crutches I have to stand like that (demonstrating). I cannot do anything; I just get a glass of water. I cannot cook.

Q. Have you tried to walk with the sticks and crutches at home, to see how you manage? A. I try around the table, but I cannot bear the pain in my ankles. I put my hand on the table and try to walk around it. 10

Q. You said you liked your job with Utah, is that right? A. Yes, I did.

Q. Was there anything said about the possibility of promotion or did you have any plans in that regard (Objected to; rejected.)

Q. Did you have any plans about promotion at Utah? A. Yes. 20

Q. What were they? A. I thought I am going to work there for a long time, for good, doing the surveying, and in time to be a surveyor for Utah.

Q. Do I gather you wanted to be a surveyor for Utah? What did you say? A. I went to work for Utah for a very long time, and I wanted to make a career in the mining - surveying.

Q. You wanted to make a career out of surveying? A. Yes.

Q. In the last week you have been examined by Doctors McMurray, Middleton and Arthurs? On behalf of the defendant company? A. Yes. 30

Q. Before the accident you were very fond of water ski-ing? A. Yes.

Q. Where; on the lakes at Cooma and Narrabeen? A. Narrabeen Lakes.

Q. What did you do at Cooma? A. No, I do not go

at Cooma; I used to go for snow ski-ing.

Q. Dancing? A. Yes.

Q. Did you do much dancing before the accident?

A. Yes.

Q. Table tennis, fishing, swimming, surfing - I have here. You used to like doing all those things? A. Yes.

Q. You are not married? A. No, I am single.

(Witness stood down)

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10

Cross-examination

Cross-Examination

MR. WARD: Q. You had been in mines or tunnels for approximately five years had you? A. Four years.

Q. And you realised of course that the barring down process was the process used to make the front of the tunnel safe? A. Yes.

Q. It was the first step in making it safe? A. Yes.

20

HIS HONOR: When you say "the front of the tunnel" do you mean the face?

MR WARD: Yes, the face.

Q. The charges having gone off and the gas out of the place, the barring down of the face is the first step in making the tunnel safe, isn't it? A. Yes, making the blast area - from the falling rocks.

30

Q. The face to you is what we might call the front wall of the tunnel isn't it? A. I said the blasted area; the freshly blasted area I am talking about.

Q. When the explosion goes off there is blown this almost circular portion of rock ahead; is that right? A. Yes.

Q. And it is blown out over an area of some 12

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feet or so? Perhaps I have not put that to you quite well enough. The amount of rock blown out is about 12 feet deep, isn't it? A. It all depends how long they take.

Q. But as a general picture that is about right?
A. It may be more; it may be less.

Q. Depending upon the ground, of course? A. Yes, on the ground.

Q. That particular shaft you were working on at the time you were injured, was that about the amount of ground that was being blown out, about a 12 ft. area? A. I do not know because I do not go up to the face of the blast when they shoot. I did not go up to the face. I did not know what amount of rock falls down and how long was the muck pile, because I was not there.

10

Q. In any case, the rock that fell on you came from, you say, near the face of the tunnel? A. It came from the roof.

Q. From the roof near the face? A. About 4 feet.

Q. About 4 feet back from the face rock? A. Yes.

20

Q. Was it in the middle portion of the arc?
A. It was in the middle portion.

Q. And you would agree that you knew it was dangerous for you to go into that blasted out area before barring down was finished? A. When I went up to the face the barring down was finished.

Q. I am not asking you that. Will you agree that you knew at that time, that is in July 1962, that it was dangerous for you to go into the blasted out area before barring down had finished?
A. They had finished the barring.

30

HIS HONOR: Q. You are not being asked whether they had finished, or whether they had not finished. What you are being asked is a general question, whether you knew it was dangerous in July 1962 to go into the area where the blasting had taken place, until the barring down had been completed? A. Yes.

MR. WARD: Q. It would be a foolhardy thing for you to do wouldn't it? A. To do what?

Q. It would be a foolish thing for you to do, to go into such an area before the barring down had been finished? A. Yes.

Q. If you were looking after yourself, you would not take the risk of doing it would you? A. I always look after myself.

10 Q. So in that case you would not take the risk of going into the blasted out area before barring down had been finished? A. Yes.

Q. Indeed, you were lectured down there at Island Bend that you were not to do it, weren't you? A. I did not get any kind of lecture that I know.

Q. Did you have time in the short time that you were there with Utah, to attend the meeting of the walker? A. What kind of a meeting?

20 Q. An informal meeting over meals, at which the walkerspoke to you about safety? A. No, there was not any kind of meeting.

Q. Did you hear that those meetings were held from time to time? A. While I was there there was no meeting and I did not attend any kind of meeting. I was not there. Nobody notified me if there were such meetings.

Q. You had only been working really for about four weeks, hadn't you? A. I think I worked five.

30 Q. Somehow or other you found out it was not safe for you to go into that part of the tunnel before barring down was finished? A. When I went up they were barring - they had finished barring when I went up.

Q. We are not dealing with that at the moment. Somehow or other you found out that it was dangerous for you, you said, to go into the area, or you knew it was dangerous - before barring down was finished; that is so, isn't it? A. Yes.

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Q. Will you agree you were told that by somebody?

A. No.

Q. Did you find that out when you were working
for Kaiser-Perini? A. Find out what?

Q. That it was dangerous to go into the blasted
out area before barring down was finished ?

A. To my knowledge nobody goes into the freshly
blasted area before barring down.

Q. Do you recall a worker called Moretti, a
miner? A. I do not remember the name.

10

Q. Did you work with the same men on a shift.
from day to day? A. Yes, I did.

Q. Do you recall that the name of your walker
or supervisor was Mario Valli? A. Yes, for three
weeks. Two weeks I was working in the Eucumbene
side of the tunnel, and for three weeks I was
working that side.

Q. In the last three weeks you were working in
the tunnel where you were hurt? A. Yes.

Q. And at that time you were under Mario Valli?
A. Yes.

20

Q. Do you remember now a miner called Moretti?
A. I do not remember the name.

Q. Do you remember, prior to this shift,
attempting to go into the blasted out area
before barring down had been finished, and been
told by a miner not to? (Objected to as being a
double question.)

Q. I will reframe the question. Do you recall
being told by a miner barring down prior to the
accident, not to go into the blasted out area
before the barring down had finished?

30

HIS HONOR: Was this immediately before the
accident?

MR. WARD: No.

HIS HONOR: Then I think you should make it
quite clear.

MR. WARD: My other question made it quite clear.

Q. Do you recall being told by a miner on days prior to the day you were hurt, that you were not to go into the blasted out area until barring down had finished? (Objected to; allowed.)

A. When I went up to the face the barring down was finished, and nobody told me anything. I went with my chain man. As far as I know -

10 HIS HONOR: Q. Mr. Ward is not asking you about the day of the accident; he is suggesting that some days before the accident, somebody told you not to go into the blasted out area until the barring down was finished. Did anybody tell you that a few days before the accident? A. No.

MR. WARD: Q. Do you recall that when you worked with Kaiser-Perini, they were not as strict about keeping people out of that blasted area? (Objected to; question withdrawn.)

20 (At this stage further hearing adjourned until Friday, 28th February, 1964.)

NO. 5

JANOS PATAKY
(recalled)

Further cross-examined:

HIS HONOR: Q. You are on the oath you took yesterday, you remember? A. Yes.

30 MR. WARD: Q. When you went back to the Snowy you knew you were going back to a job which had a lot of risks in it, did you not? A. No it has no risks.

Q. No risks? A. No.

Q. Is it not a job where you know that rocks fall from tunnels frequently? A. It was not risky. I did it for four years and I did not find it risky.

Q. You would not describe it as one of the

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safest jobs would you - working in a tunnel?

A. It is not unsafe.

Q. Certainly it is not safe if you do not pay attention to what is going on about you? A. I think I always paid attention to what I was doing because at Kaiser - for safety - I won a prize for it.

Q. Just answer my question. You have Mr. Evatt here looking after you and I have the right to ask you questions. (Objected to; allowed).

10

HIS HONOR: Mr. Pataky, listen carefully to the question. It is going to be read out to you again.

Q. Certainly it is not safe if you do not pay attention to what is going on about you? Would that be so? A. I said I always paid attention.

Q. But if you do not pay attention it is not a safe job? A. Yes.

Q. It is still or you mean it is not a safe job? A. It is a safe job.

20

Q. Is it a safe job even if you do not pay attention? Do you mean that? A. No, when you pay attention it is a safe job.

Q. And if you do not pay attention it is not safe, is it? A. It is not safe, yes.

Q. Of course, up in the blasted out area it is unsafe until the area is cleared out? A. Cleared out in what way? Is barred down?

Q. I will put it another way: until it is cleared out for the jumbo to come in? A. No it is not so.

30

Q. Because after barring down is finished and mucking is finished the jumbo comes in does it not? A. It does not.

Q. When does the jumbo come in? A. When they finish mucking they pull the mucker out and the people are going up to the face and cleaning

the invert out and they are going to lay the rail section for the jumbo and for the loco., but the people are working up there, the whole crew, and it is very safe - that is my opinion - without the jumbo.

Q. That is after mucking is finished? A. Before the mucking is finished.

10 Q. Of course there is another thing done then to make the tunnel safe after the mucking is finished, is there not? A. It is safe.

Q. Are not rock bolts used down there? A. They do.

Q. And rock bolts are used to ensure that rocks do not fall down, are they not? A. Yes, but they never put rock bolts exactly right up to the face. It is required by the Snowy Mountains Authority and they put them in places where they are supposed to put the bolts.

20 Q. Rock bolts, you say, are not put on the face?
A. I have not seen them.

Q. But of course the rock bolters go to work when the jumbo is there, do they not? A. Usually they put the rock bolts in from the jumbo. They do not put them close to the face because if they do so when they shoot, when they blast, the whole thing comes down.

Q. Fair enough. So the rock bolts come along a bit behind each blasted-out area? A. It is.

30 Q. And that is because when an area is blasted out you get the debris - do you understand debris? A. No.

Q. Rubbish? A. Yes.

Q. The rocks? A. Yes.

Q. They get thrown up the tunnel quite a way don't they? A. Yes.

Q. It just does not fall down? When the area is blasted out the rocks just don't fall down

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flat, do they? They tend to skew out the tunnel a bit as well? A. I suppose so.

Q. Of course, in that situation you might get the rocks very near the blasted area falling down too with the blast? A. Yes.

Q. You cannot really in your experience be satisfied that all the precautions for keeping a roof safe are taken until the rock bolts put in? A. Sir, I have seen with the Kaiser they used to put sometimes steel nets - they would use rock bolts in the shoulder of the tunnel and they had a steel net right up to the face, even when they were blasting too, and the net was broken in a few spots but they kept putting it up and that was because ---

10

Q. Of course, they could not do that until after barring down was finished, could they? A. But the steel net is already there almost right up to the face all the time.

Q. But it is not in the blasted area? A. No.

20

Q. And it is not right next to the blasted area? A. The steel net is right next.

Q. You think for a moment. A. When they shoot the steel net goes right up to the face and it is going to be blasted.

Q. In any case, what you say is this, that the rock that fell on you came from the blasted area? A. It came from the roof.

Q. Are you sure it was only 4 feet back from the face? A. Positive.

30

Q. You actually heard it about to fall and watched it fall, did you? A. No, I have seen when I was drawing the line down - I have seen a glimpse of it, that something is coming, but I did not hear anything.

Q. I want to take you back a bit. Would you agree that you were injured about quarter or twenty past 5 in the morning? A. I think as I have seen, as I was told, it was a quarter to 6.

Q. You do not agree it was a quarter or twenty past 5. Do you know in fact what time it was?

A. The gentleman on the ----

Q. Do you know yourself what time it was, not from what you were told, but do you yourself know what time it was? A. When I went up to the face it was over half past 5.

10 Q. Now, is this something you are working out or do you have any recollection of seeing a watch? (No answer).

Q. Is your memory good about what happened?

A. Yes, I remember the time.

Q. How do you remember the time? A. My watch.

Q. Why did you find it necessary when I asked you to tell me that somebody told you it was twenty to 6 if you knew the time? A. They told me when they took me out of the tunnel - that was the time.

20 Q. When you got out of the tunnel it was twenty to 6? A. After half past 5, yes, I went to the face.

Q. Just let us get this clear: the person who told you it was a quarter to 6 was a person who was referring to the time you actually got out of the tunnel. Is that right? A. Yes.

Q. Of course, you were over half a mile in the tunnel were you not? A. I think about half a mile, yes.

30 Q. Do you recall coming out of the tunnel?
A. No.

Q. What did you do after the blasting? A. At about 15 or 20 minutes' time from the switch box I went to the roof station.

Q. So you walked about 400 yards I suppose to your station box? A. I cannot remember the distance.

Q. That would be round about what it would.

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normally be, would it not, or would it be a little longer? A. The switch box is usually 2,100 feet from the face and the roof station is 600 feet from the face.

Q. You got there and what work did you do then at the roof station box? A. I adjusted the instrument after each blast. The instrument is on the platform and usually it moves, and I potter around and check up the back site and the plub bob is hanging from the roof station behind it. 10

Q. As I understand your evidence you wait there for about three quarters of an hour before your chainman got to the face of the tunnel to shine the torch back -- would that be right? A. Three quarters of an hour or 1 hour. I am not quite certain.

Q. Three quarters of an hour to an hour? A. Yes.

Q. Of course he holds the torch at the face doesn't he? A. Yes, on the face.

Q. And you give him the mark or you tell him where to place centre? A. Yes, I am holding the torch looking through the theodolite, and I can see his torch facing me and I am giving him a signal which way to put the torch and I give him the O.K. or what to do. 20

Q. And he puts the centre mark on the face of the tunnel? A. Yes, he puts the chalk mark.

Q. Then I think you told us that you waited another three quarters of an hour before you approached the face of the tunnel, the face of the blasted out area. Is that right? A. Yes. 30

Q. Of course when you approached the face of the tunnel mucking was in progress was it not? A. Yes.

Q. In your station box as you looked down towards the face what side of the tunnel was it on? A. I beg your pardon?

Q. On what side of the tunnel, as you looked towards the face, was your station box? A. The

roof station is on the left-hand side as you go towards the face.

Q. And you walked to the face down the left-hand side of the tunnel did you not? A. Yes.

Q. You pass the left of the mucker as you look at the face, is that right? A. The mucker was on my right-hand side but I did not pass the mucker. I stopped at the mucker.

10 Q. Of course, the driver of the mucker sits on the right-hand side of the mucker as you look at the face doesn't he? A. Yes.

Q. And at that time in tunnelling the supervisor usually stands near the right of the mucker superintending the mucking operation and the trucking operation? A. He was not there. (Question objected to).

20 Q. The usual position taken up by a supervisor during mucking is on the right of the mucker as you look at the face of the tunnel, is it not? A. It is up to him.

Q. That is the usual place, is it not? A. I do not know. It is up to the walker. He is in charge of the shift. He can supervise in any site on the left or the right. It does not make any difference.

Q. On the right he has the mucker attendant ready at hand, hasn't he? A. I did not hear?

30 Q. If he stands on the right of the mucker he has the mucker attendant there? A. Yes.

Q. And the man who hitches on the railway trucks? A. He is on the side.

Q. He is also on the right, too, isn't he? A. Yes.

Q. And that is an operation which is going rather swiftly all the time, is it not, truck in and truck out and building up the train? A. It all depends on who the crew is. Some crews work faster and some crews work slower.

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Q. That is where most of the activity is going on is it not? A. I do not agree. I do not agree - not most of it, because on the left-hand side the miners were there making the rail sections; there are usually four or five men make it before they are finished mucking.

Q. They are not doing that on the side of the mucker, are they? A. Behind the mucker.

Q. No one stands and works at the railway building alongside the mucker, do they? A. I did not say the side of the mucker - a few yards behind the mucker, but on the left-hand side. 10

Q. But you will agree, will you not, that the usual thing in your experience is that the supervisor stands on the right-hand side of the mucker as you look at the face? That is so is it not? A. I do not agree.

Q. You just think back a little bit. You see, earlier I rather gathered the impression that you did agree. 20

HIS HONOR: No, Mr. Ward, he did not. What he did say was that the supervisor can stand on the right or the left as he decides.

MR. WARD: But the question which Mr. Evatt objected to and which was answered, Your Honor?

HIS HONOR: I do not think he did, Mr. Ward.

MR. WARD: Q. Of course if he stands on the left of the mucker he has very little control over the mucking and trucking operation, has he? A. I think the mucker-driver usually works by himself. They push the mucker in - two hands help him, and I do not think he needs any more supervising because he knows his job. 30

Q. When you walked past the mucker it was still well back from the face of the tunnel, the face of the blasted out area was it not? A. On which occasion? Is it usual?

Q. No, when you walked past it I meant that day.

HIS HONOR: At the time you had your accident.

WITNESS: At the time I had my accident; No it was not very far from the face.

MR. WARD: Q. Will you agree it was 30ft. back at least from the blasted area? A. No.

Q. How far do you say it was? A. I think it was closer because the muck pile was very low.

Q. Your memory about this is quite good, is it? (Not answered).

10 Q. Your memory about this is quite good, is it? A. Fairly good.

HIS HONOR: Mr. Pataky, you said the rock pile was very - A. Low.

MR. WARD: Q. How high up were you going to make your mark on the tunnel? A. The mark has got to be done on the face from the roof right down to the bottom of the vertical line.

20 Q. How big a stick were you using? A. About 12 feet long with a paint brush tied to the end of it.

Q. And of course you certainly climb up on to the muck pile to get where you were? A. Yes, I was on the muck pile.

Q. It must be clear from that that the mucker was far enough back not to be disturbing the rocks in the pile near the face. A. I did not quite understand.

30 Q. The mucker must have been far enough back not to be disturbing the muck pile at the face? A. It was not very far, no.

Q. You see, if the mucker goes in the rocks tend to fall to the front, don't they, back towards the mucker? A. But they are falling on both sides, too, not all the time in the middle.

Q. That is right, the mucker goes across the tunnel slowly from one side to the other? A. Yes.

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Q. But the tendency is for the rocks to fall back towards the mucker? A. Yes.

Q. So at the time you went up on to the muck pile the mucker was not close enough to be disturbing the rocks in the muck pile. Would not that be so? A. I could not tell you. It was quite close and the muck pile always moves when they are mucking.

Q. You cannot recall what the situation was that day? A. I think the mucker was pretty close - pretty close there. 10

Q. Of course it was part of your job to keep a record of the times of certain parts of the cycle and certain other technical details relating to the cycle? A. Yes.

Q. And presumably you made those entries as the events occurred? I mean if something happened you made a note of the time? A. Yes.

Q. That was your duty to make a note of it - right? A. Yes. 20

Q. You would not leave it until the end of the shift and then go back and scratch your head and say "When did this take place" and "When did that take place"? A. I would not.

Q. You would do it as it happened would you not? A. No, I used to have a very little notebook with me and a pencil and if something happened I used to put it in it and usually at the end of the shift - I did not want to make more copies and I used to put it down what time they started and things like that from this small sheet of paper. 30

Q. I put it to you that the time of the blast that morning was 4.30 a.m. Do you recall that? A. Four o'clock, a quarter to 4.

HIS HONOR: No, half past 4.

MR. WARD: Q. Half past 4, the time of blast - do you recall that? A. I think it was 4 o'clock.

Q. Is this a guess? Are you guessing or do you really remember what time it was? A. I cannot remember 4 o'clock or a quarter to 4.

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Q. You would not record a wrong time for a blast would you? A. Sir, it was wrong time, No - I think it was a quarter to 4, four o'clock.

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Q. Would you have a look at this document? Do you see the pencil figuring on that document. Just have a look at the pencil figuring up here. Whose writing is that? A. It is not mine.

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Q. Not yours? A. That is not mine.

Q. You kept a sheet like that, though, did you not?

MR. EVATT: Your Honor, I thought the witness was being shown his own document.

HIS HONOR: I do not know what document he is being shown but there is nothing wrong with what Mr. Ward is doing

MR. WARD: Q. It was part of your job to keep a document like that was it not? (Not answered).

Q. I am not asking you to look at all those things on it. The question is simple - it was part of your job to keep a document like that, was it not? A. Yes.

Q. That is not the first time you have seen a sheet like that with that type of information on it? A. No.

Q. Where did you keep that type of document - up in your roof station? A. The roof station usually, yes, but I had a little notebook.

Q. That was your job, was it not, to keep a document like the one I have just shown you? A. Yes.

Q. And what you did was to record on it information - times and technical information? A. Yes.

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Q. As the document required you to? A. Yes.

Q. Now, one of the things on it was the time of
blast, was it not - on that type of document?

A. Yes.

Q. And it was your job to fill in on that type
of document the time the blast went off, was it
not? A. We did not give them - to within 15
minutes.

Q. Would anything do, is that what you are
saying? A. Not anything do, but of drilling or
mucking, a good half-hour. 10

Q. You were a careful employee, you tell us?
A. Yes, I was.

Q. You were interested in being a surveyor's
assistant were you not? A. Yes.

Q. And a competent one? A. Yes.

Q. When the blast went off did you not always
look at your watch and record the time, make a
note of the time? A. Yes, a note I used to make
of the time. 20

Q. Then you would go back to your roof station
and you would record the time would you not?
A. Yes, sometimes. Sometimes in the morning or in
the afternoon when they finish work you put the
times.

Q. I thought you told us that you made these
notes when the things happened? A. Yes, in a
notebook.

HIS HONOR: What he said is that he had a note-
book and sometimes he wrote these things in the
notebook as they happened, and at a later stage
he would put them into the sheet. 30

MR. WARD: Q. How much later? A. It all depends
on what I am doing. If I am counting rock bolts or
doing something with the instrument or cleaning
something, I do it later. It all depends.
Sometimes I put it straight down. It all depends
how your job is.

Q. Even though this type of sheet was kept in your roof station? A. Yes.

Q. There is no doubt about it that it was your job as the Assistant Surveyor to keep the sheet, was it not? A. I did not quite understand.

Q. It was your job to keep the sheet - yours.
A. You mean keep the record?

Q. Yes? A. Yes.

(Document shown to witness by Mr. Ward
m.f.i. "1".)

10

Q. (Witness handed blank piece of paper). Would you now mind writing your name? A. The name of what?

Q. Have you a pencil there?

HIS HONOR: He has a Biro. Do you prefer a pencil.

MR. WARD: A pencil, Yes, Your Honor. (Pencil handed to witness).

20

Q. I would like you to write your name? A. My name?

Q. Yes. And I would like you to write tan. You know what that is don't you? A. Yes.

Q. Sec.? A. 10 a.m.

Q. No, sec.

HIS HONOR: Write tan first.

WITNESS: Sec.

MR. WARD: Then write cos.; 28 - in figures - 44; 33; 100 and 30? A. Yes.

30

(Piece of paper marked by witness, as above,
m.f.i. "2".)

Q. Did anyone else ever write up these reports for you? A. They used to write up for the other

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surveyor. If I go down the shift and he is not there I used to finish up writing for him or he would finish up writing for me.

Q. Was there another surveyor about that day?

A. There is supposed to be somebody when I had the accident.

Q. Do you recall if that day you were writing up the report at all? A. I can't tell you.

HIS HONOR: Mr. Pataky, what time did you start work the day you were injured? A. Your Honor we started at midnight. 10

MR. WARD: Q. When you started you took over round blast time did you not? A. I think they were mucking.

Q. And you finished that cycle and it was during the second cycle that you were injured was it not? A. Yes.

Q. If you would look at this document, m.f.i. "1" again, will you agree that the entries on it up till the blasting time of the second cycle seem to have been made by the same person or the same hand? (Objected to; allowed) You agree that the entries in the document up to the entry relating to the time of blast in the second cycle appear to have been made by the same hand? A. Yes. 20

Q. And thereafter entries appear to have been made by a different hand? A. Yes.

Q. In fact in ink after the time of the blast entry and in pencil prior to that. That is right, is it not? A. Yes. 30

Q. Now, as this type of form was kept in your roof station can you tell me whose figuring do you say it is in pencil on that? While you are thinking about it let me put it this way: it appears to be the figuring of somebody who is used to writing figures, does it not? A. Yes (Question objected to; allowed). The walker is used to writing too, the foreman.

Q. When you were learning your surveying or your instrument work etc., were you given any instructions on the preferable way for you to print and write figures? A. No.

Q. Do you know from your experience there who might have had access to that type of form and who could have printed or made those entries in pencil there?

10 HIS HONOR: Do you mean who did make it or could have, Mr. Ward?

MR. WARD: Q. Could have, having regard to the figuring? A. The chainman or the foreman.

Q. It could be your chainman or the foreman?
A. The walker or the foreman, I said.

Q. Can you recall from your recollection whose printing that might be? A. I could not tell you.

20 Q. Having regard to the type of rock you were going through at that time can you recall it was taking a little over 4 hours to do the cycle?
A. I will not agree with that because it all depends how the miners are, how good they are. Sometimes it takes less, and it takes $3\frac{1}{2}$ hours. It all depends on the shift how good the workers are and how good the muckers out are.

30 Q. You have not any recollection at that time - that is what I was wondering about, not generally? Is that the position? You cannot recall how long the cycles were taking at that time? If you cannot, just tell us? A. You mean from the drilling or finish mucking, or from the finish drilling to the blasting?

Q. Take it from one blasting to the next blasting? A. One blast to the next blast, it takes about $3\frac{1}{2}$ hours I would say.

Q. Sometimes it takes $4\frac{1}{2}$ does it not? A. It all depends how is the rock and how long they drill it.

Q. Of course, you do not agree, do you, that the

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South Wales

Plaintiff's
Evidence

No. 5

Janos Pataky
Further cross-
examination
28th February
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continued

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blasting took place at 4.30 that morning, the last blasting before you were injured? A. As I said before, I think it was 4 o'clock.

Q. But you would not dispute it could have been 4.30 would you? A. I think it was 4 o'clock.

Q. Can you recall if that morning you were making entries in a notebook or you were making them on the sheet provided? A. I think I was making them in the notebook.

Q. Do you know where the notebook is? A. I have lost everything. They cut off everything at Island Bend off me and that is how they took me to Cooma Hospital. 10

Q. You would have carried it around in your pocket or in the roof station? A. In the pocket in the trousers with the log book.

Q. As you approached the muck pile just prior to your injury, did you see men in the blasted out area? A. Two men were standing on the right corner, just on the front of the muck pile, near the lights on the edge of the muck pile, on the right-hand side. 20

Q. So you mean as you look at the face, right up at the face on the right there were two men? A. No, on the muck pile on the right-hand side.

Q. What we might call the front -- A. The front end of the muck pile.

Q. Are they the only two men you saw? A. I had seen the mucker driver.

Q. I am talking about in the blasted area? A. I have seen them in the front part of the muck pile on the right-hand side, two men standing, and one was with me who was assisting on the muck pile. That is what I recall. One man was assisting me. 30

Q. That is your chainman? A. Yes.

Q. Did you recognise the names of any of those men you saw there? A. I could not say.

Q. What were they doing? A. Standing.

Q. Just standing? A. Yes, talking.

Q. Not working? A. No.

Q. So these men -- let us get this clear -- were standing having a chat on the muck pile near where the muckers work, is that what you say?

A. On the front part of the muck pile on the right-hand side. (Question objected to).

10 HIS HONOR: People might be talking but they might be talking about their work and unless he heard what they were talking about he could not say whether they were talking about their work or having a chat.

MR. WARD: Q. There were two men talking near the front of the muck pile you say which would put them near the mucker, would it not. If you you have the mucker as far forward as you say it was? A. I beg your pardon?

20 Q. These two men who were talking were not up at the face of the tunnel? A. On the front part of the muck pile on the right-hand side.

Q. By the front part of the muck pile you mean the part of the muck pile down nearest the mucker.

Q. And what -- these two men were standing there talking just at the portion of the muck pile nearest to the mucker? A. Yes.

Q. And the mucker was working? A. Yes.

30 Q. Did you see anything in their hands -- in the hands of these two men? A. No.

Q. You did not see three men in there, did you?
A. I remember two men.

Q. You recollect at that shift there were three men doing the barring down? A. I did not see anybody barring, but I have seen these two men standing up there when I went up there.

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Q. You walked straight up the muck pile to the face and started to make your mark, is that right? A. On the left-hand side is my assistant. We went up on the left-hand side and then put the gear down what we had, the things, and started to mark the face with the paint and brush, and things like that, and tape.

Q. Did you notice where the bars were? A. Two men I have seen standing on the right-hand side.

Q. They would be barrers down would they?

10

A. Yes, I suppose.

Q. You remember they were barrers down? A. No.

Q. You are just making an assumption - guessing that they were barrers down? A. I am not guessing, but if they were not barrers what would they talk about then?

Q. I beg your pardon? A. If they were not barrers, what were they doing on the muck pile? They had finished barring or were talking or coming there.

20

Q. You do not know what they were but what you say is no one would be up there unless he was a barrer down. Is that what you mean? A. I mean no one was barring and they were barrers.

Q. That is what we want you to explain to us. You do not know exactly what those two men were but you say they would not be there unless they were the barring-down type of men?

HIS HONOR: Q. Mr. Pataky, Mr. Ward is asking you that although you say you did not see anybody barring down when you were walking up to the face? A. Yes, Your Honor.

30

Q. He is saying do you say that those men must have been barrers-down, those two men, because only men who were barrers-down would have any business to be where you say you saw them? A. Yes, that is what I think.

MR. WARD: Q. When you saw these men there you did not speak to them? A. No.

Q. Of course you would agree that when the barrers-down finished their work of barring-down they just don't stay normally on the muck pile do they? A. I think this time was the tea time in the tunnel so they could not do anything else.

Q. The mucker was still working was it not?
A. The mucker and one boy who was with the mucker who was whistling.

10 Q. I mean when the mucker is working you have not only the mucker operator but you have got the man who hitches on the trucks. A. Yes, and whistling.

Q. I beg your pardon? A. With a whistle.

Q. You have at least three men working around that mucking machine and train area, have you not? A. This time I have seen the mucker driver and the men, the miner who was whistling and giving the muck course to the mucker.

20 Q. Well, it was not tea time for them was it?
A. It was not tea time for them. Maybe they had it before.

Q. And it was not tea time for you? A. No.

Q. When you saw these two barrers-down there I think you led us to believe that they just were not idly chatting - you did not get that impression, did you? A. Sir, it is not my business. I was a surveyor to the engineering part and the other part, what the miners are doing belongs to the walker or the foreman.
30

Q. If you knew it was a risk for you and a danger for you to go on the muck pile before barring down had finished and you saw these two men there, why did you not ask them if the barring-down was finished? A. Because when I went up there there was nobody barring up there and they were standing up and no one said to me anything, and I went up to the face.

40 Q. But you were telling us that you believed it was tea time and that is why they were just

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standing there. A. The rest of the crew went for tea time the mucker driver was working, and one man, and I have seen these two men, this time you are talking about. And these two men were talking when I went up to the face with Mr. Soccol who helped me, and that is all I can tell you.

Q. Where did the barrers-down put their bars normally after they have finished barring down in that shift or in that team? A. Several places. 10
Sometimes they just put it to the side of the wall. Sometimes they carry it back to the jumbo. It all depends. Sometimes they leave it at the muck pile on the sides.

Q. They would not leave it on the muck pile if the mucker was still working? A. No just to the side of the mucker. It all depends, anyway.

Q. Do you remember anyone getting the rock off you?

A. No. What I can remember clearly is that I was in hospital. I do not know what time it is. 20

Q. I think you told us yesterday you remember the rock falling on your legs and being pinned. You remember that don't you? A. I had a glimpse of something coming from the roof and I fell on my back and that is what I remember -- I was hit.

Q. You remember your legs being hit don't you?
A. I think I said all my body was aching.

Q. You do not remember anyone trying to get the rock off you? A. No. 30

(Short adjournment).

Q. What was the name of the taxi owner you worked for. A. Mr. Birdsall.

Q. At Bondi Junction? A. No, Elizabeth Bay. Ebley Street, Elizabeth Bay.

Q. Of course when you went down to Utah as a result of that telegram you filled in an application form did you not, an application for

employment form? A. When I arrived I filled in some kind of form but I did not read it before.

Q. You did not read it before you filled it in?
A. No. When I got the telegram I went to Utah after the telegram and I had to sign some sort of paper when I started to work.

Q. You had to give some sort of details of your past, did you not? A. I cannot remember.

10 Q. But you remember filling in a form don't you? A. I think I signed one that I was employed by Birdsall, and others for the Hospital and Medical Benefits.

Q. And you filled it in did you not? A. Yes.

Q. I mean you wrote and printed quite well, did you not? A. Yes.

Q. Will you agree that that is the application for employment form that you filled in and signed? A. Yes.

20 Q. And the printing and writing and figuring on that form is yours is it not? A. Yes.

(Employment application form m.f.i. "3").

Q. I now want you to print your name and write the figure "6" three times on that document which is m.f.i.? A. Yes.

Q. Do you think you write the same now as you used to? A. Yes, I think so.

Q. All the time? A. I suppose so.

Q. I beg your pardon? A. Yes.

30 Q. Did you take extra care when you wrote up the shift report? A. No.

Q. I want you now to have a look at the employment application m.f.i. "3" and also m.f.i. "1", the document which you said used to be kept in your roof station. The document you kept in your roof station was called a shift report, was it not? A. Yes.

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Q. Look at the shift report m.f.i. "1" and m.f.i. "3", your application for employment form, and will you agree that you filled in the shift report in pencil where it appears?

A. With a pen or pencil?

Q. Having a look at the printing and figuring here on the employment application? A. Yes.

Q. Will you agree now that this shift report up to the record of the time blasted in cycle 2 is in the same writing or printing? A. With the pencil, I think this may be mine. 10

Q. The pencil could be yours? A. Yes.

Q. Now, Sir, isn't it yours? A. I think it is mine, the pencil - not the pen.

Q. Just to make sure, you will now agree, will you, that the pencil under cycle 1 of your shift report and the pencilling under cycle 2 of the shift report is your pencilling? A. Yes.

Q. And what you have done of course is record at the time of the blasting in the second cycle was at 4.30 have you not? A. I should not say it was exactly 4.30. I cannot say that. 20

Q. That is what you recorded at the time, is it not? A. Yes.

Q. You have certainly not had access to one of these shift reports since your accident have you? A. No.

Q. I mean you made that entry before your injury? A. Yes.

Q. But you did not make the entry when mucking started did you? A. I did not know. 30

Q. Just to make sure, do you think the next entry in ink on that form was made by you or not? A. No.

Q. It was not made by you. Now will you not agree that the time of blasting was 4.30, now you have seen that form? A. I do not know if it

can be 15 or 20 minutes before. I used to put the time within half an hour, as I said before.

Q. In making that form out you would not be 5 or 10 wrong in the number of charges, or the number of holes which might have been drilled, would you? A. All those things I was told by the foreman.

10 Q. The more likely thing is that you would be accurate, that you, Mr. Pataky, would be accurate in keeping the form. That is the more likely thing is it not? (No answer).

Q. Do you understand what I mean? A. Yes, but sometimes if they are slow with mucking or slow with drilling you put 15 minutes left or right. It quite often happens.

Q. At Hunter's Hill you were visited by the Personnel Officer, Mr. Burns from Utah, were you not? A. Yes he was there for a few seconds, yes.

20 Q. For what? A. For a few seconds, yes. He came to see me for a minute.

Q. The day he came and saw you were you not doing Maths. on your bed. A. No.

Q. I beg your pardon? A. What I was doing?

Q. Mathematics? A. No.

Q. Do you recall that you were doing some figuring? A. No.

30 Q. What were you doing? A. I think I got a book on the bed or on the table of some Ancient History or something.

Q. It was on the table only? Were you not reading it? A. I could not say whether it was on the bed or the table or the chair, but there were some books, not Maths. books, but I think they were ancient history or English history or something like that.

Q. But you did have maths. books there did you not? A. No, I do not think so on the table

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because I tried to read the English and
Ancient History.

Q. But you did talk to him about being bored at
Hunter's Hill did you not? You did talk to him
about being unhappy at Hunter's Hill. I will put
it another way, you did talk to him about wanting
to get away out of that hospital? A. Yes, I
thought I would like to go to a better place
where I get better treatment or something.
When he came I think I was still in plaster. 10

Q. You wanted to get back to Cooma did you not?
A. I do not think I said that. I think I said
I would like to go to a better hospital.

Q. Shortly after his visit you were taken back
to Cooma? A. I was taken back to Cooma, yes.

Q. And you were met by him and Mr. Fuller?
A. Yes.

Q. He was your immediate boss, so to speak,
wasn't he, Mr. Fuller? A. Yes, I saw him a few
times. 20

Q. And you were allowed to stay in Cooma and
you went to the Rehabilitation Centre? A. Yes.

Q. And for some time at the Rehabilitation
Centre you were doing all right weren't you?
A. Yes.

Q. And you were improving? A. Yes.

Q. And you wanted to do well? A. I always
wanted, yes.

Q. At the beginning of November 1963 you came to
Sydney did you not? A. I do not remember. 30

Q. You remember leaving the Rehabilitation
Centre for a trip in Sydney don't you? A. I do
not know what was the exact time. Once they sent
me to Dr. McMurray.

Q. And you saw other people in Sydney on that
occasion did you not? A. I can't remember. I
think I saw Dr. McMurray.

Q. You remember seeing Dr. McMurray. Who else did you see? A. Maybe I have seen a Dr. Furber, but I am not quite sure.

Q. Did you see anyone else? A. I do not think so. I do not think so.

Q. The trip I am referring to is the last one before you were discharged from the Centre. Do you remember the one now? A. I cannot quite recollect. I remember I came to Sydney.

10 Q. You remember you came back by plane and Mr. Burns met you at the airport. A. I came to Sydney to see Dr. McMurray. That is what I can tell you.

Q. Do you remember coming back by plane and Mr. Burns meeting you at Cooma Airport? A. I think I have seen Mr. Burns at the Airport, Yes.

Q. Who else did you see in Sydney on that trip? A. I think Dr. McMurray or Dr. Furber.

20 Q. When you got back you did not do as much at the Centre as you had been doing before you went to Sydney did you? A. I do not agree with you because I was doing all the time my best as far as I could do that.

30 Q. Whether you could or could not do it well, will you agree that you were not doing what you were asked to do as well after you came back from Sydney as before you went down to Sydney? A. As I said, I always done what I was asked and what I could do. If I could not do something I just could not do it.

Q. Do you remember you told Mr. Evatt that you were discharged by letter and you were not given any reasons? Do you remember telling him that? A. I do not think there was any reason.

Q. Do you remember Mr. Burns speaking to you in the presence of a Mr. McCready and Mr. Shipp at the Centre some few days prior to your discharge from the Centre? A. Yes.

40 Q. And on that occasion Mr. Burns told you something to this effect that it did not appear

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you were trying since your return from Sydney?

A. No he did not say that.

Q. Did he say anything like that? A. He said to me "Johnny, Utah, the Company, is not going to pay any more for the Rehabilitation Centre." and he said "On the weekend you are discharged".

Q. He gave you no reason. Do you remember when you went down there from Hunter's Hill and stayed at the Centre, that Mr. Burns used to come in and see you from time to time didn't he? A. A few times, yes. 10

Q. More than twice? A. Maybe twice, maybe three times.

Q. He was taking an interest in you, wasn't he? A. He was coming to see everybody. There were others there from Utah.

Q. He was taking an interest in you wasn't he? (Objected to; disallowed).

Q. Did you form the impression that he was interested in how you were progressing? A. He was coming to see everybody there. There were plenty of people from Utah in the Rehab. and he used to see everybody on the occasions that he came down as well as he would see me. 20

Q. And he was friendly to you? A. He was friendly to everybody.

Q. Do you remember you were told on one occasion that whenever you felt like it - this is by Burns - the company would provide a job for you? A. No (Question objected to; allowed). 30

HIS HONOR: Can you specify the period when this conversation took place?

MR. WARD: After his return to the centre, Your Honor.

Q. After you came back from Hunter's Hill to the centre you recall Mr. Burns telling you that when you felt like it work would be provided for you by the company? A. No.

Q. Do you remember any suggestion being made to you in any way by Mr. Burns that work would be provided for you? A. No.

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Q. Do you remember any suggestion that work would be provided even if it was only pencilling work for the company? A. No. (Question objected to; allowed). No.

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Q. No what? A. I answered the question.

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10 Q. I did not quite finish it actually; at any time when you were at the centre do you remember anything being said by Mr. Burns that even if it were only pencilling at the Rehabilitation Centre while you were there, the company could arrange for it? A. No.

Q. I suppose on your experience on the Snowy you realise it is a most unusual thing for a man to be discharged from the Rehabilitation Centre is it not? (Objected to; rejected).

20 Q. Would you have a look at this document? That is your signature on that document is it not?
A. Yes, that is my signature but the writing I do not know. The signature is mine.

Q. That is the engagement notice that you were taken on with, that you had to present to Mr. Fuller? A. Yes.

(Engagement notice m.f.i. "4".)

30 Q. Had you ever during the time you were taxi driving applied for further work on the Snowy?
A. Yes, I think once with the Snowy Mountains Authority in Cooma in the office.

Q. How long were you taxi driving - two years, was it not? A. I think about two years.

Q. At any rate, the information you put on your application for employment form would be accurate would it not? A. I do not say that.

Q. The information on m.f.i. "3" would be accurate would it? A. I think that is what I said.

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Q. When you returned to Cooma from that trip to Sydney did you feel just as well as when you went to Sydney? A. I am sorry, I do not understand that question.

Q. When you came back from Sydney after seeing Dr. McMurray - do you remember the one I am referring to (No answer).

Q. In November 1963? A. Yes.

Q. You remember when you came back did you feel just as well as when you went to Sydney? A. I think I felt - Yes, I did.

10

Q. Nothing happened to you up in Sydney? A. No.

Q. And it is true, is it not, that you used to walk on your own without sticks at the Rehabilitation Centre (No answer)

Q. I am not suggesting that you walked ordinarily but you tried getting around without your sticks? A. Not quite. I done a few steps - actually I had been forced by Mr. Shipp who was the physio instructor.

20

Q. When you say forced, you mean? A. He lift me up and say "You have to go". And I say "I cannot stand on my leg, it is all aching and pain", and he was just pushing me and I took a few steps.

Q. And after you came back from that trip to Sydney you would not do that any more, would you? A. I done a few steps. And I could not do it for the pain before I was to Sydney and after when I was in Sydney, and all the time.

30

Q. Where have you applied for work this year in the last six weeks?

MR. EVATT: I do not think that was his evidence.

MR. WARD: Page 37: Have you been looking around for something to do since you have been in Sydney, something to occupy your time. This is by Mr. Evatt, and the answer was "Yes, six weeks ago I went around to several places.

MR. EVATT: That is so.

MR. WARD: Q. Which were the places you went to? A. That they promised me something.

Q. No, the places you went to looking for work?

A. Addison Road, Marrickville.

Q. What place was that? A. I could not tell you the name of the firm but they are polishing refrigerators and things like that.

10 Q. When did you go there? A. Seven or eight weeks.

Q. Just after New Year? A. It could be.

Q. Before or after New Year? A. I think it was before Christmas. I cannot remember.

Q. I suppose you were told that they closed down for Christmas were you not? A. No.

Q. It was a factory was it? A. It is not a factory. It is a small sort of factory.

20 Q. Did you know the man who owned it? A. No. But I know someone who works there and that is how I went there to get something.

Q. And you just went up there? A. And I saw the man in charge and I talked to him.

Q. Where else have you been? A. I went to a small shoe factory at Erskineville.

Q. That is the one where you have been offered work? A. Yes.

Q. Have you been anywhere else? A. I can't remember.

30 Q. Have you made any enquiries about the Mt. Wilga Rehabilitation Centre? A. I beg your pardon?

Q. Have you heard about the Mt. Wilga Rehabilitation Centre? A. Yes.

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Q. Have you made any enquiries there? A. They sent me there.

Q. When were you sent there? A. I think last year. I could not remember when. Once the ambulance came and picked me up; they did not tell me anything and they drove me somewhere. I did not know where I was.

Q. This was while you were at Hunter's Hill?
A. Yes, at Hunter's Hill and they asked me about things there, and they sent me back to Hunter's Hill and that was it. 10

Q. You went up there because the doctor wanted you to go there, no doubt? A. I do not know. I was not told. I was told to get dressed, and I did, and the ambulance came up and took me there.

Q. Of course you feel you are going to do some work in the future, don't you? A. I have been promised work.

Q. You want to work don't you? A. What I can do, yes. 20

Q. I suggest nothing else, but do you want to do that? A. I want to do that, because I have something next month in March.

Q. And is that all you are going to do, these two half-days a week, or are you going to look for other work? A. I am going to do that thing and stay at home where I am living at my friend's place and look after the kiddies and sort of thing.

Q. Have you ever tried getting on public transport, on a bus or train? A. I cannot get on it. I could not get on it. 30

Q. You do go up stairs don't you? A. Slowly, yes.

Q. If you get this job in the shoe factory out there you are not going to worry about any other work, is that the position? A. I should not put it like that. I think that is what I would be able to do.

Q. For the rest of your days that is not going to be all you want to do, is it? (Following question and answer read to witness: Q. And is that all you are going to do, these two half-days a week are you going to look for other work?
A. I am going to do that thing, and stay at home where I am living at my friend's place and look after the kiddies and sort of thing).

10 Q. Is that all you look forward to in the future?
A. It is not a matter of looking, but that is what I think I can do.

Q. If you found you could do that would you try and do some other work as well? A. I do not know.

Q. Are you going to look for any other work?
A. If I will be able to do something like that I would do something better than two half-days.

20 Q. I suppose you had a good training to become a pilot? A. I think so - the car; I can't remember, not the aeroplane.

Q. When you got the Leaving Certificate in Hungary you had no trouble getting that, we understand. That is right is it not? A. As you say.

Q. You consider yourself reasonably bright don't you? A. No I do not think so.

Q. Are you worried about this case? A. I am not worrying about it, my legs are aching and my head is aching.

30 Q. You find you get more of this when you think about it, do you? A. It is not what I think; it is what I feel; I am here being asked, and I do not feel well.

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RE-EXAMINATION:

Re-Examination

MR. EVART JUN.: Q. There are only a few matters I will have to ask you Mr. Pataky and then we can let you go. I would like to ask you in view of Mr. Ward's questions, how long your job would have lasted on the face had the rock not fallen.

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I think you said you were there 6 or 7 minutes, if my memory serves me correct. How long did this job normally take to mark the wall. A. About twenty minutes to half an hour.

Q. I do not remember asking you this in chief, but Mr. Ward cross-examined about it, and so there is no mistake, at the time this rock fell on you your assistant, the chainman, was standing beside you at the face? A. Yes, he was holding the small bucket of paint.

10

Q. The rock missed him, did it? A. Yes.

Q. You were asked many questions about your knowledge of safety and whether you would do the safe thing or not do a dangerous thing in these tunnels - many questions. Now, did you always have regard for your own safety in the tunnels? A. Yes, I always had. In 19----

Q. I was going to ask you that. Were you awarded a medal for safety in the mine when you were with Kaisers? (Objected to as irrelevant; rejected.)

20

HIS HONOR: What he did with someone else under some other conditions is not really relevant here. He has sworn in answer to Mr. Ward that he always looked after his own safety and he has sworn in answer to you the same thing.

MR. EVATT: Q. When the barrers-down go in after the 15 minutes or whatever is the waiting period, is it the practice for them to continue working until they are finished, or do they stop work whilst they are carrying out the barring-down operations, or what is the position? (Objected to; admitted if limited in scope).

30

Q. With this team with Utahs, that you were with? A. The barrers, usually they do the job as quick, you know, as it is possible to do to gain a bit of time because afterwards they will not do anything until the mucking is finished.

Q. I am sorry, I just lost that. You said they would work quickly, I think? A. Yes, because they can have a rest.

40

Q. When do they have a rest? A. When they are finished barring the barrers, if they are barring down as quickly as possible, when they finish barring, they have a time off.

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No. 5

Janos Pataky
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10 Q. Is this the position in the tunnel, that the quicker the barring down in the tunnel is finished, the quicker they can go ahead with the other stages of the work? A. They finish the barring quicker and they can have spare time when they work when they are mucking out.

HIS HONOR: Q. Mr. Pataky, what is really being asked of you is this: is the barring down a continuous operation or would the men in this particular team you worked with have knocked off in the middle of it or before it was finished for some reason, like morning tea or anything like that? A. No they bar down as quickly as possible and they do not stop till they finish.

20 MR. EVATT: Q. This incidentally would also be important for the jury's consideration - I think the miners in the tunnel are paid on piece work, so much a foot? (Objected to; rejected).

30 Q. What did they do for you at Mt. Wilga? Did you receive treatment at Mt. Wilga? A. I do not know. One afternoon about 4 o'clock they drove me out to Mt. Wilga, they asked for my name and they asked where I was in the hospital and they put me back in the ambulance and drove me back to the hospital.

Q. And you have never heard from them since?
A. I have never heard from them since.

Q. I think you go everywhere by taxi or in a car, do you? A. Yes.

(Witness retired.)

(LUNCHEON ADJOURNMENT)

In the Supreme
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NO. 6

DISCHARGE OF JURY

Plaintiff's
Evidence

At 2.15 P.M.

No. 6

Discharge of
Jury
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HIS HONOR:.. Gentlemen of the Jury, when this case commenced it was thought that it might have finished today or possibly first thing on Monday morning, but I have been told by counsel that it is likely to last a good deal longer. It may go several days into next week. Under those circumstances the parties have agreed that you can return to your ordinary avocations and the parties have agreed amongst themselves that I should try the case without the benefit of your assistance. I thank you very much for your services to date in this case and I can now discharge you.

10

No. 7

Charles Wooler
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NO. 7

CHARLES WOOLER MARSHALL

Sworn, examined, deposed:

MR. EVATT JUN.: Q. What is your full name?
A. Charles Wooler Marshall.

20

Q. I will attempt to establish Mr. Marshall as an expert, Your Honor, in - is it mining or tunnelling? A. Both.

Q. You are a licensed surveyor? A. Yes.

Q. And a licensed mining surveyor? A. Yes.

Q. And an Associate Member of the Australasian Institute of Mining and Metallurgy?. A. I am a full member.

Q. You have a mine manager's certificate. Is that correct. A. Yes.

30

Q. A certificate of competency for Metalliferous Mines - that is an examination, is it? A. Yes.

Q. You are a Member of the Council of the Australasian Institute of Mining and Metallurgy? A. Yes.

Q. You have done a refresher course in mining at the University of Technology? A. Yes.

Q. They are your academic or technical qualifications? A. Yes, broadly.

Q. Since 1923 you have had practical experience in the field of mining and tunnelling? A. Yes.

Q. For example, you were the Senior Mining Engineer for seven years with the Joint Coal Board of N.S.W.? A. Including open cut mines.

10 Q. You have submitted various papers to mining periodicals, is that right? A. Yes, and the Institute.

Q. You are familiar with this method of tunnelling as you have heard described in this case? A. Yes.

Q. And it is, I take it, a very well known procedure in mining? A. The general principles are the same.

20 Q. I am referring to this cycle of blast to blast as has been described in this case? A. Yes.

Q. It is used, I understand, all over the world? A. It is a very similar principle.

Q. You have had experience and have seen some of the Snowy tunnels down at Cooma? A. Yes.

30 Q. I want you to deal with the cycles and the practice in the tunnels as you have heard described by Mr. Pataky. After the blast is there any well recognised period of time before anyone goes near the site of the explosion? A. There is a time of varying length which is allowed until the air clears.

Q. I should have said is there a minimum time in New South Wales? A. I do not think it is generally specified but it is recognised the time must be sufficient so the air is clear.

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Q. Is there a practice as to who is the person or who are the first people to go near the site after the blast? A. It is usually the powder monkey or the person in charge of the blast or the person in charge of the face, the man responsible varies from place to place, but the person in charge of firing the shot - it is their duty to proceed with another person after they have counted the shots and are satisfied all the shots have gone off, to proceed to the face, to inspect it, and then to set out the safety precautions and work necessary before men are allowed to work at the face.

10

Q. That is even before the barrers-down go in? A. It must be inspected by this responsible person before the barrers-down go there.

Q. Who is the responsible person - the man in charge? A. The man in charge of the blast or the face.

Q. Who is that? Is that the walker, the engineer or the foreman? A. The terminology varies so much especially in the Snowy River where American terminology comes in, but there is always in practice a responsible person and I think the word "shifter" is used down there over most places.

20

Q. By inspection of the face do you also include that portion of the roof which is exposed after the blast. A. Actually the inspection should start from the position of safety where the responsible person is. As he walks forward he examines the general condition leading up and right to the face.

30

Q. What tests do these persons actually do to make sure it is safe? A. Usually there is a man as well as the person responsible for the face whose duties are to make the face and the working surroundings safe by barring-down loose rock, by sounding and by inspection.

Q. With a torch or a light or what? A. The inspection requires a good strong light because the small sections of the roof must be examined individually and it is difficult to pick up

40

small sections with general lighting.

Q. After the inspection is done then do the barrers down come in?

HIS HONOR: Q. Before you go into that, how is the sounding done? A. The sounding is done by metal bars of various length in a high face. In a low face it is done by a short hammer or a pick, but the sounding is normally done, in the case referred to here, by bars which have a solid metal end and mostly in the ones I have examined it is a high bar with a solid end, so that when the bar is hit against the roof even if the loose stuff is not visible you should achieve a clear ring rather than drummy sound which indicates a crack or soft earth.

Q. Very much like sounding plaster on a wall, is that the idea? A. Yes, and you can get a considerable amount of accuracy if that is done really thoroughly.

MR. EVATT: Q. The next stage, I take it is that the barrers-down come in, is that correct? A. The barrers down should continue there and any other men that the man responsible deems necessary to make the whole of the working face safe.

Q. The barrers-down: what actually is their function and what do they do? A. Their function is to remove all loose or 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 side to side.

Q. And they do that with these long poles? A. They do that with bars of varying lengths.

Q. Is there any average or normal time that the barring operations take? (Objected to) A. It continues until the job is finished.

Q. Is there a practice about other men being allowed to go into the area before the barring-down is finished? (Objected to).

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HIS HONOR: Is there an established practice as to the safety or otherwise of people going into that area until the work that Mr. Marshall has just described has been concluded?

MR. EVATT: Q. That was the question of His Honor, Mr. Marshall. A. There is an established safety practice.

Q. What is that? A. That until the men making the place safe with barring down or sounding or such other method as is necessary, no one else except the person responsible goes in. That is an established practice in safety in underground installations. 10

Q. And should the responsible person in charge remain at the site of the face or in the vicinity of the face until the barring-down has been finished? A. A responsible person should be there all the time while men are working.

Q. Of course, these mucking machines are going all the time in the tunnels. You are familiar with the mucking machines? A. Yes, I have seen them working in that tunnel. They are very noisy. It is difficult to carry on conversation while they are working. 20

Q. And they are working almost continuously after the barring-down first starts? A. I have seen them working while barring down is still in progress.

Q. Do they usually start after the barring down is finished? (Objected to). 30

HIS HONOR: Q. Is there any general practice, Mr. Marshall, or does it vary?

MR. EVATT: Q. When the muckers start? A. It depends on the position of the mucker. The mucker should not be working in the area until the barring down is finished, but the barring down can be there and this could be a safe area, but it is very difficult for men sounding the roof to do it efficiently while the mucker is working, as is the evidence I have heard, right up within a very short distance of the barring-down 40

Q. The objection to the mucking machine - is that the noise objection? A. There is the noise objection, yes.

HIS HONOR: Q. Is there any other objection?
A. No. If the mucker is in a safe place there is no objection.

10 MR. EVATT: Q. Is there any further practice or additional matters that are done as safety precautions when they are in loose ground? (Objected to).

HIS HONOR: There is no evidence that this ground is loose ground.

MR. EVATT: Q. You heard Mr. Ward asking questions about roof bolts, I think? A. Yes.

20 Q. What are roof bolts? A. Roof bolts are rather large bolts varying from 4 to 12 feet, which are used in the roof to give added strength. They are a bolt with a more or less 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. If the roof or rock falls away in small fragments a few feet, two or three feet, usually other devices additional to roof bolts are necessary to prevent the sudden fall away of pieces big enough to cause injury. Roof bolts by themselves round about 6 feet or 5 feet intervals would still allow in bad ground for pieces to come
30 away, and if the ground is that bad general practice features putting up straight away steel sets or lagging or using mesh between the rock bolts.

Q. Is that before any other men are allowed in the area? A. The basic principle is that the roof must be made safe before men work under it.

40 Q. If proper safety precautions are taken in tunnelling work such as this, what do you say about the nature of employment such as the plaintiff's employment as an assistant surveyor being a hazardous occupation or a risky occupation, as I think Mr. Ward put it to the plaintiff? (Objected to).

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HIS HONOR: Q. What do you mean by proper precautions? Do you mean if everybody does what he thinks is necessary to prevent the fall of rock, it is safe?

MR. EVATT: Yes, Your Honor, but may I withdraw the question and put this question.

Q. Is tunnelling or mining an unsafe occupation or a hazardous occupation? (Objected to; withdrawn).

Q. Can simple practical precautions be taken in tunnelling to make it safe for persons working in the tunnel from the danger of falling rocks? (Objected to; allowed). A. If all adequate safety precautions and measures are taken the occupation can generally be regarded, except for catastrophic matters, as a safe one.

10

Cross-
Examination

CROSS-EXAMINATION:

MR. WARD: Q. Which tunnel did you last work in Mr. Marshall? A. Excluding where I was a professional down at the Snowy River, --

20

Q. No, which is the last tunnel you worked in? A. To me tunnel and adit is more or less synonymous in meaning. I do not see this difference between mining and tunnelling, because the last gold mine I was in had No. 1, No. 2 and No. 3 tunnels.

Q. Just a moment, Mr. Marshall. You yourself have recognised in answer to Mr. Evatt that there is a difference in terminology, in meaning, between a tunnel and a mine, have you not? A. That is a very difficult question to answer, because in mining there are tunnels without doubt. A mine is a place where you extract mineral. A tunnel is an underground excavation which can be part of a water scheme, an air scheme, or coal or gold or any other mine you like. The word "tunnel" is used very often in metalliferous mining and in coal mining where the excavation passes through ground where there is not a metallic product being extracted; in other words the tunnel is an entry underground.

30

40

Q. Because as a minor or as a mining man you know that special Acts control the activities in a mine, don't they? A. Yes.

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Q. And a mine you define as a place where metal is being won? A. Where ore is being won.

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Q. But you would never say that a miner who digs a tunnel mine underground would describe himself as a tunneller, would you? A. He could.

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Charles Wooler
Marshall
Cross

10 Q. You know, don't you, that the Coal Mining Acts or the Mining Acts are not considered by you experts to relate to tunnelling? A. If there is a tunnel in connection with a coal mine, and there are many miles in N.S.W., through barren sandstone and shale, of tunnels to give access, they are tunnels or adits or entries. There is great confusion over the words.

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Q. Did you ever work on the Snowy River Scheme? A. No.

20 Q. Have you ever been in the Utah-Island Bend tunnel? A. Yes.

Q. When was that? A. Approximately December 1963.

Q. Just recently? A. Comparatively recently.

30 Q. Which tunnel was it? What was its proper name? A. I went in the entrance tunnel and this was the Island Bend; there are two tunnels - it is a Y-tunnel, for access. The Y to the left hand went to Island Bend and the other towards Geehi or, as the locals call it "the Thiess workings".

Q. Was it the Utah Control tunnel? A. Yes.

Q. It was the one linking up with the one from Thiess? A. The one driving towards Thiess.

Q. When had you been previously in one of the tunnels? A. I had not been previously. I have been subsequently.

Q. You have been this year? A. Yes.

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Q. When were you last engaged in mining underground? A. I am as consultant at this moment.

Q. Have you ever actively been engaged in the control of miners underground? A. Yes.

Q. When was the last occasion you did that?
A. 1939 when I was mining superintendent, but subsequently intermittently I have been looking after miners prospecting in Northern New South Wales. I have been underground myself at Jerinderie Silver Mine examining it to see what safety precautions were necessary to open it, when I sounded the roof.

10

Q. These have been trips you have made as a consultant to people searching for minerals?
A. Searching for mining minerals.

Q. The last actual time you worked in controlling a mining operation was 1939? A. No, that is not right.

Q. What actually did you do in 1939? A. I finished up as mining superintendent on the New Guinea Gold Fields. That was underground mining

20

Q. How far in? A. One tunnel from memory was three quarters of a mile from the surface. Another tunnel was 4,500 feet to link up with a central shaft 700 feet deep.

Q. When did you last supervise, for instance, the insertion of a rock bolt? A. Myself personally?

Q. Yes?

30

HIS HONOR: He does not mean that you did it yourself but that you supervised it.

MR. WARD: Q. When you supervised the insertion of a rock bolt? A. Six months ago as a consultant I supervised or I went with the mines superintendent to watch the development and experimentation of roof bolts for holding up the ribs of a high underground excavation.

Q. I suppose you would agree that there has been a great development in the use of rock bolts in the Snowy River tunnels? A. Professionally I am aware of that.

10 Q. Indeed, those operating in these tunnels down there have made professionally, you know, great strides in this method of making roofs in tunnels safe. A. I have discussed that in detail with senior officers actively engaged in that.

Q. And you can tell His Honor can't you, in your position, that you recognise that the people engaged in that venture have indeed made great developments in that field of safety? A. They have. Some very good work has been done down there in the development of rock bolts for certain purposes.

20 Q. You would agree, would you not, that rock bolts are frequently put much closer in than 5 feet? A. They are, depending on the country which varies so much in that area that it is almost impossible to standardise.

30 Q. What do you say concerning inserting rock bolts in an area freshly blasted out? Would you agree with the plaintiff that you would not do that? A. As a normal practice bearing in mind the country which I have examined carefully, for that reason if rock bolts were placed too close to the face to be blasted they would require a secondary testing after the blast to see if there is loosening or retensioning, because the blasts could subject the area to further tensions and cracking which might make the insertion of roof bolts right adjacent to the face inadequate.

40 Q. Certainly in that case you would agree, would you not, it is not necessary for good practice in tunnelling to insert rock bolts immediately after barring down is finished in a blasted area? A. As a general theorem I would agree with that because the rock bolt is only one of a number of devices for making the roof safe.

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Q. Of course, you would also agree, I take it, that in granite type country like you have in that Utah tunnel it would not be necessary to rock bolt right up to the blast area before doing the next blast? A. In certain cases I would say No.

Q. This is a matter which can only be gauged by someone experienced in this work on the spot at the time; is that what you say? A. That is so.

10

Q. Of course a man who has worked in the tunnels down there for some few years and has worked through the different processes of mining to the rank of supervisor or walker - you would expect him to be in that type of country skilled in making that decision? A. He could make most decisions, some decisions, in that country which is difficult.

HIS HONOR: Mr. Ward, if I may interrupt you I have had a look at these particulars and as I recall the evidence in this case I do not think it has been suggested against you that failure to rock bolt between the time of this blast and the time of the injury has anything to do with the accident to the plaintiff.

20

MR. WARD: That is true, Your Honor. It was only that my friend brought it up to the expert.

MR. EVATT: He brought it into the case.

HIS HONOR: I am not a jury and I can talk more freely now, but there is no allegation that the rock bolting has anything to do with this case. I know you did not open it.

30

MR. WARD: Q. In any case, whatever the situation is, you would not like to pass judgment whether they should have been used or not in a particular portion of the tunnel without seeing it? A. I could not.

Q. Of course, you would agree, would you not, that men barring down in the mine are the men who have the really good job of looking after themselves? A. Efficient practice always calls

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for somebody watching the men barring-down because the man barring-down has a very difficult job. He is dealing with a particular part of the roof or the face; he is watching that - he has got to watch it. But in the process of barring-down in one part of the face there can be a chain reaction in another part of the face, and therefore the man responsible for the safety, whatever his designation is, should be watching that face generally while men are barring-down.

10

Q. Of course, the man responsible for the supervision has quite a number of things to watch hasn't he? A. He has a lot of things to watch.

A. And these rocks fall without any warning quite frequently, or haven't you had sufficient experience in the granite country of the Snowy to comment on that? A. I have mind in rocks with similar characteristics to the granites, the porphyries, and you do get on occasions a rock coming away suddenly, but generally speaking there is some warning of a cracking or a slight noise, or the sounding would give you a warning. Granite is difficult - it requires eternal vigilance.

20

Q. The barrers-down of course usually work from the front of the explosion back towards the face don't they? A. They should.

30

Q. And as they go back they do the side and the roof immediately above it? A. They should do it ahead of them.

Q. That is right, ahead of them? A. Ahead of them.

Q. And then they get to the face and they work back along the centre portion of the roof don't they after they have done the face? A. I would not like to state a rule on that. They work whatever is necessary for safety. From safety to safety.

40

Q. That is a well recognised method of working is it not? A. I have heard that quoted. I

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favor the standard practice of working from safety to safety doing whatever part and taking whatever course is necessary to give the greater safety.

Q. Quite so, and I am interested in obtaining from you your agreement or otherwise not on the general thing that they should work safely but that if a man goes along the side of a blasted area testing the sides and the roof out from him, so that he has cover to the face of the tunnel, and then doing the face still protected just above him, and then working back along the centre, he is carrying out barring down in a well recognised safe method? A. I prefer the method that is a modification of that, working from the sides -- 10

Q. I am not asking for your preferences at the moment. That is a well recognised safe method of barring down is it not? A. I do not think it is. 20

Q. You do not think it is. Have you ever barred down? A. Yes.

Q. Where have you barred down in a tunnel the size of a Snowy River tunnel? A. Not quite of that magnitude, but I have barred down in big steps and big entrances.

Q. The answer is that you have never done it. Is that the answer? A. I have said specifically I have not worked in the Snowy River, but the Snowy River is not the only large underground excavation in Australia by any means. There are many big underground installations in Australia which are comparative practically with what you find at the Snowy, except the Power House excavations. 30

Q. What is wrong with a barrer-down going up the side - the side, mark you - of the blasted area testing ahead of him and at the side of him as he goes up? What is wrong with that? A. If the centre is reasonably safe it is a safe method. 40

Q. He cannot do it all at once? A. You not only make a face safe by barring but you take visual inspections. For example, if we go along the side here and the centre looks reasonably safe the practice you outlined would be good practice but if the centre opposite him is not reasonably safe he should do that first.

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HIS HONOR: Q. You mean the centre of the roof?
A. The centre of the roof, yes.

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10 MR. WARD: What you are getting at is this, that the method I have just described to you is a safe method subject to this qualification, that if there is a very obvious fault in the ceiling, that should be done first.

Q. And without being there you cannot tell whether it was safe or not safe that day? A. No.

Q. Who did you go through the tunnel with in December? A. With the tunnelling engineer.

Q. What was his name? A. Alsarkus.

20 Who arranged it? A. It was arranged through the headquarters of the Snowy River through the Senior Resident Engineer there.

Q. Because there are so many safety precautions necessary when one is working underground it is, generally speaking, a hazardous occupation is it not? A. Not if safety precautions are carried out.

30 Q. But because there have to be safety precautions it is a hazardous occupation?
A. The same as crossing the road. If you do not take the necessary safety action when crossing the road, it is hazardous. In underground excavation you should take the necessary safety measures and precautions to eliminate to a minimum the hazards.

40 Q. They only have those safety precautions because it would otherwise be a hazardous occupation? A. As with any other occupation. If you do not obey the safety rules of any other occupation ---

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Q. I am not concerned with other occupations. What is your difficulty in answering? It is hazardous if safety precautions are not taken?
A. Yes.

Q. And it must be surely -- does it not appeal to your common sense that it is more hazardous to work underground than on top of the ground?
A. Yes, you could say that.

Q. I suppose you would agree it is more hazardous to work on slippery ground than on firm ground would you not? A. Yes. 10

HIS HONOR: Q. Mr. Marshall, this has me somewhat puzzled: assuming you are tunnelling in such a tunnel as has been described in this case, and performing it in the manner of the cycle that has been described in this case, and assuming that the blasting operation is performed and then the man in charge of fixing the shots together with another man who counted the shots goes in and makes an inspection, and then the blasted area is sounded and inspected with a good strong light and barred-down, and all that operation is complete, the next operation would be a further explosion, I presume -- is that right-- after the mucking operation is complete? 20

A. Boring and there would have been the placing of any supports considered necessary or rock bolts. The rock bolts are put in for various reasons, for supports, or in certain places there are no supports and the drilling machine goes straight into the clean face, drills, and the cycle is repeated -- loaded and exploded. 30

Q. Assuming a person went in after this blasting operation and made an inspection and there was the barring-down of the loose rock and sounding and inspection and so on, and everything appeared by those means to be safe and they then proceeded to take the next step in the cycle, would there be any reason why a piece of rock should not fall from the roof or face despite all those precautions? A. There is a remote chance. 40

Q. A remote chance? A. A remote chance. Normally if that work is carried out efficiently the chance is remote.

MR. WARD: Q. If the barring down is carried out efficiently there is still some chance of a rock coming down? A. It must be barred down and the other safety precautions taken - there is a very remote chance.

Q. The other safety precautions are inspection.

A. Inspection.

Q. And what else? A. Sounding and supporting if necessary.

10 Q. The supporting of course does not come about until the jumbo is moved up to give you the height to give you access and contact to your ceiling, does it? A. Yes, that is the usual practice. I have seen the steel right against the face where it was thought necessary

Q. And of course you cannot take the jumbo up until you have mucked out your muck pile? A. That is axiomatic, you see - the dirt is across the rails.

20 Q. If the mucker is back 30 feet at least from the front of the blasted out area you would see nothing objectionable in its doing its work there, would you, while barring-down was going on right up ahead? A. Except if it was bad ground or suspected ground, and then while it was sounded I would have asked for silence. But if the ground overhead has been made safe and it is ordinary ground, while they are barring-down - but for sounding it is difficult to sound
30 with a high noise level, it is very difficult---

Q. How many times have you done it in granite country - barring-down? A. I have stopped air pumps or machines so that I could hear the sound myself.

Q. How many times have you actually barred-down in granite country, you personally? A. In granite country - I have never driven in granite country. I have driven in porphyry country.

40 Q. In country similar to the Snowy which you have agreed is granite - have you ever barred down in that type of country? A. Is your question have I ever barred-down in granite?

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Q. Like the Snowy River tunnels? A. No.

RE-EXAMINATION:

MR. EVATT: Q. You mentioned the remote chance of a rock fall in answer to a question of His Honor. If the ground is looser ground, is there any other protection apart from barring-down to prevent the fall? A. You must support your roof and shelter the men underneath from pieces falling down.

Q. How do you do that? A. A number of ways, like close logging, timber arches, or by putting a mesh over the section held back in place by roof bolts. That has been done - I have seen that. 10

Q. I take it the harder the ground the less remote is the chance of fall of the rock (objected to).

Q. The harder the rock is - A. The more solid the rock, the safer it is at the depths that they are working at on the Snowy. 20

Q. Is there a practice as to whose decision it is to decide who would put up these added safety precautions such as the wire or the timber, or, whatever it is. (Objected to and allowed).

Q. Who would that be up to (objected to, discussion ensued - allowed).

Q. Whose job would it be to decide upon the degree of hardness of the ground and whether these added safety precautions should be erected? A. The man responsible for safety at the face. 30

Q. A further question - Mr. Ward did cross-examine you about your qualifications?

HIS HONOR: I do not think he cross-examined on Mr. Marshall's qualifications.

MR. EVATT: Q. You are a consulting engineer, a mining engineer? A. Yes.

Q. (By leave) I see that you held a position of Chief surveyor in one of your mining companies? A. Yes.

Q. When was that - for how long were you the chief surveyor? A. I was the chief surveyor with the New Guinea Goldfields from 1929 to about 1934.

10 Q. Are you familiar with the conditions of surveyors and what they do and that sort of thing in mining and tunnel work? A. Generally, yes.

Q. Are you able to say whether these days, in 1964, there is a demand for surveyors, and assistant surveyors (Objected to).

Q. To your own knowledge, are you able to say?
A. Yes (Objected to).

HIS HONOR: Q. Are you in private practice as a consulting engineer? A. Yes, and as a practising surveyor.

20 MR. EVATT: Q. I think you fly all over Australia? A. I cover a number of states.

Q. Advising mining companies and engineering firms and so on? A. Yes.

Q. In fact, you are going somewhere next week after you finish here. Is there a demand for surveyors? A. I am of the opinion there is.

HIS HONOR: Q. In the Mining field? A. Yes.

30 MR. EVATT: Q. Do they get good pay down there as surveyors and assistant surveyors - anywhere?
A. Surveyors get good pay, yes.

MR. EVATT: I have a list of qualifications that I wish to tender. (Tender objected to, discussion ensued - rejected).

MR. EVATT: I wish to tender some regulations, Your Honor, and there is one question I should like to ask before tendering.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 7

Charles Wooler
Marshall
Re-Examination
28th February
1964
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No. 7

Charles Wooler
Marshall
Re-Examination
28th February
1964
continued

HIS HONOR: Yes.

MR. EVATT: Q. The type of explosives used in this work, are they known as gasless, delayed action explosives? (Objected to).

Q. Are you able to say what sort of explosives are used in this sort of job? (Objected to and rejected).

HIS HONOR: Q. Do you know what type of explosives the Utah Company, in fact used in July, 1962, in this particular tunnel? A. No, Your Honor. 10

MR. EVATT: Q. One further question, Your Honor. I am not asking for the brand but I am asking for the type of explosion. (Objected to and rejected.)

Further
Cross-
Examination

CROSS-EXAMINATION:

MR. WARD: Q. Before you can become a surveyor in a tunnel or a mine, you have to qualify, don't you? A. Yes.

Q. And you have to qualify by apprenticeship or articles? A. Until recent years, it was by articles, but recently - now, it is by a degree course. 20

Q. A degree course? A. Yes, and/or articles.

Q. But you have ascertained that in the Snowy River Scheme the S.M.A. has set up its own training body for what are really instrument readers. Do you know that in your experience? A. I do not know the extent of the course at all.

Q. But you know that they use the words "Assistant Surveyor" in a way which is not generally used in the profession? A. I do not know the standard. 30

HIS HONOR: Q. What period of articles have you to go through? A. Four years. There are two mining surveyor's courses. One, a mining surveyor under the Mining Act and the other a

mining surveyor which you can only get after obtaining your licence after four years of articles plus additional mining experience.

(Witness retired)

No. 8

(Regulation 98 insofar as it is set out in the second count of the declaration tendered. Objected to.)

(Further hearing adjourned until 10 a.m. Monday 2nd March 1964.)

10

In the Supreme Court of New South Wales

Plaintiff's Evidence

No. 8

Notes of Agreement concerning Regulation 98
28th February 1964

IN CAUSES:

CORAM: ASPREY, J.
and a Jury of four

PATAKY -v- UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED & ANOR.

THIRD DAY: MONDAY, 2nd MARCH, 1964

2nd March 1964

(Argument continued in relation to the tender of part of regulation 98 of the regulations made pursuant to the Scaffolding and Lifts Act, 1912, as amended; for His Honor's Judgment see separate transcript.)

20

MR. WARD: I have instructions to agree that the only deductions to be made from any verdict for out-of-pocket expenses are those which are set out in the document I have given my friend.

(Out-of-pocket expenses agreed at £2732.4.6.)

(Case for the Plaintiff closed, subject to the question of loss of wages.)

In the Supreme
Court of New
South Wales

No. 9

CASE FOR THE DEFENDANT:

No. 9
Opening of
Defendant's
Case

2nd March
1964

MR. EVATT: Can we have access to the report of
the Department of Labour & Industry?

HIS HONOR: Yes.

Mr. Ward, you said you were going to lodge
the report of the 18th July?

MR. WARD: Yes. If Your Honor gives me the
September report I will put in train the copying
of that and the report of the 18th July.

10

HIS HONOR: As far as I am personally concerned
it is a very good carbon copy and you need not
bother making a copy.

MR. WARD: I want a copy.

MR. EVATT: Here is one, it is not quite the same
paging but is the exact wording.

DEFENDANTS' EVIDENCE

No. 10

MARIO VALEE:

Defendants'
Evidence

Sworn and examined as under

20

No. 10

Mario Valee
Examination
2nd March 1964

MR. WARD: Q. What is your full name? A. Mario
Valee.

Q. Where do you live? A. Island Bend.

Q. You are employed by the defendant company?
A. Yes.

Q. How long have you been working for them?
A. Since the 5th April, 1962.

Q. Since then till this time have you been
engaged on working in the Utah tunnel at Island
Bend? A. Yes.

30

Q. Where Mr. Pataky was injured? A. Yes.

Q. And prior to that had you had previous experience on tunnelling work in the Snowy River Scheme? A. Yes.

Q. Who did you work with? A. Kaiser Perini Raymond from 1955 to 1958 and then in 1958 I started with Utah up to the end of the Tantangara project.

10 Q. After that you then came on to this project?
A. Yes.

Q. So that you have been associated with tunnelling work since 1955? A. Yes.

Q. How did you start, what type of work did you start on? A. I started as a second class miner.

Q. What is your present position? A. Supervisor.

Q. Were you the supervisor or "walker", I think it is also called, in charge of the shift when the plaintiff was injured? A. Yes.

20 Q. During your tunnelling experience starting as a second class miner what positions have you held in tunnelling work? A. Any position in the face from cleaning up to assist in loading the face and then after a while first class miners you may be or doing the scaling down, all the jobs around.

Q. Everything except operating the mucking machine; you have done all work in connection with tunnelling? A. Yes.

30 Q. Everything that a miner would do other than working on the mucker? A. Yes.

Q. You have worked up to the supervisory position? A. Yes.

Q. On this shift when Pataky was injured can you recall what time the blast was, the explosion of the area prior to his injury? A. It was half past 4 in the morning.

In the Supreme
Court of New
South Wales

Defendants'
Evidence

No.10

Mario Valee
Examination
2nd March 1964
continued

In the Supreme
Court of New
South Wales

Defendants'
Evidence

No.10

Mario Valee
Examination
2nd March 1964
continued

Q. Were you in charge of that explosion? A. Yes of course.

Q. And you yourself operated the explosion box, did you? A. Yes.

Q. Then after it was exploded what did you do?
A. I went down with the men.

HIS HONOR: Q. What did you say? A. To the face and we waited there until the smoke was cleared out and when the electrician went up we went up and had a look around to see if there were any big blocks hanging. I went up to make sure there were no real big blocks hanging so that the men could come up and start scaling with reasonable safety.

10

MR. WARD: Q. Would it be right to describe it this way, you went forward and had a check of the full area to see if there was any obvious faults in the roof? A. Yes, I have to go up and check all these things. I have to check on misfires too. Sometimes you have a misfire in one corner and we shoot it before we start mucking.

20

Q. You carried out these procedures? A. Yes.

Q. Which you learned on checking the site? A. Yes

HIS HONOR: The witness said before the men scale down - does he mean "bar down"?

WITNESS: Yes.

MR. WARD: Q. Does the electrician go forward and place the lights? A. He went a few moments before me.

30

Q. Were the searchlights placed in the blasted out area to light it? A. Yes, he strings all the lights along the side of the tunnel.

Q. Did you then permit the barrers--down to go into the area? A. Yes.

Q. And at the time they went in did you carry out all the safety precautions you have learned and seen used in your mining experience?

MR. EVATT: I think he should tell his story.

HIS HONOR: I won't allow that. He will have to say what in fact he did.

MR. WARD: Q. You told us you made your explosion. Did you see on that particular blast any obvious dangers when you said you had a look?
A. I could see there was quite a bit on the barring-down.

10 Q. Was there any obvious danger other than which barring-down takes care of? A. To me it seems as usual, quite normal.

Q. How many barrers-down were working on that occasion? A. From 3 to 4.

Q. Can you recall the precise number on that particular blast? A. I beg your pardon.

Q. Can you recall the precise number on that particular site? A. There were two plus the offsiãder of John Pataky; there were three.

HIS HONOR: Q. Three men barring down? A. Yes.

20 MR. WARD: Q. Can you recall the names of these barrers-down? A. Yes, Joe Moretti was one, Mario Caronzi and another Socol, he is in Italy now.

Q. What about another man called Corfe, do you recall if he was there? A. No.

MR. EVATT: I do not think my friend should lead on this.

30 MR. WARD: How did these men bar down, did you watch them? A. Yes, actually I would say the same procedure, you have to go that way anyhow. You go up the sides and bar all the shoulders from above their heads first.

HIS HONOR: Q. Which part first? A. The shoulders, on the sides of the tunnel.

Q. The sides of the tunnel first? A. Yes, we have to walk up there. We go right up to the face.

In the Supreme
Court of New
South Wales

Defendants'
Evidence

No.10

Mario Valee
Examination
2nd March 1964
continued

In the Supreme
Court of New
South Wales

Defendants'
Evidence

No.10

Mario Valee
Examination
2nd March 1964
continued

MR. WARD: I think Your Honor missed that part of the evidence about doing it over their shoulders too.

WITNESS: We go up the tunnel - the tunnel is divided into three segments.

HIS HONOR: Q. The roof and two sides? A. The walls, shoulders and roof.

Q. What do you call the shoulders? A. The middle part in between the roof and the walls.

MR. WARD: Q. That is what? A. That is where the most danger is when you go in. 10

Q. The shoulders are the most dangerous the first time you go in? A. Yes.

Q. When the barrers-down went in what were they doing, tell His Honor again? A. They go towards the face and they bar the shoulders down, then they clear the face and then come back and do the roof.

Q. They come back to the front of the tunnel? A. Yes. 20

Q. The front of the blasted area and clean the roof? A. Yes.

Q. So at that time or before they came back to do the roof was the centre part - the centre part and arc, they had done the sides, the face and the shoulders? A. Yes.

Q. Have you barred down much in your mining career? A. As much as we can, as much as we can.

Q. Have you yourself worked on barring down? A. Oh yes, I have been too. 30

Q. How long were you on barring down in a mine? A. For months, at least seven months.

Q. In doing your other mining duties have you observed others barring down? A. Of course, yes.

Q. What do you say as to the safety or otherwise of barring down in the way you just described to us.

MR. EVATT: I think he should give his evidence. That is a leading question.

HIS HONOR: I did not understand the question.

MR. WARD: Q. You know the method you have described that the barrers-down use? A. Yes.

10 Q. From your experience as a barrer-down is that a proper way of barring down? A. I think it is the most sensible.

Q. Is that the method which you have usually seen adopted in the tunnelling in your experience? A. That is right, that is how I picked it up any how.

Q. You remember Pataky being injured? A. Yes I do.

20 Q. What were you doing at the time he was injured? A. I was standing on the right hand side of the mucking machine.

Q. That is the right hand side as the mucking machine faces the face? A. Yes.

Q. Why did you stand there? A. That is the front position and I could see nearly everything that is going on.

Q. What things are you paying attention to at that time? A. The mucker, the trucks coming down, the empty trucks coming down from the cherry pickers and the full trucks going back.

30 Q. What about the face itself, can you see the face from where you are? A. Very clear.

Q. Can you superintend the barring down operation? A. Of course, yes, as much as I can.

Q. What happened to draw your attention to Pataky's injury? A. Well, I see this rock falling down from the roof.

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Court of New
South Wales

Defendants'
Evidence

No.10

Mario Valee
Examination
2nd March 1964
continued

In the Supreme
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Defendants'
Evidence

No.10
Mario vatee
Examination
2nd March 1964
continued

HIS HONOR: Q. You saw it fall, did you? A. Yes. I seen it coming down. I seen Moretti on one side and Caronzi on the other side, then all of a sudden I hear somebody calling for help. I rushed up and when I arrived over there Moretti was already lifting the rock which was on top of him, and Caronzi was off, pick it up and take it straight away down to the mucker pile because I think something else might come down. When we do get him down there we try to get a stretcher. 10

Q. I want to go back over a few of the details. What part of the area did the rock come from?

A. The roof.

Q. What part of the roof? A. Just in the middle there.

Q. You mean the centre? A. Yes, the centre.

Q. Whereabouts was it, in the blasted area?

A. Yes it was.

Q. Take the blasted area as having a front and a face. A. The face is over the front. 20

Q. Take it as the back of the face? A. Yes, that is it. (sic).

Q. Whereabouts did the rock fall from? A. Say there is the fence, it must have fallen down eight - I should say six to ten feet from me. I cannot say exactly.

Q. Six to ten feet back from the face? A. Yes.

Q. Mr. Pateky has said it fell from about 4 feet from the face; what do you say about that?

A. At least when we pick him up it was further away than that. 30

HIS HONOR: Q. What? A. When we picked him up he was further away than 4 feet from the face. He had the rock just on him by this.

MR. WARD: Q. You know in the area, we are calling it the blasted out area where the miners have drilled in and there has been a blast; that becomes in turn the tunnel. Do you appreciate that? A. Yes.

Q. The rock was in that area? A. Yes, it was in the blasted area.

Q. Was it near -- (Objected to; disallowed).

Q. If you divided that blasted area into two segments, two parts, do you understand a back part and a front part? (Not answered.)

MR. EVATT: He gave his version the way it was.

MR. WARD: That is true.

10 HIS HONOR: He says from six to ten feet back from the face when it was on the ground

MR. WARD: Where the plaintiff was.

HIS HONOR: That is right.

MR. WARD: Q. After the accident did you also inspect the blasted area roof? A. No.

Q. Can you recall from what you saw that day seeing that part of the roof that the rock came from? A. Yes.

Q. Where was that part of the roof that the rock fell from? A. Right there in the middle.

20 Q. How far from the face? A. As I said before it could be from six, nine, ten feet.

Q. You mentioned that Moretti was lifting the rock off Pataky? A. Yes.

Q. You say he lifted it? A. Just put it over on the side (indicating).

Q. Was he doing it with his hands? A. With his hands.

30 Q. Was there anybody else to assist him? A. I cannot remember that. I remember very clearly Moretti.

Q. Prior to that happening had you noticed whether the two men barring down had got to the stage of barring down the roof at the time?

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No.10

Mario Valee
Examination
2nd March 1964
continued

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No. 10

Mario Valee
Examination
2nd March 1964
continued

MR. EVATT: I do not think my friend should lead.

HIS HONOR: We have been told there were three men barring down.

MR. WARD: I thought I said "men".

HIS HONOR: You said "two men".

MR. WARD: Q. Had there been any barring down of the roof of the tunnel back from the face prior to Pataky being injured: A. Not much.

Q. When you say not much what do you mean by that? A. They just had cleared out enough so Pataky's off-sider could get there with the light and light it for him to get the centre part. 10

Q. When you say cleared out just enough whereabouts had the barrers-down done that clearing? A. It may be 4 or 5 feet from the face.

HIS HONOR: Q. What was the name of the plaintiff's off-sider? A. Arturo, we used to call him Tony - Socol.

Q. Is that the man who has gone back to Italy? A. Yes. 20

MR. WARD: Q. Where this rock fell from, did you notice whether the barrers-down had reached that point of barring down? A. No, they had not reached it yet.

Q. Was the mucker working at the time? A. Yes.

Q. How far back from where Pataky was found by you was the mucker working? A. Roughly from 15 to 20 feet.

Q. Can you recall how high the muck pile would have been at the point where Pataky was found by you? A. Round 13 feet, 12 feet, 13 feet. 30

Q. Just prior to you seeing this rock fall can you tell us whether the barrers-down were working at barring down? A. Yes.

HIS HONOR: Q. They were? A. Not where the rock was.

Q. But they were still working? A. Yes, they were still working of course.

MR. WARD: Q. Mr. Pataky has told us that two barrers-down were standing without their bars I think or standing near the mucker in the ----

10 A. No, his offsider went away at the particular moment. He went to put his brush and the paint away.

HIS HONOR: Q. What? A. We used a long handled brush to mark.

MR. WARD: Q. Who had done that? A. His offsider. Only his offsider was down at the muck pile. The other two barrers were still there.

Q. That is at the time Pataky was hit by this rock his assistant you say had gone away with his brush? A. Was just going down.

20 Q. Had the mark been put on the face at that time? A. Yes.

HIS HONOR: By whom?

MR. WARD: I will come to that.

Q. At the time of the injury the mark was on the face? A. Yes.

Q. What sort of mark was it? A. They are yellow strips, a centre and each 5 feet on each side of the centre was another mark.

30 Q. Did you see who put those marks there? A. I seen the marks, I did not see Pataky or Tony put it on but I see he had the marks there.

Q. You had seen this other man you call his assistant with this stick? A. Yes.

Q. Previously? A. Yes.

Q. How long before? A. When he finished and was coming to the muck pile.

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continued

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No.10

Mario Valee
Examination
2nd March 1964
continued

Q. When he finished and went away with his stick? A. He had just come down.

Q. When you say just can you give us any idea of time. Do you mean seconds or minutes or what?
A. I was not there all the time.

Q. The impression you got he just came down?
A. He just come down.

Q. Did you see Pataky at all at the face of the tunnel prior to his injury? A. No, ~~that surprised me.~~

MR. EVATT: I would like that struck out.

HIS HONOR: Yes, that is struck out.

MR. WARD: Q. The answer is no. A. I had talked with him a few minutes before. A big rock fell in front of him and I said to him --- (interrupted).

Q. We will come to that later. A. At that moment I did not see him.

Q. On that particular cycle did you see Pataky at the face at all? A. No.

~~Q. If he had been at the face prior to that rock fall what can you say as to whether you would have seen him or not? (Objected to; struck out.)~~

Q. Prior to the rock falling had you been looking at the face? A. Just after we blasted, yes.

Q. During the superintending of the operation did you keep the face under observation all the time? A. Well, it is in between me and the foreman. I could be there many times and sometimes I could not.

Q. On that particular cycle were you there?
A. I was there.

Q. And if you were there would you keep this face of the tunnel also under observation? A. Of course, yes.

10

20

30

Q. Can you recall the time of Pataky's accident?

A. I think it was around twenty past 5 or quarter past 5, something like that, or 5 minutes more.

Q. How long after the blast would you estimate it was that he was injured? A. I would say 50 minutes, about 40 to 50 minutes.

Q. After the blast? A. Yes.

10 Q. What length of time do you estimate there was between the time you blew the blast and Pataky was injured? A. About 40 or 50 minutes, 45 or 50 minutes.

Q. How long had the mucker been working prior to the injury? A. A little bit over half an hour.

20 Q. How much or how many trucks had been loaded from the mucker? A. The first train was already out, that means six cars and had just started the second train. I would not know exactly now but it may have been altogether six or eight cars.

Q. About 8 cars approximately had been loaded?
A. Yes.

Q. That is one train and a bit of the next train?
A. Yes.

Q. In such a blast as you had in that cycle how many trucks would you normally, truckloads of muck would you normally get out? A. 22, 24, 26.

30 Q. I think you said you got a stretcher after you had taken Pataky back out of the blasted area? A. I did not have a stretcher right away. I sent somebody to get it because we have a place where we keep the big cans sort of thing. We used to keep the stretcher inside. I sent somebody to get the stretcher; they came back and said they couldn't open the can. I went down myself and I did not succeed at all. The lid of the thing was so tight you couldn't open it so we
40 tried to rise him as gently as we could and placed him on the loco.

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No.10

Mario Valee
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2nd March 1964
continued

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No.10

Mario Valee
Examination
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continued

Q. Did you go out with him on the loco? A. Yes.

Q. Can you give His Honor some idea of how much time would have intervened between the rock falling and getting Pataky outside the tunnel?

A. I would say a quarter of an hour to 20 minutes at the most.

Q. I show you m.f.i. 1. (approaching). You see the writing on the back of that document? A. Yes.

Q. Can you tell us whose writing that is?

A. My brother's.

10

Q. What about the ink work on the front of this document?

MR. EVATT: I object to this; I submit it is quite irrelevant.

HIS HONOR: No doubt he would know his brother's handwriting and he has identified that. At the present stage he has not shown any qualifications for identifying anybody else's.

MR. WARD: I have only asked him about his brother's.

20

HIS HONOR: You asked him whose handwriting it was and he looked at the back and said "My brother's." You said whose is it in ink on the front and he was then about to tell us and Mr. Evatt objected.

MR. WARD: He has identified some writing on the back.

HIS HONOR: As his brother's handwriting and there was no objection to that. I have no doubt he would know his own brother's handwriting. I don't know what handwriting he is going to identify on the front. It has not been shown he is familiar with anybody's handwriting.

30

MR. WARD: At the moment the plaintiff has identified the pencilling on the front of the document as his.

HIS HONOR: You are asking this witness about the ink, not the pencilling.

MR. WARD: Yes.

HIS HONOR: You would have to qualify him.

MR. WARD: I leave it at that.

MR. WARD: Q. Did your brother work at that time in the tunnel? (Objected to; allowed.)

Q. Did your brother work at any time in that particular tunnel? A. Not in the tunnel, he was mostly outside. He came in from time to time.

10 Q. What was his position? A. He was in charge of the surveyors or whatever you call them.

Q. Do you mean by that the surveyors of whom Mr. Pataky was one? A. Yes.

Q. I think they are also S.M.A. surveyors too? A. They are not there all the time; they check in almost weekly.

Q. The surveyors your brother was in charge of were those of whom Mr. Pataky was one? A. Yes.

20 (Mr. Ward tendered document m.f.i. 1.
Mr. Evatt requested that his junior be allowed to look at the document and in the meantime Mr. Ward continue with his examination of the witness.)

MR. WARD: Q. You were mentioning in answer to one question something you had said to Pataky on some other occasion; do you recall that? A. I beg your pardon?

30 Q. You mentioned in the course of giving an answer to one question, you were stopped, about some conversation you had with Pataky? A. A little thing that happened before, that of course - where you might be lucky you have not been hit.

HIS HONOR: What is all this about. I cannot understand it. It is hard for me to hear what the witness is saying; what conversation is this?

MR. WARD: Your Honor may recall there has been a questioning about previous warnings. As I

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understood what the witness was about to say was something which related to some warning he had given, but I may be wrong.

HIS HONOR: About Pataky in the tunnel?

MR. WARD: Not on this cycle but at some other time.

HIS HONOR: In a similar cycle?

MR. WARD: Yes.

HIS HONOR: Ask it.

MR. WARD: Q. What was that conversation you were going to tell us about you had with Pataky? (Objected to; allowed.)

10

WITNESS: More or less to congratulate him. We seen it; he was looking at his instrument there (indicating).

HIS HONOR: His theodolite.

WITNESS: And this big rock came down, pretty close to him too. We had a bit of a scare.

HIS HONOR: Q. You told him he was lucky not to be killed? A. Not to be hurt at the most.

20

MR. WARD: Q. That was on some previous occasion? A. Yes, a few hours before.

MR. EVATT: The previous shift, that was the previous round. Does that mean the previous shift.

HIS HONOR: The previous cycle.

MR. WARD: Q. Did there appear to be any cause for the fall of this rock observable to you? A. Not to me. It should have been barred down, that is all. We did not have time enough to be there.

30

Q. It should have been barred down, they did not have time enough to be there? A. They were not that far yet.

Q. Did your shift crew have morning tea or have a cup of tea during the process of barring down - would the barrers-down on your shift have morning tea or a cup of tea? A. It is a break for all the men inside but it is always a rotation, some men work and some go out and then when they have been to tea they replace the others who have been working. We have two hours time for that to do it.

10 Q. That day were the barrers-down at coffee break or tea break? A. Not yet.

MR. EVATT: I don't know whether we have raised this in our case.

HIS HONOR: This evidence was given.

MR. EVATT: I may have missed it.

MR. WARD: Your client suggested this, these two men he saw standing there were - it was after the tea break.

MR. EVATT: You say we raised this.

20 MR. WARD: I didn't suggest it. I can show you the page.

MR. EVATT: I am relying on my notes.

MR. WARD: It was p.48, the fifth line "Q. Could you agree...."

HIS HONOR: That is my recollection.

MR. EVATT: It is cross-examination.

MR. WARD: It is an answer.

HIS HONOR: Your client volunteered it.

30 MR. WARD: Q. Was it or was it not tea time at the time of Pataky's injury? A. Well, for some of them yes it was.

Q. Was work still proceeding at the face and the mucker? A. Yes, we don't stop at the face, it is rotation.

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Q. If tea time comes on do the barrers knock off and go to tea? A. Somebody else comes up and replaces them and then they go out to tea.

Q. What is your recollection, had the barrers-down been replaced because of tea time or not?

A. No, they were there still barring down. They were waiting for replacement. That is why the foreman was not there, or the foreman is away with half the crew and didn't see a thing.

Q. It has been said to us that in the process of making a tunnel safe, one of the operations is drumming, is that a phrase known to you? A. Yes.

10

Q. What does it mean to you? A. By tapping the rock and seeing if there is a hollow sound or if it sounds good or not.

Q. Having regard to the type of country you were working in in this tunnel would you say that the mucker in any way working that day would interfere with the drumming test? (Objected to; allowed.)

20

Q. As a person who has barred down to the extent you have seen it going on and having regard to the tunnel you were working in would the mucker interfere with the hearing of any drummings in the barring-down process? A. No.

(Mr. Ward tendered document m.f.i. 1.
Tender rejected except pencil figures on
document known to be entries made by
plaintiff; Exhibit "4");

MR. WARD: Your Honor will admit the document including the printing and the pencil?

30

HIS HONOR: But excluding the ink back and front.

MR. WARD: Q. What do you do when barring down is finished? A. Barring down is never finished in a tunnel.

HIS HONOR: Q. Never finished? A. No, it is always going on. We finish at the face, we finish mucking, the next time we push the jumbo in. There will be somebody else on the jumbo

scaling down. We cannot stop. There is always something to bar down. You can never bar enough.

MR. WARD: Q. You mean by that there is always something with it to which you have to pay attention? A. Yes.

HIS HONOR: He didn't say that.

MR. EVATT: He said barring down went on all the time. That is what he actually said.

10 MR. WARD: Q. What happens with the men who do the barring down after a blast have finished the barring down of the tunnel, of that blasted area; what happens then? A. Sometimes we go and eat, sometimes they will have other jobs around.

Q. Does the mucker go into the blasted area before these men have finished their work of barring down? A. Yes.

Q. On that day had the mucker got to the blasted out area or not? A. No.

20 Q. Before the mucker goes to the blasted out area do you carry out any further inspection of the blasted out area? A. It depends on how it looked on my first visit. It depends how the rock formation is because on every blast there is something different about it.

Q. Does there come a time or not when the blasted area is clear for people to work in? A. Well, there is usually by the time they finish mucking they are finished barring down.

30 x Q. Do you do anything in between the finish of the barring down and the next process in the blasted area? A. Of course.

MR. EVATT: Q. I think that is one of the important matters, that must be important because my friend keeps coming back. I think the witness should do his best to tell us.

HIS HONOR: I do not think Mr. Ward was leading. I think he said he would do something.

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MR. EVATT: That is contrary to what he swore before.

HIS HONOR: That is not any reason for objecting to the question. It may be a reason for you to cross-examine at a later stage or a reason for comment but it is not a reason in relation to admissibility.

MR. EVATT: He has already sworn that barring down is never finished.

HIS HONOR: There are plenty of witnesses who have said black is white during their evidence and it is one of the things no doubt you have drawn to the attention of a jury many hundreds of times in your career. In my limited experience I have. I will allow it.

10

MR. WARD: Q. I think you said "of course" in answer to that, did you not? A. I beg your pardon?

(Question marked "x" read.)

WITNESS: Yes, as soon as we finish mucking we go in and put our railroad sections down, 10 feet sections for the mucking machine and ten feet sections where the jumbo runs.

20

Q. At the time these men who put the railway lines in go in, are the barriers down still working? A. No, they cannot be there.

Q. Before these men with the railway lines go in would you do anything in the blasted area, you yourself as supervisor? A. Yes, that is what I told you before, it depends. It is not really a routine there because every blast has something different and you have to act according to what comes out.

30

Q. There may be a difference in what you do but generally speaking what is it you do do?
A. Well ---

MR. EVATT: He said it depends.

HIS HONOR: He said every blast is different, there is no routine.

MR. WARD: Q. Is there any further step you take in ensuring the safety in the blasting out area before the railway men are allowed into the blasted area? A. Well, of course we rely on the barring down then and as far as I can see too.

Q. What do you mean - as far as you can see too. What do you do about it? A. If I see it is not safe to go in and lay a section I push the jumbo in so a man can work under the jumbo where it is safe. We do that many times.

10

Q. On your inspection of the tunnels in the blasting area do you use anything to inspect them, helped by anything? A. No.

Q. Do you have a torch with you? A. Yes, of course.

Q. What do you do with the torch? A. In a tunnel we have a lighting system which runs only one side, not both sides; only on the right hand side, there are many dark corners and if you look for something and want to be sure of something many times you have to take a look you think it is just leaning over. You use your torch to see behind the rock if there is any crack in it or anything.

20

Q. That day did you have your torch with you? A. Yes.

Q. And did you use it? A. Yes.

Q. Was there anything you could observe which would suggest on your inspection that rock would fall, at the very point from which it fell on Pataky? A. No, I cannot say that.

30

Q. When you say you cannot say that, what do you mean? A. You have a general look around and there is so many rocks hanging there and waiting to be scaled down that you cannot really say especially up there, you cannot really say "That is a big one;" you have to tap it and try with the scales.

40

HIS HONOR: Q. Did you tell Mr. Ward a while ago that the barrers-down had not got to the section

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from which this rock fell which injured the plaintiff? A. Exactly.

MR. WARD: Q. I think you had already told us they had got up to the face; had they done any more than the face, had they done the roof over the face? A. Yes, they did the roof over the face. They did that for the chap who helps.

Q. For the surveyor's mate who has the torch?
A. Yes.

Q. That is one of the early parts of the barring-down? (No answer.)

10

HIS HONOR: Q. That is Socol? A. Yes.

CROSS-EXAMINATION:

MR. EVATT JNR: Q. Who was Mr. Socol?

HIS HONOR: He has told us that.

MR. EVATT: Q. I know that. What was his duty?
A. He was a first class miner.

Q. Was he on barring-down? A. He was on barring down and he used to hold the light for Mr. Pataky.

20

Q. Was he barring down on this work? A. Yes, he did, before he gets on to it he gives a hand with barring down.

Q. Am I to take it he would bar down with the other miners? A. Yes.

Q. With the exception of the interruption of barring down to help Mr. Pataky? A. Of course, when he has his place safe.

Q. He gives a signal? A. Yes, puts the lights there.

30

Q. And when Mr. Pataky goes down from the roof section - you know where the roof section is?
A. Yes.

MR. WARD: The roof station I think he means. We are talking about a roof section. He means station.

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HIS HONOR: Roof station.

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MR. EVATT JNR.: Q. You know where the roof station is, don't you? A. Yes, of course.

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Q. And then the surveyor like Mr. Pataky would come down to the face and do the markings?

10 A. They don't really need to do that, there is the offsider to do that.

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Q. Does not the offsider give the signal to come down? A. No, the offsider gives the signal to let him know he is up there waiting for him because the roof station is sometimes 900 feet from the face. The first man goes against the face and gives a signal and puts the light there. and watches for the wire (sic) whether or not he has to shift to the right or left. When he is dead centre he gives the signal it is okay and we acknowledge it. They try again. They usually try twice.

20

Q. After that the surveyor or the assistant surveyor goes to the face to do the markings for the drilling? A. Of course. As soon as he has got his centre there he knows that the marks that the surveyor would give to him would be exactly 3 feet off the true centre.

Q. To make sure we understand each other. After Mr. Socol does the markings, the centreing with the light, after that part is finished the surveyor, Mr. Pataky comes down to the face? A. He didn't have to.

30

Q. Do the surveyors ever come down? (Not answered.)

HIS HONOR: Is there any objection to him coming down? A. He can come down for a look to see if it is well done or anything but he don't have to.

MR. EVATT JNR: Q. Do you say there is no reason for these surveyors to go down? A. Of course not.

40

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Q. Never? A. Because the man there knows exactly what to do.

Q. You are serious about that? A. It is two feet from one side and five feet from the other.

Q. Does not the surveyor do the painting?
A. That comes later.

Q. You said the surveyor never has to go to the face, is that right? A. At this point.

Q. At any point? A. No, I did not say that.

Q. Does the surveyor have to go to the face?
A. Later on, yes.

10

Q. At any time?

MR. WARD: He said that - later on.

MR. EVATT: JNR.: Q. I would like it yes or no. Does the surveyor have to go to the face at any time? A. Yes.

Q. To work? A. He has to.

Q. What does he have to do there? A. He has got this brush and string. His offsider holds the string to the point and he goes first right to the sides and he goes to the roof.

20

Q. Who has to paint the circle, the surveyor?
A. Yes, that is when everything is finished, when the jumbo is at the face.

Q. The surveyor has to paint the circle, does he not? A. Yes.

Q. Is that the only time a surveyor has to go to the face? A. No.

Q. What other times does he have to go the face? A. When he paints the sides.

30

Q. He has to go to the face then? A. Yes.

Q. When else does the surveyor have to go to the face? A. There is no need then.

Q. He only has to go twice, to put the circle and paint the sides? A. Yes.

Q. Is that right? A. Yes.

Q. When did he paint the sides, before or after the circle? A. Before.

Q. He has to do the sides? A. Yes.

Q. Just before the jumbo comes in? A. Yes, that is where we finish mucking.

Q. After the mucking is finished? A. Yes.

10 Q. Or before the mucking is finished? A. No, after the mucking is finished.

Q. Does the jumbo come to the face before the mucking is finished? A. No, he has had the mucking finished.

Q. When the surveyor goes to the face he only goes there to do the painting, is that right? A. Yes, the painting and takes his levels.

Q. When he gets to the face Mr. Socol, the assistant helps him? A. Of course.

20 Q. He would hold the bucket of paint? A. No.

Q. What does he do? A. He keeps the string on the marks on the face.

Q. There is no suggestion here, I must get this straight, you are not suggesting for one minute that Mr. Socol was not with Mr. Pataky when he was hurt on this day? A. He just went to the muck pile as I said before. He just came down from the muck pile.

HIS HONOR: Q. Just came down from the muck pile?

30 MR. EVATT JNR.: Q. After the accident?
A. When it happened Socol was just coming down.

HIS HONOR: Q. Where to? A. From the muck pile he was going down to put away his brush.

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Q. In what direction was he walking, to the face or from the face? A. From the face.

Q. Had anybody marked the centre line? A. Yes, it was marked.

Q. Who marked the centre line? A. Tony Socol.

MR. EVATT JNR.: Q. He had marked the centre line? A. Yes.

Q. And Mr. Pataky was there with him when the centre line was being marked? A. I found him there.

10

Q. You are not suggesting for a minute that whilst the centre line was being marked Mr. Pataky and Socol were there together?
A. Of course.

Q. You say that before that Mr. Socol had been engaged in the barring down? A. No, you have everything mixed up now.

Q. I withdraw that question. Mr. Socol himself had been engaged in barring down?
A. Of course, before he commenced there with the lights he has to make it safe for himself.

20

Q. To make it safe for himself? A. Yes.

Q. Can you imagine the back of this wall as the face after the explosion. How far in were you going in this shift, 9 feet? A. It depends there too.

Q. You cannot remember how many feet? A. I beg your pardon.

Q. You cannot remember how many feet? A. Oh yes. I think we had 11 feet then.

30

Q. It was a long time ago this accident?
A. Yes, a long time ago. It was my first accident.

Q. You remember when it was, don't you?
A. Yes.

Q. When was it? A. The date you mean? - I cannot remember.

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Q. You can remember it was half past 4? A. Yes.

Q. And it was twenty past 5? A. Yes.

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Q. What was the day of the week? A. Which I answered?

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Q. What was the day of the month? A. I cannot remember.

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10 Q. What was the month? A. I think it was April, May - if I am not mistaken June.

Q. What was the year? A. 1962.

Q. Would you agree with me it could have been in July? A. No.

Q. It could not have been in July?

HIS HONOR: You have been asked a question. You were asked would you agree if the accident could have taken place in July. What do you say?
A. I am not sure.

20 MR. EVATT JNR.: Q. You have come along to this Court and said this blast was at half past 4? A. These things, they stay with you, can't you understand that? Have you ever been working in a tunnel - have you ever been --

HIS HONOR: That is not an answer to a question.

MR. EVATT JNR.: Q. Is there a clock on the wall? A. No.

Q. Can you tell me 3 days after the accident what time was the first blast in your shift?
A. I would not know.

30 HIS HONOR: You must not comment, answer the question.

WITNESS: If you permit me to say something to you --

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HIS HONOR: Don't you say anything, until Mr. Evatt asks the question and you answer it.

MR. EVATT JNR: Q. How do you remember it was half past 4? A. I remember the blast and I remember all of the proceedings there.

Q. How do you remember that the blast was at half past 4 and not 4 o'clock or 5 o'clock?

A. It really stuck into me. That was my worst and my first accident I ever had in my shift.

Q. It was the worst accident you have had?

A. Yes.

10

Q. You have had others but not so bad? A. Of course -- I had one not so long ago (indicating).

Q. Your face would be 9 feet, 12 feet or 6 feet of rock? A. Eleven feet.

Q. How wide is it? A. It is supposed to be 22 feet something, it is a bit wider, 24 feet.

Q. You have 4 barrers-down on the job? A. Yes.

Q. The barrers-down stand on the muck pile?

A. Yes.

20

Q. Is that right? A. Yes.

Q. Where do the barrers-down start their work, near the face or at the back? A. At the back, they go up.

Q. Is not this the position that there are four barrers-down, 1,2,3,4, standing at say 5 yard intervals or 3 or 4 yards between them spread right across the face? A. No.

Q. Why not? A. They cannot do that

Q. Why not? A. Because they kill each other.

30

Q. Explain why they could not do that? A. They are walking along the sides and they bar along the shoulders and the sides. They make it safe above their head. When they are at the face they scale the face down or bar the face

down. That is the first thing they do to make sure, having to walk around there. They look after their head.

Q. What was done, was it not, they had done that? A. Of course they did that. They just walked up. There is the face, they bar it down and they start the roof. As soon as they do that enough there, after Socol put his mark there.

10 Q. He had his mark? A. Yes.

Q. Later on as you say this surveyor, Pataky, came down? A. Yes.

Q. Pataky came down and joined Socol and they did the painting? (Objected to)

Q. Later, after Socol had given the signal Pataky came down and joined him? A. Yes.

Q. And then they did the painting and then the accident happened? (Objected to; withdrawn.)

20 Q. I think in fairness to you you didn't see Pataky come up to the face? A. No I didn't.

Q. That is right? A. Yes.

HIS HONOR: Q. Did you see him at the face? A. I didn't actually when he got there.

Q. Where were you standing? A. Just beside the muck up on the right hand side forward.

Q. Forward of the mucker? A. No, beside there. I was talking to the operator.

30 Q. The operator is on the right hand corner of the machine? A. On the side.

Q. The right hand side? A. Yes, exactly 14 feet from the end of the machine.

Q. Did you have a good view of the face? A. Fairly good.

Q. How far were you from the face? A. Maybe from the face itself I would have been 30 feet.

MR. EVATT JNR.: Q. Was the lighting good or bad in the tunnel? (Objected to)

40 Q. What was the lighting like in the tunnel? A. Like in a tunnel.

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HIS HONOR: Q. Could you see the face clearly from where you were standing 30 feet away from it? A. Yes, of course.

MR. EVATT JNR.: Q. You could see the face clearly? A. Yes.

Q. You could see before the face clearly. You could see the face clearly and you could see between you and the face? A. Yes.

Q. And you could see the sides of the walls?

A. Of the right hand side of course and part of the left. 10

Q. And part of the left? A. Yes.

Q. Did this rock fall from the dead centre?

A. Yes.

Q. The lighting there was fair, was it not?

A. Yes.

Q. And Pataky must have climbed over the muck pile? A. He climbed up and down. The muck pile has not got to be really going up like this - 20

~~Q.--You are not suggesting that Pataky deliberately sneaked along to the face so you could not see him?--A.--No, I never said that? (Objected to; struck out.)~~

Q. What you are putting is you didn't notice Pataky go to the face? A. I just didn't do it.

Q. You just didn't see? A. No.

Q. Because you had other things to do?

A. Maybe, but I remember I have been there. I was with my barring down boys for quite a while and I came down and stood beside the mucker as I usually do all the time and really he struck me when I saw him lying under the rock. 30

Q. You may have been talking to the driver of the mucking machine? A. Yes, easy.

Q. In any event Mr. Socol would know what barring down has been done and would have been done? (Objected to.) 40

(Further hearing adjourned until 10.00 a.m. Tuesday, 3rd March, 1964.)

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(Loss of wages agreed at £32.5.0 per week nett.)

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10

(Letter from defendants' solicitors to plaintiff's solicitor dated 6th December, 1962; reply dated 14th December, 1962; further letter from defendants' solicitors to plaintiff's solicitor dated 20th December, 1962; reply dated 8th February, 1963, tendered and marked Exhibit "5".)

MR. EVATT JNR.: There is a report of 20th March, 1963 by Dr. McMurray, which is referred to in his report of February 1964, which has not been tendered. I submit it should be tendered, Your Honor.

(Argument ensued; decision deferred.)

20

MR. EVATT JNR.: Q. I want to ask you about your knowledge of what the surveyors do in the tunnel. You are a walker? A. Yes.

Q. You used to be a miner? A. Before, yes.

Q. I take it you have never acted as a surveyor; you have not got a surveyor's certificate, have you? A. No.

Q. Nor done the examinations for a surveyor? A. No.

30

Q. The surveyor's section is not the section which you miners belong to in the tunnel? A. The surveyor's section is a branch itself. It does not entirely belong to the shift. However, we have one surveyor in each shift, who advises the walker on the levels and on measurements of the tunnels and on the direction.

Q. But the actual duties of a surveyor don't come so much under your control as under the control of the head surveyor or the chief surveyor or some other person? A. I would not know in this case

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exactly, but I got to do what the surveyor tells me.

Q. You have to do what the surveyor tells you?
A. Sometimes, yes.

Q. And he probably has to do what you tell him?
A. Many times.

Q. Listen carefully to this, because it does not seem to agree with your evidence yesterday ---

HIS HONOR: Mr. Evatt, you must not make these comments - prefacing your question with comments. 10

MR. EVATT: Q. The first work done in surveying is the surveyor's assistant going to the face of the rock with a torch? A. After he has got his place safe.

Q. And the surveyor's assistant is called the chain man? A. Yes.

Q. And he goes to the face after the barrers-down are supposed to have made that part of the roof where he works safe? A. Of course, he is there with them too. Actually he belongs to the barring-down crew. 20

Q. The chain man then holds his torch to the face? A. After he signals the surveyor.

Q. And receives his signal from the surveyor in the roof station? A. Yes.

Q. What I am putting to you is that the only task that the chainman does at this stage is to put one mark on the face in the line from the roof station? A. Yes, he starts with that.

Q. He puts a mark? A. Yes. 30

Q. Then the chainman comes down from the face and continues with his barring-down? A. Yes.

Q. What does he do next? A. He takes his measurements from the point the surveyor gives him.

HIS HONOR: Q. What does he do next? A. He draws three paint lines - a true centre and one marked on each side of the true centre five feet apart.

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Q. What does he do then? A. Then he goes scaling down.

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Q. Back to the barring-down? A. Yes, what is called barring-down.

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10 MR. EVATT: Q. What I want to put to you is this: that the chainman in fact does not draw those lines at all; those lines and measurements showing the true centre and the other markings have to be done by the surveyor? A. What do you mean, the other markings - the perimeter markings?

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20 Q. No. I put to you that the only mark the chainman puts on the face is the one mark which is in line with the light or beam in the roof station; that is the only mark that the chainman marks on the face? A. No. I told you before. He does that first and from that point he takes his measurements.

Q. I want to put it once again: Will you agree that the chainman does not take any measurements or draw any lines and that those duties are the duties of the surveyor? A. I cannot agree with that in this case.

Q. Is it because you don't know? A. I know it. The chainman always did those three marks, always.

30 Q. When does a surveyor first have to go to the face, according to you? A. Well, he can go and check what the chainman did and then his first job is to give him the level of the railroad.

HIS HONOR: Q. Who does he give that level to? A. To me.

Q. The shift supervisor? A. Of course; so I know exactly which level we are working, because I have to keep the level right as much as I can.

40 Q. Where would he take that level from? A. It is a bench mark in the side of the tunnel.

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Q. Whereabouts - near the face or back from the face? A. It depends how far back his bench mark is and he depends on his view, because he has his instrument there. Then he turns his instrument around on a ray (?). That can be ten feet from the face or twenty feet too. It all depends how far the ray (?) is.

MR. EVATT: Q. Does the surveyor ever have to put markings on the side of the face or the centre of the face? A. Of course, he has his perimeter marks.

10

Q. When does he do that? A. When we finish mucking. We are ready to start drilling and he puts these side marks in.

Q. You would have to put those before the jumbo comes in? A. Yes, the side marks before the jumbo comes in and the top mark when the jumbo is in to the face.

Q. I want to take you back to this checking. You say the chainman puts these marks and lines on the face, but the surveyor will go to the face to check them? A. I do not see any reason why he should not or why he should.

20

HIS HONOR: Q. It is a matter for the surveyor - is that it? A. Yes, it is a matter for him. If he trusts his men, he does not need; if he does not trust his men, he goes. Actually the surveyor is responsible.

MR. EVATT: Q. Mr. Socol was only a temporary chainman, wasn't he? A. No; he was for a long time.

30

Q. A chainman? A. Yes; he has been helping the surveyors since I can remember.

Q. It is your job to make sure that no person goes near the face until the roof has been made safe?

(Objected to; allowed.)

Q. Will you agree that it is your job to make sure that nobody goes near the face until the face has been made safe? A. In this case I

40

don't think it was entirely mine because as a supervisor I have the whole job to look after. I cannot be all the time at the face. See what I mean?

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HIS HONOR: Q. You have other work to do, you say? A. Of course, Your Honor.

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Q. If you don't supervise the operations around the face, who does? A. The foreman.

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10 Q. Who was the foreman there when Mr. Pataky met with his injury? A. No, he was back eating at that time; he was having his lunch. That is why I was there.

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MR. EVATT: Q. The other thing you said yesterday was this: Apparently it is possible to make certain sections of the roof safe one before the other; in other words, you can make the centre part of the roof near the face safe before the sides? A. No.

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HIS HONOR: He did not say that at all

20 WITNESS: I told you yesterday you never walked under the centre; never.

HIS HONOR: Q. Never walked under the centre? A. No, until it is safe. That is suicide.

MR. EVATT: I think we are at cross purposes.

HIS HONOR: Q. Didn't you say yesterday that the men barr-down the shoulders first on each side? A. Yes.

30 Q. And then the next thing they do is to barr-down that part of the roof which is immediately adjacent to the face for four or five feet? A. Yes.

Q. To enable the chainman to go up to the face? A. Yes, Your Honor.

MR. EVATT: Q. So at the time of this accident the sides of the roof were safe? A. Yes.

Q. Four or five feet in the centre part of the roof next to the face was safe, but where the rock fell

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and further back was unsafe, you say? A. Yes, of course, it was unsafe.

Q. From your experience in the mines, can you think of any reason why Pataky would go to the face at this stage with Mr. Socol? A. The only reason would be to check on what Mr. Socol was doing.

Q. After the accident you say you saw Mr. Socol coming down from the muck heap with the brush in his hand? A. No - before the accident.

10

Q. What? A. Before; just in the moment before. I told you that yesterday.

Q. Then Mr. Socol, you would agree, would be himself lucky not to have been hit with the rock?
(Objected to; rejected.)

Q. You say Mr. Socol was seen walking down from the muck heap by you with the brush just before the accident? A. Just a minute before, yes.

Q. Is this your recollection; that Socol was just coming down when the accident happened?

20

MR. WARD: What about the two questions before that.

MR. EVATT: Does Your Honor see the 11th question from the top?

HIS HONOR: Yes, I see that.

Q. Yesterday, Mr. Valee, you said that when the rock fell on Mr. Pataky Mr. Socol was coming from the muck pile and you said he was going down to put away his brush; he was walking from the face? A. From the face; he was coming down to the muck pile.

30

Q. Towards the muck pile? A. Down; he was going back, you see.

Q. No, I do not see. He was walking away from the face? A. Yes.

Q. Was he on the muck pile? A. I cannot tell

you now exactly where he was, but I know he was going away from there.

Q. Going away from the face? A. From the face, down to the muck pile.

Q. And you said he had the stick with the brush on it? A. Yes.

Q. In his hand? A. Yes.

Q. Where did he keep that? A. When they finish, they always keep it behind.

10 Q. Behind the muck pile? A. Yes; where they don't spill the paint - you know.

MR. EVATT: Q. Was he coming down on the centre part of the muck pile? A. No on the side.

MR. EVATT: Your Honor, I think a "not" has been left out on page 127, the seventh question - "you are not suggesting for a minute that whilst the centre line was being marked" - Your Honor sees that?

20 HIS HONOR: Q. Was Mr. Pataky with Mr. Socol when Mr. Socol marked the centre line on this day?

MR. WARD: Could I suggest, in view of the language difficulty, that Your Honor might reframe that question to: "Did you see"?

HIS HONOR: I was puzzled by the answer to the question to which Mr. Evatt directed my attention.

MR. WARD: I think it is caught up later in the transcript that he did not see him there.

HIS HONOR: Yes, I think that is so.

30 Q. Did you see Socol mark the centre line on that day? A. No. I saw the marks.

Q. But you did not actually see him mark? A. No, I did not see him mark.

MR. EVATT: Q. As far as what you yourself saw, you don't know who painted the marks on the face on that shift? A. No.

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Q. That is right? A. I have seen the marks.

Q. You saw the marks? A. Yes.

Q. After the accident? A. No; I have seen them before.

Q. Before the accident? A. Yes.

Q. You saw the marks on the face before the accident? A. Yes.

Q. But you did not see who was putting the marks there? A. I did not see Mr. Socol putting the marks there.

10

HIS HONOR: Q. You did not see anybody putting the marks there? A. No.

MR. EVATT: Q. Are you on the staff there? A. Yes.

Q. Are you on £35 a week --- (Objected to; rejected.)

HIS HONOR: Q. I want to be sure that I understand the order of events in the tunnel. I am talking about the order of events on the day when Mr. Pataky met with his accident. Do you understand? A. Well, I don't quite get what "order of events" means.

20

Q. Well, I am talking about the day of the accident to Mr. Pataky? A. Yes.

Q. When the holes are drilled in the face of the rock, they lay the shots or charges there? A. Yes.

Q. Then everybody goes back for a considerable distance - is that right? A. Yes.

Q. And then the order is given to explode the charges? A. Yes.

30

Q. Who gives that order? A. Me and the foreman.

Q. Both of you do? A. Yes, always; we must be both of us there.

- Q. After the dust and the smoke has cleared away, you go up towards the blasted out area? A. Yes.
- Q. And you take the electrician up? A. Yes.
- Q. And he sets up the lights? A. Yes.
- Q. And then you make an inspection? A. Yes.
- Q. And then you send the barrers-down in?
A. Yes.
- Q. And they commence by barring-down the shoulders of the tunnel on each side? A. Yes.
- 10 Q. Until they reach the face? A. Yes.
- Q. Then they barr-down four to five feet of the roof immediately adjacent to the face? A. Yes.
- Q. Now, while those operations are going on is the mucking machine brought in? A. Yes.
- Q. At what stage is the mucking machine brought in?
A. Right after the shot.
- Q. Right after the shot? A. Yes.
- Q. Before even the barring-down is commenced?
A. Yes, Your Honor.
- 20 Q. And behind the mucking machine, of course, are trucks? A. Yes.
- Q. Do they bring a truck in as well? A. Well, there are seven trucks.
- Q. Do they bring seven in? A. Yes.
- Q. And do they start the mucking machine operating before the barring-down commences? A. Yes.
- Q. And it is going on all the time the barring-down is going on? A. Yes.
- 30 Q. How wide is this tunnel? A. 24 feet, Your Honor.
- Q. And how wide are the railway lines? A. 42 inches.

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Q. And do you stay there by the mucking machine while the barring-down is going on? A. It depends on what I have got to do. Many times I have got to see that the powder car goes out and is refilled. Many times I have to go out and see four empty muck cars.

Q. Right down at the entrance to the tunnel?

A. Yes, right outside.

Q. And this tunnel was how long? A. I am not sure, but altogether maybe a mile.

10

Q. At the time when he was injured? A. Yes.

Q. How far would the mucking machine be from the face? A. That depends on how far the muck pile comes back.

Q. On the day he was injured, can you recall how far the mucking machine was back from the face?

A. I could not say exactly; that is hard to say.

Q. Would the men who were working the mucking machine be in any danger from rock falling from the roof? A. Well, sometimes it could be

20

Q. Because you say they go in there before even the roof is barred-down? A. Yes, but you have to understand this: The muck pile does not stay only in that twelve feet of the place; sometimes the muck pile can go 150 feet, you see. Well, he starts there and before he reaches the dangerous part that would be done.

MR. EVATT: Q. These marks that are made on the tunnel are made near the top of the face, aren't they? These are the marks, you say, which are made by the chainman? A. Yes.

30

Q. They are made up near the top of the face? A. Wherever they can reach. It all depends how high the muck pile is. It doesn't matter how high they can be as long as they are on line.

Q. You will agree, won't you, that the first mark is put there when the torch is put in alignment with the roof station? A. That is the instrument mark.

Q. That is the easy one to mark? A. That is the instrument mark.

Q. That is the instrument mark and that is the first mark? A. Yes.

Q. The other markings that have to be put on the face have all to be made a certain distance from that first mark? A. Yes.

Q. Is that correct? A. Yes.

10 Q. And it has to be an exact distance? A. Oh, an inch more or less does not make much difference in a tunnel.

Q. Those distances are measured by string? A. No, a ruler.

Q. What? A. What do you call it? A measuring ruler - a tape.

HIS HONOR: Q. A tape measure? A. Yes.

MR. EVATT: Q. You say a ruler. You do mean a tape measure? You know what it is? A. Yes -- you string him out.

20 Q. It is loose? A. Yes.

Q. A ruler would be stiff and straight? A. We call it a ruler, too. It is a little metal box with a tape.

Q. And the tape slides out and it is made of aluminium? A. Yes.

Q. Who holds this tape? A. The chainman.

Q. And? A. Whoever is near to give him a hand, if he needs a hand; or sometimes he can do it himself. I did it myself many times.

30 Q. Won't you agree that the surveyor and the chainman must do these markings together to hold the tape? A. There doesn't have to be a surveyor there.

Q. Won't you agree you need two persons to hold a tape? A. Many times you may need it; many times

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not. As I told you, I did that thing many times myself without asking anybody else.

HIS HONOR: Q. Does the muck pile, after the blast has taken place, start at the foot of the face and then run back? A. Yes, Your Honor.

RE-EXAMINATION:

MR. WARD: Q. Is the more general thing that as you get to the front of the face to the face itself, the muck pile gets higher? A. Yes.

Q. In other words, it is on a gradient back towards the back of the tunnel? A. Not every time.

10

Q. But that is the more usual thing? A. Yes, that is the more usual thing.

Re-examination

Q. Sometimes you will get the unusual blast where you get the muck pile higher at the front of the tunnel than the face of the tunnel - is that right? A. Yes.

Q. But you invariably get the muck being thrown down the tunnel after the blast and that is why the mucker starts? A. Yes.

20

Q. Almost as soon as you clear the area for gas etc? A. Smoke, gas.

Q. On this day you said you could not tell His Honor how far back from the face the mucker was. Can you give us an estimation, because I think you did yesterday?

HIS HONOR: He gave it yesterday; fifteen to twenty feet; the mucking machine was fifteen to twenty feet from the plaintiff, and the plaintiff was six to ten feet back from the face.

30

MR. WARD: Q. At that time is it your recollection that the mucker had not reached into the blasted area at the time of the accident? A. No, it had not reached it.

Q. You were asked about the first mark made on the face by the chainman and you said it was

made with the theodolite or something? A. Yes.

Q. What did the chainman use to make that first mark? A. Chalk.

Q. And then he makes the paint marks? A. Yes.

Q. Or sometimes you say his surveyor is with him?
A. Yes.

Q. When you talk about "After his place is safe" by "his place" do you mean the front portion of the roof near the face? A. Yes, the face and the first portion of the roof too.

Q. When you have to go outside the tunnel or when you have to attend to the powder train or anything of that nature, do you leave anyone in charge at the face? A. Yes, the foreman.

(Witness retired)

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NO. 11

No. 11

(Luige Mastellone, a member of the panel of Government Interpreters; residing at No. 2 Ocean Street, Woollahra, was sworn to interpret the evidence of the following witness from the Italian language to the English language and vice versa.)

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20

GIUSEPPE MORETTI:
Sworn, examined as under

MR. WARD: Q. What is your full name?
A. Giuseppe Moretti.

Q. Where are you living? A. In Wonthaggi,
Victoria.

Q. Do you work there? A. Yes.

Q. And in July, 1962 were you working for Utah in the Island Bend tunnel when Mr. Pataky was injured? A. Yes.

30

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Q. What work did you do in the tunnel?

A. Mining.

Q. Were you working in the tunnel when Mr. Pataky was injured? A. I was in the tunnel. I was near the face of the tunnel and I was barring-down some rocks from the roof of the tunnel.

Q. Where were you standing? A. I was on the right side of the tunnel near the face and I was barring-down some rocks from the roof of the tunnel.

10

Q. What had you done prior to getting to that place? A. I was barring-down all the time.

Q. Had you finished barring-down or not when the accident happened? A. No, we had not finished. There is never an end to barring-down rocks.

Q. Did you see Mr. Pataky in the blasted area before he was injured, on that cycle? A. No.

Q. What did you see of the accident? A. I was working there and I heard some noise behind me. I did not really see the accident happen, but after I heard this noise I just turned around, as a safety measure for myself, and I have seen Mr. Pataky that was there and a piece of rock was lying on top of him.

20

Q. What did you do then? A. I removed the rock, the piece of rock, from his body and I helped him.

30

Q. Was Pataky between you and the face? A. When I turned around I saw that he was just about in the middle of the tunnel.

Q. How far from the face of the tunnel?

MR. EVATT: Couldn't the witness be asked where he was?

HIS HONOR: He was asked what happened; surely he could say where Pataky was when he saw him lying there.

MR. WARD: Q. How far from the face of the tunnel was Pataky when you saw the rock on him? A. I would not know for sure, but approximately would be six or seven feet.

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HIS HONOR: Q. How far were you from the face?
A. I was approximately ten feet away.

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MR. WARD: Q. Ten feet away from the face?
A. From the face.

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10 Q. Did you see the portion of the tunnel that the rock came from that fell on Pataky? A. I think the rock came from the middle of the tunnel. I did not see it; I only noticed the rock when I turned around and I saw Mr. Pataky lying with the piece of rock on his body.

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20 Q. Had you barred-down the centre of the tunnel where Pataky was lying? A. Yes, I had already done that part of the tunnel but even if you do your work 100 per cent, it is never 100 per cent., because even after that some pieces of rock still fall down.

Q. Did you have anyone helping you with the barring-down? A. Yes; there were another two men on the left side from the point where I was.

Q. Who were they? A. The name of one is Mr. Mario Gorasci - I don't know what is the correct name - and the other one I know the christian name, Arturo.

30 Q. How long had you been barring-down before Mr. Pataky was injured? A. I would not know exactly - I did not check my watch - but I would say would be approximately half an hour.

Q. Can you tell His Honor what barring-down you had done prior to the accident? You describe what you had done up to the time of the accident?
A. After the explosion we wait for a little while to clear the tunnel and the smoke and then we start to put water down and after that we go to barr-down.

40 Q. How did you do your barring-down? A. I was using a piece of steel or iron.

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HIS HONOR: Q. We want to know what portions of the tunnel you had barred-down prior to the accident to the plaintiff? A. I started from the middle because would offer more safety.

Q. The middle of what? A. The roof of the tunnel.

MR. WARD: Q. Where did you go after the middle? A. I worked my way backwards on the left side, because on the right side there were another two men.

10

Q. Where had you removed rocks from prior to the accident? A. I was on the right side, but the job of barring-down is never finished; there are always pieces, a loose piece of rock, that fall down.

Q. Had you removed any rocks from any portion of the tunnel other than the right hand side? (Objected to.) A. I was doing the roof and also the right side of the tunnel, also on the side of the tunnel - not only the roof but also the side.

20

HIS HONOR: Q. When you started to barr-down on this occasion, did you start to barr-down on the roof or the side of the tunnel first?

MR. WARD: In view of the description of the roof shoulder and sides, does Your Honor want to leave it just at that? I get the impression from the other evidence ---

HIS HONOR: If I asked him the three parts I might confuse him. (Discussion ensued.)

30

Q. When you first started to barr-down, did you commence to barr-down the roof first or the sides of the tunnel first? A. You always start from the roof, so you can have better safety, and then you go on the side.

Q. Do you understand what is known as the shoulders of the tunnel? A. Is a portion of the side of the tunnel - the shoulder is a portion of the side of the tunnel.

Q. When you said that you started on the roof first, do you mean the roof or do you mean the shoulder?

A. The roof of the tunnel.

MR. WARD: Q. I want you to imagine that this is the face. You tell His Honor what you did first that day barring-down. Imagine you have the bar in your hand? A. I start to barr-down in the middle (indicating centre of roof).

10 Q. Now tell us what you had done prior to the accident? A. As I said before, we have to wait first that there is no smoke in the tunnel and if there is ---

Q. No. After you started barring-down, just tell us how you did it that day? A. I started from the middle and I went towards the face of the tunnel.

HIS HONOR: He started towards the middle of the roof and went towards the face of the tunnel.

20 WITNESS: I started from the middle of the roof and I went towards the face of the tunnel, and then you go backwards on the side.

HIS HONOR: Q. When you started in the middle of the roof, to go towards the face of the tunnel, how far were you from the face when you started; how far approximately? A. Approximately twenty feet.

30 MR. WARD: Q. How much of the tunnel did you have to bar down? A. There is never a fixed rule. Sometimes there is one man and he has to do the lot; sometimes there are four men and he has to do a share.

Q. How much did you do that day, the day Pataky was injured? A. A quarter of the tunnel on the right side, because there were three of us working.

HIS HONOR: Q. You said you started from the middle of the roof, twenty feet away from the face. Had you got to the portion of the roof which meets the face prior to the accident? A. Yes, I was working my way backwards.

(Short adjournment)

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MR. WARD: Q. On that day, where was the muck pile highest? Where was the muck pile highest after the blast? Was the muck pile higher near the face than near the front of the muck pile? All the rock, earth, gravel and rubble that comes down after the blast - was that higher near the face than near the front? A. There is never a fixed rule. Sometimes the pile is at the highest near the face, sometimes far back. It all depends on the type of explosion and the type of rock.

10

Q. What was it that day? Do you remember or not? A. On the left side was a little bit higher.

Q. What size bar were you using? A. I would not know exactly, but approximately eight feet.

Q. How high are you? A. Five feet six.

Q. How high was the muck pile? A. I would not know, but I would think it would be approximately five feet. I was on the lower side of the pile.

20

Q. How high was the rock pile twenty feet back from the face? (Objected to; allowed.)

Q. Can you recall how high the muck pile was twenty feet back from the face? A. It is very hard to say, because sometimes it is just one foot and it is going higher all the time. It is very hard to say.

Q. How long was the area blasted out that day? A. I think that day must have been approximately eight feet. There is never a fixed rule. Sometimes it is ten feet, sometimes is six feet.

30

Q. Had you spoken ever to Pataky before his accident? (Objected to.)

Q. On any day previous to Pataky's accident, had you spoken to him about being in the area of the blast while barring-down was going on? (Objected to; allowed.) A. No - yes. We have discussed these conditions many times with Mr.Pataky and we exchanged ideas, not only

40

between two of us but in general. We talked to each other on the working conditions.

Q. Did you ever speak to him whilst you were barring-down about him being in the blasted area? (Objected to; allowed.) A. Do you refer to that particular day?

Q. Either prior to his injury or on the day's prior to his injury? A. Previous days, yes, but not that particular day of the accident.

10 Q. What had you said to him on previous days? (Objected to; argument ensued.)

HIS HONOR: Q. In what language did you carry on your conversations with Mr. Pataky? A. In English language.

MR. WARD: Q. Will you tell us what you said to him? Say in English what you said? A. I said to him, Mr. Pataky, "When you go near the face, there is a blast, you must be careful because in the top there is the danger all the time." That is
20 all.

HIS HONOR: Q. When did you say this to him? A. All the days.

Q. All the days? A. Other days.

Q. Not on the day of the accident? A. No.

MR. WARD: Q. Did you see him in the blasted area before he was injured on that cycle?

HIS HONOR: He has said: "I did not see Pataky in the blasted out area before the accident. I was working there. I heard a noise behind me.
30 After I heard the noise I turned around."

CROSS-EXAMINATION

MR. EVATT JNR: How long have you been working in that tunnel - prior to the accident? A. I worked in that tunnel approximately fourteen months.

Q. Before the accident? A. I don't remember the exact time prior to that accident.

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Q. A month, two months, six months? A. More than that; I think it has been seven or eight months.

Q. After the blast there is a pause? A. Yes.

Q. And that is to allow the air and the dust to settle down, and so on? A. Yes.

Q. And then the barrers-down go in to remove the loose rock? A. Yes.

Q. And you do the middle section of the roof first and the sides last? A. Yes.

10

Q. And the reason you do the middle section of the roof first is because that has to be done early for the surveyor to go in to the face?
A. Yes.

Q. Before the surveyor goes in to the face, the chainman shines a torch from the face of the tunnel to give a marking from the roof station.

INTERPRETER: Would you explain what is a chainman?

20

HIS HONOR: The assistants to the surveyor.

MR. EVATT: Q. Before the surveyor goes in to the face, the assistant to the surveyor shines a torch from the face so that a marking or bearing can be obtained? A. Yes.

Q. And then after that the surveyor and his assistant paint the various markings on the face? A. Yes.

Q. They have to hold the tape to take the markings? A. Yes.

30

Q. What you say here is that the rock fell from the middle section of the roof after you had barred it down, but the reason for that is that sometimes rocks do fall down after the roof has been barred? (Objected to; rejected.)

Q. The section of the roof where the rock fell had been barred-down, you say? A. Yes.

Q. And on other occasions before this accident you would warn Mr. Pataky not to go near the face until it was safe? (Objected to; allowed.)

Q. On the occasions before this accident, you would warn Mr. Pataky not to go to the face until it was safe? A. He is not the only one that has been warned about that. Everybody has been warned, and not on that particular occasion.

10

Q. But you used to warn Mr. Pataky not to go to the face until it was safe? A. No.

Q. You never gave him that warning? A. No.

Q. You say that when the rock fell you were about ten feet from the face? A. Yes.

Q. And I think you said that Pataky was about six feet from the face? A. I was ten feet away from the face and I turned around and I saw Mr. Pataky that was six feet away from the face.

20

Q. And Mr. Pataky's assistant would be close by him? (Objected to.)

Q. Was Mr. Pataky's assistant standing close to him? A. No.

Q. How far away were you from Pataky - four feet?

HIS HONOR: He said he was ten feet; Pataky was six feet. Six from ten is four. This evidence has been given several times now.

MR. EVATT: But he may not have been in the same line, Your Honor.

30

HIS HONOR: Well, that is not the way you framed your question.

MR. EVATT: Q. How far were you from Mr. Pataky?
A. I would not know whether it was seven or eight feet. I was on the side of the tunnel.

Q. Could you have been twenty feet from Pataky?
A. No.

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Defendants'
Evidence

No.11

Giuseppe
Moretti
Cross-
Examination
3rd March
1964
continued

In the
Supreme
Court of New
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Defendants'
Evidence

No.11

Guiseppe
Moretti
Cross-
Examination
3rd March
1964
continued

Q. You think about seven or eight feet? A. Yes.

Q. Do you remember the name of the foreman of the shift? A. Mario Valee.

Q. Was he there at the time of the accident?
A. No.

Q. Where was he - outside the tunnel? A. He was in the tunnel, but not at the place of the accident. He was far back. He was near the mucker and when the accident happened he came to pick him up.

Q. Was there any boss on the job as well?
A. Yes, there is another boss. He is the superintendent. But he is even further back than the foreman.

MR. WARD: No questions.

(Witness retired)

No.12

George
Anthony Burns
Examination
3rd March
1964

NO. 12

GEORGE ANTHONY BURNS:
Sworn, examined as under

MR. WARD: Q. What is your full name? A. George Anthony Burns.

Q. You live at Island Bend, do you? A. Yes.

Q. And you are the personnel officer of the defendant company? A. Yes.

Q. Before taking on this position, did you have experience in mining and tunnelling over many years? A. In mining.

Q. What does your position with the company involve? A. The usual personnel duties. I handle the employment of labour, the interpretation of awards, the maintenance of all personnel records - everything really that relates to personnel.

10

20

30

Q. And in the course of that do you also concern yourself with those who are injured whilst working with the company? A. Yes. All matters that call for company action in connection with accidents I handle.

In the
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Court of New
South Wales

Q. After Pataky was injured, did you see him at hospital? A. Yes at Hunters Hill.

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Evidence

Q. You saw him at Hunters Hill, did you? A. Yes.

No. 12

10 Q. When you were there, what was he doing, at Hunters Hill? A. I called to see him. I had heard that he was unhappy and depressed there. He was sitting in his bed and he had been occupying himself with maths; he had sheets of paper over the bed and he had been doing calculations. I did not examine what it was.

George
Anthony Burns
Examination
3rd March
1964
continued

20 Q. Did you have a discussion with him? A. Yes. He asked me if it was possible to get him out of the hospital. He wanted to get back to Island Bend. He felt if he was away from the hospital he could make more progress.

Q. Did you put in train arrangements to have him placed in the Snowy Rehabilitation Centre? A. Yes.

Q. Did you and Mr. Fuller meet him when he arrived down there? A. Yes.

30 Q. What conversation did you have with him then? A. Well, he was in a very nervous condition. Mr. Fuller and I were trying to reassure him. We suggested that he come up to Island Bend with us for the week-end, but he said he wanted to go into Cooma to some friends. We told him we wanted to help him in every way we could and as soon as he felt like it he could come up to Island Bend and we would find him some kind of job. We suggested he go to the Rehabilitation Centre. (Objected to; argument ensued.)

Q. Did your position permit you to bind the company in that regard about any employment of Pataky? (Objected to).

40 HIS HONOR: Q. Do you have to refer the employment of any injured person to anybody else, or have

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No. 12

George
Anthony Burns
Examination
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continued

you got a complete discretion to do it yourself?
A. Provided there is a supervisor or superinten-
dent who is willing to accept the man in his
work force - and, of course, Mr. Fuller was
Mr. Pataky's chief; Mr. Fuller is the Chief
Surveyor.

HIS HONOR: I will allow it.

MR. WARD: Q. Did Pataky say anything to that?

A. No.

Q. In any case, the arrangements were made and
he was put into the centre, and did you there-
after visit him at the centre? A. Yes

10

Q. Was this matter of his employment or his
doing any work for the company in any way
referred to by you again whilst he was at the
centre? A. Yes.

Q. What did you say to him about it? A. In my
efforts to encourage him I several times said
to him: "Don't forget as soon as you feel
like it we can even bring some work in here
for you to do".

20

Q. Did you ever receive any request from him
for work? A. No.

Q. Did he tell you ever that he felt like
doing any work? A. No.

Q. During his rehabilitation at the centre,
what did you see him doing? A. At various
times I saw him doing the exercises that were
prescribed by Mr. Shipp, and on two or three
occasions I saw him actually walking with
calipers on.

30

Q. With or without crutches? A. Without
crutches.

Q. On the occasions you saw him, how far would
he have walked? A. Oh, possibly the width
of the Court. He did not walk normally but he
was walking unaided.

HIS HONOR: Q. Apart from the calipers, you
mean? A. Yes. He had the calipers on, yes.

MR. WARD: Q. Did he have anyone near him whilst he was walking? A. Yes; I have an idea that on one occasion at Least Mr. Shipp walked backwards in front of him. I think that was the first time he demonstrated it.

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Q. You receive at the company reports concerning employees whilst they are at the centre? A. Yes.

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Evidence

Q. The company itself pays for employees at the centre out of its own funds, does it not? A. Yes.

No.12

10 Q. Do you recall an occasion when a visit to Sydney was organised for Mr. Pataky? A. Yes, arranged by the doctors.

George
Anthony Burns
Examination
3rd March
1964

Q. When was that? A. I think it was in October, 1963.

continued

Q. Did you meet him on his return? A. Shortly afterwards, yes.

Q. Were you at the airport when he returned from that trip? A. Yes.

20 Q. What did you observe about him after that trip to Sydney, on the occasions you saw him? (Objected to; allowed.) A. I only saw him once after his return from Sydney. That was on a visit to the centre following a report that we had received. He came walking, with great apparent difficulty, into the office where I was, on two hand crutches. I said to him: "You have gone back. You are not making the progress you were and I don't think you are trying and from all the reports we get you are not trying, John."
30 (Objected to; allowed.)

40 WITNESS: He said he was trying and I said: "You are not walking much differently than when you came off the aeroplane in the first place when you came down from Sydney." He said: "That is not right." I said: "If you will not persevere with the treatment here, there is no purpose in our keeping you in the place", and so I said: "If you are not going to do better than this, you will have to leave at the end of this week." He said he would go straight away, I think; he said he would leave, and he did leave the next day, I believe.

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Q. Then I think you arranged for his final pay, etc.? A. Yes, ~~because it was apparent he had no intention of returning~~ -- (Rejected; struck out by direction.)

Defendants'
Evidence

Q. Besides Mr. Shipp, who was the administrative officer at the centre? A. Mr. McCreadie.

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HIS HONOR: Q. Do you know the date of his discharge from the centre? A. No, I don't know offhand. It is in the file there.

George
Anthony Burns
Examination
3rd March
1964
continued

MR. WARD: It would be 23rd November, 1963.

10

Q. Did the reports you received come from the administrative head of the centre? (Objected to; allowed.)

Q. Who would the reports that you received come from? A. From Mr. McCreadie.

(Documents previously m.f.i. 3 and 4 tendered; objected to. Tender of m.f.i. 4 not pressed. m.f.i. 3 admitted in evidence and marked Exhibit "6".)

20

(Document previously m.f.i. 2 tendered; objected to; admitted in evidence and marked Exhibit "7".)

CROSS-EXAMINATION:

Cross-
Examination

MR. EVATT JNR: Q. Mr. Burns, the plaintiff, you say, was dismissed by you either on - did you say the 23rd?

HIS HONOR: I think Mr. Burns said he had this interview with Mr. Pataky a day or so before 23rd November, 1963.

30

MR. EVATT: I think this is in Exhibit "B".

Q. I take it 19th November was the date you spoke to him? (Exhibit "B" shown to witness.) A. Yes.

Q. He had come back from this trip to Sydney earlier than that, a few weeks before that? A. I think it was in October some time.

Q. You say it was October, but haven't you instructed to the effect that it was November? Have you ever told anyone it was November? A. No, I don't think so.

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Q. You say it was October? A. I think so.

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Evidence

Q. What date in October? A. I don't know. It is in the records in his file.

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10 Q. Have a look at those. Would those records show when the plaintiff went to Sydney from the Rehabilitation Centre? A. They should do, yes.

George
Anthony Burns
Cross-
Examination
3rd March
1964
continued

Q. Well, did he go in November? A. He went in the first week of November, I think.

HIS HONOR: Q. To Sydney? A. Yes. This is a report. He was examined on 31st October, 1963. This is dated 31st October and says ---

HIS HONOR: Don't state the contents of the report.

WITNESS: It mentions that he was to go to Sydney the next week.

20 MR. EVATT: Q. So that would be the first week in November? A. Yes.

Q. The only time you saw him after he came back from Sydney was that one interview in which I think you put it to him that he was not trying? A. Yes.

30 Q. Did you have available at that time Dr. Robson's report suggesting that he needed encouragement? A. I think the term was "cajoled". I had discussed him with Mr. Shipp and Mr. McCreadie, but not with Dr. Robson. I received no reports directly from Dr. Robson.

Q. You say you did not see any reports about this man from Dr. Robson at all? A. Not directly from Dr. Robson, no.

Q. Then I take it that you did not that Dr. Robson recommended encouragement for this man, I think about November 11th.

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Evidence

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George
Anthony Burns
Cross-
Examination
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continued

HIS HONOR: It is on page 100. 31st October.

MR. EVATT: It was one after that, about 11th November. It is at the bottom of page 102 and the top of page 103. That is what I wanted.

Q. Did you know that on 11th November, 1963 Dr. Robson had reported of the plaintiff: "We must carry on with encouragement and exercise. There is some improvement still"? Did you know that? A. No. ~~I understood the report I received was "Co-operation was poor"~~ (Last portion of answer objected to; rejected; struck out by direction.)

10

Q. In any event, you dismissed Pataky on that day, the 19th or on the 20th? A. Yes.

Q. And you know that his Workers' Compensation was stopped on that day? A. No. (Objected to; rejected.)

Q. You apparently were quite satisfied with the plaintiff up until November? A. We were hopeful.

20

Q. There is a big psychological obstacle with people as badly crippled as the plaintiff, isn't there? A. I agree, yes.

Q. And they fluctuate between periods of feeling bright and periods of despondency? A. Yes.

MR. WARD: No questions.

(Witness retired.)

(Case for the defendant closed.)

PLAINTIFF'S CASE IN REPLY

NO. 13

Opening

(Regulation 114 of the Regulations under the Scaffolding and Lifts Act tendered and marked Exhibit "C".)

Regulation 95(7) of the abovementioned Regulations tendered; objected to; argument ensued; decision deferred.)

In the
Supreme
Court of New
South Wales

Plaintiff's
Case in Reply

No.13

Opening
3rd March
1964

10

NO. 14

JANOS PATAKY

Recalled on former oath

No.14

Janos Pataky
Examination
3rd March
1964

MR. EVATT JNR.: Q. The name of one of the other men working in the tunnel was Mr. Garrozi (?), wasn't it? (Objected to; rejected.)

Q. Have you seen outside the Court one of the other persons who was working in the tunnel at the time you were hurt? (Objected to; rejected.)

20 Q. Have you seen sitting outside the Court one of the Italians who was in the tunnel at the time of the accident and who has not been called as a witness? A. Yes, I did (objected to; allowed).

Q. You answered that? A. Yes. I did, this morning.

Q. When you come down from the roof station to work at the face, can your work be done by yourself or do you need an assistant to do your work? A. I always need an assistant.

30 Q. For what purpose? A. First of all, when I do that mark, that three foot off centre mark, from there I have to make measurements - three feet to the right, eight feet to the right and another two feet to the right. Three feet to the right is where the true centre line goes and from the true centre line to the right and to the left I had to measure five feet for some purpose. When the face is

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Plaintiff's
Case in Reply

No.14

Janos Pataky
Examination
3rd March
1964
continued

going to be painted, you paint the face from these three points.

Q. Why do you need two people to do it?

A. Somebody has got to hold the end of the tape. Somebody has to bring the paint.

Q. Is the mark that the chainman makes on the face one mark only; this is when you are in the roof station? A. I gave him two or three times and he makes two or three little marks on the face just below each other

1)

Q. Does the chainman make any other marks on the face apart from those? A. No. He cannot.

Q. Why is that? A. He would not know the measurements.

Q. It is the surveyor's job to know the measurements - is that right? A. Yes, that is my job. That is why I was employed by the company - to do that work.

CROSS-EXAMINATION

Cross-
Examination

MR. WARD: Q. Why is he called a chainman?

20

Isn't that because he carries the chain?

Isn't he the chainman because he carries the chain? A. I was not educated on this, but I think it comes from the word when surveyors were working on the land and they used the measurement of a chain, and the man who held the measure - I think that is why they called him chainman.

Q. And down at the Snowy the chainmen carry the tape chain too, don't they, in the tunnel?

A. It is the surveyor who keeps the tape in his pocket.

30

Q. And the chainman does too, doesn't he?

A. Not necessarily. He is not working by himself.

Q. But sometimes he does, doesn't he? A. I don't think so. He is not working - he cannot work by himself.

Q. There are no different measurements in the tunnel? Once you get centre, you permanently have to get so many feet one side of centre and so many feet the other side of centre for your markings, your first markings, don't you? A. How about bends in the tunnel?

40

Q. But it is always the same, isn't it? A. It is not always the same.

Q. Just think. The centre you give from your theodolite, don't you? A. The three foot off-set centre.

Q. Three feet off-centre? A. Yes, or off-set.

Q. And the chainman makes a mark with chalk?
A. With chalk, yes.

10 Q. And did you give him any other mark? A. No.
He has the torch and he has the chalk.

Q. Did you indicate any further place for him to mark? A. In that stage, no. I just gave him the centre.

Q. That is the first mark from which the measurements are taken, isn't it? A. Yes.

Q. And the first lot of painted measurements are always the same?

HIS HONOR: Do you mean always the same distance from that mark?

20 MR. WARD: Q. Yes, always the same distance from that mark at each place if you are going down the tunnel? A. If you are driving the tunnel straight, but if you are on a bend it is not.

Q. When you come to the more defined markings you have different things to mark out? A. Yes.

Q. That is, the defined markings around the top part of the face? A. Yes.

Q. Did Dr. Bryant come into this Court late last week? A. I beg your pardon?

30 Q. Dr. Bryant - do you remember the man who operated on you? A. Dr. who?

Q. Do you remember the first doctor who was treating you down at Cooma? A. I am sorry, I don't get the question.

HIS HONOR: Are you sure you have the name right? Mr. Ward?

40 MR. WARD: Q. Do you remember late last week a doctor being present at Court who was one of the first doctors to treat you - at lunchtime, standing over here (indicating)? A. To answer you exactly, I don't know which doctor treat me first.

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Plaintiff's
Case in Reply

No.14

Janos Pataky
Cross-
Examination
3rd March
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continued

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Plaintiff's
Case in Reply

No.14

Janos Pataky
Cross-
Examination
3rd March
1964
continued

Q. Have you seen any doctor at Court who treated you in your early days? A. Yes, I have seen one doctor outside.

Q. Dr. who? A. Not in the Court; outside the Court.

Q. Who was that doctor? A. He was from Cooma.

Q. What was his name?

HIS HONOR: I will allow the witness to think about that during the lunch hour.

(Luncheon Adjournment)

10

AT 2.00 P.M.

MR. WARD: Q. Did you see Dr. O'Keefe at the Court last week? A. I did see him outside, yes.

Q. And he was one of the doctors who treated you in the early days, wasn't he? A. Yes.

Q. And did you see Dr. Morson at Court last week? A. Yes, I did.

MR. EVATT: No questions.

(Witness retired)

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(Report of Dr. McMurray dated 20th March, 1963, tendered and marked Exhibit "D".)

(Argument ensued on admissability of Regulation 95(7) of the Regulations made under the Scaffolding and Lifts Act.)

(Further hearing adjourned until :
9.00 a.m. on Thursday, 5th March,
1964.)

NO.15

JUDGMENT OF HIS HONOUR MR. JUSTICE ASPREY
ON TENDER IN EVIDENCE OF PART OF REGULA-
TION 98 OF THE REGULATIONS MADE PURSUANT
TO THE SCAFFOLDING & LIFTS ACT, 1912, AS
AMENDED.

In the
Supreme Court
of New South
Wales

No.15

IN THE SUPREME COURT OF
NEW SOUTH WALES IN CAUSES

CORAM: ASPREY, J.

10

Monday, 2nd March, 1964.

PATAKY v. UTAH CONSTRUCTION &
ENGINEERING PTY. LIMITED & ANOR.

Judgment of His
Honor Mr. Justice
Asprey on Tender
in Evidence of
Part of Regula-
tion 98 of the
Regulations made
pursuant to The
Scaffolding &
Lifts Act 1912
as Amended
2nd March 1964

20

HIS HONOR: In this action the Plaintiff has sued the defendants for damages in respect of injuries sustained by the plaintiff whilst working as the employee of the defendants on 7th July 1962. The plaintiff has sued on two counts. The first count I need not discuss in detail and it will suffice to say that it is a count based upon the alleged negligence of the defendants at common law. The second count of the declaration is a count which alleges that the defendants were carrying out certain excavation work to wit the making of a certain tunnel within the meaning of the Scaffolding and Lifts Act, 1912, as amended, in an area in which the Act had effect and the defendants employed the plaintiff to work at the excavation work and tunnel and pursuant to the Act and 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:

30

"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, yet the defendants did

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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 he suffered the injuries in respect of which he is suing in this action.

To this second count the defendants have pleaded, firstly, "not guilty" and by a third plea a denial of the allegations and each and every one of them which I have just recited from the second count. The plaintiff then joined issue. 10

At the outset of the trial it was heard before a jury of four but, by agreement between the parties, the jury has been discharged and I am trying the case alone. At this stage of the action the plaintiff is still in his case in chief, but so that the nature of the question which I am considering can be perhaps better appreciated, I will state, for the purposes only of this ruling and not otherwise, what are the facts relevant to this matter which the plaintiff could claim to have established in evidence at this stage of the case. 20

The defendants were engaged at the material time in constructing a tunnel at a place called Island Bend in the Snowy Mountains area of New South Wales and the plaintiff was working for the defendants in the capacity of an assistant surveyor in this tunnel. At the date of the accident the tunnel had been constructed into a mountain for a distance of some 800 or 900 yards. This tunnel was being constructed to an ultimate dimension of 21 ft. in diameter upon completion but, to permit subsequent concreting to bring it to this dimension, the tunnel was being excavated at the time of the accident to a diameter of some 25 or 26 ft. 30

The procedure adopted by the defendants in constructing the tunnel was apparently a well-recognised method of excavation and followed a regular cycle of separate operations. Firstly, a number of holes are drilled in the forward rock face and charges or shots are therein laid and detonated (this is known as the blasting operation). Secondly, after the expiration of fifteen minutes from the completion of the 40

blasting operation, the shift supervisor (who is also known as the "walker") orders the putting up of lights in the blasted area by an electrician and he, the "walker", then inspects the blasted area. Thirdly, the "walker" then orders miners to "bar down". This is a process by which miners with steel bars of varying lengths bar down or prise from the tunnel roof and both the sides of the tunnel, loose rock. The loose rock is observed by the eye and is also detected by taking soundings of the rock with the bars. This work usually takes from half to three-quarters of an hour. Fourthly, the rock and earth and gravel which have fallen to the tunnel floor from the blasting operation and from the barring down operations is called a "muck pile" and a "mucking machine" is brought in on railway lines to a situation adjacent to the muck pile. This machine removed the muck pile into trucks which are then taken back out of the tunnel. Fifthly, the assistant surveyor is at this stage situated at a platform known as the "roof station" some 600 to 800 feet from the tunnel face. He received a signal from his assistant (or chainman) that the chainman is going to the face. The chainman then goes up on the face with a torch and then shines the torch back so that the assistant surveyor is able to pick up the light with a theodolite and the chainman then makes a mark on the face. He does that three or four times and makes three or four marks. Sixthly, the "mucking" is still in operation at this stage and when this is completed the assistant surveyor goes up to the face, makes certain calculations and marks the centre line of the face. Seventhly, when these operations have all been completed, apparently the cycle repeats itself.

The Plaintiff, whilst at the roof station was signalled by the chainman on the day in question and he states that he went up to the face with the chainman and saw that the barrers-down had finished barring down and then he went up to the face, apparently to mark it. He stated that he was doing this for six or seven minutes, when he saw a rock of approximately 3ft. in diameter falling from the roof. This rock struck the plaintiff and he sustained very

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serious injuries.

In these circumstances, Mr. C. Evatt Jnr., junior counsel for the plaintiff, for the purpose of proving certain of the matters alleged in the second count tendered that part of Regulation 98 which is set forth in the second count of the declaration. This tender was objected to by Mr. Ward, counsel for the defendant, on three grounds: firstly, that that part of Regulation 98 which has been tendered is ultra vires the Scaffolding & Lifts Act; Secondly, that it is too vague, uncertain and indefinite to be a valid exercise of power; thirdly, that it only applies to a drive and a tunnel, and that the plasted-out area where this accident took place was not one of those places.

10

The approach to the problem presented to me is, firstly, to consider the meaning of the statutory power under which the regulation in question purports to be made and, secondly, to interpret the regulation to ascertain whether it is within the ambit of the statute (see Brunswick Corporation v. Stewart, 65 C.L.R. 88 at pp. 93, 99). As a preliminary step, however, I will examine the setting of the regulation which is under attack.

20

The relevant part of Regulation 6 (1)(a) of the Regulations imposes the obligation to comply with the provisions of these Regulations upon every person who, directly or by his servants or agents, carries out, inter alia, any excavation work. Regulation 98 is contained in Part VII of the Regulations, which Part is headed: "Safeguards and Measures to be taken for Securing the Safety and Health of Persons Engaged in Excavation Work". Regulation 98 is both the first and only Regulation in a sub-heading "D" headed: "Shafts, Wells and Tunnels." The word "drive" is not defined in either the Act or Regulations, but the Oxford Dictionary's definition of "drive" in this context states that it is "a passage driven or excavated horizontally". "Tunnel" or "tunnelling" is not defined either in the Act or Regulations, but the meaning of these words is self-evident and for myself I do not see any difference, at any rate for the present purposes, in the meanings of the expressions

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40

"drive" and "tunnel". "Excavation work" is defined in s.3 of the Act as including any work in connection with tunnelling.

"Excavation work" is referred to at a number of places in the Act. See s.4A(b). Part 2 of the Act includes in its heading "Excavation Work". See also s.6, s.6A, s.13, 15, 18 and 19(c).

10 The Regulation making power in the Act is to be found in s.22 and s.22(1) reads as follows:

"The Governor may make Regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act."

20 The form of this first sub-section of s.22 is one which is frequently found in Acts of Parliament and its operation has been judicially construed on various occasions. A number of the cases in the High Court of Australia dealing with this subject are quoted in Shanahan v. Scott (96 C.L.R. p.245 at p.250), where in the judgment of Dixon C.J., Williams, Webb and Fullagar, JJ. the following statement appears:

30 "The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the
40 purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends."

This passage was applied by the Chief Justice and Taylor J. in Peppers Self Service Stores

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No.15

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Pty. Limited v. Scott (98 C.L.R. 606 at p.610).

It appears to me to be clear that in relation to s.22(1) the various sections of the Act to which I have referred above and in which reference to "excavation work" is contained, could not be relied upon to empower the Governor to make regulations relating to the safety of persons employed in tunnels and counsel for the plaintiff did not attempt to place any reliance upon them for such a purpose. Hence, if a power exists in the Act to make the regulation to question, it must exist in sub-section (2) of s.22.

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Paras. (a) and (f) of sec.22(2) contain references to excavation work but they may be discarded as immaterial for the present purposes. However, s.22(2) (g)(iv) provides that, without limiting the generality of the powers conferred by s.22(1), the Governor may make regulations relating to the manner of carrying out, inter alia, excavation work. S.22(2)(g)(v) provides that, in like manner, the Governor may make regulations relating to safeguards and measures to be taken for securing the safety and health of persons engaged in, inter alia, excavation work.

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Sub-paragraph (iv) empowers the making of regulations relating to the manner of carrying out excavation work, that is to say, the mode or method in which any work in connection with, for example, tunnelling, is to be conducted. Such a power does not, at any rate in terms, authorise the making of regulations relating to the nature of the place in which the work itself is to be conducted, i.e., the tunnel. It appears to me to be a power to regulate the modus operandi and not the locus in quo. This construction of sub-paragraph (iv) appears to me to be pointed to, firstly, by the insertion therein of the words "manner of". These words would be unnecessary if the intention of the draftsman of the Act had not been to place some limitation upon the scope of the regulation-making power. Secondly, the use of such a word as "manner" appears to me in this context to be quite inappropriate to create a power to regulate the nature of the construction of the

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place where the work of excavation is to be performed in contrast with the method of the performance of the work itself. Thirdly, the presence and juxtaposition of sub-paragraph (v) should be particularly observed when seeking to ascertain the true construction of sub-paragraph (iv) and in sub-paragraph (v) is found a special regulation-making power dealing precisely with safeguards to be taken in relation to the safety of persons engaged in excavation work and it is not limited to either the excavation of the work or the place of work.

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In argument Mr. Evatt Jnr. did not place much reliance upon sub-paragraph (iv), directly his contentions to the effect of sub-paragraph (v), but, be that as it may, for the reasons which I have given, I do not think that sub-paragraph (iv) could be relied upon to justify the making of a regulation of the nature of that part of Regulation 98 which has been tendered.

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Sub-paragraph (v) empowers the making of regulations relating to safeguards and measures to be taken for securing the safety and health of persons engaged in, inter alia, excavation work. In this context I see no difference between the word "safeguards" and the word "measures" and, together or alone, they mean no more, in my opinion, than "protective acts, procedures or steps". The word "measures" of itself does not import the quality of protection but, in conjunction with the word "safeguard" and with the words which follow it, I think that its meaning is clear. But for what purpose are the safeguards and measures to be taken? This is stated to be "for" (i.e., with the object of) securing the safety (etc.) of persons engaged in excavation work."

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In the course of his argument upon the construction of these words, Mr. Ward referred me to *Brown v. National Coal Board* ((1962) A.C. 574); *Walsh v. National Coal Board* ((1956) 1 Q.B. 511) and *Gough v. National Coal Board* ((1959) 698). In reading these cases as a guide to the construction of the words "for securing the safety", etc., contained in sub-

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para. (v) it should be remembered that in The English Coal Mines Act, 1911, the relevant section, s.49, must be read with another section of the Act, namely s.102(8) and in the English Mines and Quarries Act 1954, the relevant section, s.48(1), must be read with subsection (2) of that section and also with s.157. S.49 of the Coal Mines Act 1911, reads in a mandatory form, which states that the working places in question "shall be made secure" and these words in themselves have been held to have imposed an absolute obligation (see *Edwards v. National Coal Board* (1949) 1 K.B. 704 per Tucker L.J. at p.708 and per Singleton L.J. at pp. 714-715; *Gough v. National Coal Board* (supra) per Lord Reid at p. 708; *Walsh v. National Coal Board* (supra) per Romer L.J. at pp. 522-523) from which absolute obligation a possible way of escape is to be found in s.102(8) which has no counterpart in the Regulations which I am considering so far as Regulation 98 is concerned. 10 20

In s.48(1) of the Mines and Quarries Act, 1954 (which repealed the Coal Mines Act 1911) the British Parliament effected substantial change in the wording of the obligation and this is discussed by Lord Radcliffe in his speech in *Brown v. National Coal Board* (supra). Despite the differences in the wording of s.22 (2)(g)(v) of the Scaffolding and Lifts Act, s.49 of the Coal Mines Act 1911 and Section 49 (1) of the English Mines and Quarries Act, 1954, I think that these words of Lord Radcliffe which are directed to the differences in the type of obligation imposed by the 1911 and 1954 corresponding sections are pertinent to the problem I am considering, i.e., whether s.22 (2)(g)(v) enables the authorship of an absolute obligation. I read from p.593 of the report: 30

"It may be possible to find a pregnant difference in the nature of each obligation corresponding with the difference in the language used. It is at least possible to see that the differences of language bear some relation to difference in the kind of thing that is to be the subject of the duty. But it is, I think impossible to say that in the face 40

of all these differences such words as 'the manager shall take such steps as may be necessary' for securing a specified result impose a liability of just the same order as a requirement that he is to secure or ensure that result or, more simply, that a state of affairs corresponding with the desired result is at all times to exist."

- 10 I think that these words are pertinent because the phraseology contained in sub-para. (v), "safeguards and measures to be taken for securing the safety (etc.) of persons engaged in excavation work", means no more than "protective acts, procedures or steps to be taken with a view to securing the safety, etc., of persons engaged in excavation work" and, in my view, this wording falls far short of enabling a regulation to be made imposing upon the person responsible for carrying out the work an absolute obligation of guaranteeing the safety of the persons whom he employs for that purpose. In other words, I think that the type of matter aimed at by sub-para. (v) is more akin to s.48 (1) of the English Coal Mines and Quarries Act 1954 and is markedly different from the absolute obligation which has been held to be contained in s.49 of the English Coal Mines Act, 1911.
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- 30 In considering this question it is not without interest to observe that, when subparagraphs (1), (2) and (3) of Regulation 73 of the same set of Regulations were made, also pursuant to the power contained in s.22(2)(g) (v) (see Australian Iron and Steel Ltd. v. Ryan 97 C.L.R. 89 at p.97) it was thought advisable to insert the prefatory qualifying wording at the commencement of Regulation 73 and to provide Regulation 74 so as to exonerate compliance with paragraphs (1), (2) and (3) of Regulation 73 where such compliance is impracticable (see Smith v. Rex Building Co. Pty.Limited, 63 S.R. 32). In these circumstances in which both Reg. 73(1), (2) and (3) and Regulation 98 stem from the authority of s.22(2)(g)(v) the absence of such "escape" clause as Regulation 74 with reference to Regulation 98 tends strongly to show that the wording of that part of
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Regulation 98 which has been tendered was intended to create an absolute and imperative obligation whereunder the happening of the accident was sufficient evidence of its breach (cf. Marshall v. Gotham Co. Ltd. (1954) A.C. per Lord Tucker at p.374; Brown v. National Coal Board (supra) per Lord Radcliffe at 592). I should have thought that clear words were needed to enable such an obligation to be imposed by regulation especially when (i) the statute itself refrained from so doing in its operative sections and (ii) the physical situation in which such an obligation would have to be performed is fraught with such latent geological defects and hazards as would frequently compel the person upon whom the obligation was imposed to do the impossible as Viscount Simonds reminds us in Brown's Case (supra).

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Even if I were wrong in the construction which I have given to sub-para. (iv), I would also be of the opinion that sub-para.(iv) did not enable a regulation to be made imposing an absolute obligation of safety. A power to state the way or mode in which excavation work is to be carried out does not, in my opinion, import in this context a power to impose upon the person carrying it out the responsibility of the impregnability of his employees against accident.

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I now turn to that part of Regulation 98 which has been tendered. This is the second sentence and paragraph in the regulation. The first sentence reads: "Every shaft and well shall be securely cased, lined, or otherwise made safe", and I presume that the words "or otherwise" would be construed as meaning "or by some other means", (cf. General Constructions Pty. Ltd. v. Peterson; 108 C.L.R. p.251 at p.255). The remainder of Regulation 98 particularises in some detail the acts, procedures or steps which must, or in one case, may, be taken. I see no essential difference between the phrase "shall be made secure" in s.49 of the Coal Mines Act 1911 and the phrase "shall be securely protected and made safe". Both import an absolute obligation and for the reasons which I have already given I do not think that the Act enables the Governor to impose such an obligation by way of regulation.

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Mr. Ward has also argued that the part of Regulation 98 which has been tendered merely

re-states the grant of the relevant part of the regulation-making power contained in sub-para. (v) and that it does no more than state the result of what the Governor is empowered by sub-para. (v) to do and does not state what are the safeguards or measures which should be taken for the purpose of securing the safety of persons engaged in excavation work and is, therefore, not a valid exercise of the regulation-making power.

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It seems to me that a 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 and accordingly I am of the opinion that this is a further reason why that part of Regulation 98 which has been tendered cannot be said to have been validly made pursuant to sub-paragraph (v).

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Another of Mr. Ward's grounds of attack was that that part of Regulation 98 which was tendered was too vague, uncertain and indefinite to be a valid exercise of power, and in the course of argument I referred to what Dixon J. (as he then was) said as to this principle in *King Gee Clothing Co. Pty. Ltd., v. The Commonwealth of Australia* 71 C.L.R. 184 at pp. 194-197; see also *Cann's Pty. Ltd., v. The Commonwealth of Australia*, 71 C.L.R. 210 per Dixon J. at pp. 227-8. In view of the opinion at which I have arrived in relation to Mr. Ward's first submission, I do not think it necessary for me to discuss this suggested ground of invalidity, but cf. *Vardon v. The Commonwealth of Australia*, 67 C.L.R. 434. Perhaps it may be considered to be another way of expressing the ground of invalidity to which I have referred to.

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As to the last ground argued by Mr. Ward, I would be against this contention, but this also becomes, for the same reason, unnecessary for me to discuss.

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I therefore hold that that part of Regulation 98 of the Regulations made pursuant to the Scaffolding and Lifts Act 1912, as amended, is

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I should have said, in addition to the matters which I stated just before the adjournment, that Mr. Evatt Jnr. did state that, in his view that part of Regulation 98 which was tendered did import an absolute obligation and he did not in any way contend to the contrary; in fact he not only agreed with the statement that it did import an absolute obligation but also argued in favour of that construction.

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For the reasons I have given, I will reject the tender of that part of Regulation 98 which is set forth in the second count of the declaration.

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JUDGMENT OF HIS HONOR MR. JUSTICE
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REGULATION 95(7) OF THE REGULATIONS
MADE PURSUANT TO THE SCAFFOLDING &
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IN THE SUPREME COURT)
OF NEW SOUTH WALES)
IN CAUSES.) CORAM: ASPREY J.

Tuesday, 3rd March, 1964.

PATAKY v. UTAH CONSTRUCTION &
ENGINEERING PTY. LIMITED & ANOR.

HIS HONOR: In the plaintiff's case in reply Mr. Evatt Jnr., junior counsel for the plaintiff, tendered Regulation 95(7), of the Regulations made pursuant to the Scaffolding and Lifts Act, 1912, as amended. That Regulation reads as follows: "Safe means of access shall be provided to every place where persons are employed in an excavation work."

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Mr. Ward, counsel for the defendants, objected to the tender of this particular Regulation on three grounds. Firstly, he stated that the Regulation should have been tendered in chief and not in the plaintiff's case in reply and that, as it had not been particularised (a fact which is conceded by Mr. Evatt Jnr.) and as it forms no part of the plaintiff's pleadings (a fact which is also conceded by Mr. Evatt Jnr.) I should not, at this late stage of the trial, permit the Regulation to be admitted in evidence.

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In reply to this objection, Mr. Evatt Jnr. has argued that he does not rely upon this Regulation as any part of his case in chief but as an answer to a possible argument which may be set up by the defendants, having regard to the evidence given on behalf of the defendants in this case. That evidence is, according to one witness, Mr. Valli, that the plaintiff was injured at a position at some 6ft. to 10ft. from the face of the tunnel; according to another witness, Mr. Moretti, the plaintiff was injured at a place some six or seven feet from the face of the tunnel. Mr. Evatt Jnr. argues that it may be set up by the defendants that the plaintiff was injured when he was in the act of going to the face of the tunnel. If it were to be found as a fact that the plaintiff was injured in the course of going to the face of the tunnel and if that were a "place" within the meaning of Regulation 95(7), then I think there would be some merit in what Mr. Evatt Jnr. has put forward by way of argument in reply to Mr. Ward.

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However, I think that the Regulation is not admissible on the two remaining grounds which have been raised by way of objection to its admission in evidence.

In the first place, I think that the word "place" in this Regulation means in this context of fact the tunnel itself and that "safe means of access to every place" means "safe means of access to the tunnel" and not "safe means of access to every individual place of working in the tunnel". If the

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last mentioned construction were correct it would seem to be difficult to understand why the draftsman of these Regulations thought it necessary to insert a regulation such as is contained in the second sentence of Regulation 98 which requires the tunnel and thus each and every part of the tunnel to be made safe. I think that "safe means of access" in Regulation 95(7) means access to the tunnel itself and not to the face of the tunnel and the sides of the tunnel and the shoulders of the tunnel and the floor of the tunnel and the roof of the tunnel.

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It should be noted that the plaintiff's place of work was not in any event limited to the face of the tunnel, for a good deal of his time, possibly most of his time, he was situated at the roof station which is suspended from the roof at a distance of some 600 to 800 feet from the tunnel face and to get to this station he had to enter the tunnel from its mouth some 600 or 700 yards still further back. Hence, if Mr. Evatt's contention as to the construction of Regulation 95(7) were correct, his "place" of work was not, as Mr. Evatt suggests, the tunnel face but that part of the tunnel from and including the roof station to the tunnel face a distance of some 600 to 800 feet. The accident to the plaintiff accordingly took place not at a point within the "means of access" to a place of work but at the place of work itself and accordingly Regulation 95(7) would have no relevance.

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In any event, on the evidence in this case and if my construction of the Regulation be correct, it would not be relevant to the present matters in issue.

I should also have mentioned in dealing with the first point of objection that Mr. Evatt Jnr. referred me to the case of Birkett v. A.F. Little Pty. Ltd. (1962) N.S.W.R. 492. This is a case which refers (inter alia) to the provisions of Regulation 73(2) which reads: "A person who carried out any building work shall provide and maintain safe means of access to every place at which any person has to work at any time."

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Mr. Evatt Jnr. has drawn my attention to the fact that Maguire J., according to the headnote, held that Regulation 73(2) is directed to the condition of ways, paths, premises and such like which have to be traversed by a workman before he reaches the actual site where he is to carry out his duties. I would respectfully agree with the conclusion of Maguire J., in his application of Regulation 73(2) to the facts of that case, but it appears to me that, when Regulation 95(7) is applied to a tunnel of the type with which we are dealing and upon the facts of this case, it is not permissible to split the tunnel up into its roof, its sides, its shoulders, its face, its floor and so on.

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There is another reason, however, why I think that Regulation 95(7) is not admissible. I have already rejected the tender of that part of Regulation 98 which is pleaded in the second count of the declaration for the reason that, in my view, it is ultra vires the Act. Regulation 95(7) is also in absolute terms.

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In this connection Mr. Evatt Jnr. referred me to the case of Trott v. W.E. Smith (Erectors) Ltd. (1957) 1 W.L.R. 1154. When this case is looked at, however, I would think that it would tend to support the conclusion to which I came earlier with regard to that part of Regulation 98 which was pleaded in the second count, because Trott's case was brought upon Regulation 5 of the English Building (Safety, Health & Welfare) Regulations 1948 which, after requiring that suitable and sufficient scaffolds shall be provided and after providing for other matters, goes on to state that "sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

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A perusal of the judgments in this case leads me to the conclusion that, if it were not for the words "so far as is reasonably practicable," the Court would have held that the obligation under the Regulation in question was an absolute obligation, so that if an accident occurred on the means of access in

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question, then that in itself would be sufficient to entitle a plaintiff to rely upon a breach of statutory duty. (see Edwards v. National Coal Board (1949) 1 K.B. 704 and other cases cited by me in rejecting the tender of part of Regulation 98).

I have already, in my earlier reasons in relation to Regulation 98, stated that in my view the Scaffolding and Lifts Act, 1912, as amended, does not empower the Governor to make Regulations which impose such an absolute obligation upon a person responsible for the carrying out of excavation work within the meaning of the Act. I take the same view of Regulation 95(7) as I do of that part of Regulation 98 which has been pleaded in second count and I think it is ultra vires the Act.

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For these reasons I reject the tender of Regulation 95(7).

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FINAL JUDGMENT OF HIS HONOR MR. JUSTICE
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IN THE SUPREME COURT }
OF NEW SOUTH WALES }
IN CAUSES. }

CORAM: ASPREY J.

24th June 1964.

PATAKY v. UTAH CONSTRUCTION &
ENGINEERING PTY. LIMITED & ANOR.

JUDGMENT

In this matter the plaintiff has sued the defendant for damages for negligence and the case arises out of an accident which befell the plaintiff on the 7th July 1962 when he was working in a tunnel in the Snowy Mountains area which was being constructed by the defendant as engineering contractors. The plaintiff by his declaration sued on two counts,

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the first count alleging negligence against the defendant at common law, and the second count alleging a breach of part of Regulation 98 made pursuant to the Scaffolding and Lifts Act 1912 as amended. In a separate judgment already delivered by me I have rejected the tender of that part of Regulation 98 upon which the second count was based, and accordingly that count has not been proved by the plaintiff and there will be a verdict entered for the defendant on the second count. I adopt as part of my present judgment the reasons which I then gave for rejecting the tender of the relevant part of Regulation 98 and I shall proceed to deal herein with the case for the plaintiff insofar as it is based on the first count of his declaration.

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There is a sharp conflict between the witnesses as to various important matters of fact relating to the manner in which and the time at which the plaintiff sustained his injuries but I shall, at the outset, deal with those matters which are really not in conflict between the parties.

The plaintiff is a naturalised Australian citizen and came to Australia in 1957 and, prior to working for the defendant, worked for the Snowy Mountains Hydro-Electric Authority for something like 2½ years and spent that time in tunnels and shafts being constructed as part of the works known as the "Snowy Scheme". He then worked for about a year in the same area with Kaiser-Perini-Morrison-Raymond who had a contract with the Snowy Mountains Hydro-Electric Authority for the construction of a tunnel in the area, and he worked for the last-mentioned firm as an Assistant Surveyor. He had previously graduated to this qualification by study and by going through the positions of a Third, Second and then a First Class Chain man and an Instrument man. After the contract which was being carried out by Kaiser-Perini-Morrison-Raymond had been concluded, the plaintiff returned to Sydney and occupied himself driving a taxicab; but on the 7th June 1962 he was offered a job as an Assistant Surveyor with the defendant. He started work in this capacity on the 11th June 1962.

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The tunnel in which the plaintiff met with

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his accident on 7th July 1962 was being constructed at a place called Island Bend and on the date of the accident had been constructed into a mountain for a distance of 800 to 900 yards. The correct dimension to which the tunnel was being constructed was 21 feet in diameter, but in order to allow for the tunnel to be concreted over, the tunnel was being actually excavated to a dimension of some 25 to 26 feet. The procedure for the excavation of the tunnel followed a regular cycle of events or operations. Firstly, a number of holes are drilled in the forward rock-face of the tunnel and explosives are laid in the face, and after the area is cleared of personnel, these explosives are detonated. A considerable amount of rock and rubble is discharged from the tunnel in the area detonated and this apparently falls to the floor of the tunnel and forms part of what is known as the "muck pile". Secondly, after the expiration of 15 minutes from the completion of the blasting operation the Shift Supervisor (who is also known as the "Walker"), or a foreman, goes up to the face of the tunnel where the blasting operation has been carried out in company with an electrician who sets up lights and the Supervisor then makes an inspection of the freshly blasted face. Thirdly, the Supervisor orders miners to "bar down". This is a process by which miners with steel bars of varying lengths bar down or prize from the tunnel roof and both sides of the tunnel the blasted out area of loose rock. The loose rock is detected by visual observation and also by taking soundings of the rock with the bars. This work usually takes from half to three-quarters of an hour. Fourthly, the rock and earth rubble which has fallen to the tunnel floor from both the blasting operation and the barring down constitutes the muck pile and a mucking machine is brought into the tunnel on railway lines and loaded at a situation adjacent to the muck pile. By means of the mucking machine the material comprising the muck pile is removed from the floor of the tunnel and placed into trucks by which means it is taken back out of the tunnel. The Assistant Surveyor is located at this stage at a platform suspended from the roof of the tunnel and known as the "roof station" and the roof

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station is some 600 to 800 feet back from the tunnel face. The Assistant Surveyor received a signal from his assistant or, as he is sometimes called, the "Chainman", that he (the Chainman) is going to the face. The Chainman then goes up to the face of the tunnel with a torch and then shines the torch back in the direction of the tunnel entrance so that the Assistant Surveyor is able to pick up the light by means of a theodolite and, as a result of their efforts, the Chain-man is enabled to make markings on the face of the tunnel. Sixthly, when the mucking operation is completed, the Assistant Surveyor goes up to the face, makes his calculations, and again marks the face of the tunnel to indicate where drill-holes are to be made for the laying of explosives. Seventhly, when these operations have all been completed, the cycle repeats itself.

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On 7th July 1962 the plaintiff was injured during the cycle of operations which I have just described and during a shift which commenced at midnight. The accident occurred during the second cycle of that shift, but one of the points sharply in issue between the parties is: at what precise stage had these operations reached when the plaintiff met with his injuries? The plaintiff states that on the day in question the tunnel face was blasted, for that operation everybody in the tunnel went back for a distance of 2,200 feet from the tunnel face and that after the blast he went to the roof station to await the signal from his assistant. This assistant (or Chain-man) was a man by the name of Socol who, at the date of the hearing of this case, was stated to be in Italy. The plaintiff states that approximately three-quarters of an hour after the blast he received the signal from Socol and he then used his theodolite for the purpose of fixing the position to mark the face. He then states that he went from the roof station to the face of the tunnel from half an hour to three-quarters of an hour after he received the signal from Socol. He states that, when he got to the face, the barriers-down had finished their work and the bars had been put away. This is an extremely important piece of evidence from the point of view of the plaintiff. His case was opened by his

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Counsel on the basis that the barring-down had been completed before the plaintiff went up to the face of the tunnel and the plaintiff himself adhered to this as the factual situation prior to the accident happening to him.

In this shaft on the day in question the barrers-down were three in number and consisted of one Joe Moretti, one Mario Caronzi and Socol who also acted as barrer-down in addition to his duties as Chain-man. The plaintiff states that, when he got to the area of the face, the mucking machine was in operation and that he went up to the face with Socol he saw that the barrers-down were finished. He said, "I went up to the face to do my job, to do my work. I was doing it 6 or 7 minutes. I was doing the fine movements actually. I was drawing the line on the face with a long pole and a paint brush and I was drawing the line down and I saw a rock falling on me." The rock was about 3 feet or bigger in diameter and, according to the plaintiff, it fell from the roof as the plaintiff was drawing the line on the tunnel face. The rock hit the plaintiff on his protective helmet and pushed him back and pinned him to the ground and he sustained serious injuries. The plaintiff was taken out of the tunnel and he states that his next conscious recollection was at the Cooma District Hospital. When asked by his Counsel whether he saw the foreman or any other person in charge when he went to the face, he replied "No". In cross-examination the plaintiff stated that the rock which fell on him came from the roof of the tunnel about 4 feet back from the tunnel face and from the middle portion of the roof. He agreed that it would have been a dangerous thing and a foolish thing to go into the area where the blasting had taken place until the barring-down had been completed. He said that when he went up to the face "it was over half past 5" and that he walked down the left-hand side of the tunnel. He agreed that the driver of the mucking-machine sits on the right-hand side of that machine as you load at the face of the tunnel. When asked what was the usual position of the Shift Supervisor or Walker, the plaintiff said: "It is up to the Walker. He is in charge of the shift. He can supervise in any site on the left or the

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right. It does not make any difference." Apparently the mucking-machine attendant and the man who hitches on the trucks also stand on the right-hand side of the tunnel. The plaintiff also stated that on the occasion in question the mucking-machine was not very far from the face, closer than 30 feet away, because the muck-pile was very low. He said that in order to make his mark from the roof down the face to the bottom of the vertical line he was standing on the muck-pile and was using a stick about 12 feet long with a paint-brush tied on the end of it.

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The plaintiff agreed that it was part of his job to keep a record of the times of certain parts of this cycle and of certain other technical details and that he made a note of these events as they occurred. A sheet was kept for that purpose but the plaintiff stated that he retained with him a note-book and pencil and at times he made his entries in the note-book and re-recorded these entries in the sheet at the end of the shift. The entry-sheet was kept at the roof station. The plaintiff was cross-examined as to entries made on the entry-sheet for 7th July 1962 (m.f.i. "1" - Ex. "4") and on his employment form (m.f.i. "3" - Ex. "6") and was asked in Court to write down certain figures on a piece of paper (m.f.i. "2" - Ex. "7"). I have considered these aspects of the case and I am satisfied that the entry on Ex. "4" opposite the words "Time Blasted" is the writing of the plaintiff and that the blasting operation during the second cycle of operations took place at 4.30 a.m. If this were so, then the plaintiff went up to the face in the vicinity of 5.45 a.m. or 6 a.m. having regard to the evidence given previously as to the various time factors. The plaintiff also stated that as he approached the muck-pile he saw the driver of the mucking-machine and he also noticed two men standing on the right-hand side of the muck-pile near the mucking-machine. These two men were not working but talking together but he did not know their names. He supposed that these men were barrers-down. There was also, he observed, a man assisting the driver by giving him his course. He says that the rest of the crew had gone for teatime

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or, at least, he believed that to have happened.

In re-examination, the plaintiff stated that the men who do the barring-down work as quickly as possible and this appears to me to be an important factor in the context of circumstances which I am considering because it would indicate that when these men are observed not to be working it is because their work has been concluded.

For the defendant, two witnesses were called who were part of the crew in the tunnel when the plaintiff met with his injuries. The first witness was one, Mario Valee (or Valli) who was the Shift Supervisor or Walker. On this occasion Valee detonated the blast and then went up to the face and checked the blast site before the men commenced to bar-down. It appears from Valee's evidence that, after the area has been inspected and lights arranged, the barring-down is the first operation commenced. On this occasion, according to Valee, three men were engaged in the process of barring-down, Moretti, Carozzi and Socol. At p.122 of the transcript Valee gave this evidence :- 10 20

Q. You remember Pataky being injured?

A. Yes I do.

Q. What were you doing at the time he was injured? A. I was standing on the right-hand side of the mucking-machine.

Q. That is the right-hand side as the mucking-machine faces the face? A. Yes. 30

Q. Why did you stand there? A. That is the front position and I could see nearby everything that is going on.

Q. What things are you paying attention to at that time? A. The mucker, the trucks coming down, the empty trucks coming down from the cherry pickers and the full trucks going back.

Q. What about the face itself, can you see the face from where you are? A. Very clear. 40

Q. Can you superintend the barring-down operation? A. Of course, yes, as much as I can.

Q. What happened to draw your attention to Pataky's injury? A. Well, I see this rock falling down from the roof."

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10 He said that the rock which fell on the plain-
tiff fell from the centre of the roof in the
blasted area. Valee stated that there had
not been much barring-down of the roof prior to
the plaintiff being injured. He said that
"they had just cleared out enough so Pataky's"
(the plaintiff's) "offsider could get there
with the light and light it for him to get to
the centre part.....may be four or five feet
from the face". He said that the barrers-down
had not reached the point of barring-down from
where the rock fell which injured the plaintiff.
20 He stated that when this rock fell the barring-
down was still in course of operation but that
the marks had already been put on the face and
that the plaintiff's assistant (Socol) had just
left to put away the long-handled paint brush
and the paint. He said that he did not see who
put the paint marks on the face but that he did
not see the plaintiff at any time at the face
prior to his injury.

30 When asked whether there appeared to him to
be any cause for the fall of the rock observable
to him Valee 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.
He said that the time of tea-break had not yet
arrived for the barrers-down. He agreed that
for some of the men engaged in this operation
40 the plaintiff's injury occurred at the time of
the tea-break but these men are replaced by other
men.

Valee was then asked this question and gave
this answer:-

"Q. What is your recollection, had the
barrers-down been replaced because of tea

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time or not? A. No, they were there still barring-down. They were waiting for replacement. That is why the foreman was not there, or the foreman is away with half the crew and didn't see a thing."

Under cross-examination Valee agreed that a man in the job carried out by the plaintiff had to go to the face and paint the side marks which marks he had already stated in his evidence in chief were on the face prior to the accident to the plaintiff. From questions put to and answers given by Valee I have concluded that, although he observed Socol give the signal to the plaintiff, he did not see the plaintiff come up to the face. In fact he did not see the plaintiff until after the rock had knocked the plaintiff to the ground. 10

Valee also stated that the men barred-down the shoulders of the tunnel on each side first and then that part of the roof for four or five feet to enable the Chain-man to go up to the face but, he said, where the rock fell was unsafe. 20

I find the evidence of Valee difficult to follow in this respect: He agreed that the surveyor has to go to the face and paint the sides but this, he claimed, is after the mucking-machine had finished its operations. He saw the centre line which had been marked but he did not see who marked it but he stated that the Chain-man paints the centre line and one line on each side of centre 5 feet apart but that the surveyor goes to the face and checks what the Chain-man has done in that regard. It is agreed however by Valee that whoever put the centre and two side marks on the wall they had been put there prior to the fall of the rock on the plaintiff and that Socol was walking away from the face along the muck-pile when the accident happened. However, Valee did agree that the surveyor may be there even when the side marks are painted, perhaps to assist in the measurement of the side marks, viz : 30 40

"Q. What did the Chain-man use to make the first mark? A. Chalk.

Q. And then he makes the paintmarks?
A. Yes.

Q. Or sometimes you say his surveyor
is with him? A. Yes."

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10 The other witness Moretti stated that he was
barring-down some rocks from the roof in the
area about 10 feet from the face when he
heard a noise and looked behind him and saw
the rock lying on the plaintiff approximately
six or seven feet from the face. He stated
that he had already barred-down the centre of
the tunnel where the plaintiff was lying. He
said:

"A. Yes, I had already done that part of
the tunnel, but even if you do your work
100 per cent, it is never 100 per cent,
because even after that some pieces of
rock still fall down."

To these questions he also gave these answers:

20 "Q. After you started barring-down, just
tell us how you did it that day? A. I
started from the middle and I went to-
wards the face of the tunnel.

HIS HONOR: He started towards the
middle of the roof and went towards
the face of the tunnel.

30 WITNESS: I started from the middle of
the roof and I went towards the face of
the tunnel, and then you go backwards
on the side.

HIS HONOR: Q. When you started in the
middle of the roof; to go towards the
face of the tunnel, how far were you
from the face when you started; how
far approximately? A. Approximately
twenty feet.

40 MR. WARD: Q. How much of the tunnel did
you have to bar-down? A. There is never
a fixed rule. Sometimes there is one
man and he has to do the lot; sometimes
there are four men and he has to do a
share.

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Q. How much did you do that day, the day Pataky was injured? A. A quarter of the tunnel on the right side, because there were three of us working.

HIS HONOR: Q. You said you started from the middle of the roof, twenty feet away from the face. Had you got to the portion of the roof which meets the face prior to the accident? A. Yes. I was working my way backwards." 10

It will be observed that if Moretti is correct as to the course of the barring-down on that particular day, that portion of the roof from which the rock fell upon the plaintiff had already been barred-down and that the evidence of Valee and Moretti is in conflict upon this point.

It appeared to me considering the demeanour of the plaintiff, Valee and Moretti in the witness-box that each was endeavouring to give the best of his recollection with regard to the events which resulted in the accident to the plaintiff. The conflict in the evidence is basically whether the operation of barring-down had finished or not in the area where the accident took place. The plaintiff agrees that it would have been a foolish and dangerous thing for him to have proceeded into the area in question if the barring-down procedure had not been completed there but his case is that it had. 20
On the evidence of the plaintiff who was a man of some experience in these operations, on the evidence of Valee as to the completion of the side paint-marks and the act of Socol in walking away with the paint-brush and on the evidence of Moretti who stated that he had already done that part of the tunnel I have come to the conclusion that the barring-down operation had been completed at any rate in that part of the tunnel where the plaintiff was standing when the piece of rock fell from the roof immediately above his head. I think that that conclusion is also supported to some extent by the evidence as to the time factors of elapsed time from the occurrence of the explosion at 4.30 a.m. I think that when Valee stated that the operation of barring-down was still in progress he was 30 40

speaking to the idea which he himself expressed, namely, that barring-down is never finished in a tunnel. The plaintiff's case and evidence was that all the barring-down had been completed and that the bars had been put away. Despite the evidence of Valee and Moretti I take the view that barring-down had concluded in the subject area when the accident happened. If that were not the case I find it difficult to understand how the plaintiff was not observed whilst going to the face and whilst remaining there, as he must have done, with Socol for some appreciable period of time and whilst remaining there after Socol had started away from the face with the paint-brush. Valee had the face in view and, despite the fact that the plaintiff came up the tunnel on the left-hand side, once he passed the mucking-machine he would have been in that limited space in the view of Valee as supervisor and others beside the machine. If the dangerous and obvious procedure of barring down were then in operation, it is difficult to understand why the plaintiff went to the area but, if he did so, why he was not warned to go back. I think upon the evidence that the barring-down had been completed and that a tea-break had occurred and that in a short relaxation of attention the plaintiff had proceeded to the face unobserved by Valee and Moretti and commenced his duties at it.

The question now arises as to where this finding of fact leaves the case for the Plaintiff. The heads of negligence relied upon by the plaintiff are as follows :-

- (1) That the system of work whereby the sides of the tunnel were barred-down before the centre of the roof was not a well-recognised and safe method and the barrers-down should do their work straight ahead of them (see the evidence of Mr. Marshall, an expert witness called on behalf of the plaintiff and see also the evidence of Moretti and the plaintiff himself);
- (2) that the mucking-machine should not have been allowed to have commenced work in the area until the barring

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down was finished because of the difficulty of the men sounding the roof to do it efficiently owing to the noise of the machine whilst it is in operation;

- (3) that the defendant did not have a responsible person in charge of the operations and that the foreman was not in the vicinity of the face at the time of the accident; 10
- (4) that the roof of the tunnel was not barred-down at all;
- (5) that the roof of the tunnel was not barred-down safely;
- (6) that there was no proper supervision of the barring-down of the tunnel after the explosion by some person on behalf of the defendant who would be responsible for the safety of the crew in the tunnel; 20
- (7) that the barring down process had not been carried out sufficiently far back from the face of the tunnel to enable the plaintiff to carry on his work with safety.

The difficulty which I see in the way of the plaintiff in relation to these heads of alleged negligence on the part of the defendant is that the plaintiff, to succeed in obtaining a verdict, must not only prove a breach of duty on the part of the defendant but that such breach caused or materially contributed to the accident in which he sustained the injuries in respect of which he is suing the defendant in this action. As regards the first head of negligence relied upon by the plaintiff it seems to me that, whether the work had been carried out according to the method espoused by Marshall, Moretti and the plaintiff or whether it was carried out in accordance with the procedure which Valee claimed to be the proper method of working, nevertheless the barring-down had been completed on the plaintiff's own case before he entered the area in which he met with his

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accident. Accordingly it seems to me that the question as to which of those methods is the proper procedure for barring-down is irrelevant to an accident which occurred after the barring-down had been completed.

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10 As regards the second head of negligence, namely, because of the noise of the mucking-machine the men sounding the roof for the purpose of barring-down were unable to work efficiently and so detect pieces of rock which were unsafe and thus likely to fall, there is no evidence in this case that this was the cause of any failure to detect that the rock which fell on the plaintiff was in fact loose at the time of the sounding. In fact, there is no evidence that the area of the roof from which this particular rock fell was not sounded before the mucking-machine commenced its operations because as the evidence lies the barrers-down commenced work immediately. Valee denied that in the particular circumstances the operation of the mucking-machine would have interfered with the drumming or sounding process. In any event, the evidence of both Moretti and Marshall is to the effect that the system of sounding for loose rock is not perfect and that there is always a chance that even after sounding and barring-down has taken place a rock may fall.

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30 As to the third heading of negligence that the foreman or some other person in charge was not there at the time of the accident, Valee as Shift Supervisor was present and in any event there would appear to be no connection with the absence of the foreman or some such person and the fall of the rock.

40 As regards the fourth head of negligence, namely that the roof was not barred-down at all, this is contrary to the plaintiff's own case that the barring-down had been completed and that the bars had been put away at the time when he entered the area at which he met with the accident. I have found this head to be contrary to the facts.

As regards the fifth and sixth heads of negligence, namely, that the roof was not

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barred-down safely and that there was no proper supervision of the procedure, there is no evidence that the barring-down had not been done efficiently or that it had not been properly supervised. The evidence of Moretti is that one can never be 100% sure that a rock will not fall after barring-down has been completed and Mr. Marshall said that there was always a remote chance of a rock falling after the completion of the operation of barring-down. 10
This is evidence which I accept and I think it accords with the common sense of the situation. Where a tunnel is being constructed for a considerable length under a mountain, where the nature of the strata of the mountain above the tunnel cannot be known with accuracy, where in the course of the progress of the tunnel explosions are continually being detonated for the purpose of removing the rock face, it is not surprising that pieces of rock will continue to fall even after the sounding process and the barring-down procedure has been carried out. 20
That there is always such a possibility of such an event occurring appears to me to be borne out by the fact that even after the tunnel has further progressed through the mountain the procedure of rock bolting and other procedures is still carried out. In other words, even in parts of the tunnel wall behind the area of immediate work there is always a chance that there will be further falls of rock. Hence it becomes necessary to further secure the roof by means of the rock bolting procedure. Of course it has been suggested in this case that there was either the time or the opportunity for that procedure to be carried out in the area immediately adjacent to the rock face when and where the plaintiff met with his accident. 30
Finally, there is the evidence of Valee who stated that the procedure of barring down is never completed. 40

As regards the seventh head of negligence this is opposed to the plaintiff's own case and the facts as I find them to be. I have come to the conclusion that the fall of rock which injured the plaintiff was an accident to which no fault attached to the defendant, and whilst I am exceedingly sorry for the plight of the plaintiff who has undoubtedly met with very

serious injuries I cannot ascribe those injuries to any act of negligence on the part of the defendant. Tunnelling through a mountain must necessarily involve considerable dangers inherent in such work and where an accident happens there must be shown to be both a breach of duty and a causal connection between that breach and the injuries which have been sustained by the plaintiff and the onus of establishing these matters lies upon the plaintiff. The unfortunate plaintiff in the present case has not satisfied me in these respects. Accordingly there will be a verdict for the defendant on the first count of the declaration herein and judgment for the defendant will be accordingly entered for the defendant in the action.

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continued

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NO.18

No.18

NOTICE OF APPEAL

Notice of Appeal
2nd July 1964

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IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 10247 of 1962.

BETWEEN: JANOS PATAKY
Appellant (Plaintiff)

AND: UTAH CONSTRUCTION &
ENGINEERING PTY.
LIMITED and BROWN
AND ROOT SUD-
AMERICANA LIMITED
Respondents (Defendants)

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NOTICE OF APPEAL

TAKE NOTICE that the Full Court will be moved on the first day on which its business permits after the expiration of sixteen days from the date hereof FOR A RULE allowing an appeal by the abovenamed appellant against the verdict and judgment entered against him in this action and ordering that the verdict for the respondents be set aside and that a verdict be entered for the appellant or in the alternative that

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of New South
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Notice of Appeal
2nd July 1964
continued

the matter be referred to His Honour Mr. Justice Asprey for further consideration as to the issue of liability or in the alternative that a new trial be granted to the appellant and that the respondents pay the appellant's costs of this appeal or for such other orders as the Full Court shall deem necessary. Particulars of the Judgment appealed from are as follows :-

The action was heard by His Honour Mr. Justice Asprey at Sydney on the 27th and 28th February 1964 and on the 2nd, 3rd, 5th, 6th and 23rd March, 1964, and 24th June, 1964, on which last said day His Honour found a verdict for the respondents and entered judgment accordingly. 10

The grounds of appeal are as follows:

1. His Honour's verdict was against the evidence and the weight of the evidence.
2. His Honour should have found a verdict in favour of the appellant. 20
3. His Honour should have admitted the tender of the Regulations under the Scaffolding and Lifts Act and further held that they provided a cause of action.
4. His Honour was wrong in law in holding that Regulation 98 and the other Regulations under The Scaffolding and Lifts Act were ultra vires and invalid.
5. His Honour should not have ruled that the Regulations under the Scaffolding and Lifts Act were invalid and did not provide a cause of action. 30
6. His Honour's findings of fact were against the evidence, the weight of evidence, and against the submissions put on behalf of the parties.
7. His Honour erred in law in holding that there was no evidence of negligence.
8. His Honour should have held that there was sufficient evidence of negligence upon which a finding in favour of the appellant 40

could have been returned.

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9. His Honour wrongly rejected and admitted certain evidence.

10. Fresh evidence is available.

11. His Honour should have held that breaches of the Scaffolding and Lifts Act Regulations could be considered as evidence of negligence in respect of the first count of the Declaration.

10 12. His Honour should have held that the second count of the Declaration provided a good cause of action for the appellant.

13. His Honour did not decide the action on the issues that were raised by the parties at the hearing.

14. The appellant reserves the right to add further grounds of appeal when His Honour's reasons for judgment become available and have been considered.

20 DATED this 2nd day of July 1964.

C. EVATT

Counsel for the Appellant.

NOTE: This Notice of Motion is filed by John Lawrence Aston, Esq., Solicitor for the abovenamed appellant of 11c Castlereagh Street, Sydney.

TO: The withinnamed respondents and to their Attorney, Russell O. Silva, of 10 O'Connell Street, Sydney.

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Supreme Court
of New South
Wales

NO.19

RULE OF FULL COURT OF NEW SOUTH WALES

No.19

IN THE SUPREME COURT }
OF NEW SOUTH WALES }

No.10247 of 1962

Rule of Full
Court of New
South Wales
17th March 1965

BETWEEN JANOS PATAKY Appellant
(Plaintiff)

AND UTAH CONSTRUCTION &
ENGINEERING PTY.LIMITED
and BROWN & ROOT SUDA-
AMERICANA LIMITED Respondents 10
(Defendants)

The Seventeenth day of March, One thousand
nine hundred and sixty-five.

UPON MOTION made this day WHEREUPON AND UPON
READING the Notice of Appeal herein dated the
Second day of July, 1964, and the Appeal Book
filed herein and UPON HEARING Mr. C.R. Evatt
of Queen's Counsel with whom was Mr. M.H. Mac-
Hugh of Counsel for the Appellant and Mr.W.D.T.
Ward of Counsel for the Respondents IT IS 20
ORDERED that the Appeal herein be dismissed
and the same is hereby dismissed in so far as
it relates to His Honour's having directed a
verdict and judgment to be entered for the
Defendants on the first count of the declara-
tion AND IT IS FURTHER ORDERED that the Appeal
herein be and the same is hereby allowed in so
far as it relates to the verdict and judgment
to be entered for the Defendants on the second
count of the declaration upon the grounds set 30
out in grounds 3, 4, 5 and 12 of the Notice of
Appeal AND IT IS FURTHER ORDERED that the
verdict and judgment so directed to be entered
on the second count of the declaration should
be set aside and a new trial should be ordered
on the issues raised under the second count of
the declaration and the pleas thereto AND IT
IS FURTHER ORDERED that the Respondents
should pay to the Appellant the Appellant's
costs of this appeal, and the costs of the 40
first trial of the action should abide the

event of the second trial AND IT IS FURTHER ORDERED that the question whether there should be a certificate to the present Respondent under the Suitor's Fund Act is reserved for a separate application to be made by the Respondents if it is so advised.

In the
Supreme Court
of New South
Wales

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Rule of Full
Court of New
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17th March 1965
continued

BY THE COURT
FOR THE PROTHONOTARY
E.R.STEPHENS
CHIEF CLERK

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NO.20

No.20

JOINT REASONS OF FULL COURT OF NEW
SOUTH WALES

Joint Reasons
of their Honours
for Judgment of
Full Court of
New South Wales
(Sugerman
Maguire and
Nagel JJ)
17th March 1965

IN THE SUPREME COURT
OF NEW SOUTH WALES

No.10247 of 1962

CORAM: SUGERMAN, J.
MAGUIRE, J.
NAGLE, J.

Wednesday, 17th March, 1965.

20 PATAKY v. UTAH CONSTRUCTION AND ENGINEERING
PTY. LIMITED & ANOR.

JUDGMENT

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SUGERMAN, J.: In this action the plaintiff sued the defendant for damages on two counts. The first count alleged negligence against the defendant at common law and the second count alleged a breach of part of Regulation 98 made pursuant to the Scaffolding and Lifts Act, 1912, as amended. Upon the Regulation in question being tendered in evidence in support of the second count, its tender was objected to on the grounds that it was ultra vires, and that objection was upheld by Asprey, J., the learned trial Judge, for reasons which he gave in a separate judgment delivered during the course

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of New South
Wales

No.20

Joint Reasons
of their Honours
for Judgment of
Full Court of
New South Wales
(Sugerman
Maguire and
Nagel JJ)
17th March 1965
continued

of the action on the 3rd March, 1964. Accordingly, the action having continued by consent of the parties before Asprey, J. sitting without a jury, when he came, on the 24th June, 1964, to deliver his judgment in the action, His Honour directed that a verdict be entered for the defendant on the second count upon the ground that the tender of the part of Regulation 98 on which that count was based had been rejected, and accordingly that count had not been made out by the plaintiff.

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In so doing, His Honour adopted, as part of his judgment in the action, the separate reasons which he had earlier given for rejecting the tender of the relevant part of Regulation 98. His Honour then proceeded to consider the plaintiff's claim upon the first count of the declaration, and, for reasons which he gave, reached the conclusion that there should be a verdict for the defendant on the first count also. In the result, then, there was a verdict, and judgment, for the defendant on both counts of the declaration.

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From this decision an appeal has been brought to this Court upon a number of grounds which include the grounds :- (3) that His Honour should have admitted the tender of the regulations under the Scaffolding and Lifts Act and further held that they provided a cause of action; (4) that His Honour was wrong in law in holding that Regulation 98 and the other regulations under the Scaffolding and Lifts Act were ultra vires and invalid; (5) that His Honour should not have ruled that the regulations under the Scaffolding and Lifts Act were invalid and did not provide a cause of action, and (12) that His Honour should have held that the second count of the declaration provided a good cause of action for the appellant.

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40

Upon the appeal now coming on for hearing, it appears that, insofar as it is directed to His Honour's decision on the first count of the declaration, it is not pressed. It is, however, pressed as to the second count, and in particular as to those grounds of appeal which I have quoted. It is common ground that

the questions raised by these grounds of appeal are identical with those which were considered and decided in the recent considered judgment of this Court in *Scarlett v. The Utah Constructions and Engineering Pty. Limited*, (82 W.N. (Part 2) 74), and, as I understand, it is common ground that in relevant respects this present case is indistinguishable from that case. It is therefore, as I understand the matter, conceded that, as to the second count of the declaration, the appeal, if we are to follow *Scarlett's Case*, must succeed on the ground in substance that the decision in that case shows that the learned trial Judge in the present case was in error in his conclusion that the relevant part of Regulation 98 was invalid, upon which conclusion his rejection of the tender of that regulation in evidence, and his ultimate judgment for the defendant in the action on the second count, both rested. This being so and no reason appearing why we should not, in this present case, follow the Court's previous decision in *Scarlett's Case*, and no further matters having been advanced in argument, the result must be, and both parties have agreed that it must be, that this appeal, to the extent to which I shall indicate, must be allowed.

The Order of the Court will then be that the appeal be dismissed insofar as it relates to His Honour's having directed a verdict and judgment to be entered for the defendant on the first count of the declaration, but that, insofar as His Honour directed a verdict and judgment to be entered for the defendant on the second count of the declaration, the appeal should be allowed upon the grounds set out in grounds 3, 4, 5 and 12 of the notice of appeal; that the verdict and judgment so directed to be entered on the second count of the declaration be set aside; that a new trial should be ordered of the issues raised under the second count of the declaration and the pleas thereto; that the respondent should pay to the appellant the appellant's costs of this appeal, and the costs of the first trial of the action should abide the event of the second trial. There will be an order accordingly, and the question whether there should be a

In the
Supreme Court
of New South
Wales

—————
No.20

Joint Reasons
of their Honours
for Judgment of
Full Court of
New South Wales
(Sugerman
Maguire and
Nagel JJ)
17th March 1965
continued

In the
Supreme Court
of New South
Wales

certificate to the present respondent under
the Sutors Fund Act is reserved for a separ-
ate application to be made by the respondent
if it is so advised.

No.20

Does that cover the matter?

Joint Reasons
of their Honours
for Judgment of
New South Wales
(Sugerman
Maguire and
Nagel JJ)
17th March 1965
continued

MR. WARD: Yes.

MR. EVATT: Yes.

SUGERMAN, J.: There will be an order
accordingly.

No.21

NO.21

10

Notice of
Motion for
leave to Appeal
to Her Majesty
in Council
19th March 1965

NOTICE OF MOTION FOR LEAVE TO
APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 10247 of 1962

BETWEEN JANOS PATAKY Respondent
(Plaintiff)

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

Applicants
(Defendants) 20

TAKE NOTICE that on the 22nd day of March,
1965 or so soon thereafter as the business of
the Court permits the above named Utah Con-
struction & Engineering Pty. Limited and Brown
& Root Sudamericana Limited will move for an
Order granting leave to appeal to Her Majesty
in Council from the judgment of the Full Court
of New South Wales given in the above matter
on the 17th March, 1965 upon the following
grounds :-

30

1. That the Full Court of New South Wales was in error in holding that so much of Regulation 98 of the Regulations made under the Scaffolding & Lifts Act, 1912 (as amended) as stated that "every drive and tunnel shall be securely protected and made safe for persons employed therein" was valid.
- 10 2. That the said Court was in error in holding that so much of Regulation 98 of the Regulations made under the Scaffolding & Lifts Act, 1912 (as amended) as stated that "every drive and tunnel shall be securely protected and made safe for persons employed therein" was a valid exercise of power by the Governor under and by virtue of Section 22(1)(9)(iv)(v) of the Scaffolding & Lifts Act, 1912 (as amended).
- 20 3. That the said Court should have dismissed the plaintiff's appeal in so far as it related to the second count in the plaintiff's declaration.
4. That the said Court should have held that a breach of the said second paragraph of Regulation 98 as aforesaid does not afford a private cause of action.
5. That the said Court should have held that the second paragraph of the said Regulation 98 was so uncertain, vague and indefinite as not to be an exercise of any power of The Governor under the said Act.
- 30 6. That the said Court should have held that the second paragraph of the said Regulation 98 was so uncertain vague and indefinite as not to afford by breach a cause of action.

Dated this 19th day of March 1965.

W.D.T.WARD

Counsel for the Applicants (Defendants)

In the
Supreme Court
of New South
Wales

No.21

Notice of
Motion for
leave to Appeal
to Her Majesty
in Council
19th March 1965
continued

40 NOTE: This Notice of Motion is filed by

In the
Supreme Court
of New South
Wales

No.21

Notice of
Motion for
leave to Appeal
to Her Majesty
in Council
19th March 1965
continued

Russell O'Hara Silva, Solicitor for the
abovenamed applicants of 29 Bligh
Street, Sydney to the within named
respondent (plaintiff) and to his
attorney John Lawrence Aston Esq., of
11c Castlereagh Street, Sydney.

No.22

Rule of Full
Court of New
South Wales
granting condi-
tional leave to
appeal to Her
Majesty in
Council
22nd March 1965

NO.22

RULE OF FULL COURT OF NEW SOUTH
WALES

IN THE SUPREME COURT
OF NEW SOUTH WALES

No. 10247 of 1962

10

BETWEEN JANOS PATAKY Plaintiff

AND UTAH CONSTRUCTION &
ENGINEERING PTY.LIMITED
and BROWN & ROOT SUDA-
MERICANA LIMITED

Defendants

The 22nd day of March, 1965.

UPON MOTION made this day on behalf of UTAH
CONSTRUCTION & ENGINEERING PTY.LIMITED and
BROWN & ROOT SUDAMERICANA LIMITED WHERE-
UPON AND UPON READING the notice of motion
herein dated the 19th day of March, 1965,
and the affidavit of Russell O'Hara Silva
sworn the 19th day of March, 1965 AND UPON
HEARING Mr. J.D. Holmes Q.C. and with him
Mr. W.D.T. Ward of Counsel for the Defend-
ants and Mr. M.H. McHugh of Counsel for the
Plaintiff AND UPON Mr. J.D. Holmes Q.C.
undertaking on behalf of the Utah Construction

20

& Engineering Pty. Limited that the leave of
 appeal granted in the action of McLaughlin v.
 Utah Construction & Engineering Pty. Limited
 will not be further pursued IT IS ORDERED
 that leave to appeal to Her Majesty in Council
 from the judgment of this Court given on the
 17th day of March, 1965 be and the same is
 hereby granted to Utah Construction & Engin-
 eering Pty. Limited and Brown & Root Sudameri-
 10 cana Limited (hereinafter called the Appell-
 ants) UPON CONDITION that the Appellants do
 within 21 days from the date hereof, give
 security to the satisfaction of the Protho-
 notary in the amount of five hundred pounds
 (£500. 0. 0.) for the due prosecution of the
 said appeal and the payment of the costs of
 the Respondent in accordance with the order
 hereinafter appearing AND UPON FURTHER
 20 CONDITION that the Appellants do within four-
 teen (14) days from the date hereof deposit
 with the Prothonotary the sum of Twenty-five
 pounds (£25. 0. 0.) as security for and to-
 wards the costs of the preparation of the
 transcript record for the purposes of the said
 Appeal AND UPON FURTHER CONDITION that the
 Appellants do within one (1) month of the date
 hereof take out and proceed upon all such
 appointments and take all such other steps as
 may be necessary for the purpose of settling
 30 the index to the said transcript record and
 enabling the Prothonotary to certify that the
 said index has been settled and that the con-
 ditions hereinbefore referred to have been
 duly performed AND UPON FURTHER CONDITION
 that the Appellants do obtain a final order
 of this Court granting them leave to appeal as
 aforesaid AND UPON FURTHER CONDITION that
 before final leave to appeal is granted the
 Appellants do file in this Court an undertak-
 40 ing in writing that the Appellants whatever
 the result of the appeal will bear the party
 and party costs of both parties of this appli-
 cation and of the preparation of the said
 transcript record and of all other proceedings
 hereunder and of the said final order and of
 the Appeal AND THIS COURT DOTH FURTHER ORDER
 that the costs incurred in New South Wales by
 both parties to this appeal to be taxed by the
 50 proper officer of the Court so far as may be
 requisite to obtain compliance with the above

In the
 Supreme Court
 of New South
 Wales

No.22

Rule of Full
 Court of New
 South Wales
 granting condi-
 tional leave to
 appeal to Her
 Majesty in
 Council
 22nd March 1965
 continued

In the
Supreme Court
of New South
Wales

No.22

Rule of Full
Court of New
South Wales
granting condi-
tional leave to
appeal to Her
Majesty in
Council
22nd March 1965
continued

conditions AND THIS COURT DOTH FURTHER ORDER
that any moneys payable by the Appellants to the
Respondent in compliance with the above condi-
tions and such costs that become payable by the
Appellants in the event of the said appeal being
dismissed may be paid out of any moneys paid in
to Court as such security as aforesaid so far as
the same shall extend and that after such pay-
ment out the balance (if any) of the said moneys
shall be paid out of Court to the Appellants
AND THIS COURT DOTH FURTHER ORDER that pending
the said appeal all proceedings under the said
judgment or otherwise in this cause be and the
same are hereby stayed and that each party is to
be at liberty to restore this matter to the list
upon giving two (2) days notice thereof to the
other for the purpose of obtaining any necessary
rectification of this order.

10

BY THE COURT
For the Prothonotary
E.R. STEPHENS .
Chief Clerk.

20

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965

NO.23

REASONS OF FULL COURT OF NEW SOUTH
WALES

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 10247 of 1962

CORAM: SUGERMAN, J.
MAGUIRE, J.
NAGLE, J.

30

Monday, 22nd March, 1965

PATAKY v. UTAH CONSTRUCTION &
ENGINEERING PTY. LIMITED and
BROWN & ROOT SUDAMERICANA LIMITED

JUDGMENT

SUGERMAN, J.: This is an application for condi-
tional leave to appeal to the Privy Council in
this action against the decision of this Court

given on 17th March whereby this Court in part allowed the appeal which the present Respondent had brought against the verdict and judgment of Asprey, J., and in part set aside that verdict and judgment and ordered a new trial of the issues raised by the second count of the declaration.

In the
Supreme Court
of New South
Wales

No.23

10 Leave is sought in order that the Appellants may have an opportunity of having brought before the Privy Council for decision the same question of law as arises in the case of McLaughlin v. Utah Construction & Engineering Pty. Limited, in which this Court granted leave to appeal to the Privy Council on 3rd March. The considerations which should govern in deciding whether the question involved in the appeal is such as ought in the Court's opinion to be submitted to Her Majesty in Council for decision are the same in this case as in the case of McLaughlin, and, but for the pendency of the order for leave to appeal in McLaughlin's Case, there would be no question but that, for the reasons which we gave in that case, we should make an order granting conditional leave to appeal in the present case. That order for leave was, however, made, and it may therefore be enquired why there should be orders granting leave to appeal to the Privy Council to the same applicant in two cases, both involving the same question. That difficulty I understand Mr. Holmes to meet by saying that, for reasons which he has mentioned to us, it is desired that this case, rather than McLaughlin's Case, should be the testing ground before the Judicial Committee on the question of law involved and, that in order to enable this to be done, he is prepared on behalf of his client, Utah Construction & Engineering Pty. Limited, the Appellant in McLaughlin's Case, to give an undertaking that the conditional leave to appeal in that case will not be further pursued, so that that appeal will not go on.

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

That being so, no reason appears why we should not grant conditional leave to appeal in the present case upon terms substantially similar to those upon which conditional leave was granted in McLaughlin's Case, but differing

In the
Supreme Court
of New South
Wales

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

from them in some respects which I shall indicate. First of all we require as a condition of our granting conditional leave in this case that Mr. Holmes undertakes that the conditional leave to appeal granted in the case of McLaughlin v. Utah Construction & Engineering Pty. Limited will not be pursued. I understand, Mr. Holmes, that you do give that undertaking on behalf of your client, Utah Construction & Engineering Pty. Limited, which is one only of the Appellants in the present appeal.

10

MR. HOLMES: I do, your Honour.

SUGERMAN, J.: Secondly, in granting conditional leave to appeal in McLaughlin's Case, we thought it proper, for reasons which we then stated, to require of the Appellant an undertaking that the Appellant, whatever the result of the appeal, would bear the party and party costs of both parties of the application for conditional leave and of the preparation of the transcript record and of all other proceedings under the said application and of the final order and of the appeal. We think it proper that a similar condition be imposed in the present case. In the McLaughlin Case we went on and added a proviso requiring that, in the event of an appeal being allowed by Her Majesty in Council and the Respondent being ordered to pay the Appellant's costs, the Appellant should make application to this Court for an indemnity certificate under the Suitors Fund Act 1951-60 in respect of the appeal. We then went on to provide that, in the event of such a certificate being granted to the Respondent, the said undertaking, that is the Appellant's undertaking to bear the costs of the appeal in any event, should be deemed to be satisfied by the payment by the Appellant to the Respondent of the amount by which the costs payable by the Respondent to the Appellant and the costs of the Respondent of the Application for conditional leave etc. should exceed the amount of the indemnity, if any, obtained by the Respondent under the said certificate. Since our original statement in McLaughlin's Case of our attention

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to make an order with a proviso in that form we have given further consideration to the question of the propriety of imposing such a qualification or proviso upon a condition in an order giving conditional leave to appeal requiring the Appellant to bear the costs of the appeal in any event. When the case of McLaughlin came before us again on 3rd March in order that we should make our formal order giving conditional leave in terms of a draft whose form had in the meantime been settled and agreed upon between counsel, we made certain observations on this question. We commenced those observations by stating that the Court should make it clear that an order in this form was not to be taken as any expression of opinion by this Court that the Court or Judge to whom, in the event contemplated as a possible event, application was made for a certificate under the Suitors Fund Act, should in the circumstances of the case grant such a certificate. We then went on to state certain reasons, which appear in the transcript of what we then said and, consequently, we find it unnecessary to repeat here, why it might be thought that in such a case a certificate under the Suitors Fund Act should not be granted.

The question having arisen before us again in this case, we have after consideration concluded that we should not defer this question until the event of the appeal and the happening of the contingency of the Appellant's being successful therein, but that being asked to insert this same proviso in this order now sought, we should ourselves assume the responsibility of deciding whether it is proper to insert such a proviso in the light of the considerations which we discussed in the course of what we said on 3rd March. Having considered the matter, we are of opinion that the considerations there mentioned should be given effect to now by declining to insert in the present the proviso to the condition requiring the appellant to bear the costs in any event. We are conscious, as Mr. Holmes has pointed out, that there might be available to him, subject of course to delays which his client does not wish to incur, another method of testing the question of the validity of the relevant part

In the
Supreme Court
of New South
Wales

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

In the
Supreme Court
of New South
Wales

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

of Regulation 98 of the Regulations under the Scaffolding & Lifts Act before the Judicial Committee, which would not require the leave of this Court; that is to say, to allow the action to go to its second trial, and in the event of his clients' being unsuccessful in the second trial, taking advantage of the right which he says he would then have of bringing, as of right, an appeal to the Privy Council which would test the particular question. The consequences of that I think serve rather to illustrate, than to militate against, the considerations which we set forth in our short statement on the 3rd March. If that event happened, and if the appeal to the Privy Council were successful, the Respondent would no doubt be entitled to apply to the Court for a certificate under the Suitors Fund Act and would, I think I can say almost certainly, obtain such a certificate. That would be no more than giving effect to the real purpose and intention of that Act, namely to indemnify the Respondent against the consequences of his having to bear costs which have fallen upon him only because a favourable decision which he had obtained in this Court had been obtained through this Court's mistake of law and had to be set aside by the Privy Council. The whole point here is that the present applicant, the proposed Appellant, craves this Court's leave to appeal to the Privy Council. It is thought proper, for reasons which have been stated in McLaughlin's Case that that leave should be granted only on the terms that it bear all the costs in any event. It follows that the Respondent would be under no need to be indemnified out of the Suitors' Fund in any event (it being remembered that the granting of indemnity out of that Fund is in general, and certainly in this type of case, discretionary in the Court) and that it would be unlikely that an indemnity would be granted, and indeed it would seem wrong that an indemnity should be granted in the event that the Respondent had no need for it because he was already indemnified from another source and on the basis of another principle than that which is embodied in the Suitors' Fund Act.

That is all I think that need be said by

way of general explanation of the order which will be made. There are one or two other variations which have been agreed to.

In the
Supreme Court
of New South
Wales

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

10 The order of the Court then will be,
 upon Mr. Holmes giving the undertaking which
 he has given to this Court that the leave to
 appeal granted in McLaughlin v. Utah Construc-
 tion & Engineering Pty. Limited will not be
 further prosecuted, the Court does now grant
20 leave to appeal to Her Majesty in Council
 from the judgment of the Court in this present
 action in terms of the order which was made in
 the case McLaughlin v. Utah Construction &
 Engineering Pty. Limited on 3rd March, 1965, of
 which a copy has been handed to me by counsel,
 which I have initialled for identification,
 with the following variations, namely in lieu
 of the period of two months therein provided
 for the giving of security, the period be
30 21 days; in lieu of the period of two months
 therein provided for the taking out and pro-
 ceeding upon appointments, the time be one
 month; and that the proviso, dealing with the
 obtaining of an indemnity certificate under
 the Suitors' Fund Act, to the condition that
 the Appellant bear the costs of the appeal etc.
 in any event, be deleted therefrom. Other-
 wise, order in terms of the order in McLaugh-
 lin's Case as appearing in the draft which has
 been handed to me and which I have initialled.

Is that intelligible to the parties?

MR. HOLMES: Perfectly clear. Could my
solicitor borrow from your Honour the copy
that your Honour has initialled? It is the
only one that we have.

40 SUGERMAN, J.: You may borrow it. Indeed it
 might be a convenient course if you would have
 prepared and filed draft minutes of order in
 terms of the order in this case. that is to
 say the order in McLaughlin's Case converted
 to this case. If that is done, I do not
 think the matter need be mentioned again in
 Court. My brothers and myself can have a
 look at it, and I can then initial that as
 the order of the Court.

In the
Supreme Court
of New South
Wales

When is the order in this case to date as
of?

MR. HOLMES: Today.

No.23

Reasons of
their Honours
for granting
conditional
leave to appeal
to Her Majesty
in Council
(Sugerman
Maguire &
Nagle JJ)
22nd March 1965
continued

SUGERMAN, J.: If it is to date as of today,
that course will not be available. If it is
to date as of today, I think the short note
of the order which is to be made should be
this: Order granting leave to appeal to Her
Majesty in Council from the judgment of this
Court in this action in terms of the order
made in Action No.9988 of 1963 between Wilfred
Henry McLaughlin and Utah Construction &
Engineering Pty. Limited, one of the present
applicants, with the following variations,
namely, that the time of two months therein
provided for the giving of security shall be
reduced to 21 days; that the time of two
months therein provided for taking out pro-
ceeding upon appointments shall in lieu there-
of be one month; and that the proviso, re-
lating to an application for an indemnity
certificate under the Suitors' Fund Act in
certain events, to the condition requiring an
undertaking from the Appellant that the
Appellant will bear the cost of the appeal
etc. in any event shall be deleted. The
present order is made upon the undertaking by
Mr. Holmes on behalf of his client, Utah
Construction & Engineering Pty. Limited, that
the leave to appeal granted in the said action
of McLaughlin v. Utah Construction & Engineer-
ing Pty. Limited will not be further pursued,
which undertaking Mr. Holmes has already given
to the Court.

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The terms of the said order in McLaughlin
v. Utah Construction & Engineering Pty.Limited
are set out in a document which has been
tendered by Counsel and has been initialled by
me. This may be returned to the Solicitor
for the Applicant on terms that he will return
it to the Court.

40

NO.24

CERTIFICATE OF PROTHONOTARY

In the
Supreme Court
of New South
Wales

IN THE SUPREME COURT
OF NEW SOUTH WALES

No. 10247

No.24

BETWEEN JANOS PATAKY Respondent
(Plaintiff)

AND UTAH CONSTRUCTION & ENGINEER-
ING PTY. LIMITED and BROWN
& ROOT SUDAMERICANA LIMITED

Applicants
(Defendants)

Certificate of
the Prothonotary
of Compliance
with the Rule
of Court
23rd April 1965

10

IN PURSUANCE of the Conditional Order for
leave to appeal to the Privy Council made
herein on the Twenty second day of March 1965,
I have been attended by the Solicitors for
the Appellants and the Respondent herein AND
I FIND AND CERTIFY as FOLLOWS:

20

1. The Appellants did within Twenty one (21)
days from the date of the said Order pay into
Court to the credit of this action the sum of
Five hundred pounds (£500.0.0) as security
for the due prosecution of the appeal herein
to Her Majesty in Council from the judgment
made herein on the Seventeenth day of March,
1965, and for the payment of all such costs
as may become payable to the Respondent in the
event of the Appellants not obtaining an order
granting them final leave to appeal from the
said judgment or of the appeal being dismissed
for want of prosecution or Her Majesty in
Council ordering the Appellants to pay the
Respondent's costs of the said Appeal, as the
case may be.

30

2. The said Appellants did within fourteen
(14) days of the date of the said order of the
Twenty second day of March, 1965 pay into

In the
Supreme Court
of New South
Wales

No.24

Certificate of
the Prothonotary
of Compliance
with the Rule
of Court
23rd April 1965
continued

Court to the credit of this action the sum of Twenty five pounds (£25. 0. 0.) as security for and towards the costs of the preparation of the transcript record on the said appeal.

3. The said Appellants have up to the date hereof taken out all necessary appointments and done all other things for the purpose of settling the said transcript record and of enabling me to certify that the said transcript record has been settled and that the provisions of the said order have been settled and that the provisions of the said order have been duly complied with on the part of the Appellants, and that the index to the said transcript record has been duly settled.

10

4. That the Appellants have filed in this Court an Undertaking in writing that they whatever the result of the appeal will bear the party and party costs of both parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order and of the appeal.

20

DATED this Twenty third day of April, 1965.

R.E. WALKER

PROTHONOTARY.

NO.25

RULE GRANTING FINAL LEAVE TO APPEAL

In the
Supreme Court
of New South
Wales

IN THE SUPREME COURT)
OF NEW SOUTH WALES)

No. 10247 of 1962

No.25

BETWEEN UTAH CONSTRUCTION & ENGINEER-
ING PTY. LIMITED and BROWN
& ROOT SUDAMERICANA LIMITED

Rule granting
Final Leave
to Appeal
27th April 1965

Appellant
(Defendants)

10

AND JANOS PATAKY

Respondent
(Plaintiff)

The Twenty seventh day of April One
thousand nine hundred and sixty five.

UPON MOTION made this day pursuant to the
Notice of Motion filed herein on the Twenty
third day of April, 1965, WHEREUPON AND UPON
READING the said Notice of Motion the affi-
davit of Russell O'Hara Silva sworn on the
Twenty third day of April, 1965, and the Pro-
thonotary's Certificate of Compliance, AND
20 UPON HEARING what is alleged by Mr. W.D.T.
Ward of Counsel for the Appellants and Mr.H.
R. Hudson of Counsel for the Respondent IT
IS ORDERED that final leave to appeal to Her
Majesty in Council from the Judgment of this
Court given and made herein on the Seven-
teenth day of March, 1965, be and the same is
hereby granted to the Appellants.

BY THE COURT

30

FOR THE PROTHONOTARY

E. R. STEPHENS

CHIEF CLERK.

In the
Supreme Court
of New South
Wales

CERTIFICATE OF PROTHONOTARY

IN THE SUPREME COURT } No. 10247 of 1962
OF NEW SOUTH WALES }

No.26

Certificate of
the Prothonotary
of the Supreme
Court of New
South Wales
verifying the
Transcript
Record
14th May 1965

BETWEEN UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED and BROWN & ROOT
SUDAMERICANA LIMITED

Appellants
(Defendants)

AND JANOS PATAKY

Respondent
(Plaintiff)

10

CERTIFICATE VERIFYING TRANSCRIPT RECORD

I RONALD EARLE WALKER of Sydney in the State
of New South Wales, Prothonotary of the Supreme
Court of the said State DO HEREBY CERTIFY that
the sheets hereunto annexed and contained in
pages numbers one to 203 inclusive contain a
true copy of all the documents relevant to the
appeal by the Appellant Utah Construction &
Engineering Pty.Limited and Brown & Root Suda-
mericana Limited to Her Majesty in Council
from the judgment of the Supreme Court given
and made herein on the Seventeenth day of March
One thousand nine hundred and sixty five so far
as the same have relation to the matters of the
said appeal together with the reasons for the
said judgment given by the said Court and an
index of all the papers, documents and exhibits
"A" to "C" and "4" to "7" in the said action
included in the annexed transcript record which
true copy is remitted to the Privy Council pur-
suant to the order of Her Majesty in Council of
the Twentieth day of December in the year of
Our Lord One thousand nine hundred and fifty
seven.

20

30

IN FAITH AND TESTIMONY whereof I have
hereunto set my hand and caused the seal
of the said Supreme Court to be fixed this
fourteenth day of May in the year of Our
Lord One thousand nine hundred and sixty
five.

40

(SGD.) R. E. WALKER (L.S.)
PROTHONOTARY OF THE SUPREME COURT
OF NEW SOUTH WALES

E X H I B I T S

Exhibit A

EXHIBIT A - TELEGRAM DEFENDANT UTAH CON-
STRUCTION & ENGINEERING PTY.
LTD. to PLAINTIFF DATED
7TH JUNE 1962

Telegram
Defendant
Utah Construction
& Engineering
Pty. Ltd. to
Plaintiff dated
7th June 1962

8-6-62

3 1 6 8 J J.
20.11.62.

+
SRK 169= CUL08 =
COOMA NSW 29 12.5P

(Stamp)
Chief Telegraph Office
7
JUN
1962
Sydney, N.S.W.

J PATAKY
206 VICTORIA ST
KINGS CROSS SYDNEY NSW

PLEASE PHONE ISLAND BEND 230 INTERESTED
POSITION ASSISTANT SURVEYOR TUNNEL £35
PER SIX DAY WEEK PLUS SHIFT ALLOWANCE
... DON FULLER UTAH
(206 230 £35 UTAH) 13

Exhibit B

Letter from Defendants to Plaintiff together with cheque payable by Defendants to the Plaintiff dated 20th November 1963

EXHIBIT B - LETTER FROM DEFENDANTS TO PLAINTIFF TOGETHER WITH CHEQUE PAYABLE BY DEFENDANTS TO THE PLAINTIFF DATED 20TH NOVEMBER, 1963.

UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED
and
BROWN & ROOT SUDAMERICANA LTD.
(Joint Venture)
P.O. ISLAND BEND, N.S.W.

10

In reply refer to: IBR/11/25

20th November 1963.

Mr. John Pataky,
C/- Snowy Mountains Joint Safety
Rehabilitation Centre,
Box 332, Post Office,
COOMA NORTH.

Dear Sir:

Attached please find the Joint Venture's cheque number 3677L in amount £104.0.0 (One hundred and four pounds) being final payment due to you on termination of your engagement on Tuesday, 26th November 1963, in accordance with notice given to you on the 19th November 1963.

20

Yours truly,
UTAH CONSTRUCTION & ENGINEERING
PTY. LIMITED and BROWN & ROOT SUD-
AMERICANA LTD. (Joint Venture).

G. A. Burns

30

G. A. BURNS
PERSONAL MANAGER.

Enc. Cheque
GAB/10'1

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

Exhibit B

Letter from
Defendants to
Plaintiff
together with
cheque payable
by Defendants
to the Plain-
tiff dated
20th November
1963
continued

New South Wales

Not Negotiable 20/11/63.

A/c. Payee 1D

Only Stamp Duty

No. 3677 L

10 Date 20th November 1963

Pay the sum of EXACTLY £104 - 0 - 0 £104-0-0
N.H.

TO J. PATAKY Utah Construction &
THE Engineering Pty.Limited
ORDER and
OF Brown & Root Sudamericana
Ltd.
Joint Venture

Boyd C. Paulson

F.A. Keogh

20 NATIONAL BANK OF AUSTRALASIA LIMITED
340-346 GEORGE STREET, SYDNEY

Detach before depositing

Utah Construction & Engineering
Pty. Limited and
Brown & Root Sudamericana Ltd.
Joint Venture

| Details | Gross Discount | Nett |
|----------------------|----------------|----------|
| Final Pay due - Pro | | |
| Rata Leave £105.0.0. | | |
| Tax 1.0.0. | | £104.0.0 |

30

No. 3677

Exhibit C

EXHIBIT C - REGULATION 114 UNDER THE
SCAFFOLDING & LIFTS ACT
1912 AS AMENDED.

Regulation 114
under The
Scaffolding &
Lifts Act
1912 as Amended

EXAMINATION OF SITE AFTER FIRING.

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.

10

20

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.

30

EXHIBIT D - TUNNEL SHIFT REPORT

Exhibit D

UTAH CONSTRUCTION & ENGINEERINGPTY. LIMITED

and

BROWN & ROOT SUDAMERICANA LTD.

(Joint Venture)

Tunnel
Shift
Report
7th July
1962SHAFT/TUNNEL SHIFT REPORTHEADING: ISLAND BENDDATE: 7-7-62SHIFT: GRAVEYARDWALKER: M. VULLESURVEYOR: J. PATAKY

10

| Details | Cycle 1 | Cycle 2 | Cycle 3 | Cycle 4 | Cycle 5 |
|--|------------|------------|------------|------------|------------|
| Stn. or Elev. at Face | 684+40 | 684+49 | 684+57 | | |
| Time Drilling Started | | 2.45 | 7.00 | | |
| Time Drilling Finished | | 4.00 | Cont | | |
| 20 No. of Holes Drilled | | 78 | 30 | | |
| No. of Holes Fired | | 78 | | | |
| Average Depth of Holes | | 10' | 11 | | |
| Quantity and Type of Explosive (lbs.) | | 550 Gel. | | | |
| Time Blasted | | 4.30 | | | |
| Mucking Started | 12.15 | 4.45 | | | |
| Mucking Finished | 2.30 | 6.45 | | | |
| Feet Advanced | 9' | 18' | | | |
| 30 No. of Muck Trucks loaded | 25 | 21 | | | |

Exhibit D

Tunnel
Shift
Report
7th July
1962
continued

| Details | Cycle 1 | Cycle 2 | Cycle 3 | Cycle 4 | Cycle 5 |
|--|------------|------------|------------|------------|------------|
| Time Rock Bolting Started | | | | | |
| Time Rock Bolting Finished | | | | | |
| Rock Bolts Place (No. & length) | | | | | |
| Station of Rock Bolts (from to to) | | | | | |
| No. of Detonators | | 105 | | | |
| Rock Bolts Grouted (No. & length) | | | | | |
| Station of Grouted Rock Bolts (from-to) | | | | | |
| Cement used in Grout (bags) | | | | | |
| Steel Rib Supports started | | | | | |
| Steel Rib Supports - Finished | | | | | |
| No. of Steel Rib Supports (placed) | | | | | |
| Stn. of Steel Rib Supports (from-to) | | | | | |
| Details of Wall Plates Placed | | | | | |
| Permanent Timber in Super Ft. | | | | | |
| Pilot Holes (No. & length) | | | | | |
| Temperature Meas. Holes | | | | | |
| Ventilation Line from Face (feet) | 129 | 118 | | | |
| <u>REMARKS:</u> | | | | | |

At 5.20 am - accident at face - Face Painter
Got badly hurt by falling Rock.

EXHIBIT E - COPY LETTER DEFENDANTS'
SOLICITOR TO PLAINTIFF'S
SOLICITORS DATED 6TH
DECEMBER 1962.

Exhibit E

Copy Letter
Defendants'
Solicitor to
Plaintiff's
Solicitors
Dated 6th
December 1962

6th December, 1962.

Messrs. Barkell & Peacock,
Solicitors,
11c Castlereagh Street,
SYDNEY. N.S.W.

10 Dear Sirs,

Re: Utah Construction & Engineering
Pty. Limited & Anor ats. Pataky -
Your ref: BAR: JC.

I refer to my recent telephone conversa-
tion with you and should be glad if you would
supply me with the following better particu-
lars herein :-

As to the first count:

- 20
1. Please specify the work and operations upon
which the plaintiff was employed by the
defendant.
 2. Designate the certain tunnel referred to.
 3. Please specify the acts or omissions and
the servants or agents involved in respect
of each of the allegations that the
defendant by itself its servant and agents
was negligent;
 - 30 (a) in and about the care control manage-
ment maintenance inspection and
supervision of the said employment,
work, operations, tunnel and rocks;
 - (b) in and about the system of work in
which the plaintiff was employed;
 - (c) in and about failing to use proper
and safe plant gear and equipment.

Exhibit E
Copy Letter
Defendants'
Solicitor to
Plaintiff's
Solicitors
Dated 6th
December 1962

4. Specify in detail the nature and extent of the injuries suffered by the plaintiff.
5. Please specify in detail the nature and extent of the present and future disabilities suffered by the plaintiff.
6. Please specify the moneys the plaintiff otherwise would have received.

As to the second count

1. Please specify the tunnel referred to. 10
2. Please indicate the nature of the plaintiff's work.
3. Please specify the manner in which the defendant did not ensure that the tunnel was securely protected.
4. Please specify the manner in which the defendant did not ensure that the tunnel was made safe.

I refer to service of the Declaration upon me on the 4th December, instant and should be glad if you would consent to Pleas being filed within fourteen (14) days after receipt by me of the above particulars. 20

Yours faithfully,

EXHIBIT F - LETTER PLAINTIFF'S SOLICITORS
TO DEFENDANTS' SOLICITOR
DATED 14TH DECEMBER 1962.

Exhibit F

Copy Letter
Plaintiff's
Solicitors to
Defendants'
Solicitor
dated 14th
December 1962

BARKELL & PEACOCK
Solicitors & Attorneys
11c Castlereagh Street, Sydney.

Partners: Telephone:
Albert E. Barkell 28 4032
John L. Aston, LL.B. Telegraphic & Cable
Colin J. Cooper, LL.B. Address: "Barklex"
David Singer, B.A., LL.B.

10

Our Ref.: BAR: JC

Your Ref.:

14th December, 1962.

Messrs. Russel O. Silva,
Solicitor,
10 O'Connell Street,
SYDNEY.

Received 17 DEC 1962 (Stamp)

20

Dear Sir,

Re: Pataky -v- Utah Construction
& Engineering Pty. Limited &
Anor.

We thank you for your letter of 6th
December, 1962, and supply the following:

FIRST COUNT:

1. The Plaintiff was employed as a surveyor
and marker and at allied operations.
2. Island Bend Tunnel.
3. (a-c) The following are the specific
Acts and Omissions constituting
negligence and the unsafe system of
work :-

30

Exhibit F

Copy Letter
Plaintiff's
Solicitors to
Defendants'
Solicitor
dated 14th
December 1962
continued

"Failure to ensure that the tunnel was free from the danger of falling rocks; tunnel not properly barred down; failing to prevent Plaintiff from working in tunnel too soon after the use of explosives; no warning to the Plaintiff; no proper inspection or testing of the tunnel to remove the danger of falling rock; breaches of Regulations 98 and 114 of the Scaffold- 10
ing & Lifts Act Regulations; failure to fence off or otherwise prevent the Plaintiff from working in areas where there was a danger of falling rock."

4. The Plaintiff suffered injury to both legs and ankles with fractures together with a fractured sternum lacerations and abrasions to the head and body and shock and concussion.

5. The Plaintiff suffers permanent dis- 20
ability to both legs, both ankles and chest of an orthopedic nature together with brain damage and nervous dis-
ability with blackouts and headaches.

BR.

- 2 -

6. At the time of the injuries the Plaintiff was earning about £38.0.0. weekly. As yet he has been unable to work since the accident.

SECOND COUNT:

- 1. Island Bend Tunnel. 30
- 2. Surveying and marking.
- 3-4. This is a matter of evidence.

As the above are the very best particulars which can be supplied, we must ask you to plead within fourteen (14) days.

Yours faithfully,
BARKELL & PEACOCK

Barry A. Rothwell.

EXHIBIT G - COPY LETTER DEFENDANTS'
SOLICITOR TO PLAINTIFF'S
SOLICITORS DATED 20TH
DECEMBER 1962.

Exhibit G

Copy Letter
Defendants'
Solicitor to
Plaintiff's
Solicitors
Dated 20th
December 1962

20th December, 1962.

Messrs. Barkell & Peacock,
Solicitors,
11c Castlereagh Street,
SYDNEY. N.S.W.

10 Dear Sirs,

Re: Utah Construction & Engineering
Pty. Limited and Anor ats.
Pataky - Your ref: BAR:JC.

20 I thank you for your letter of the 14th
instant. Counsel has advised that the
defendants are entitled to particulars of the
third and fourth questions under the second
count in the original request for particulars
of the 6th December. It is respectfully sub-
mitted that the allegations in the declaration
are wide and general and analagous to a count
in a "running down" action which alleges that
the defendant "negligently drove a vehicle".
The defendant has always been entitled to partic-
ulars in the letter instance and we submit that
there is no difference between that type of case
and the present.

30 However, we do not wish to delay the plead-
ings and are filing the defendants' pleas forth-
with. We give you fourteen (14) days to re-
consider the supplying of these particulars. If
you do not do so I have instructions to request
on summons that the same be supplied.

Yours faithfully,

Exhibit H

EXHIBIT H - LETTER PLAINTIFF'S SOLICITORS
TO DEFENDANTS' SOLICITOR
DATED 8TH FEBRUARY 1963.

Letter
Plaintiff's
Solicitors
to Defendants'
Solicitor
dated 8th
February 1963

BARKELL & PEACOCK
Solicitors & Attorneys
11c Castlereagh Street, Sydney

Partners: Telephone:
Albert E. Barkell 28 4032
John L. Aston, LL.B. Telegraphic & Cable
Colin J. Cooper, LL.B. Address: "Barklex" 10
David Singer, B.A., LL.B.

Our Ref.: BAR:JC

Your Ref.:

8th February, 1963.

Russell O. Silva, Esq.,
Solicitor,
10 O'Connell Street,
SYDNEY.

Dear Sirs,

RECEIVED 11 FEB 1963 (Stamp) 20
Re: Pataky -v- Utah Construction &
Engineering Pty. Limited & Anor.

We thank you for your letter of 20th Decem-
ber, 1962, and advise that the Defendant was in
breach of its duty to ensure that the tunnel was
securely protected and made safe in that it
failed to protect the Plaintiff from being struck
by falling rock. The specific Acts and Omiss-
ions constituting negligence were set out in
answer 3 (a-c) for the first count. Would you 30
please add "failure to provide boarding or
similar overhead protection for the Plaintiff".

We trust that the above answer clarifies
the position.

Yours faithfully,
BARKELL & PEACOCK

B. Rothwell.

EXHIBIT I - EMPLOYMENT APPLICATION

Exhibit I

Utah Construction & Engineering Pty. Ltd. and
Brown & Root Sudamericana Ltd. (Joint Venture)

Employment
Application
11th June 1962

EMPLOYMENT APPLICATION
Island Bend (N.S.W.) Project

- 1. SURNAME (Block Letters): PATAKY
- 2. Full Christian Names: JANOS
- 3. Private Address: 206 Victoria St. King's Cross N.S.W.
- 10 4. Date of Birth: 16-2-32 Place of Birth: Hungary Nationality at Birth: Hungarian.
- 5. If Naturalised, State Date:
Certificate No.:.....
- 6. If not Naturalised, Give No. of Alien Registration Card:.....
- 7. Married or Single: Single No. of Children under 16:
- 8. Next of Kin: Name: J. Pataky
Relationship: Father.
Address: 7 Pacsirta St. Szolnok Hungary.
- 20 9. Were You Previously Employed by "Utah"? No.
- 10. If so, Give Details of such Service:.....
.....
- 11. Have You had any Accidents or Illness?
Give Details:.....
- 12. Have You Worked in the Snowy Mountains Region at any time?: Yes.
.....
- 13. Names and Addresses of Last Two Employers (Excluding "Utah"):
- 30 (1) Name: K.P.M.R. Address: Section Creek
Classification: Assistant Surveyor.
Dates Employed: 4 - 4 -59.

Exhibit I
Employment
Application
11th June
1962
continued

(2) Name: Anthony Birdsall Address: 14
Ebley St. Bondi Junction. N.S.W.

Classification: Taxi Cab Driver.

Dates Employed: 15 - 8 - 60.

- 14. State Type of Work Desired:.....
- 15. Details of Trade Certificates Held:
.....
- 16. Drivers Licence Class A No:3168 J.J.
Date of Expiry: 8-6-63.
- 17. Do You Hold a Lifts and Scaffolds Certificate 10
of Competency?
- 18. If so, No. of Certificate: - Date of
Issue: - Competent -
to Drive
- 19. Do You Hold a First Aid Certificate?: No.
- 20. Union (if any) No.
- 21. I understand I cannot be employed on other
sections of this Project without permission
from my Supervisor.

I certify that the above answers and state- 20
ments are true and complete to the best of my
knowledge and I understand that any false state-
ment may be cause for discharge.

Signature J. Pataky Date 11-6-62

FOR OFFICE USE ONLY:

Employed as.....Rate.....

Commenced.....Number.....

Approved by.....

EXHIBIT J - PIECE OF PAPER ON WHICH
PLAINTIFF WROTE NAME AND
FIGURES

Exhibit J

Piece of
Paper on which
Plaintiff
wrote name and
Figures

Jouton Patacky JANOS PATAKY 3,666

10 oun

Sec

Cos

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IN THE PRIVY COUNCIL

No. 11 of 1965

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

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

-- and --

JANOS PATAKY Respondent (Plaintiff)

RECORD OF PROCEEDINGS

GALBRAITH & BEST,
10 Bell Yard,
London, W.C.2.
Solicitors for the Appellants.

RODGERS HORSLEY & BURTON,
7 Norfolk Street,
Strand, London, W.C.2.
Solicitors for the Respondent